

WHEN SILENCE IS NOT GOLDEN: THE STORED COMMUNICATIONS ACT, GAG ORDERS, AND THE FIRST AMENDMENT

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I. INTRODUCTION

Cloud computing has completely changed the landscape of information storage. Sensitive information that was once stored in file cabinets and eventually on computers is now stored remotely using web-based cloud computing services.¹ The cloud's prevalence in today's world is undeniable, as recent studies show that nearly forty percent of all Americans² and an estimated ninety percent of all businesses use the cloud in some capacity.³ Despite this fact, Congress has done little in recent years to protect users and providers of cloud computing services.⁴

What Congress *has* done dates back to its enactment of the Stored Communications Act (SCA) in 1986.⁵ Passed decades before the existence

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¹See *Riley v. California*, 134 S. Ct. 2473, 2491 (2014) (defining cloud computing as “the capacity of Internet-connected devices to display data stored on remote servers rather than on the device itself”); see also Paul Ohm, *The Fourth Amendment in a World Without Privacy*, 81 MISS. L.J. 1309, 1315–16 (2012) (explaining that data storage has migrated from local devices controlled by their users to data centers controlled by providers).

²Press Release, SOASTA, SOASTA Cloud Computing Survey: 2 in 5 Americans Use the Cloud (June 10, 2014), available at <https://www.soasta.com/press-releases/soasta-cloud-computing-survey-2-5-americans-use-cloud/>.

³Sharon Florentine, *Cloud Adoption Soars, But Integration Challenges Remain*, CIO CLOUD COMPUTING (Jan. 5, 2016), <http://www.cio.com/article/3018156/cloud-computing/cloud-adoption-soars-but-integration-challenges-remain.html>.

⁴See Lindsay S. Feuer, Note, *Who Is Poking Around Your Facebook Profile?: The Need to Reform the Stored Communications Act to Reflect a Lack of Privacy on Social Networking Websites*, 40 HOFSTRA L. REV. 473, 514 (2011) (“The SCA has not been amended since its enactment in 1986 to encompass the overwhelming changes in technology.”).

⁵Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, TITLE II, 100 Stat. 1848, 1860 (1986).

of the cloud we use today,⁶ Congress enacted the SCA in an effort to protect users' privacy amidst the significant advancements in technology at that time.⁷ Unfortunately, this antiquated law now fails to provide adequate protections in the face of modern technology.⁸ The SCA instead allows the government to obtain users' private digital documents directly from their cloud computing service providers without notice of any kind.⁹ What's more, and what this article focuses on, is that the government can seek secrecy (gag) orders under 18 U.S.C. § 2705(b) to prohibit the service provider from ever shedding light on the government's search.¹⁰ Because these gag orders are without a set duration, the court has the ability to silence cloud computing service providers indefinitely.¹¹

The sobering truth is that once a court enters a § 2705(b) gag order, that court places its proverbial hand over the mouth of the service provider for as long as it desires, without any requirement for ongoing evidentiary support of necessity.¹² Although this truth bears on the privacy rights of users,¹³ it also takes a significant toll on the rights of cloud computing service providers.¹⁴ This article argues that the gag orders imposed under § 2705(b) of the SCA violate the First Amendment rights of cloud computing service companies. First, Part II briefly discusses the history of the SCA and explains the application and prevalence of § 2705(b) gag

⁶See James Ryan, Comment, *The Uncertain Future: Privacy and Security in Cloud Computing*, 54 SANTA CLARA L. REV. 497, 501 (2014) (discussing how cloud computing has evolved significantly since its inception in the 1950s).

⁷See S. REP. NO. 99-541, at 1 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3555, 3557.

⁸See Gabriel R. Schlabach, Note, *Privacy in the Cloud: The Mosaic Theory and the Stored Communications Act*, 67 STAN. L. REV. 677, 697 (2015) (proposing an amendment to the SCA because it is an "outdated tool for protecting citizens' privacy at a time when Americans need that protection more than ever").

⁹18 U.S.C. § 2703 (2012 & Supp. III 2016).

¹⁰See 18 U.S.C. § 2705(b) (2012 & Supp. III 2016).

¹¹See *id.* (stipulating that the court may require non-disclosure for as long as it deems necessary).

¹²See *id.*

¹³See *In re* Application of the U.S. for an Order Pursuant to 18 U.S.C. § 2705(b), 131 F. Supp. 3d 1266, 1271 (D. Utah 2015) (noting that "in some limited instances, high government interests may outweigh subscriber awareness of an invasion of Fourth Amendment protections . . .").

