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

MUSLIM COMMUNITY ASSOCIATION OF ANN ARBOR; AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE; ARAB COMMUNITY CENTER FOR ECONOMIC AND SOCIAL SERVICES; BRIDGE REFUGEE & SPONSORSHIP SERVICES, INC.; COUNCIL ON AMERICAN-ISLAMIC RELATIONS; ISLAMIC CENTER OF PORTLAND, MASJED AS-SABER,

Plaintiffs,

v.

JOHN ASHCROFT, in his official capacity as Attorney General of the United States; ROBERT MUELLER, in his official capacity as Director of the Federal Bureau of Investigation,

Defendants.

Civil Action No. 03-72913

Honorable Denise Page Hood

Magistrate Judge R. Steven Whalen

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

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INTRODUCTION

Amici curiae are a diverse group of non-profit organizations that provide critical immigration and social services to refugees and immigrants throughout the United States, either directly or through their affiliate organizations. They file this brief in support of plaintiffs' opposition to defendants' motion to dismiss.

Section 215 of the Patriot Act directly infringes basic constitutional rights secured by the First, Fourth, and Fifth Amendments. Those infringements cannot be justified by Congress' unquestionably valid goal of enhancing national security. As Justice Warren wrote in *United States v. Robel*, 389 U.S. 258, 264 (1967):

> For [over] two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . .which makes the defense of the Nation worthwhile.

Amici support plaintiffs' challenge to Section 215 of the Patriot Act because Section 215 threatens the essential support and services that amicus curiae and their affiliate organizations provide to refugees and immigrants. Section 215, combined with the government's targeting of certain immigrant groups since September 11, chills the vital exercise of First Amendment rights by amici and their clients. Immigrants and refugees are far less willing to share personal and confidential information with immigration and refugee organizations in light of the government's ability to obtain access to such information without probable cause.

Due to their cultural backgrounds, many clients of amici and their affiliates have particular difficulty sharing personal information about matters such as past sexual abuse, torture, medical problems or family history. The specter of Section 215 orders that could require amici to release confidential information about their clients to the government has significantly exacerbated this problem. Because it prevents amici from assuring clients that their privacy will be respected and their confidentiality maintained, Section 215 drastically inhibits the ability of amici to serve their clients effectively. By substantially destroying the

right to privacy in sensitive records, it discourages clients and potential clients of amici from seeking the services and support they need.

The threat to privacy interests posed by Section 215 damages the relationship of trust and confidence that must exist between amici and their clients. By allowing compelled production of records and information that amici have previously advised clients would remain confidential, it may require amici to breach pre-existing confidentiality agreements. The injury to the relationship between amici and their clients is compounded by Section 215's broad gag provision, which would prohibit amici organizations from disclosing to clients, or *anyone*, that the government has sought and obtained their private and confidential records and would thereby prevent these organizations and the targeted individuals from challenging the Section 215 order in a timely or meaningful way.

STATEMENT OF INTEREST OF THE *AMICI CURIAE*

Amici are organizations devoted to assisting individuals in transition. Many help immigrants; others are dedicated to the working poor. All share a common attribute: they or their affiliates maintain records of confidential personal information that may be subject to investigation and seizure by the government under the Patriot Act. Amici share a common concern that Section 215 of the Patriot Act is diminishing their ability to serve their constituents and discouraging those they serve from seeking much-needed assistance and support.

1. American Friends Service Committee

American Friends Service Committee ("AFSC") provides a wide range of services to refugees and immigrants. AFSC provides labor services to undocumented farm workers, runs programs for immigrants from Southeast Asia, Mexico and Latin America, and provides legal services to immigrants that includes obtaining family and medical information necessary for special registration. AFSC is a Quaker organization, and its work is shaped by its spiritual framework.

AFSC's programs reach communities across the country, from Miami, Florida to

Portland, Oregon. Many address the needs of undocumented immigrants. AFSC has two legal projects that represent immigrants in adjustment of status proceedings and programs that teach "Know your Rights" courses to immigrants, staff and community members who participate in demonstrations like the Immigrant Workers Freedom Rides. AFSC staff also help immigrants decide whether to file complaints regarding abuse by the INS or the border patrol. Some programs document this abuse, and the names of the victims are available in the files of the organization. To effectively administer these programs, AFSC staff must obtain and keep personal and private information about its clients and must maintain a relationship of trust with them.

