

THE HONORABLE MARSHA J. PECHMAN

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

AMAZON.COM, LLC,  
Plaintiff,

v.

KENNETH R. LAY, in his official capacity as  
Secretary of the North Carolina Department of  
Revenue,  
Defendant.

---

JANE DOE 1, JANE DOE 2, JANE DOE 3,  
JANE DOE 4, JANE DOE 5, JANE DOE 6,  
AND CECIL BOTHWELL,  
Plaintiffs-Intervenors,

v.

KENNETH R. LAY, in his official capacity as  
Secretary of the North Carolina Department of  
Revenue, and AMAZON.COM, LLC,  
Defendants in Intervention.

---

No. 2:10-cv-00664-MJP

**INTERVENORS' MEMORANDUM IN  
SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT, OR, IN THE  
ALTERNATIVE, AMICI CURIAE  
BRIEF**

**NOTE ON MOTION CALENDAR:  
AUGUST 6, 2010**

**TABLE OF CONTENTS**

1

2

3 **TABLE OF AUTHORITIES** .....ii

4 **INTRODUCTION**.....1

5 **FACTUAL BACKGROUND**.....2

6 **ARGUMENT**.....5

7     I.     DOR’S INFORMATION REQUESTS TO AMAZON VIOLATE THE

8           FIRST AMENDMENT.....5

9           A.     The First Amendment Protects The Right To Receive Information

10                And Ideas Through Books, Films, And Other Expressive Materials

              Anonymously.....6

11           B.     The Significant Chilling Effect Created By DOR’s Requests

12                Demonstrates The Severity Of The Threat To The First

              Amendment.....10

13           C.     DOR Cannot Show A Compelling Interest In The Information

14                Demanded By Its Information Requests, Or A Nexus Between The

              Information And Its Interest In Tax Collection. ....18

15     II.    DOR’S INFORMATION REQUESTS TO AMAZON VIOLATE THE

16           VIDEO PRIVACY PROTECTION ACT.....21

17     III.   DOR’S POLICY AND PRACTICE OF ISSUING OVERBROAD

18           INFORMATION REQUESTS TO SELLERS OF EXPRESSIVE

19           MATERIALS VIOLATES THE FIRST AMENDMENT AND THE

              VPPA. ....22

20 **CONCLUSION** .....24

21

22

23

24

25

26

27

**TABLE OF AUTHORITIES**

**Cases**

*Bantam Books v. Sullivan*, 372 U.S. 58 (1963)..... 7

*Bates v. City of Little Rock*, 361 U.S. 516 (1960)..... 20

*Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999)..... 7

*Burse v. United States*, 466 F.2d 1059 (9th Cir. 1972), *superseded by statute on other grounds*, *In re Grand Jury Proceedings*, 863 F.2d 667 (9th Cir. 1988)..... passim

*Dirkes v. Borough of Runnemede*, 936 F. Supp. 235 (D.N.J. 1996)..... 21

*Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963)..... 18, 22

*Gonzales v. Google, Inc.*, 234 F.R.D. 674 (N.D. Cal. 2006) ..... 9

*In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461 et seq.*, Misc. No. 09-118(RCL), 2009 WL 3495997 (D.D.C. Oct. 26, 2009)..... 6, 18

*In re Grand Jury Subpoena to Amazon.com Dated August 7, 2006*, 246 F.R.D. 570 (W.D. Wis. 2007)..... passim

*In re Grand Jury Subpoena to Kramerbooks & Afterwords Inc.*, 26 Med. L. Rptr. 1599 (D.D.C. 1998) (Dkt. No. 21, Ex. B)..... 6, 10, 18, 22

*In re Grand Jury Subpoena*, 829 F.2d 1291 (4th Cir. 1987) ..... 23

*Lamont v. Postmaster General*, 381 U.S. 301 (1965)..... 7, 8

*McDonald v. United States*, 335 U.S. 451 (1948) ..... 15

*McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995)..... 7

*NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) ..... 7

*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)..... 8

*Reno v. ACLU*, 521 U.S. 844 (1997)..... 8

*Roaden v. Kentucky*, 413 U.S. 496 (1973)..... 7

*Smith v. California*, 361 U.S. 147 (1959) ..... 17

1 *Stanley v. Georgia*, 394 U.S. 557 (1969)..... 6

2 *Talley v. California*, 362 U.S. 60 (1960) ..... 7

3 *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (Colo. 2002)..... 6, 10, 18, 19

4 *United States v. Rumely*, 345 U.S. 41 (1953)..... 8

5 *United States v. Stevens*, 130 S. Ct. 1577 (2010)..... 15

6 *United States v. Trader’s State Bank*, 695 F.2d 1132 (9th Cir. 1983) ..... 19

7 *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748

8 (1976)..... 6

9 *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457 (2001)..... 15

10 **Statutes**

11 18 U.S.C. § 2710..... 21

12

13 **Other Authorities**

14 Andrew Shain, *N.C. Requirement: Stolen Data Law In Effect Today*, Charlotte

15 Observer, Oct. 1, 2006 ..... 17

16 *DOT Security Breach Affects 25,000 Employees*, WRAL.Com, May 25, 2007,

17 <http://www.wral.com/news/local/story/1446009/>..... 17

18 GAO, *Information Security: IRS Needs to Address Pervasive Weaknesses*, GAO-

19 08-211 (Jan. 8, 2008), available at [http://www.gao.gov/cgi-bin/getrpt?GAO-](http://www.gao.gov/cgi-bin/getrpt?GAO-08-211)

20 08-211 ..... 16

21 GAO, *Information Security: IRS Needs to Continue to Address Significant*

22 *Weaknesses*, GAO-10-355 (Mar. 2010), available at

23 <http://www.gao.gov/new.items/d10355.pdf>..... 16

24 GAO, *Information Security: IRS Electronic Filing Systems*, GAO-01-306 (Feb.

25 2001), available at <http://www.gao.gov/new.items/d01306.pdf> ..... 16

26 Katie Hafner, *After Subpoenas, Internet Searches Give Some Pause*, N.Y. Times,

27 Jan. 25, 2006, at A1 ..... 9

Mark Johnson, *Data Lost: Laptop Theft Puts Residents At Risk*, Charlotte

Observer, Jan. 13, 2007, at 1A..... 17

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

North Carolina Department of Revenue, Internet Transactions Resolution  
 Program, <http://www.dornc.com/taxes/sales/itrp.html> ..... 5, 22

Press Release, Investigation Into Alleged Immigrant List Complete (July 20,  
 2010), [http://www.utah.gov/governor/news\\_media/article.html?article=3321](http://www.utah.gov/governor/news_media/article.html?article=3321) ..... 17

Privacy Rights Clearinghouse, Chronology of Data Breaches: Security Breaches  
 2005-Present (2010),  
[http://www.privacyrights.org/sites/default/files/static/Chronology-of-Data-  
 Breaches\\_-\\_Privacy-Rights-Clearinghouse.pdf](http://www.privacyrights.org/sites/default/files/static/Chronology-of-Data-Breaches_-_Privacy-Rights-Clearinghouse.pdf)..... 16

1 Jane Does 1-6 and Cecil Bothwell (“Intervenors”) are individuals whose personal  
2 information and constitutional rights to privacy and freedom of expression are directly at issue in  
3 this case. They moved to intervene in this lawsuit on June 23, 2010 (Dkt. No. 21); that motion is  
4 still pending. Intervenors file this memorandum in support of Amazon’s motion for summary  
5 judgment as proposed intervenors or, in the alternative, request leave to do so as *amici curiae*. If  
6 intervention is granted, Intervenors intend to move for summary judgment on their claims.