¹⁴See *In re* Grand Jury Subpoena for: @Yahoo.com, 79 F. Supp. 3d 1091, 1091 (N.D. Cal. 2015) (stating that such an indefinite gag order would "amount to an undue prior restraint of Yahoo!'s First Amendment right to inform the public of its role in searching and seizing its information . . .").

orders. This section also expounds upon the deeply-rooted history of the First Amendment right to free speech and describes the stringent protections put in place to preserve such a vital right of all American citizens. Part III then delves into the dual reasoning as to why these gag orders violate the First Amendment rights of cloud computing service providers and articulates why no countervailing governmental interest can justify § 2705(b)'s undue restriction on speech. To resolve these issues, Part IV proposes a solution based on a thorough examination of comparable federal non-disclosure orders and their limitations. Finally, Part V concludes the article by succinctly summarizing the issue and the offered solution.

II. BACKGROUND

To fully appreciate the issue at hand, we must first take a step back and consider the history and application of both the SCA and the First Amendment right to free speech.

A. *Overview of the Stored Communications Act*

In 1986, Congress enacted the Electronic Communications Privacy Act (ECPA)¹⁵ in order “to update and clarify Federal privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies.”¹⁶ The SCA was included under Title II¹⁷ for the purpose of addressing access to stored wire and electronic communications and transactional records.¹⁸ The SCA has two key components: (1) it prevents service providers from voluntarily disclosing a customer’s communications to the government or others, subject to various exceptions; and (2) it establishes procedures under which the government

¹⁵Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986).

¹⁶S. REP. NO. 99-541, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3555; *see also* Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 875 (9th Cir. 2002) (“The legislative history of the ECPA suggests that Congress wanted to protect electronic communications that are configured to be private, such as email and private electronic bulletin boards.”).

¹⁷Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, TITLE II, 100 Stat. 1848, 1860 (1986).

¹⁸S. REP. NO. 99-541, at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3557 (noting also that the SCA was included “to protect privacy interests in personal and proprietary information, while protecting the Government’s legitimate law enforcement needs”).

can require a provider to disclose customers' communications or records while also prohibiting the provider from revealing such disclosure to anyone, including its customers.¹⁹

Specifically, § 2703 of the SCA authorizes the government to obtain the contents of electronic communications pursuant to a warrant without providing notice to the person whose communications are being seized and searched.²⁰ This authorization applies to electronic communications held by both providers of remote computing services and providers of electronic communication services.²¹ Though the terms "electronic communication service"²² and "remote computing service"²³ can be confusing,²⁴ courts and commentators generally agree that those terms include, but are not limited to, providers of the following services: e-mail, social networking, and cloud-based storage.²⁵ This broad net of authorization includes application to highly utilized email service providers such as Yahoo!, Google,²⁶ and AOL;²⁷ popular social networking sites like Facebook and Myspace;²⁸ and cloud computing service providers such as DropBox²⁹ and Microsoft.³⁰

¹⁹ See RICHARD M. THOMPSON II & JARED P. COLE, U.S. CONG. RESEARCH SERV., R44036, STORED COMMUNICATIONS ACT: REFORM OF THE ELECTRONIC COMMUNICATIONS PRIVACY ACT (ECPA) (2015).

²⁰ 18 U.S.C. § 2703(c)(3) (2012 & Supp. III 2016).

²¹ *Id.* § 2703(c).

²² 18 U.S.C. § 2510(15) (2006 & Supp. V 2011) ("[E]lectronic communication service means any service which provides to users thereof the ability to send or receive wire or electronic communications . . .").

²³ 18 U.S.C. § 2711(2) (2012 & Supp. III 2016) ("[T]he term 'remote computing service' means the provision to the public of computer storage or processing services by means of an electronic communications system . . .").

²⁴ See Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1214 (2004) (criticizing Congress's distinction between the two terms, stating that the delineation has the effect of "freezing into the law the understandings of computer network use as of 1986").

²⁵ Jeffrey Paul DeSousa, Note, *Self-storage Units and Cloud Computing: Conceptual and Practical Problems with the Stored Communications Act and Its Bar on ISP Disclosures to Private Litigants*, 102 GEO. L.J. 247, 250 (2013).