2. Asian Law Caucus

The Asian Law Caucus ("ALC") is the nation's oldest legal and civil rights organization dedicated to serving the low-income Asian Pacific American community. Each year, 1,500 clients come to the ALC's legal clinics in San Francisco, Oakland and Sacramento, California for assistance. These clients range from immigrant workers to disabled seniors to individuals who need help with asylum or removal proceedings. For example, ALC's Employment and Labor Clinic provides direct legal support to monolingual immigrant workers in the San Francisco Bay Area with issues ranging from wage and hour disputes to worker's compensation. In its clinics, ALC works diligently to assist the Asian Pacific American community with immigration matters, including obtaining legal permanent resident status, applying for naturalization, and contesting government efforts to remove non-citizens from the United States.

In order to provide these services, ALC must maintain client records, most of which are protected by the attorney-client privilege. Since ALC is active in representing elderly and disabled immigrants in obtaining disability waivers for certain citizenship requirements, its records may include medical information as legal work product and advice. ALC has also worked with abused spouses of lawful permanent residents or citizens to help them obtain immigration protection under the Violence Against Women Act. ALC's records also include

detailed information on international travel and immigration status and, in certain asylum cases, the records may reflect political affiliation. ALC assures its clients that their information will be kept confidential.

ALC has seen the chilling impact of the government's anti-terrorism efforts on the communities that it serves. Recently, ALC has consulted with non-citizen Muslim and Middle Eastern clients dealing with the Department of Homeland Security's special registration proceedings. ALC is also in the process of seeking funding for a fellowship to specifically address the newly-urgent legal concerns of the South Asian and Middle Eastern communities.

3. Episcopal Migration Ministries

Episcopal Migration Ministries ("EMM") is one of nine national resettlement agencies that works with the State Department and other government agencies to help refugees resettle upon arrival in the United States. EMM has resettled approximately 50,000 refugees in the United States during its 20-year history. It operates in 26 dioceses of the Episcopal Church, sponsoring refugees from all parts of the world.

EMM's 36 national affiliates assist immigrants on an individual basis by providing counseling and support. Affiliates provide a wide range of services, including immigration services, social services, counseling and job placement assistance. EMM's national staff and diocesan programs assist separated family members, immigrants facing deportation and immigrants who need counseling to ensure their legal residency. To effectively provide these services, EMM's affiliates generate and maintain confidential information about their clients, including medical records, family history information, and information about other personal issues (such as domestic violence, sexual abuse and mental illness). EMM's affiliates are free-standing entities that provide additional support services, including help for those seeking asylum.

EMM also partners with other volunteer agencies to promote a United States admissions program that will respond generously to the international refugee crisis. To this end, EMM promotes legislation that would enable asylum seekers to obtain fair and equal treatment in

their search for refuge. EMM opposes policies that disenfranchise immigrants by denying them access to services and benefits. It also promotes awareness of immigrants' rights issues and of the contributions immigrants make to American society. Since the Patriot Act was enacted, EMM has advanced resolutions through its various governing bodies to oppose its discriminatory aspects and to protest the Act's expansion in ways that would further erode immigrants' rights.

4. Immigration and Refuge Services of America

Immigration and Refuge Services of America ("IRSA") acts through its partner agencies to defend human rights, build communities, foster education and promote self-sufficiency through an array of programs. IRSA oversees 31 refugee resettlement agencies nationwide. These agencies offer on-site, individualized assistance to refugees as they begin the resettlement process. IRSA is the nation's largest non-sectarian network of nonprofit organizations serving refugees, immigrants and their families. Each year IRSA assists anywhere from 5,000 to 10,000 refugees to settle in the United States, approximately 10 percent of the refugees who enter the United States each year through the State Department.

More than 100,000 refugees have been resettled through the IRSA network since 1975. IRSA develops and manages education and assistance programs to help refugees settle in the United States. IRSA assists refugees in overcoming past trauma, gaining personal independence and economic self-sufficiency, and becoming contributing members of new communities. IRSA agencies help refugees secure affordable housing, find work, and achieve self-sufficiency. These agencies also provide life-skills training, job counseling and English classes, and assist new immigrants with enrolling their children in schools and applying for Social Security cards. The IRSA *Medical Case Management Program* assists HIV-positive refugees who need special assistance as they begin the resettlement process in the United States. This program helps refugees secure appropriate medical care and treatment and facilitates communication and collaboration between refugee resettlement caseworkers and health care providers.