### 7 INTRODUCTION

8 Through overly broad information requests that it has issued to Amazon and that it has  
9 threatened to continue issuing to other Internet retailers, the North Carolina Department of  
10 Revenue (“DOR”) has unnecessarily jeopardized the First Amendment rights of individuals to  
11 read, watch, and purchase expressive materials of their choice free from government scrutiny. In  
12 its requests to Amazon, DOR has demanded that Amazon provide “all information” regarding  
13 “all sales” to customers with North Carolina shipping addresses for the last seven years.  
14 Amazon responded to DOR with anonymous, detailed descriptions of items purchased by its  
15 customers in North Carolina. That was not sufficient for DOR. Already in possession of  
16 detailed information about what Amazon’s customers had purchased, DOR demanded that  
17 Amazon further provide it with detailed customer information, including names and addresses,  
18 which could be matched to the product descriptions to reveal exactly which books, films, and  
19 other expressive materials each person purchased or received in North Carolina.

20 There are no facts in dispute here. The only dispute is that DOR does not think there is  
21 anything constitutionally improper with its requests, or with its policy and practice of issuing  
22 similarly worded requests to other companies. The First Amendment dictates otherwise. The  
23 law is clear that when a government request for information implicates the First Amendment  
24 rights of individuals to read, view, and purchase expressive materials of their choosing  
25 anonymously, the government must show a compelling interest in the specific information  
26 requested, and a nexus between an ongoing investigation and that information. DOR cannot do  
27 so as a matter of law, given its statements that the detailed, expressive information it has in its

1 possession is of “absolutely no value” to it in the collection of taxes. DOR’s only excuse is to  
2 assert—without reference to the actual language of its requests—that it did not ask for this  
3 expressive information. The actual language of DOR’s requests, which ask for “all information”  
4 regarding “all sales,” belies this assertion and establishes that the requests and DOR’s policy and  
5 practice of issuing such requests are constitutionally overbroad.

6 Intervenor are individuals whose First Amendment rights are at stake because of DOR’s  
7 demands to Amazon and to other Internet retailers. Intervenor have purchased numerous books,  
8 films, and other expressive and private materials on Amazon and other websites. Their purchase  
9 records reveal profoundly personal and private details about their intimate family issues, their  
10 religious and political beliefs, and their medical and mental health issues. If DOR were able to  
11 obtain this information, Intervenor would be chilled from purchasing certain items in the future,  
12 particularly controversial ones, and several would not purchase anything from Amazon.

13 To alleviate this chilling effect and to restore the well-established right of individuals,  
14 including Intervenor, to receive information and ideas of their choosing anonymously, without  
15 government intrusion, summary judgment is appropriate against DOR on both the First  
16 Amendment and Video Privacy Protection Act grounds.

### 17 **FACTUAL BACKGROUND**

18 In December 2009, DOR sent Amazon an information document request asking that it  
19 provide “all information for all sales to customers with a North Carolina shipping address by  
20 month in an electronic format,” for all dates between August 1, 2003 and February 28, 2010.  
21 Declaration of Jennifer Galbreath (Dkt. No. 45) Ex. A. The request, as well as the cover letter  
22 sent with it, stated that failure to disclose the information by the due date “may prompt the State  
23 to issue a summons in accordance with North Carolina General Statute § 105-258.” *Id.*

24 It is undisputed that Amazon responded by providing DOR with detailed purchase  
25 records for the relevant time period, including Amazon’s standard product code for each item  
26 (“ASIN number”), which reveals detailed information such as the name, title and brand of the  
27 item purchased. *Id.* ¶ 8; Declaration of H. Alan Woodard (Dkt. No. 43-2) ¶ 13. Amazon did not,

1 however, disclose the customer name or address that corresponds to each purchase record.  
2 Galbreath Decl. ¶ 9; Woodard Decl. ¶ 13.

3 DOR sought to force Amazon to provide that information. In March 2010, DOR sent  
4 Amazon another information request stating that Amazon had omitted the “Bill to Name; Bill to  
5 Address (Street, City, State, and Zip); Ship to Name; Ship to Address (street); Product/item code  
6 or description,” and that if Amazon did not provide that information, DOR would issue a  
7 summons, which would allow DOR to initiate a summary enforcement proceeding in court  
8 against Amazon to force it to turn over the information. Galbreath Decl. ¶ 11, Ex. B. DOR  
9 attached a list of “required fields” to that request. *Id.* Ex. B. This list included a field for “Line  
10 Item Description,” which asks for a “[d]etail[ed] description of [the] line item.” *Id.*

11 The detailed information demanded by DOR implicates the fundamental rights of  
12 Amazon’s customers, including Intervenors. If DOR were to receive customer information from  
13 Amazon, DOR would be able to combine that information with the detailed product codes that it  
14 already has in its possession to determine which North Carolina customers, including  
15 Intervenors, purchased which specific books, movies, music, and other expressive and private  
16 items. *Id.* ¶ 13. That prospect is especially distressing to Intervenors, whose customer records  
17 reveal profoundly personal and private details about their intimate family issues, their religious  
18 and political beliefs, and their medical and mental health issues. *See* Declaration of Jane Doe 1  
19 (Dkt. No. 24) ¶¶ 6-9, 11; Declaration of Jane Doe 2 (Dkt. No. 25) ¶¶ 6-8; Declaration of Jane  
20 Doe 3 (Dkt. No. 26) ¶¶ 6-13; Declaration of Jane Doe 4 (Dkt. No. 27) ¶¶ 6-8; Declaration of Jane  
21 Doe 5 (Dkt. No. 28) ¶¶ 7-11; Declaration of Jane Doe 6 (Dkt. No. 29) ¶¶ 6-7; Declaration of  
22 Cecil Bothwell, filed with this memorandum, ¶¶ 8-11. If DOR were able to obtain information  
23 about which specific items Intervenors have purchased or received from Amazon, that would  
24 chill Intervenors from purchasing items, especially controversial, personal and sensitive items,  
25 on Amazon or other websites. *See* Jane Doe 1 Decl. ¶¶ 13-14; Jane Doe 2 Decl. ¶¶ 10-11; Jane  
26 Doe 3 Decl. ¶¶ 15-16; Jane Doe 4 Decl. ¶¶ 10-11; Jane Doe 5 Decl. ¶¶ 13-14; Jane Doe 6 Decl.



1 ¶¶ 9-10; Bothwell Decl. ¶ 12-13. Several Intervenors would simply stop purchasing anything  
2 from Amazon altogether. *See* Jane Doe 4 Decl. ¶ 11; Jane Doe 5 Decl. ¶14.

3 DOR has now acknowledged that it does not need the specific information about which  
4 individuals purchased which specific items through Amazon for the purposes of tax assessment.  
5 *See* Woodard Decl. ¶¶ 9, 16. DOR has nevertheless refused to destroy or to return the detailed  
6 purchasing information that it still has in its possession unless Amazon provides it with different  
7 information. *See* Woodard Decl. ¶ 16; Declaration of David A. Zapolsky (Dkt. No. 46) Ex. 3.  
8 DOR has also refused to acknowledge that it is not entitled to customer information that can be  
9 matched to the detailed purchasing information, and DOR has expressly reserved the right to  
10 demand such information and to force Amazon to provide it. *See* Zapolsky Decl. Ex. 4;  
11 Galbreath Decl. Ex. F (“The Department reserves the right to request additional information  
12 including, but not limited to, information not provided in response to earlier IDR requests.”).