²⁶ See *Bower v. Bower*, 808 F. Supp. 2d 348, 349 (D. Mass. 2011) (denying motion to compel Google and Yahoo! to produce emails pursuant to a discovery request because the requested production was barred by the SCA).

²⁷ See *In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp. 2d 606, 607–08 (E.D. Va. 2008) (quashing subpoena seeking e-mails from AOL because requested production was barred by the SCA).

This article focuses primarily on § 2705(b) of the SCA, which allows a governmental entity acting under § 2703 of the SCA to ask the court to order the provider of electronic communications services or remote computing services “not to notify any other person of the existence” of a legal demand for its customer’s communications and data.³¹ Unfortunately, the government utilizes this statute frequently—for example, between September 2014 and May 2016, Microsoft received in excess of 6,000 federal demands for customer information or data.³² Of those demands, over 2,000 were accompanied by gag orders of indefinite duration under 18 U.S.C. § 2705(b), forbidding Microsoft from telling the affected customers that the government was examining their information for “as long as the court deem[ed] appropriate.”³³ Thus, Microsoft, and other major players like it, are left with little to no recourse, as it is at the court’s discretion as to when, if ever, the nondisclosure order will be lifted.³⁴ Therein lies the

²⁸ See *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 991 (C.D. Cal. 2010) (quashing the portions of a subpoena requesting private messages from both Facebook and MySpace because such production was prohibited by the SCA); see also Ryan A. Ward, *Discovering Facebook: Social Network Subpoenas and the Stored Communications Act*, 24 HARV. J. L. & TECH. 563, 586 (2011) (discussing the applicability of the SCA to social networking sites, like Facebook and Myspace, and concluding that courts should “find that social networks are acting as [electronic communication service] providers for unread private messages on their systems.”).

²⁹ See *TLS Mgmt. & Mktg. Servs. LLC v. Rodriguez-Toledo*, No. 15-2121 (BJM), 2016 U.S. Dist. LEXIS 177791, at *12 (D.P.R. 2016) (finding that the SCA applies to Dropbox because “Dropbox is an ‘electronic communication service’”).

³⁰ See *Microsoft Corp. v. United States (In re Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.)*, 829 F.3d 197, 207 (2d Cir. 2016) (referring to Microsoft as a provider of both electronic communication services and remote computer services), *petition for cert. filed*, 86 U.S.L.W. 3035 (U.S. June 23, 2017) (No. 17-2).

³¹ 18 U.S.C. § 2705(b) (2012 & Supp. III 2016).

³² First Amended Complaint for Declaratory Judgment at 7, *Microsoft Corp. v. U.S. Dep’t of Justice*, No. 2:16-cv-00538-JLR (W.D. Wash. June 17, 2016).

³³ *Id.* at 7, 8. Notably, Microsoft is not the only company who has been subject to these indefinite gag orders. See Brief of Amici Curiae Amazon.com, et al. in Support of Microsoft Corp. at 8, *Microsoft Corp.*, No. 2:16-cv-00538-JLR (“Pinterest, in the first six months of 2016, received law enforcement information requests on forty-one accounts, but was only able to notify four account holders. The gag orders affecting all accounts except *one* . . . were indefinite.”); *id.* (“In the first seven months of 2016, Yahoo has received over 700 federal search warrants for user data, and well over half—about 60%—were accompanied by gag orders of indefinite duration.”).

³⁴ *In re Search Warrants Directed to Facebook Inc. & Dated July 23, 2013*, 2013 NY Slip Op 52346(U), at *11 (Sup. Ct. 2013) (unpublished table decision) (holding that “[t]he Nondisclosure Order remain[ed] in effect until the court order[ed] otherwise.”).

problem and the very real violation of the First Amendment rights of cloud computing service providers across the country.

B. Background of the First Amendment Right to Free Speech

The First Amendment of the United States Constitution prohibits Congress from making any law abridging the freedom of speech.³⁵ This protection of free speech is an essential underpinning of United States democracy, without which societal progress would come to an abrupt standstill.³⁶ Though First Amendment protections are not absolute, courts fiercely protect the right to free speech and have interpreted the First Amendment to highly disfavor two types of speech restrictions relevant to this discussion: content-based restrictions³⁷ and prior restraints.³⁸

1. Content-Based Restrictions

Content-based restrictions are prohibitions on speech imposed to preclude specific subject-matter from the public forum,³⁹ as opposed to content-neutral restrictions, which simply serve to regulate the time, place, or manner of certain speech.⁴⁰ Within the realm of content-based restrictions are those regulations that prohibit speech regarding matters of

³⁵U.S. CONST. amend. I.