In the past two years, IRSA has begun to encourage its partner agencies to develop confidentiality policies and to implement protocols for responding to subpoenas of client files. For example, through IRSA's *National Alliance for Multicultural Mental Health*, IRSA has been actively involved in confidentiality issues related to the treatment of survivors of torture and trauma. Although IRSA and its agencies do not keep confidential information about every client, certain records contain very personal information. When necessary, files may contain information related to health issues, including psychiatric issues, or abuse. IRSA and its agencies operate in approximately 20 different states and adhere to all applicable state privilege and confidentiality laws. Several IRSA agencies have received informal requests for information from the FBI, and in one case a client's files were subpoenaed. The client was from Iraq.

5. International Institute of San Francisco

The International Institute of San Francisco ("IISF"), an IRSA affiliate, provides health assessments, clinical health services and legal immigration and citizenship services to low-income immigrants and refugees from over 50 countries. In addition to the confidential records kept in connection with its other programs, IISF maintains extensive records pertaining to its immigration and naturalization legal services. They include personal family records such as birth and marriage certificates, educational and employment information, and financial data such as Social Security numbers and tax and financial information. Some records (in particular for asylum, naturalization and VAWA cases) include information on religious affiliation, membership in political organizations and/or history of physical and sexual abuse. Many IISF records include privileged attorney-client communications. In some cases IISF records relate not only to immigration applicants, but also to their siblings, spouses, children and parents.

IISF enters into service agreements with its clients and advises them that their records will be kept confidential. IISF has advised clients from certain countries, in particular those from the Middle East, that their confidential information may be vulnerable as a result of changes in federal law, including the Patriot Act. Many clients express fear, frustration and

confusion and do not understand why they are being targeted. Despite IISF's long history of service to the immigrant community and the trust it has earned, its clients are increasingly cautious about revealing sensitive information in light of the current political climate. IISF conducts bi-weekly presentations to discuss changes in immigration policy. It is common for attendees to express anxiety about their rights and their status at these forums.

6. Lawyers' Committee for Civil Rights

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area ("LCCR") provides legal advice and representation to immigrants and refugees on a wide variety of matters, including asylum cases, worker's rights issues, and civil rights matters. As part of its asylum program, LCCR interviews and evaluates the cases of immigrants from all over the world. LCCR frequently obtains many kinds of confidential records, including reports from social workers, health care providers, and psychologists who evaluate and treat clients. LCCR also creates its own internal case files, which contain confidential intake memoranda and legal analyses. LCCR then places asylum cases with pro bono attorneys in the San Francisco Bay Area, monitors cases, and assists pro bono attorneys.

LCCR's client population is diverse, and includes individuals from the Middle East, South Asia and certain African countries that the government holds in suspicion. LCCR has been involved in cases where clients have been asked to participate in the government's special registration program. LCCR interviews 150-200 asylum-seekers each year.

Confidentiality is essential to the LCCR's ability to provide competent legal representation; those seeking asylum, in particular, have long histories of trauma and persecution. In order to encourage them to tell their stories, LCCR must promise to keep all information revealed in the strictest confidence. If a client believed that her personal information would be compromised, her reluctance to share information could greatly impact her case.

Immediately following the events of September 11, LCCR established a telephone hotline for victims of "anti-Arab" hate crimes and discrimination. LCCR provided legal advice

and representation to clients who were victims of retail discrimination, police brutality, discrimination in the public schools, racial profiling in airports, hate crimes, and employment discrimination. LCCR also engages in impact litigation related to the government's abuse of immigrants. The LCCR is representing an Egyptian national who, immediately after the events of 9/11, was held in a maximum security prison for over two months, denied his religious freedom, denied access to a lawyer, and subjected to body cavity searches in front of a laughing crowd of government officials. Confidentiality is of the utmost concern to immigrant and refugee clients, particularly clients who fear retaliation by government officials.

7. Oregon Action

Oregon Action works broadly to promote economic justice. A grassroots organization, it helps individuals organize on their own behalf through leadership development and community organizing. Great emphasis is placed on civic participation with the goal of assisting individuals to effect social change. Oregon Action is concerned primarily with economic issues that are relevant to working and low-income people. For example, the group has been involved recently in a campaign against an Oregon state policy that requires a food stamps applicant to provide a social security number. Oregon Action also addresses issues relevant to immigrants.