13 DOR’s representation that it does not need the detailed purchasing information does not  
14 alleviate Intervenors’ concerns that DOR might obtain their purchase records, as DOR has  
15 expressly claimed the right to do. Before moving to intervene, Intervenors specifically asked  
16 DOR to narrow its requests and return the detailed product information it now admits it does not  
17 need. Declaration of Jennifer Rudinger, filed with this memorandum, Ex. A, B. DOR refused.  
18 *Id.* Ex. C. Intervenors also asked DOR to change its policy and practice of issuing broadly  
19 worded document requests that ask for “all information” by narrowing the requests to avoid  
20 sweeping in constitutionally protected expressive and private information. DOR declined to do  
21 that as well, and refused to acknowledge any problems with its broadly worded requests, making  
22 it clear that DOR will not change its policy and practice unless forced to by a court. *Id.* Ex. C.

23 Intervenors’ concerns are heightened by the fact that DOR has issued similar, overbroad  
24 information requests to other retailers that encompass details about individuals’ purchases of  
25 expressive and private items. *See* Woodard Decl. Ex. F (stating that “[w]e have requested the  
26 same information from other businesses”). Indeed, following the filing of this lawsuit, DOR  
27 publicly announced that it will issue similar requests for information to any out-of-state Internet

1 retailer that has not collected sales taxes in North Carolina and does not agree to collect sales  
 2 taxes for the next four years. *See* North Carolina Department of Revenue, Internet Transactions  
 3 Resolution Program, <http://www.dornc.com/taxes/sales/itrp.html> (last visited July 23, 2010).  
 4 DOR's threats to Amazon are troubling enough for Intervenor. *See* Jane Doe 1 Decl. ¶ 13; Jane  
 5 Doe 2 Decl. ¶ 10; Jane Doe 3 Decl. ¶ 15; Jane Doe 4 Decl. ¶ 10; Jane Doe 5 Decl. ¶ 13; Jane Doe  
 6 Decl. ¶ 9; Bothwell Decl. ¶¶ 8-13. DOR's policy and practice of issuing such broad  
 7 information requests—and its threat to do so to other retailers, most of whom will not have either  
 8 the resources or desire to fight such requests—only exacerbate those concerns, making  
 9 Intervenor seriously consider whether they can purchase certain items over the Internet at all.  
 10 *See* Jane Doe 1 Decl. ¶ 14; Jane Doe 2 Decl. ¶ 11; Jane Doe 3 Decl. ¶ 16; Jane Doe 4 Decl. ¶ 11;  
 11 Jane Doe 5 Decl. ¶ 14; Jane Doe 6 Decl. ¶ 10; Bothwell Decl. ¶ 14.

12 To ensure that their and other individuals' constitutional rights to expression and privacy  
 13 are protected, Intervenor filed a motion to intervene in this suit on June 23, 2010. Dkt. No. 21.  
 14 Pursuant to DOR's request, its deadline for responding to that motion was extended by stipulated  
 15 Court Order, Dkt. No. 38; DOR filed its opposition on July 12, 2010, Dkt. No. 41. That same  
 16 day, DOR filed a motion to dismiss in response to Amazon's complaint. Dkt. No. 43. Amazon  
 17 then filed its motion for summary judgment on July 15, 2010. Dkt. No. 44. That motion is noted  
 18 for August 6, 2010.

## 19 ARGUMENT

### 20 I. DOR'S INFORMATION REQUESTS TO AMAZON VIOLATE THE FIRST 21 AMENDMENT.

22 DOR does not contest the well-established law that when it seeks records concerning  
 23 which books, films, or other expressive materials individuals have received, the First  
 24 Amendment requires it to show a compelling interest and a nexus between that interest and the  
 25 information sought. *See* Mot. to Dismiss (Dkt. No. 43) at 20-22 (arguing that Amazon fails to  
 26 state a claim under the First Amendment because DOR has a compelling interest in tax  
 27 collection). DOR cannot meet its burden here, given its concession that it does not need detailed

1 information about individuals' expressive purchases for purposes of tax collection. The Court  
 2 should therefore declare that DOR's requests to Amazon violate the First Amendment and enjoin  
 3 DOR from requesting and obtaining information about which individuals have been purchasing  
 4 which books, movies, music, and other expressive and private materials from Amazon.

5 **A. The First Amendment Protects The Right To Receive Information And Ideas**  
 6 **Through Books, Films, And Other Expressive Materials Anonymously.**

7 Courts have uniformly recognized that government requests for records of which books,  
 8 films, or other expressive materials individuals have received implicate the First Amendment and  
 9 trigger exacting scrutiny. *See, e.g., In re Grand Jury Investigation of Possible Violation of 18*  
 10 *U.S.C. § 1461 et seq.*, Misc. No. 09-118(RCL), 2009 WL 3495997, at \*5-9 (D.D.C. Oct. 26,  
 11 2009) (denying motion to compel subpoena for identities of customers who obtained movies  
 12 through a website because government had not shown compelling interest or sufficient  
 13 connection between the information sought and the criminal investigation); *In re Grand Jury*  
 14 *Subpoena to Amazon.com Dated August 7, 2006*, 246 F.R.D. 570, 572-73 (W.D. Wis. 2007)  
 15 (requiring showing of need and modifying a grand jury subpoena seeking information about  
 16 identity of book buyers because it raised First Amendment concerns); *In re Grand Jury*  
 17 *Subpoena to Kramerbooks & Afterwords Inc.*, 26 Med. L. Rptr. 1599, 1600-01 (D.D.C. 1998)  
 18 (Dkt. No. 21, Ex. B) (requiring government to show compelling interest and a sufficient  
 19 connection between its investigation and its request for titles of books purchased by Monica  
 20 Lewinsky); *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1053 (Colo. 2002) (holding  
 21 that search of bookseller's customer purchase records necessarily intrudes into constitutionally  
 22 protected areas).

23 These cases are grounded in the principle that the First Amendment protects not only the  
 24 right of individuals to speak and to express information and ideas, but also the corollary right to  
 25 receive information and ideas through books, films, and other expressive materials. *See, e.g., Va.*  
 26 *State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 757 (1976) (right to  
 27 receive advertisements); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (films); *Bantam Books v.*

1 *Sullivan*, 372 U.S. 58, 64 n.6 (1963) (books). The setting of stores like Amazon and other  
2 Internet retailers that facilitate the sale and purchase of expressive materials is therefore  
3 “presumptively under the protection of the First Amendment.” *Roaden v. Kentucky*, 413 U.S.  
4 496, 504 (1973).

5 Within this protected setting, privacy and anonymity are vitally important. Anonymity  
6 “exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular,”  
7 because, among other things, it serves as a “shield from the tyranny of the majority.” *McIntyre*  
8 *v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995). An individual may desire anonymity  
9 when engaging in First Amendment activities—like reading, speaking, or associating with  
10 certain groups—because of “fear of economic or official retaliation, . . . concern about social  
11 ostracism, or merely . . . a desire to preserve as much of one’s privacy as possible.” *Id.* at 341-  
12 42. Because eliminating this shield of anonymity and privacy would deter the unfettered  
13 exercise of First Amendment rights, the Supreme Court has consistently protected the right to  
14 anonymity. *See, e.g., Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 200 (1999)  
15 (invalidating identification requirement that discouraged participation in petition circulation  
16 process); *McIntyre*, 514 U.S. at 342 (invalidating ban on the distribution of anonymous campaign  
17 literature); *Talley v. California*, 362 U.S. 60, 64 (1960) (invalidating ban on the distribution of  
18 anonymous handbills because “[t]here can be no doubt that . . . [it] would tend to restrict freedom  
19 to distribute information”); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958)  
20 (invalidating order requiring disclosure of organization’s membership list because “privacy in  
21 group association may . . . be indispensable to preservation of freedom of association”).