³⁶Wendy Everette, Comment, “*The FBI Has Not Been Here [Watch Very Closely for the Removal of this Sign]*”: *Warrant Canaries and First Amendment Protection for Compelled Speech*, 23 GEO. MASON L. REV. 377, 395 (2016); see also *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95–96 (1972) (“To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship.”).

³⁷See *Ward v. Rock Against Racism*, 491 U.S. 781, 798 n.6 (1989) (stating that “content-based restrictions on political speech ‘must be subjected to the most exacting scrutiny’” (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988))).

³⁸See *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 570 (1976) (“We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact.”).

³⁹*Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm’n*, 447 U.S. 530, 537 (1980) (“The First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.”).

⁴⁰See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (defining content-neutral restrictions as “time, place, and manner regulations”).

public concern,⁴¹ including speech that is critical of the exercise of the government's power.⁴²

The Supreme Court demonstrated its disapproval of restrictions on allegations of governmental misconduct in *Gentile v. State Bar of Nevada*.⁴³ There, in applying Nevada Supreme Court Rule 177,⁴⁴ the State Bar of Nevada sought to prosecute an attorney who, during a press conference, asserted that the State prosecutors had wrongfully sought the conviction of his client as a scapegoat and had not been honest enough to indict the truly culpable parties.⁴⁵ The Court ultimately found that the governmental interest of preventing adjudicative prejudice did not outweigh the attorney's right to freely disseminate information relating to alleged governmental misconduct.⁴⁶ In protecting the attorney's speech, the Court emphasized that such criticism of the exercise of governmental power lies at the very core of the First Amendment.⁴⁷

Because of the significant concerns underlying preclusion of speech on entire topics, such as governmental misconduct,⁴⁸ content-based restrictions are subject to strict scrutiny.⁴⁹ Thus, these restrictions are constitutional only if the government can show that the regulation is a narrowly-tailored means of serving a compelling governmental interest.⁵⁰ This high hurdle is

⁴¹ See *Consol. Edison*, 447 U.S. at 534.

⁴² See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991); see also *Consol. Edison*, 447 U.S. at 538 (“To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.”).

⁴³ See 501 U.S. at 1034.

⁴⁴ *Id.* at 1036.

⁴⁵ *Id.* at 1034.

⁴⁶ See *id.* at 1034–35, 1058 (holding that the attorney's speech had the “full protection of the First Amendment”).

⁴⁷ *Id.* at 1034–35; see also *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (stating the same with regard to speech critical of the government's exercise of power).

⁴⁸ *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48–49 (emphasizing that the judiciary's principal rationale for hesitating to uphold content-based speech restrictions is to ensure that the “government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views” (quoting *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972))).

⁴⁹ See *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 786 (1978) (determining that the constitutionality of a statute restricting the exposition of ideas turned on whether the statute could survive “the exacting scrutiny necessitated by a state-imposed restriction of freedom of speech”).

⁵⁰ See *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n*, 447 U.S. 530, 536 (1980).

one not often cleared, primarily due to the heavy burden of proof it places on the proponent of the content-based prohibition.⁵¹

Illustrative of a content-based restriction that did not survive such strict scrutiny is the statute at issue in *Reno v. ACLU*.⁵² There, the Court evaluated the constitutionality of the Communications Decency Act of 1996 (CDA), which imposed criminal and civil penalties against all entities and individuals engaging in sexually explicit or indecent telecommunication with or in the presence of a minor.⁵³ The Court held that, despite the congressional goal of protecting children from harmful materials, the statute abridged the freedom of speech protected by the First Amendment due to its overbreadth.⁵⁴ Specifically, the Court found that the statute was not narrowly tailored because it criminalized legitimate protected speech, such as sexually explicit or indecent speech, as well as unprotected obscene speech.⁵⁵

2. Prior Restraints

Like content-based restrictions, courts have decidedly disfavored prior restraints, nearly to the point of their extinction.⁵⁶ A “prior restraint” on speech describes either an administrative or judicial order that forbids certain communications *in advance* of the time that such communications

⁵¹ See *Reno v. ACLU*, 521 U.S. 844, 879 (1997) (determining that even where a compelling governmental interest existed, protecting minors from internet pornography, two provisions of the Communications Decency Act failed to meet the burden of being “narrowly tailored”).

⁵² *Id.* at 844.