The passage of the Patriot Act has engendered concern at Oregon Action. In particular, the organization fears for the privacy of its membership data. Oregon Action maintains a large member and supporter list of about 25,000 people that may include contact information, age and political affiliation. It also maintains donor records going back 10 or 15 years. In addition, some smaller databases identify particular issues and individuals who have been active in those causes. These smaller databases may contain more detailed information, such as an individual's immigration status. Oregon Action estimates that in a year or two its database will be more robust, and it will maintain more detail about its members. As its data storage capabilities increase, Oregon Action expects to merge these smaller databases into a

comprehensive system. When members ask, the organization tells them that their information will be kept confidential.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO CHALLENGE SECTION 215 OF THE PATRIOT ACT.

Plaintiffs have standing to challenge the constitutionality of Section 215 because of the concrete chilling effect that it is having on the exercise of First Amendment freedoms of speech and association by amici and their clients as well as plaintiffs.[1] *See Sec. of State of Maryland v. Munson Co., Inc.*, 467 U.S. at 958 ("Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society — to prevent the statute from chilling the First Amendment rights of other parties not before the court."). Moreover, unlike any of the cases cited by defendants in their motion to dismiss, this case involves a statute with a broad gag provision. *See* 50 U.S.C.A. 1861(d) ("No person shall disclose to any other person . . . that the Federal Bureau of Investigation has sought or obtained tangible things under this section.") This provision renders it impossible for either those who receive a Section 215 order or those whose records are targeted by the order from effectively challenging it. Consequently, if the Court were to require actual service of a Section 215 order as a prerequisite to standing, as the government suggests, no person or organization would *ever* have standing to raise a timely and meaningful challenge to the constitutionality of Section 215.

A. Section 215 Has Had a Concrete Chilling Effect on the Exercise of First Amendment Rights By Amici.

It is critical that amici curiae and their affiliates maintain a relationship of trust and confidence with their clients, many of whom are seeking sanctuary in the United States after

[1] Moreover, when legislation at issue involves a threat to First Amendment rights, the Court "justifiably often lessen[s] standing requirements." *Id.* Indeed, "when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged." *Sec. of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956-57 (1984). Here, there is not only a danger of chilling free speech but concrete injury: the exercise of freedoms of speech and association by amici and their clients has already been chilled.

suffering abuse, persecution, and torture in their homelands. The services that amici provide include assistance with resettlement efforts, job placement services, medical services and mental health counseling. To adequately provide these services, the organizations must obtain private and confidential information from their clients, which is often maintained in case files. In the past, clients were able to provide personal information to these organizations with comfort in the knowledge that the information would remain confidential. Under Section 215, all such confidential information is subject to production to the FBI without any showing of probable cause or even reason to believe that the target of the Section 215 order is engaged in any criminal activity. This significantly diminishes the ability of amici to assure clients that their privacy will be respected and their confidentiality maintained. As a result, many clients are refusing necessary services for fear that their personal information will not remain confidential but instead will be given to the government without their knowledge. In this way, Section 215 is significantly burdening the exercise of First Amendment freedoms of speech and association.

Section 215, combined with the government's well-documented targeting of immigrant groups since September 11, has resulted in a concrete and objective chilling effect on the exercise of First Amendment rights by amici and their clients. Immigrants and refugees are less willing to share personal and confidential information with service organizations and are more reluctant to participate in political or religious organizations for fear that they will be unfairly targeted by the government. Section 215 effectively eliminates *any* right to privacy, even with regard to highly sensitive information such as medical records, mental health records, and records documenting physical or sexual abuse suffered by the individual. As more individuals seeking aid from immigration and refugee organizations are necessarily advised about the potential consequences of Section 215, fewer are willing to accept essential services that they need to become productive members of society in the United States. Because Section 215 has directly injured amici and their clients as well as plaintiffs by creating a concrete and

palpable chilling effect, plaintiffs clearly have standing to challenge its constitutionality.[2]

B. Because of the Broad Gag Order in Section 215, Plaintiffs' Facial Challenge to Section 215 Is the Only Feasible Means By Which the Statute's Constitutionality Can Be Tested In a Timely and Meaningful Way.

Plaintiffs have standing to raise this facial challenge to Section 215's constitutionality for an additional reason. The statute by its terms prevents persons directly injured by its application from ever having the requisite knowledge and information to bring a legal action.

Under Section 215, the government can obtain private information about an individual from an organization without providing any notice to the targeted individual. In addition, the recipient of the order is categorically prohibited from disclosing the fact of the order to the individual *or anyone*. Section 215(d), codified at 18 U.S.C. § 1861(d) provides that:

> 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.