22 The Supreme Court has also recognized that anonymity and privacy are essential to  
23 preserve the freedom to receive information and ideas through books, films, and other materials  
24 of one’s choosing. For example, in *Lamont v. Postmaster General*, 381 U.S. 301, 302 (1965),  
25 the Court invalidated a postal regulation that required the recipient of “communist political  
26 propaganda” to file a written request with the postmaster before such materials could be  
27 delivered. The regulation violated the First Amendment because it was “almost certain to have a

1 deterrent effect”: “Any addressee [was] likely to feel some inhibition” in sending for literature  
2 knowing that government officials were scrutinizing its content. *Id.* at 307. Forced disclosure of  
3 reading habits, the Court concluded, “is at war with the ‘uninhibited, robust, and wide-open’  
4 debate and discussion that are contemplated by the First Amendment.” *Id.* (quoting *New York*  
5 *Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

6 Similarly, in *United States v. Rumely*, 345 U.S. 41, 56 (1953), a Congressional committee  
7 investigating possible abuses by political lobbyists demanded that a bookseller identify all  
8 customers who had placed orders in bulk for certain titles. The Court held that Congress had no  
9 power to demand such information. Although the Court did not rule on the constitutional  
10 question, the Court stated that “[s]urely it cannot be denied that . . . the power to inquire into all  
11 efforts of private individuals to influence public opinion through books and periodicals . . . raises  
12 doubts of constitutionality in view of the prohibition of the First Amendment.” *Id.* at 46. As  
13 Justice Douglas explained in greater detail in his concurrence: “Once the government can  
14 demand of a publisher the names of the purchasers of his publications, the free press as we know  
15 it disappears. . . . If the lady from Toledo can be required to disclose what she read yesterday and  
16 what she will read tomorrow, fear will take the place of freedom in the libraries, bookstores, and  
17 homes of the land.” *Rumely*, 345 U.S. at 57-58 (Douglas, J., concurring).

18 These words ring equally true today in the Information Age, with the prevalence of the  
19 Internet and other new technologies. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) (holding that  
20 speech on the Internet deserves the same protections as traditional forms of speech). Although  
21 these technological advances provide valuable tools for creating and disseminating information,  
22 *id.*, the unprecedented potential for government and companies to store vast amounts of personal  
23 information for an indefinite time poses a new threat to the right to personal privacy and free  
24 speech. In *In re Grand Jury Subpoena to Amazon.com*, 246 F.R.D. at 572-73, the district court  
25 recognized this reality in holding that a grand jury subpoena to Amazon requesting the identities  
26 of buyers of a certain seller’s books raised significant First Amendment concerns. The court  
27

1 explained its concern over the chilling effect that would flow from enforcing such a subpoena in  
2 the age of the Internet, despite its confidence in the government's good-faith motives:

3 [I]f word were to spread over the Net—and it would—that [the  
4 government] had demanded and received Amazon's list of customers and  
5 their personal purchases, the chilling effect on expressive e-commerce  
6 would frost keyboards across America. Fiery rhetoric quickly would  
7 follow and the nuances of the subpoena (as actually written and served)  
8 would be lost as the cyberdebate roiled itself to a furious boil. One might  
9 ask whether this court should concern itself with blogger outrage  
10 disproportionate to the government's actual demand of Amazon. The  
11 logical answer is yes, it should: well-founded or not, rumors of an  
Orwellian federal criminal investigation into the reading habits of  
Amazon's customers could frighten countless potential customers into  
canceling planned online book purchases, now and perhaps forever. . . .  
Amazon . . . has a legitimate concern that honoring the instant subpoena  
would chill online purchases by Amazon customers.

12 *In re Grand Jury Subpoena to Amazon.com*, 246 F.R.D. at 573.

13 Those observations were not merely speculative. In 2006, when the government  
14 subpoenaed information from the four major Internet search engines (AOL, Microsoft, Yahoo,  
15 and Google) regarding what their customers were searching for on the Web, the public reaction  
16 was immediate shock, outrage, and fear. *See, e.g., Katie Hafner, After Subpoenas, Internet*  
17 *Searches Give Some Pause*, N.Y. Times, Jan. 25, 2006 at A1. So much so, that the district court  
18 considering a challenge to one of the subpoenas *sua sponte* raised privacy concerns with the  
19 request. *Gonzales v. Google, Inc.*, 234 F.R.D. 674, 687-88 (N.D. Cal. 2006).

20 As explained below, DOR's requests to Amazon have had a similar chilling effect on  
21 Amazon's users, including Intervenors. This chilling effect demonstrates exactly why all of  
22 these cases have consistently held that government requests for private and expressive  
23 information raise significant First Amendment concerns that can only be overcome by a showing  
24 of compelling interest and nexus.

**B. The Significant Chilling Effect Created By DOR's Requests Demonstrates The Severity Of The Threat To The First Amendment.**

Courts considering similar government requests for expressive information have focused on the existence of a chilling effect in concluding that rights to free expression are implicated by such requests. *See, e.g., In re Kramerbooks*, 26 Med. L. Rptr. at 1600 (relying on evidence of chilling effect, including declaration that showed that many customers threatened not to shop at the bookstore if it turned over documents revealing patron's choice of books, to hold that subpoena implicates the First Amendment); *Tattered Cover, Inc.*, 44 P.3d at 1061 (holding, under state constitutional law, that evidence of chilling effect caused by execution of a search warrant for bookstore's purchase records outweighed the asserted investigative need). The chilling effect of DOR's potential access to individuals' purchase records is amply illustrated in this case by the declarations of Jane Does 1-6, Dkt. Nos. 24-29, filed with the motion to proceed pseudonymously, and Cecil Bothwell, filed with this memorandum. Intervenors have compelling reasons for why they want to keep their purchase records away from the eyes of government officials and why they would be chilled from purchasing certain items if their purchase records could become available to the State. For example:

Jane Doe 1<sup>1</sup>

Jane Doe 1, an engineer, purchased numerous self-help books from Amazon in order to file for divorce and to obtain a restraining order for herself and her child against her abusive former spouse. She purchased these books after her former spouse's substance abuse problems escalated and her former spouse became violent and threatened to kill her. Jane Doe 1 Decl. ¶¶ 3, 6. The books she purchased include: "You Don't Need A Lawyer," by James Kramon; "Represent Yourself In Court: How to Prepare & Try A Winning Case," by Paul Bergman; "Practical Guide to Family Law," by Matthew S. Cornick; and "How To File For Divorce in North Carolina: With Forms," by Jacqueline D. Stanley. *Id.* Jane Doe 1's experience was

---

<sup>1</sup> Use of the pseudonym "Jane Doe" or gender pronouns does not signify that Jane Does 1-6 are male or female.

1 traumatizing, life-changing, and deeply private for her, and she does not want DOR or anyone  
2 else to know about her private family struggles. *Id.* ¶ 7.

3 In addition, as a recognized expert in information security, her professional reputation is  
4 important to her. *Id.* ¶ 8. A review of her Amazon purchase history would reveal not only the  
5 intimate family and personal problems, but might also lead someone to draw conclusions about  
6 her political or social beliefs. *Id.* ¶ 9. For example, she has bought politically-charged books  
7 like “Laura Bush: An Intimate Portrait of the First Lady,” by Ronald Kessler, “Hoodwinked: The  
8 Documents That Reveal How Bush Sold Us A War,” by John Prados, and “Body of Secrets:  
9 Anatomy of the Ultra-Secret National Security Agency,” by James Bamford. *Id.*

10 The possibility that DOR might obtain her purchase records from Amazon has made her  
11 extremely upset and anxious. *Id.* ¶ 10. This is particularly so because she has personal  
12 experience with DOR’s inability to keep its records secure: a few years ago, she received  
13 information about another taxpayer in an envelope addressed to her. *Id.* Jane Doe 1 would like  
14 to continue purchasing items from Amazon, but if DOR were able to obtain her purchasing  
15 history from Amazon, she would be chilled from making certain purchases in the future and  
16 would have to consider seriously whether to make any purchases on Amazon. *Id.* ¶ 13.