⁵³ 47 U.S.C. § 223(a)(1)(B) (2013); see also *Reno*, 521 U.S. at 877 (finding that 47 U.S.C. § 223 contains “open-ended prohibitions [that] embrace all nonprofit entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors”).

⁵⁴ *Reno*, 521 U.S. at 849.

⁵⁵ *Id.* at 874. In support of its decision, the *Reno* Court explained the reasoning behind America’s historic opposition to content-based restrictions:

As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.

Id. at 885.

⁵⁶ *United States v. Brown*, 250 F.3d 907, 915 (5th Cir. 2001).

are to occur.⁵⁷ The judiciary's distaste for these restrictions stems from the fact that "prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgment."⁵⁸ As a result, courts presume that prior restraints are invalid,⁵⁹ and the probability of overturning this weighty presumption is often slim to none.⁶⁰

An example of one such failed attempt is the prior restraint at issue in *CBS v. Davis*.⁶¹ There, the Court examined a preliminary injunction that prohibited CBS from airing videotape footage taken at a South Dakota meat-packing company as part of an ongoing investigation into the company's unsanitary practices.⁶² The proponent of the injunction contended that airing the footage would cause the company irreparable "economic harm," and additionally alleged that an injunction was the necessary remedy because CBS obtained the videotape through "calculated misdeeds."⁶³ The Court, however, found that the proponent failed to satisfy its burden to overturn the injunction's presumed invalidity, and instead granted a stay in favor of CBS.⁶⁴ Though this is but one case depicting a

⁵⁷ *Alexander v. United States*, 509 U.S. 544, 550 (1993) (quoting *M. NIMMER, NIMMER ON FREEDOM OF SPEECH* § 4.03 (1984)).

⁵⁸ *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968); *see also Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (pronouncing that the Court's distaste of this type of extreme censorship is deeply-rooted in American law). One commentator has cogently articulated the many reasons for this deeply-rooted American hostility toward prior restraints as follows:

A system of prior restraint is in many ways more inhibiting than a system of subsequent punishment: It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process; the procedures do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows.

THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 506 (1970).

⁵⁹ *See CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (maintaining that "any prior restraint on expression comes to this Court with a heavy presumption against its constitutional validity" (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971))).

⁶⁰ *See Near v. Minnesota*, 283 U.S. 697, 716 (1931) (stating that prior restraints on publication are limited to "exceptional cases").

⁶¹ 510 U.S. at 1318.

⁶² *Id.* at 1315.

⁶³ *Id.* at 1318.

⁶⁴ *Id.*

prior restraint's demise, the outcome in *CBS* is typical in cases evaluating the constitutionality of such an extreme remedy.⁶⁵

In sum, both content-based restrictions and prior restraints on speech are ill-regarded by the judiciary in light of the robust protections found within the First Amendment. To say that it is a simple matter for either type of regulation to survive the court's stringent review is to severely underestimate the judicial bias against these provisions. Stated more precisely, the government bears a heavy burden in proving the constitutional validity of such restrictions; unfortunately for the government, this burden is one that it likely cannot carry.⁶⁶

III. GAG ORDERS UNDER THE STORED COMMUNICATIONS ACT VIOLATE THE FIRST AMENDMENT

Generally, “[j]udicial gag orders impinge upon freedom of speech and press under the First Amendment, and must pass muster under well-established constitutional case law.”⁶⁷ Greater levels of scrutiny arise when the restrictions are content-based⁶⁸ or are prior restraints as opposed to subsequent punishments.⁶⁹ Thus, when either are present, the government's countervailing interests must be significant to overcome the presumption of invalidity.

A. *Limitations on Content-Based Speech*

The government may regulate speech based on time, place, or manner to further a significant governmental interest so long as it is not based upon the content of the speech.⁷⁰ When a regulation or restriction on speech is based upon its potential primary impact, it is considered content-based.⁷¹

⁶⁵ See *id.* at 1317 (“Although the prohibition against prior restraints is by no means absolute, the gagging of publication has been considered acceptable only in *exceptional* cases.”) (emphasis added); see also *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 562 (characterizing prior restraints as “one of the most extraordinary remedies known to our jurisprudence”).

⁶⁶ See *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971).

⁶⁷ *In re Sealing & Non-Disclosure*, 562 F. Supp. 2d 876, 880 (S.D. Tex. 2008).

⁶⁸ See *Boos v. Barry*, 485 U.S. 312, 321–22 (1988).