Therefore, the fact of the Section 215 order can *never* be disclosed to the person directly injured by it, the person whose personal records have been obtained as a result of the order. Nor does the statute provide any procedures by which the recipient of the order can make a timely challenge to the order.[3] Plaintiffs' current facial challenge to Section 215 is, therefore,

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[2] The government relies upon *Laird v. Tatum* to argue that plaintiffs have merely alleged a "subjective" chilling effect on First Amendment freedoms and thus have failed to establish standing. 408 U.S. 1 (1972). This reliance on *Laird* is misplaced because plaintiffs and amici have alleged an objective and concrete chilling effect — not a mere "subjective" one. Moreover, the facts in *Laird* are distinct from this case; in *Laird* the government gathered information that was available to the general public from the news media and other publications. *Id.* at 6. By contrast, Section 215 enables the government to gather and obtain without limitation *private* and *confidential* information (including, for example, medical records, documents regarding sexual and domestic abuse, social service records, and associational information) from private service organizations. This is not information that is available through publications or the news media; it is information that was provided by individuals *in confidence* to service organizations. In addition, the challenged exercise of governmental power at issue here is "regulatory, proscriptive [and] compulsory in nature;" it requires organizations such as amici to provide confidential information to the FBI upon receipt of a Section 215 order without any legal recourse. *See* 50 U.S.C.A. 1861. By contrast, the legislation in *Laird* did not require any person or entity to do anything. 408 U.S. at 4-6.

[3] Defendants assert that: "If an order were served upon plaintiffs themselves rather than a third party, plaintiffs would receive actual notice of the demand for records, and would be in a position to contest the validity before the FIS Court if they chose to do so. (Defs. Brief, at 21,

(Footnote continues on next page.)

the only feasible means by which Section 215's constitutionality can be meaningfully tested.

The government argues that this challenge to Section 215 is not ripe because the Attorney General has allegedly not yet chosen to exercise his Section 215 power.[4] As demonstrated above, however, the continuing threat posed by the government's Section 215 powers, by itself, has significantly chilled the exercise of First Amendment freedoms by amici and their clients. In addition, because Section 215 is structured to prevent affected parties from having any knowledge (let alone prior notice) of its operation, rigorous application of the prudential doctrine of ripeness would be inappropriate, just as exception to the doctrine of mootness has long been recognized in cases that are "capable of repetition, yet evading review." *See Rosales-Garcia v. Holland*, 322 F.3d 386, 396 (6th Cir. Mar. 5, 2003) (citations omitted).

If this case is not allowed to proceed, the government will be able to use Section 215 now and in the future, and those harmed by it will be without knowledge or recourse but will instead be perpetually intimidated in the exercise of their First Amendment freedoms. As the Supreme Court has explained, "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. . . .' [I]f it did, the courts would be compelled to leave [t]he defendant ... free to return to his old ways.'" *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quotations omitted). In light of the gag order provision and lack of notice provided under Section 215, the government can obtain information in violation of constitutional rights under Section 215, yet its exercise of that power will perpetually evade

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(Footnote continued from previous page.)

n.8). The Act provides, however, no procedure by which any party could move to quash a Section 215 order in the FIS court or elsewhere.

[4] Notably, the government makes no claim that it will *never* apply Section 215 to plaintiffs or similar parties in the future. It merely represents that it had not done so through September 18, 2003 (the date of the Baker declaration), while admitting that it "may use this provision under appropriate circumstances in the future." (Defs. Br. at 1.) It can be inferred from that admission and the government's opposition to the plaintiffs' complaint that the government intends to use Section 215 in the future.

meaningful review. As is true of cases in which an alleged violation is technically moot but future violations will evade timely review, the Court should allow this action to proceed to prevent future unreviewable deprivations of the constitutional rights of plaintiffs and others similarly situated, including amici and their clients.

None of the cases cited by the government in its motion to dismiss is analogous to the present case. The government does not cite a single case denying standing to challenge the constitutionality of a statute that effectively prevents those harmed by its application from challenging it. Because there is a demonstrated present and concrete injury to the free speech and associational rights of plaintiffs and amici, and because Section 215 renders it impossible for a party targeted by or served with a order to effectively challenge the statute's application in a timely and meaningful way, the Court should uphold plaintiffs' standing to make this facial challenge to Section 215's constitutionality and should deny the government's motion to dismiss.

II. PLAINTIFFS HAVE STATED A CLAIM UNDER THE FOURTH AMENDMENT.

A. Amici and Their Members Have Privacy Interests Recognized Under State and Federal Law.

The Fourth Amendment protects the privacy of individuals and organizations from unlawful intrusion by the government. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Section 215 as applied to amici infringes this protection because amici maintain confidential documents for their members, as well as generating their own confidential records. The government's presumption that organizations like amici are only unaffected "third-part[ies]" is, therefore, misguided.