17 Jane Doe 2

18 Jane Doe 2, General Counsel of a global firm, has purchased books with overt political  
19 leanings, like Michael Moore’s “Dude, Where’s My Country?” and Al Franken’s “Lies and the  
20 Lying Liars Who Tell Them: A Fair and Balanced Look at the Right.” Jane Doe 2 Decl. ¶¶ 3, 6.  
21 She does not want DOR to know about her political leanings or the other private details of her  
22 life that can be pieced together from the over 200 items that she has purchased from Amazon  
23 since 2003. *Id.* ¶ 4, 8. Although she intends to purchase expressive and private items from  
24 Amazon in the future, she would be chilled from doing so if DOR were able to obtain her  
25 purchasing history. *Id.* at ¶¶ 10, 11.

26 Jane Doe 3

27 Jane Doe 3, a writer at a software company, is an atheist. Jane Doe 3 Decl. ¶¶ 3, 6. She



1 has purchased several books from Amazon reflecting her beliefs, including “Godless: How an  
 2 Evangelical Preacher Became One of America’s Leading Atheists,” by Dan Barker and Richard  
 3 Dawkins, “God Is Not Great: How Religion Poisons Everything,” by Christopher Hitchens, and  
 4 “The God Delusion,” by Richard Dawkins. *Id.* She has also purchased DVDs of the same  
 5 nature, including “The God Who Wasn’t There,” a documentary highly critical of modern  
 6 Christianity which questions the existence of Jesus Christ, and “Religulous,” a politically  
 7 charged documentary by Bill Maher which criticizes organized religions of all types. *Id.* She is  
 8 not “out” about her belief in atheism, and she does not want DOR or anyone else—including her  
 9 religious co-workers—to learn about her private beliefs. *Id.* ¶¶ 7-8.

10 Jane Doe 3 has also purchased other books through Amazon which reveal other  
 11 profoundly personal and private matters, including books concerning: ways to save her marriage  
 12 (“The Seven Principles For Making Marriage Work: A Practical Guide From the Country’s  
 13 Foremost Relationship Expert,” by John M. Gottman); mental health conditions afflicting her  
 14 former spouse (“Stop Walking On Eggshells: Taking Your Life Back When Someone You Care  
 15 About Has Borderline Personality Disorder,” by Paul T. Mason); and cancer (“Eating Well  
 16 Through Cancer: Easy Recipes & Recommendations During & After Treatment,” by Holly  
 17 Clegg). *Id.* ¶¶ 9, 10, 12. She purchased these books through Amazon in part because it was  
 18 convenient to do so and in part because she did not want others to see her buying those books  
 19 and carrying them around. *Id.* ¶11. She would like to continue purchasing items from Amazon,  
 20 but she would be chilled from doing so, at least with respect to certain items, if DOR were able  
 21 to obtain her purchasing records. *Id.* ¶¶ 15, 16.

#### 22 Jane Does 4 and 5

23 Jane Doe 4, a student at the University of North Carolina Law School, has received books  
 24 from Jane Doe 5, her parent, which may be viewed by some as controversial, such as “Lies the  
 25 Government Told You: Myth, Power, and Deception in American History,” by Andrew P.  
 26 Napolitano, and “Obama Zombies: How the Liberal Machine Brainwashed My Generation,” by  
 27 Jason Mattera. Jane Doe 4 Decl. ¶¶ 3, 6. After graduation, she aspires to work in the public

1 sector, ideally in a legislative or public policy capacity, and she does not want the State or  
2 anyone else to judge her based on what she has been reading. *Id.* ¶ 8. She would like to continue  
3 using Amazon, but she would be chilled from obtaining certain items from Amazon if her  
4 purchasing records were to become accessible to the State, and she would also have to consider  
5 seriously whether to purchase any items through Amazon. *Id.* ¶¶ 10, 11.

6 Jane Doe 5, an accountant and a Florida resident, purchased books for her child through  
7 Amazon after discussing the books and their subject matters with her. Jane Doe 5 Decl. ¶¶ 3, 8.  
8 She does not want the subjects of her conversations with her child or the potentially controversial  
9 books she purchased revealed to the government or to anyone else because that information is  
10 deeply personal and private, and may reveal her political beliefs and values. Jane Doe 5 is also  
11 concerned for her professional reputation, as many of her business colleagues and clients would  
12 be put off by the subject matter of the items purchased. *Id.* ¶¶ 8-10. She intends to continue  
13 using Amazon, especially because her child lives in another state, but if DOR were able to access  
14 this information, she would be chilled from purchasing certain items on Amazon. She would  
15 also have to consider seriously whether to purchase any items through Amazon. *Id.* ¶¶ 13-14.

16 Jane Doe 6

17 Jane Doe 6, a retired lawyer, has purchased books on potentially sensitive and revealing  
18 matters, such as “The Stages of Meditation,” by the Dalai Lama. Jane Doe 6 Decl. ¶¶ 3, 6. She  
19 would like to continue using Amazon, but if DOR were able to access her private and personal  
20 purchasing records, she will seriously have to consider whether to purchase certain items from  
21 Amazon and to consider what it would mean if the State obtained the information. *Id.* ¶¶ 7-9.

22 Cecil Bothwell

23 Cecil Bothwell, an elected member of the Asheville City Council, has purchased  
24 expressive items from Amazon and sold books he has written and published through Amazon.  
25 Bothwell Decl. ¶ 3. Mr. Bothwell is an atheist. *Id.* ¶ 5. When he was elected to the Asheville  
26 City Council, his political opponents seized on that and undertook high profile, public efforts to  
27 attempt to prevent him from being sworn in to office pursuant to a provision of the North

1 Carolina Constitution which purports to prohibit anyone who “den[ies] the being of Almighty  
2 God” from holding public office. *Id.*

3 Mr. Bothwell eventually overcame that challenge and was permitted to take office, but  
4 that experience made him acutely aware of how damaging and potentially life-altering the  
5 revelation of personal and intimate details about public officials can be, and how critical it is to  
6 make sure that government does not unnecessarily obtain personal and private information about  
7 individuals, especially public officials. *Id.* ¶ 6. Because of this experience, Mr. Bothwell does  
8 not want to take any chance that his private, personal purchasing records on Amazon will be  
9 turned over to the State if they are linked to his name and other identifying information. *Id.* ¶ 8.

10 He also does not want the State to know the identity of those who have purchased the  
11 books he has written and published, many of which concern potentially controversial and  
12 sensitive subjects. *Id.* ¶ 9-11. For example, one of these books, written by Mr. Bothwell, is “The  
13 Prince of War: Billy Graham’s Crusade For A Wholly Christian Empire,” a highly critical,  
14 unauthorized biography of Billy Graham, one of North Carolina’s most famous and popular  
15 former residents. *Id.* Mr. Bothwell faced severe criticism and hostility for writing this book, and  
16 he is very concerned that his readers and customers will suffer similar adverse consequences,  
17 including retaliation, if it were publicly disclosed that they were reading the book, and that they  
18 will therefore be chilled from purchasing his books through Amazon were the State to have  
19 access to this information. *Id.* That chill, in turn, will prevent him from having his messages  
20 heard by as many people as possible. *Id.* ¶ 12.

