
IN THE
United States Court of Appeals
FOR THE
Second Circuit

v.

5.6.d5(1s)] in R,th SM T//F1 ETIES N

(e)11(es)] TJETBT 311.33 434.71 Tm 0 Tc[A

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Policy Statement of the National Rifle Association on Extremist

.. 3

Josh Richman,

recordkeeping, such as the establishment of systems to register or compile involvement in these issues including direct lobbying on predecessor language to the statute at issue in this case allows the NRA to offer a unique perspective in support of Appellants.

The NRA also stands second to no organization in its support for legitimate law enforcement, military, and national security activities to defend our nation against terrorism. Countless NRA members, including NRA employees, have served overseas in that fight since 2001. *See* Jeff Johnston, *ers*, *American Rifleman*, June 2003, at 47. Indeed, the NRA was originally formed to promote

safety, law and order, a

NRA Bylaws art. II. Those receiving such training in recent years have included military and security personnel at Naval Station Guantanamo Bay, Cuba. *See* Leona Mynes, *National Rifle Association Certifies Firearms Instructors*, U.S. Navy press release, May 5, 2010, *available at*

http://www.navy.mil/submit/display.asp?story_id=53179 (last visited March 7, 2014

denunciation of violent extremism. *See NRA Disavows Connections With Groups Advocating Violence*, *American Rifleman*, Oct. 1964, at 72-73 (denouncing groups that support the overthrow or subversion of the government); Policy Statement of the National Rifle Association on Extremist Organizations and Militia Groups, May 23, 1995 (reaffirming the 1964 policy).

At the same time, the NRA has made clear its view that counter-terrorism efforts must be conducted within the bounds of the Constitution. *See, e.g., Terrorism Bill and Anti-Gun Exploiters*, *American Rifleman*, Aug.

threats to privacy, freedom of association and
-terrorism proposals).

Joining in a coalition with groups including the American Civil Liberties Union, the NRA supported an amendment to what later became the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132; one provision of the amendment struck language that would have allowed issuance of *ex parte* orders for business records of common carriers, public accommodations, storage facilities, or vehicle rental facilities. *See H. Amdt. 950 to H.R. 2703*, 104th Cong. (1996). Two years later, though, a new

congressional policy a policy that was repeatedly reaffirmed and strengthened by the very Congresses that enacted and reauthorized the legislation at issue in this case.

illustrates

statute on other statutorily protected privacy rights. The decision below should therefore be reversed.

ARGUMENT

I. The mass surveillance program threatens the First Amendment rights of the NRA and its members.

inform its members and supporters, and to inspire those people to communicate, in turn, with policymakers at all levels of government. *See, e.g.,* C.B. Lister, *Firearms Laws in the 73d Congress*, *American Rifleman*, July 1934 at 17 (citing Roosevelt administration complaints about NRA communications on pending legislation); Edward H. Baker, *How the NRA Sets the Standard for Customer Engagement*, *strategy+business*, Dec. 19, 2013, available at <http://www.strategy-business.com/blog/How-the-NRA-and-Apple-Set-the-Standard-for-Customer-Engagement-A-QA-with-Peter-Murray?gko=ba413> (last viewed March 12, 2014) (describing NRA media and grassroots communications). That political effectiveness could be

drastically reduced

beliefs shown through their

Id. at 462-63. By

Amendment con

s ability to express its

Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547

Shear, *White House Denounces Web Video by N.R.A.*, The New York Times, January 16, 2013. They might also be concerned about associating with a group of which the Vice-President of the National Education Association

See Josh

Richman, *Netroots Nation Features a Call to Action on Gun Control*, The Oakland Tribune, June 21, 2013; Christopher Swindell, *Gun safety debate is B.S.*, The Charleston Gazette, May 30, 2013.