Contrary to the government's characterization, organizations like amici maintain records of confidential information they have obtained in the course of providing legal, counseling, and religious services to their members. Such records are absolutely privileged from compelled production. *See generally, Reed v. Baxter*, 134 F.3d 351, 356 (6th Cir. 1998) (attorney-client privilege); *Jaffee v. Redmond*, 518 U.S. 1, 16-17 (1996) (federal

psychotherapist-patient privilege); *Doe v. Broderick*, 225 F.3d 440, 450-51 (patient's legitimate expectation of privacy in his substance abuse records); *Mockaitis v. Harcleroad*, 104 F.3d 1522, 1531-32 (9th Cir. 1997) (priest's legitimate expectation of privacy under "clergy-penitent" privilege). Although 50 U.S.C. § 1861(e) provides that the production of records does not waive applicable privileges in other proceedings, the confidential relationship amici maintain with their members is compromised by *any* disclosure of their records. *See, e.g., Jaffee*, 518 U.S. at 18 ("An uncertain privilege...is little better than no privilege at all."). Indeed, courts have recognized that individuals have a legitimate expectation that the contents of privileged communications will remain private. *See, e.g., Mockaitis*, 104 F.3d at 1531-32.

In addition to the confidential records that amici maintain on behalf of their members, amici also generate their own confidential documents. Amici have a legitimate expectation of privacy in these documents, including the advocacy materials that they produce. Congress explicitly recognized the private nature of these materials when it enacted the Privacy Protection Act. The Act prohibits government officials from searching or seizing "any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication" unless there is probable cause to believe the person possessing such materials has committed a crime under investigation, or there is reason to believe that the immediate seizure of such materials is necessary to prevent the death of, or serious bodily injury to, a human being. 42 U.S.C. § 2000aa(a). Similar restrictions apply to documentary materials that do not qualify as "work product" but are held for the same purpose. 42 U.S.C. § 2000aa(b).

Furthermore, a considerable portion of the documents and records that amici promulgate are directly tied to activities protected by the First Amendment. When such records are sought by the government in a compelled production, the Fourth Amendment must be applied with "scrupulous exactitude." *Stanford v. Texas*, 379 U.S. 476, 484-485 (U.S. 1965). The First Amendment directly prohibits the government from compelling an organization to produce documents if doing so would chill free speech, freedom of association, or free exercise

of religion, or would violate the establishment clause by excessively entangling the government in religion. *See, e.g., Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 91-92 (1982); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449,460-61 (1960); *NLRB v. Catholic Bishop*, 440 U.S. 490, 502-07 (1979); *Baldwin v. C.I.R.*, 648 F.2d 483, 488 (8th Cir. 1981).

Given the private nature of the materials maintained and produced by organizations such as amici, Section 215 must satisfy constitutional scrutiny under the Fourth Amendment.

B. Section 215 Fails to Provide Sufficient Fourth Amendment Safeguards to Protect Amici's Privacy Interests.

Section 215 fails to protect amici's privacy interests and lacks the constitutional safeguards required by the Fourth Amendment. By enacting Section 215, Congress requires the FISA Court to issue an order compelling the production of "any tangible thing" that is "sought for" an investigation to obtain "foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities." 50 U.S.C. § 1861(a)(1)-(b)(2). No previous congressional enactment has been so broad in scope, nor has Congress ever authorized the executive branch to rely on such investigative methods without simultaneously imposing meaningful procedural safeguards. *See, e.g.,* 50 U.S.C. § 1805 (requiring FISA Court to find probable cause before authorizing electronic surveillance); *ACLU v. U.S. Dept. of Justice*, 265 F. Supp. 2d 20, 23 (D.D.C. 2003) (noting that Section 215, as amended, eliminated the required showing of "specific and articulable facts").

The government attempts to avoid these constitutional deficiencies by analogizing a Section 215 order to a *subpoena duces tecum*, which can be issued upon a showing of "reasonable relevance." This analogy ignores three fundamental distinctions between an order that compels production under Section 215 and one that orders production pursuant to a subpoena.