21 Mr. Bothwell would like to continue purchasing expressive items through Amazon in the  
22 future. *Id.* ¶ 13. He would also like to continue selling his books through Amazon. *Id.* He will  
23 be chilled from doing so, however, at least with respect to certain items, if DOR were able to  
24 access his records and the records of his customers and readers from Amazon. *Id.*

25 As demonstrated by Intervenors, the information that DOR is demanding reveals  
26 sensitive and highly personal information about these individuals’ intimate family struggles,  
27 medical and mental health problems, and religious and political beliefs. The declarations of

1 Intervenor establish that DOR’s demand for information about which books, films, and other  
2 expressive materials people are purchasing will chill Amazon’s users from obtaining certain  
3 items in the future from Amazon, and some would simply choose not to purchase any items from  
4 Amazon. Jane Doe 1 Decl. ¶¶ 13-14; Jane Doe 2 Decl. ¶¶ 10-11; Jane Doe 3 Decl. ¶¶ 15-16;  
5 Jane Doe 4 Decl. ¶ 10; Jane Doe 5 Decl. ¶ 13; Jane Doe 6 Decl. ¶ 9; Bothwell Decl. ¶ 13.

6 DOR misses the mark when it argues that the First Amendment claim fails because DOR  
7 employees will not have the time to search the 50 million North Carolina customer purchases by  
8 ASIN number to learn the title of each book, DVD, or music purchased. Mot. to Dismiss at 7-8.  
9 The First Amendment does not depend on what the government will do with the data it collects  
10 about individuals’ expressive activities. First Amendment interests are violated when the  
11 government asks for this detailed, expressive information, because individuals will be chilled by  
12 the prospect of government collection of this data. That unacceptable chill is particularly clear  
13 here, given that DOR will have a database of over 50 million entries with all of this detailed  
14 expressive information. DOR’s argument is essentially that even though it will have this  
15 protected information, individuals should simply trust the government not to look at it. That  
16 argument has been rejected by the Supreme Court. Simply put, “trust us” is not good enough  
17 when First Amendment rights are at stake. *See United States v. Stevens*, 130 S. Ct. 1577, 1591  
18 (2010) (“But the First Amendment protects against the Government; it does not leave us at the  
19 mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the  
20 Government promised to use it responsibly.”) (citing *Whitman v. Am. Trucking Assns., Inc.*, 531  
21 U.S. 457, 473 (2001)); *McDonald v. United States*, 335 U.S. 451, 455-56 (1948) (“The right of  
22 privacy was deemed too precious to entrust to the discretion of those whose job is the detection  
23 of crime and the arrest of criminals.”).

24 DOR similarly attempts to minimize the First Amendment and privacy concerns by  
25 focusing on its confidentiality obligations. *See* Response to Mot. to File Complaint in  
26 Intervention Using Pseudonyms (Dkt. No. 42) at 3. Those obligations do not “soften the blow”  
27 to Intervenor’s First Amendment rights to keep their information private from the eyes of the

1 government. *Burse v. United States*, 466 F.2d 1059, 1086 (9th Cir. 1972) (holding that the  
2 secrecy of the grand jury proceeding “did little to soften the blow to the First Amendment rights”  
3 because “[t]he public did not know what the grand jury learned, but the proceedings were no  
4 secret to the Government”), *superseded by statute on other grounds, In re Grand Jury*  
5 *Proceedings*, 863 F.2d 667 (9th Cir. 1988).

6 Moreover, there is a realistic possibility that DOR’s confidentiality obligations might be  
7 breached—intentionally or inadvertently. This concern is not just theoretical. For example, the  
8 Internal Revenue Service (“IRS”), DOR’s federal analogue, has had a continuing spate of  
9 privacy and security problems over the last decade, despite strict rules regarding the  
10 confidentiality of taxpayer information and its best efforts at securing the information. *See, e.g.,*  
11 *GAO, Information Security: IRS Electronic Filing Systems*, GAO-01-306 (Feb. 2001), *available*  
12 *at* <http://www.gao.gov/new.items/d01306.pdf> (finding that in 2001, the agency’s computer  
13 systems were highly insecure and vulnerable); *GAO, Information Security: IRS Needs to*  
14 *Address Pervasive Weaknesses*, GAO-08-211 (Jan. 8, 2008), *available at*  
15 <http://www.gao.gov/cgi-bin/getrpt?GAO-08-211> (finding that as of 2008, “significant  
16 weaknesses in various controls continue to threaten the confidentiality and availability of IRS’s  
17 financial processing systems and information,” and that fully 70 percent of previously identified  
18 weaknesses had not been addressed by the agency); *GAO, Information Security: IRS Needs to*  
19 *Continue to Address Significant Weaknesses*, GAO-10-355 (Mar. 2010), *available at*  
20 <http://www.gao.gov/new.items/d10355.pdf> (finding that as of 2010, 69 percent of the previously  
21 identified security weaknesses in key systems had still not been addressed). Other government  
22 agencies have likewise experienced similar security breaches in recent years. *See, e.g.,* Privacy  
23 Rights Clearinghouse, *Chronology of Data Breaches: Security Breaches 2005-Present* (2010),  
24 [http://www.privacyrights.org/sites/default/files/static/Chronology-of-Data-Breaches\\_-\\_Privacy-](http://www.privacyrights.org/sites/default/files/static/Chronology-of-Data-Breaches_-_Privacy-Rights-Clearinghouse.pdf)  
25 [Rights-Clearinghouse.pdf](http://www.privacyrights.org/sites/default/files/static/Chronology-of-Data-Breaches_-_Privacy-Rights-Clearinghouse.pdf) (compiling a list of incidents of insider theft, fraud, hacking, break-ins,  
26 lost hard drives, and accidental disclosures of personal information from private sector and  
27 governmental institutions since January 2005; as of July 2010, this list details over 494 million

1 records that have been lost). Indeed, just last week, it was discovered that a database maintained  
2 by the State of Utah was improperly accessed, resulting in the public disclosure of personal  
3 information and the alleged immigration status of thousands of individuals in Utah. *See* Press  
4 Release, Investigation Into Alleged Immigrant List Complete (July 20, 2010),  
5 [http://www.utah.gov/governor/news\\_media/article.html?article=3321](http://www.utah.gov/governor/news_media/article.html?article=3321).

6 DOR, like the IRS and other governmental entities, has itself had information security  
7 breaches in the past. Jane Doe 1, for example, received information about another taxpayer from  
8 DOR in an envelope addressed to her. Jane Doe 1 Decl. ¶ 10. In another incident, a laptop  
9 containing confidential information about 30,000 individuals was lost by a DOR employee who  
10 left the laptop in her car. Mark Johnson, *Data Lost: Laptop Theft Puts Residents At Risk*,  
11 *Charlotte Observer*, Jan. 13, 2007, at 1A (reporting that a majority of the more than 200 data  
12 security breaches revealed nationwide since 2005 have come from government agencies). Other  
13 government agencies in North Carolina have had similar problems. *See, e.g.*, Andrew Shain,  
14 *N.C. Requirement: Stolen Data Law In Effect Today*, *Charlotte Observer*, Oct. 1, 2006, at 3B  
15 (reporting theft of computer owned by N.C. Division of Motor Vehicles with information about  
16 16,000 people); *DOT Security Breach Affects 25,000 Employees*, *WRAL.Com*, May 25, 2007,  
17 <http://www.wral.com/news/local/story/1446009/> (reporting security breach of computer server  
18 holding information on 25,000 North Carolina Department of Transportation employees). The  
19 chilling effect from DOR's requests to Amazon is, thus, exacerbated by the realistic possibility  
20 that the information will not necessarily remain confidential in DOR's hands.