Accordingly, like the NAACP, and for the same reasons, the NRA has jealously guarded information about its members and supporters. Those protective efforts have included litigation to challenge federal campaign finance laws that would have required disclosure of the names and addresses of certain contributors. , 540

U.S. 93, 194-95 (2003). In *McConnell*, the executive vice-president of the

concern to him

See Decl. of Wayne

LaPierre, J.A., *M*

, 2003 WL

of contributors appear to limit their donations to avoid disclosure of their identities to the Federal Election Commission. For example, many contributors

information, and social media posts. *See* Letter from Ronald Weich to Sens. Dianne Feinstein and Saxby Chambliss, Feb. 2, 2011, *available at* http://www.dni.gov/files/documents/2011_CoverLetters_Report_Collection.pdf (last viewed March 10, 2014); Glenn Greenwald, *XKeyscore: NSA tool*, *The Guardian*, July 31, 2013. The same would be equally true for NSA tracking of mobile phone locations. *See* Barton Gellman and Ashkan Soltani,

wealth of detail about her familial, political, professional, religious, and

id. at 955, so does the telephone metadata at issue in

this case.

At the outer extreme, a location tracking program could reveal the whether for a political or l shooting range or visit its National Firearms Museum. Similarly, location-tracking surveillance could reveal the travels of NRA staff members to engage in legislative or litigation meetings, political events, or other activities protected by the First Amendment. Any of these forms of tracking

B. Modern data analysis techniques, and the risk of public disclosure, heighten First Amendment concerns about the mass surveillance program.

Government collection of identifying information about individuals is all the more threatening given advances in data aggregation and analysis techniques. *See generally* JA053-058 (Felten Decl. ¶¶ 47-64). The analysis of multiple data points and of combined types of data makes it possible to identify individuals from seemingly minor data. For example, according to phone call make it possible to

[wilmington-housing-authority-moves-to-state-supreme-court.aspx](#) (last viewed March 10, 2014) (challenge to housing authority firearms regulation).

James Risen and Eric Lichtblau, *How the U.S. Uses Technology to Mine More Data More Quickly*, The New York Times, June 8, 2013. These techniques have become commonplace in private industry, with one analysis firm holding as many as 1,500 data points on each of 500 million consumers worldwide. Natasha Singer, *You for Sale: Mapping, and Sharing, the Consumer Genome*, The New York Times, June 16, 2012. Advanced data analysis techniques have also been widely heralded in the political world,

wavering voter in the country that it needed to persuade to vote for Obama, by name, address, and phone number. *Data You Can Believe In*, The New York Times, June 23, 2013.

Adding to the inherent danger of government access to such information, and of the unprecedented ability to use it to identify individuals, is the risk of public disclosure

See Doe v. Reed, 130 S. Ct. 2811, 2825 (2010) (Alito, J., concurring). The government may argue that no such exposure is possible, or likely, due to the security measures surrounding the data. But those assurances are not comforting, given that the very existence of the phone records program was exposed by a lone ex-

contractor. See Glenn Greenwald, *et al.*, *Edward Snowden: the whistleblower behind the NSA surveillance revelations*, The Guardian, June
-sharing policies, with enormous
amounts of data routinely made available to low-

accident or abuse would make it unacceptable. The self-reporting and correction of error or abuse after the fact

freedom from any form of gun registration. Those provisions have been enacted out of well-founded concern for the potential misuse of such information, based on experience at home and abroad. In New York City, for example, rifle and shotgun registration lists have repeatedly been used to order the surrender or removal of firearms that had once been lawfully registered by their owners, but were later prohibited in the city due to design features or magazine capacity. See Edmund DeMarche, *NYPD cracks down on long guns that hold more than five rounds*, FoxNews.com, Dec. 5, 2013, available at <http://www.foxnews.com/us/2013/12/05/nypd-targets-owners-multi-clip-shotguns-rifles/> (last viewed March 12, 2014); David I. Caplan, *Firearms Registration And Waiting Periods: New York City's Lesson*, *American Rifleman*, Oct. 1993, at 67. See also David Kopel, *Who Needs Guns? Lessons From Down Under*, *Chronicles*, Oct. 2003 at 20 (describing confiscation and other restrictions following enactment of registration laws in Australia). Even if there were no threat of confiscation, the chance of public release of gun ownership information may threaten .