First, the Supreme Court has justified holding subpoenas to a lesser showing than what probable cause requires based on the fact that the person served can challenge the compelled production. Indeed, the issuance of a subpoena "commences an adversary process during

which the person served with the subpoena may challenge it in court before complying with its demands." *Miller*, 425 U.S. at 446 & n.8 (1976); *Oklahoma Press*, 327 U.S. 186, 217 (1946). In contrast, a party subject to a Section 215 order cannot raise a pre-enforcement constitutional challenge in any judicial fora. *In re Sealed Case No. 02-001*, 310 F.3d 717, 719 (FISA Ct. App. 2002); 50 U.S.C. § 1861(d) (prohibiting the subject of a Section 215 order from ever disclosing that the government has sought or obtained tangible things). Second, Section 215, unlike a subpoena, does not authorize a court – even the FISA Court – to quash an order. *Compare* 50 U.S.C. § 1861(c)(1) *with* F.R.Crim. P. 17(c)(2). Thus, unlike in the case of a subpoena, a court cannot protect the privacy interests of those whose confidential records are the subject of a Section 215 order. Third, unlike a subpoena, a Section 215 order does not require the FBI to demonstrate relevance. *United States v. Powell*, 379 U.S. 48, 57-58 (1964) (noting that although probable cause is not necessary for a grand jury subpoena, records or things identified in the subpoena must be relevant to the investigation). Accordingly, for all of these reasons, the government's analogy of a Section 215 order to a *subpoena duces tecum* is invalid.

As it is written, Section 215 authorizes the government to compel the production of all "tangible things" held or created by amici, and deviates from established Fourth Amendment safeguards. The Supreme Court, in *Boyd v. United States*, 116 U.S. 616, 635 (1885), emphasized: "[I]llegitimate and unconstitutional practices get their first footing. . . by silent approaches and slight deviations from legal modes of procedure." Unlike the slight deviation and silent intrusion in *Boyd*, Section 215's effect on amici is deafening. Because the statute compels the production of "any tangible thing" without regard to any showing of probable cause, amici are effectively prohibited from asserting – much less protecting – their countervailing privacy interests in their records and documents.

III. PLAINTIFFS HAVE STATED A CLAIM UNDER THE FIFTH AMENDMENT.

A. Section 215 Impacts Property and Liberty Interests.

The Fifth Amendment provides that "no person shall . . . be deprived of life, liberty, or

property, without due process of law." U.S. Const. Amend. V. The "touchstone of due process is protection of the individual against arbitrary action of government." *Black v. Romano*, 471 U.S. 606, 624 (1985). Section 215 implicates both property and liberty interests, and thereby triggers the protection of the due process clause.

First, under the statutory language of Section 215, the FBI may demand the production of "*any* tangible items" related to a foreign intelligence investigation. 50 U.S.C. § 1861 (a) (emphasis added). Any tangible item that is subject to the government's demands clearly qualifies as a property interest protected under the due process clause. *See, e.g., United States v. James Daniel Good Real Property*, 510 U.S. 43, 49 -50 (1993) (ex parte seizures of real and personal property requires due process). Second, as explained above, Section 215 chills the free speech and free association rights of amici in violation of the dictates of the First Amendment, as protected by the due process clause. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 336 n.1 (1995).

Finally, amici's privacy and confidentiality interests established by state law are also protected under the due process clause. State statutes and rules that use "mandatory" language creating an entitlement that cannot be denied absent "specified substantive predicates," create a property or liberty interest within the meaning of the due process clause. *See Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983); *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 459-460 (1989). Although the mandatory language test has been limited by the Supreme Court with regard to prison regulations, *Sandin v. Conner*, 515 U.S. 472, 484-85 (1995) (focusing on nature of deprivation rather than language of regulation), the test is still applicable in other contexts. *See "Tony" L. v. Childers*, 71 F.3d 1182, 1184 (6th Cir. 1995); *Carlo v. City of Chino*, 105 F.3d 493, 497-99 (9th Cir. 1997) *cert. denied*, 523 U.S. 1036 (1998).

Amici like the American Friends Service Committee provide services in programs across the country and are subject to various states' privacy and confidentiality statutes. For example, the records of amici that provide therapy services are subject to the psychotherapist privilege requirements under each state's laws. *See Jaffee v. Redmond*, 518 U.S. 1, 10-15

(1996) (recognizing federal psychotherapist-patient privilege and noting that all states and the District of Columbia had enacted psychotherapist privilege statutes).[5] Similarly, those amici that provide legal services are statutorily obliged to maintain client confidentiality of their records. *See, e.g.*, COLORADO RULES OF PROF'L CONDUCT R. 1.6 ("A lawyer *shall not* reveal information relating to representation of a client" except under limited circumstances) (emphasis added); IDAHO RULES OF PROF'L CONDUCT R. 1.6 (same); PENNSYLVANIA Rules of PROF'L CONDUCT D.R. 1.6 (same); WISCONSIN SUP. CT. R. 20:1.6 (same); *see also Nakao v. Rushen*, 635 F. Supp. 1362, 1365-66 (N.D. Cal. 1986) (Section 1 of the California Constitution provides for a fundamental right to privacy, which is a "substantial liberty interest" that must be protected by due process). By mandating the confidentiality of client or patient information, the states have created privacy interests cognizable under the due process clause.