21 Because DOR's demands on Amazon are chilling individuals from exercising their right  
22 to receive information and ideas from books, films, and other expressive materials, DOR's  
23 demands raise serious First Amendment concerns. *See Smith v. California*, 361 U.S. 147, 150-51  
24 (1959) (holding that "legal devices"—like DOR's requests for information—"cannot be applied  
25 in settings where they have the collateral effect of inhibiting the freedom of expression, by  
26 making the individual the more reluctant to exercise it").

1           **C.     DOR Cannot Show A Compelling Interest In The Information Demanded By**  
2           **Its Information Requests, Or A Nexus Between The Information And Its**  
3           **Interest In Tax Collection.**

4           DOR's information requests for "all information" relating to "all sales" on Amazon fail  
5           the heightened judicial scrutiny applicable to government requests for information that  
6           implicates the First Amendment. The Supreme Court has established that to force a disclosure of  
7           personal information of the type requested here, the government must show a compelling need  
8           for the information and a nexus between the information and a government investigation. *See,*  
9           *e.g., Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 546 (1963)* (holding that a  
10          state legislative committee subpoena could not be enforced because "it is an essential  
11          prerequisite to the validity of an investigation which intrudes into the area of constitutionally  
12          protected rights of speech . . . that the State convincingly show a substantial relation between the  
13          information sought and a subject of overriding and compelling state interest"); *see also Bursey,*  
14          466 F.2d at 1083 (holding that "[w]hen governmental activity collides with First Amendment  
15          rights, the Government has the burden of establishing that its interests are legitimate and  
16          compelling and that the incidental infringement upon First Amendment rights is no greater than  
17          is essential to vindicate its subordinating interests").

18          This same standard applies to government requests for a bookseller's customer  
19          information. In *Kramerbooks*, for example, the court drew on the association and anonymous  
20          speech cases to hold that to demonstrate the enforceability of a subpoena, the government must  
21          show a compelling interest in or need for the information sought and a sufficient connection  
22          between the information and the criminal investigation. *In re Kramerbooks*, 26 Med. L. Rptr. at  
23          1600; *see also In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461 et seq.,*  
24          2009 WL 3495997, at \*5-9 (applying *Kramerbooks* standard to subpoena seeking identity of  
25          individuals receiving movies from a website); *In re Amazon.com*, 246 F.R.D. at 572-73 (agreeing  
26          with the analysis in *Kramerbooks* and requiring the government to show that the grand jury  
27          needs the information); *Tattered Cover*, 44 P.3d at 1056-59 (adopting the *Kramerbooks* standard  
            into state constitutional requirement for a warrant implicating freedom of expression).

1 DOR does not take issue with this standard. Instead, DOR argues that it has a  
2 “compelling interest” in the administration of the tax system and the enforcement of summonses  
3 for tax information. Mot. to Dismiss at 22. DOR may generally have a compelling interest in  
4 administering its tax system, but it is not enough for DOR to assert this broad interest any time it  
5 requests tax-related information from individuals. *See Tattered Cover*, 44 P.3d at 1058 (holding  
6 that “because the law enforcement officials’ need to investigate crime will almost invariably be a  
7 compelling one . . . the court must engage in a more specific inquiry as to whether law  
8 enforcement officials have a compelling need *for the precise and specific information sought.*”  
9 (emphasis in original)). DOR has conceded that it has “no reason to request expressive content,  
10 such as book or movie titles,” in the course of a sales or use tax audit. Woodard Decl. ¶ 9. The  
11 detailed expressive information that DOR currently has in its possession is, thus, in its own  
12 words, “of no use” to DOR. *Id.* ¶14. Given this admission, DOR cannot show any legitimate  
13 interest, much less a compelling one, in knowing which individuals purchased which specific  
14 books, films, and other expressive materials from Amazon or from any other website—the  
15 specific information at issue here.

16 Moreover, in its motion to dismiss, DOR failed to address the second prong of the test:  
17 whether there is a nexus between the information sought and its investigation, and whether “the  
18 incidental infringement upon First Amendment rights” of its requests for information “is no  
19 greater than is essential to vindicate its subordinating interests.” *Bursey*, 466 F.2d at 1083. Even  
20 where the government has an interest in enforcing a tax summons, the government must show a  
21 nexus between the information and the goals of the investigation. *See United States v. Trader’s*  
22 *State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (vacating order of enforcement where  
23 government request for information was overbroad and the government failed to show a  
24 connection between the documents requested and the goal of assessing tax liability). Because  
25 DOR has completely failed to do so, its requests cannot withstand First Amendment scrutiny.

26 DOR’s conclusory assertion of its general interest in tax administration, even if a  
27 compelling interest, is not enough to satisfy this second prong. *See Bates v. City of Little Rock*,



1 361 U.S. 516, 525 (1960) (“[G]overnmental action does not automatically become reasonably  
2 related to the achievement of a legitimate and substantial government purpose by mere assertion  
3 . . . .”). Here, DOR’s information requests call for the production of information that is  
4 unnecessary and, according to DOR, not even desired. DOR has stated that it does not need or  
5 want the detailed, expressive information about individuals’ purchasing histories to complete a  
6 tax assessment of sales and use taxes. Woodard Decl. ¶ 9 (“The exemptions and differential  
7 rates of taxation under the North Carolina revenue laws are not based on the expressive content  
8 of books, music, or videos.”). DOR therefore cannot show a nexus between the expressive  
9 information that it has requested and its interest in tax collection, nor that the requests are no  
10 greater than essential to satisfy its interest in tax collection.

11 Moreover, even if DOR could show a nexus between this expressive information and its  
12 interests in tax collection, DOR’s information requests are overbroad and impermissibly sweep  
13 in information about an unknown, but significant, number of individuals for whom DOR has no  
14 legitimate need to know any information. These individuals include, for example, the many non-  
15 North Carolina residents, like Jane Doe 5, a Florida resident, who send items to individuals in  
16 North Carolina through Amazon, but who are not liable for use taxes or any North Carolina  
17 taxes. Even though DOR does not need any information regarding these individuals, its requests  
18 expressly call for the production of such information. *See Galbreath Decl. Ex. B* (stating that  
19 Amazon’s response failed to provide “Bill to Name” and “Bill to Address” information). The  
20 requests are, thus, constitutionally overbroad. *See Bursey*, 466 F.2d at 1983.

21 Finally, DOR’s information requests are also overbroad because DOR has admitted that it  
22 already has enough information to “proceed to issue a sales tax assessment against Amazon,  
23 assessing tax on all transactions at the highest rate.” Mot. to Dismiss at 17. Any further  
24 information that it seeks might arguably be useful only to efforts to collect use taxes, which it has  
25 not yet even decided to undertake. *Id.* Because it has not yet decided to conduct any use tax  
26 investigations against individuals, there is no specific need for this information. The requests  
27 are, thus, unconstitutional because the First Amendment prohibits DOR from demanding

1 information about its citizens that sweeps in information about their expressive activities without  
2 a specific need for such information.