See, e.g., Timothy O'Connor and Meghan E. Murphy, *Journal News gun permit map used by burglars to target White Plains home?*, *Newsday*, Jan. 13, 2013 (describing burglary and

name and address were published online); Victor Fiorillo, *These Philadelphians Want Gun Permits*, Philadelphia, Aug. 15, 2012, available at

the NSA,
and by apparent legal workarounds that have been used to cover otherwise
unlawful sharing that does occur. *See* Eric Lichtblau and Michael S.
Schmidt, *Other Agencies Clamor for Data N.S.A. Compiles*, New York
Times, Aug. 3, 2013 (describing data requests from the Drug Enforcement
Administration, Secret Service, Pentagon, Department of Homeland
Security); Brian Fung, *The NSA is giving your phone records to the DEA.
And the DEA is covering it up.*, The Washington Post, Aug. 5, 2013,

demonstrated below, the Congress has consistently acted to protect the privacy interests of gun owners, not only before the enactment of the Patriot Act and throughout the period in which the Act has been reauthorized and amended, but especially by acting in the same year as the most recent reauthorization of the Patriot Act to give permanent effect to several

interpretation of Section 215 would allow all of these provisions to be effectively overridden at will, and is therefore implausible.

A. The interpretation of Section 215 would nullify statutory protections against centralization of gun ownership records.

At the outset of the modern debate over firearms regulation, the Gun Control Act of 1968 (GCA) created the first broad federal regulation of retail firearms sales in the United States. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, Title IV, 82 Stat. 197, 225 (1968); *amended by* Gun Control Act of 1968, Pub.L. 90-618, Title I, 82 Stat. 1213 (1968). During the 1968 debate, both the House and the Senate overwhelmingly voted down proposals to require registration of guns. 114 Cong. Rec. H22267 (daily ed. July 19, 1968); 114 Cong. Rec. S27420-421

Government would take a similar view of demands issued to non-governmental parties.

(daily ed. Sept. 18, 1968). Among the provisions eventually enacted, the GCA (under provisions still in effect, as amended) requires federally licensed firearms manufacturers, importers, and dealers to maintain records of all firearms made, imported, acquired or disposed of. Dealers are required to make those records available for inspection when necessary to

gathered during firearms transfers. The Brady Handgun Violence Prevention Act of 1993, Pub. L. No. 103 159, 107 Stat. 1536 (1993), further amended the GCA by creating the National Instant Criminal Background Check

the system with respect to the call (other than the [transaction] identifying number and the date the number was assigned) and all records of the system

. Section

103(i) of the Act also prohibits use of the NICS to create a federal gun registration system:

Prohibition Relating To Establishment of Registration Systems With Respect To Firearms. No department, agency, officer, or

RSM, Inc. v. Buckles, 254 F.3d 61, 67 (4th Cir. 2001) (discussing 18 U.S.C. § 926(a)).⁴

B. The interpretation of Section 215 conflicts with contemporaneously enacted protections for gun

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In amendments to various appropriations acts, the Congress has also

accumulation of firearms ownership records. Tellingly, several of th, lr gun

Alcohol, Tobacco, Firearms, and Explosives) has contained a funding restriction to prevent such activities. An Act making appropriations for the Treasury Department, the United States Postal Service, the Executive Office of the President, and certain Independent Agencies, for the fiscal year ending Sept. 30, 1979, and for other purposes. Pub. L. No. 95 429, 92 Stat 1001 (1978).

In the same year as the most recent reauthorization of the Patriot Act, *see* PATRIOT

are not indexed by the name of the buyer. The 112th Congress made this protection permanent, too

monitoring and possibly exposing their communications. If programs like those currently approved by the [redacted] are allowed to continue and grow unchecked, they could also [redacted] contrary to clear congressional intent [redacted] undo decades of legal protection for the privacy of Americans in general, and of gun owners in particular. Accordingly, this Court should reverse the judgment of the District Court, and remand the matter for entry of a preliminary injunction.

**CERTIFICATE OF COMPLIANCE WITH TYPE-
VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND
TYPE STYLE REQUIREMENTS**