B. Section 215 Does Not Satisfy Due Process Requirements.

Under the *Mathews* balancing test, three distinct factors are considered to determine due process requirements: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

As currently enacted, Section 215 provides no procedural protections against the arbitrary incursions by the government into the property and liberty interests at stake. "The Supreme Court has identified notice and an opportunity to be heard as the hallmarks of

[5] Professional confidentiality requirements, as enacted by individual states, may require even further vigilance against disclosure. *See, e.g., Rost v. State Bd. of Psych.*, 659 A.2d 626 (Pa. Commw. 1995) (holding therapist violated ethical duty by releasing records upon issuance of subpoena, despite patient's waiver of privilege) (therapist had duty to either obtain written permission to release the records from patient or judicially challenge propriety of subpoena); *see also* 50 P.S. § 7111 (mandating "all documents concerning persons in [mental health] treatment shall be kept confidential and, without the person's written consent, may not be released or their contents disclosed to anyone" except for enumerated circumstances.)

procedural due process." *United States v. Treadway*, 328 F.3d 878 (6th Cir. 2003) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). Under Section 215, no notice would be permitted to amici or their constituent members should the FBI submit a demand for their records. Similarly, there is no provision for a hearing or other opportunity to contest the FBI demand or judicial order. Indeed, under the statutory language, no judicial discretion is permitted. 50 U.S.C. § 1861(c)(1). The FBI is thus effectively free to demand any item from any person at any time, without judicial oversight.

Because no protective procedures are in place, there is a high risk of erroneous or improper action by the FBI in accessing amici's records. As discussed above, Section 215 strongly infringes upon the property and liberty interests of amici and their constituent members. These factors must outweigh the government's interests in maintaining complete secrecy in its proceedings and demands. The utter lack of any procedural protection under Section 215 cannot survive a due process analysis.

The cases cited by the government in its motion to dismiss are simply inapposite. As demonstrated above, demands under Section 215 may not be analogized to grand jury subpoenas or search warrants. Similarly inapplicable are cases discussing *ex parte in camera* review of applications for approval of wire-tap or electronic surveillance under FISA which, unlike Section 215, requires a judicial finding of probable cause that the target "is a foreign power or an agent of a foreign power." 50 U.S.C. § 1805 (a)(3).[6]

Securities and Exchange Comm'n v. O'Brien, 467 U.S. 735 (1984), on which the government principally relies, involved a private SEC investigation in which the plaintiff challenged the ability of the SEC to issue third-party subpoenas without informing the target of the investigation. The Court found that the due process clause was not implicated because the

[6] Moreover, these cases only arise when the target of the investigation has been criminally prosecuted and seeks to challenge evidentiary submission of the information acquired from the electronic surveillance under 50 U.S.C. § 1806; the government fails to address what procedural protection is provided to those who receive no notice and who may be subjected to surveillance for the remainder of their lives.

SEC was a federal administrative agency conducting an investigation, and adjudicated no legal rights. *Id.* at 742. Here, however, Section 215 requires the participation of a judicial court in ordering the production of documents. The deprivation of property and liberty interests through a court order, without the provision of notice or hearing, and without any requirement of a judicial finding of probable cause, goes beyond the boundaries contemplated in *O'Brien*. Furthermore, because *O'Brien* involved a civil subpoena, there was an opportunity to challenge or quash the subpoena in a court of law. *Id.* at 741. Section 215 provides no such opportunity.

> [D]ue process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.

Hannah v. Larche, 363 U.S. 420, 442 (1960). Contrary to the government's assertion that *no* due process is required in these proceedings, in light of the interests at stake, the covert nature of the government proceedings, the low certification standard required of the FBI, and the lack of judicial review or other procedural protections, Section 215 proceedings both implicate and offend the due process clause.

IV. CONCLUSION

For the reasons stated above, as well as those set forth in plaintiffs' memorandum of points and authorities, defendants' motion to dismiss should be denied.

Dated: October 31, 2003

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