3 **II. DOR'S INFORMATION REQUESTS TO AMAZON VIOLATE THE VIDEO**  
4 **PRIVACY PROTECTION ACT.**

5 DOR's information requests are also improper because they violate the Video Privacy  
6 Protection Act of 1988, 18 U.S.C. § 2710 ("VPPA"), as the requests would result in the  
7 disclosure of which audiovisual materials, such as video tapes and DVDs, individuals have  
8 purchased. The VPPA was passed to prevent exactly this situation from occurring: Congress  
9 passed the Act in reaction to Judge Robert Bork's 1987 Supreme Court nomination, during  
10 which a newspaper obtained a list of 146 videotapes that the Bork family had rented. *See Dirkes*  
11 *v. Borough of Runnemede*, 936 F. Supp. 235, 238 (D.N.J. 1996). Congress was "outraged by the  
12 invasion into the Bork family's privacy" and "acted quickly to outlaw certain disclosures of such  
13 clearly private information." *Id.*

14 DOR's information requests seek the disclosure of this "clearly private information."  
15 The "personally identifiable information" protected by the VPPA is "information which  
16 identifies a person as having requested or obtained specific video materials or services from a  
17 video tape service provider." 18 U.S.C. § 2710(a)(3). Amazon is indisputably such a "video  
18 tape service provider" that is "engaged in the business . . . of rental, sale, or delivery of  
19 prerecorded video cassette tapes or similar audio visual materials . . ." 18 U.S.C. § 2710(a)(4).  
20 As such, it is prohibited from knowingly disclosing information about individuals' purchasing  
21 records of audiovisual materials except in narrow circumstances, such as if there is a warrant  
22 permitting access to the records. 18 U.S.C. § 2710(b). DOR's information requests do not fall  
23 under these narrow exceptions. Even if DOR were to apply for a court order to enforce the  
24 requests, the VPPA would require it to show a "compelling need for the information that cannot  
25 be accommodated by any other means," and DOR would have to give the consumer notice and  
26 an opportunity to contest the disclosure before being able to access the records. 18 U.S.C. §  
27 2710(b)(2)(F). DOR has not shown any intent to provide individual notice to those whose

1 records it is seeking, and, in any event, it cannot meet the high standard for compelling need for  
2 the same reasons that it cannot satisfy First Amendment scrutiny.

3 **III. DOR'S POLICY AND PRACTICE OF ISSUING OVERBROAD INFORMATION**  
4 **REQUESTS TO SELLERS OF EXPRESSIVE MATERIALS VIOLATES THE**  
5 **FIRST AMENDMENT AND THE VPPA.**

6 Not only has DOR issued overbroad information requests to Amazon, but it has a policy  
7 and practice of issuing similar requests to other retailers. *See* Woodard Decl. Ex. F. Indeed,  
8 following the filing of this lawsuit, DOR stated that it will continue to issue such requests to out-  
9 of-state retailers that do not agree to collect sales tax. *See* Internet Transactions Resolution  
10 Program, <http://www.dorn.com/taxes/sales/itrp.html>. For the same reasons as discussed above,  
11 DOR's policy and practice of issuing overbroad information requests that seek "all information"  
12 for "all sales" from sellers of expressive materials other than Amazon also violates the First  
13 Amendment and, if complied with by sellers of audiovisual material, would violate the VPPA.  
14 DOR has stated that it does not need detailed, expressive information like the titles of books or  
15 movies purchased in the course of its sales or use tax audits. Woodard Decl. ¶¶ 7-9. It can  
16 therefore never succeed in showing a compelling interest in requesting this information in the  
17 course of its sales or use tax audits, or a sufficient nexus between the information and such  
18 audits, as is required by the First Amendment. *See Gibson*, 372 U.S. at 546; *In re Kramerbooks*,  
26 Med. L. Rptr. at 1600-01.

19 DOR's policy and practice of issuing such overbroad information requests and its public  
20 threat to continue doing so to out-of-state retailers has an impermissible "chilling effect on  
21 expressive e-commerce" that "would frost keyboards across America." *In re Grand Jury*  
22 *Subpoena to Amazon.com*, 246 F.R.D. at 573. That is especially the case because most  
23 companies will likely acquiesce to such requests without notifying Intervenors or other  
24 customers, as they will have neither the resources nor the desire to do so. As Intervenors'  
25 declarations make clear, if DOR could obtain detailed, expressive information about all of their  
26 Internet purchases, Intervenors would seriously consider whether they can purchase certain  
27

1 expressive and private items over the Internet at all. *See* Jane Doe 1 Decl. ¶ 14; Jane Doe 2 Decl.  
2 ¶ 11; Jane Doe 3 Decl. ¶ 16; Jane Doe 4 Decl. ¶ 11; Jane Doe 5 Decl. ¶ 14; Jane Doe 6 Decl. ¶ 10;  
3 Bothwell Decl. ¶ 14.

4 That chill is precisely why where, as here, the government seeks information that is  
5 protected by the First Amendment and acts in a way that poses a risk of chilling the right to free  
6 expression, it “must use a scalpel, not an ax.” *Burse*, 466 F.2d at 1088; *In re Grand Jury*  
7 *Subpoena*, 829 F.2d 1291, 1302 (4th Cir. 1987) (quashing as improper a subpoena requiring  
8 videotape distributors to produce copies of videos that depict sexually explicit conduct, and  
9 holding that the government must act “in the least intrusive matter possible, which means, at  
10 minimum, by identifying the requested material in a way that allows the recipient of the  
11 subpoena to know immediately whether an item is to be produced or not”). DOR’s information  
12 requests fail to “use a scalpel” because they broadly seek “all information” without specifying  
13 that they do not need detailed, expressive information.

14 What DOR must do to ensure compliance with the First Amendment and the VPPA is  
15 clear and simple: it must specifically state in the information requests that it issues to retailers  
16 that its request does not call for information regarding expressive content, such as book or movie  
17 titles. DOR has refused this straightforward request. The Court should therefore enjoin DOR  
18 from issuing information requests that are not narrowly tailored enough and do not clarify that  
19 DOR is not seeking detailed, expressive information.

**CONCLUSION**

For the foregoing reasons, summary judgment should be granted.

Respectfully submitted this 23rd day of July, 2010.

**AMERICAN CIVIL LIBERTIES UNION OF  
WASHINGTON FOUNDATION**

Sarah A. Dunne, WSBA # 34869  
901 Fifth Ave, Suite 630  
Seattle, Washington 98164  
Tel: (206) 624-2184  
Fax: (206) 624-2190  
Email: dunne@aclu-wa.org

**AMERICAN CIVIL LIBERTIES UNION OF  
NORTH CAROLINA FOUNDATION**

Katherine Lewis Parker (*pro hac vice*)  
Post Office Box 28004  
Raleigh, North Carolina 27611  
Tel: (919) 834-3466  
Fax: (866) 511-1344  
Email: acluncklp@nc.rr.com

/s/ Venkat Balasubramani

Venkat Balasubramani, WSBA #28269

**FOCAL PLLC**

8426 40<sup>th</sup> Ave SW  
Seattle, WA 98136  
Tel: (206) 529-4827  
Fax: (206) 260-3966  
Email: venkat@focallaw.com

**AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION**

**Speech, Privacy and Technology Project**

Aden J. Fine (*pro hac vice*)  
Mariko Hirose (*pro hac vice*)  
125 Broad Street, 18<sup>th</sup> Floor  
New York, NY 10004  
Tel: (212) 549-2500  
Fax: (212) 549-2651  
Email: afine@aclu.org  
mhirose@aclu.org

**CERTIFICATE OF SERVICE**

The undersigned certifies that she filed the foregoing Intervenor's Memorandum in Support of Summary Judgment, Or, In The Alternative, *Amici Curiae* Brief, with the Declaration of Cecil Bothwell and the Declaration of Jennifer Rudinger as exhibits, through the Court's CM/ECF system which will provide a notice of filing to counsel for all parties.

July 23, 2010.

/s/ Mariko Hirose  
Mariko Hirose