⁶⁹ See *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558–59 (1975).

⁷⁰ See *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm’n*, 447 U.S. 530, 536 (1980); see also *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); *Everette*, *supra* note 36, at 396.

⁷¹ See *Boos*, 485 U.S. at 321 (holding that “[b]ecause the display clause regulate[d] speech due to its potential primary impact, . . . it must be considered content-based”).

One type of content-based regulation is a law that distinguishes favored speech from disfavored speech on the basis of the particular notions expressed.⁷² Another is a law that completely excludes a specific subject matter from public debate.⁷³

Section 2705(b) gag orders are content-based restrictions on speech “because they effectively preclude speech on an entire topic—the electronic surveillance order and its underlying criminal investigation.”⁷⁴ Particularly relevant is that the silenced information is vital to public debate about the proper scope and extent of this law enforcement tool.⁷⁵ Thus, the SCA threatens to stifle an important check on governmental affairs—something that the First Amendment was designed to protect against.⁷⁶ As such, we must consider the constitutionality of the SCA’s gag order against the background of a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”⁷⁷ With this in mind, the ultimate constitutional inquiry is

⁷² See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994).

⁷³ See *Consol. Edison*, 447 U.S. at 537 (“The First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.”).

⁷⁴ *In re Sealing & Non-Disclosure*, 562 F. Supp. 2d 876, 881 (S.D. Tex. 2008); see also *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 878 (2d Cir. 2008) (stating that non-disclosure restrictions upon national security letter recipients restrain the recipients from publicly expressing a category of information, and that information is relevant to intended criticism of a governmental activity).

⁷⁵ See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1035 (1991) (stating that “[p]ublic awareness and criticism have even greater importance where . . . they concern allegations of police corruption”); see also Paul Schwartz, *Reviving Telecommunications Surveillance Law*, 75 U. CHI. L. REV. 287, 287 (2008) (indicating that the prevalence of non-disclosure orders may partly explain the relatively small number of reported decisions in this area of the law).

⁷⁶ See *Gentile*, 501 U.S. at 1034 (“There is no question that speech critical of the exercise of the State’s power lies at the very center of the First Amendment.”); see also *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (stating that “[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs” (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966))); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system.”).

⁷⁷ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

whether § 2705(b) gag orders are narrowly tailored to achieve a compelling governmental interest.⁷⁸

B. *Imposition of Prior Restraint on Speech*

In addition to restricting content-based speech, the § 2705(b) gag order imposes a prior restraint on speech. Courts have historically considered a prior restraint to be a “predetermined judicial prohibition restraining specified expression.”⁷⁹ Though any restriction on speech faces scrutiny, the First Amendment provides greater protection for prior restraints than subsequent punishments.⁸⁰

There are four features that distinguish prior restraints from subsequent punishments: (1) prior restraints are generally judicial in origin rather than legislative, although an enabling statute may authorize the order which imposes the restriction on speech; (2) the purpose of prior restraints is typically suppression rather than punishment; (3) prior restraints are enforced by the contempt power of the court; and (4) contempt proceedings preclude litigants from raising constitutional invalidity as a defense.⁸¹

Under the SCA, the presiding court issues the gag order restricting the service provider’s speech.⁸² Thus, the gag order is of judicial origin, even though the court’s authority stems from the underlying enabling legislation found in § 2705(b).⁸³ Additionally, the purpose of the § 2705(b) gag order is to suppress information that might jeopardize an investigation or put lives

⁷⁸ See *Boos v. Barry*, 485 U.S. 312, 321 (1988) (requiring the government to show that the content-based regulation was necessary to serve a compelling state interest for which it was narrowly drawn); see also Everette, *supra* note 36, at 396 (“Content-based restrictions that preclude speech on one topic are generally upheld only when there is a compelling reason for the restriction.”).

⁷⁹ *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 467 (5th Cir. 1980) (en banc) (citing *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976)); see also Thomas R. Litwack, *The Doctrine of Prior Restraint*, 12 HARV. C.R.-C.L. L. REV. 519, 520 (1977) (“A prior restraint has traditionally been defined as a formal prohibition on speech, imposed in advance of utterance or publication.”)

⁸⁰ *Alexander v. United States*, 509 U.S. 544, 554 (1993); see also *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (reasoning that this distinction draws from the idea that “a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand”).

⁸¹ See *Bernard*, 619 F.2d at 467–69; see also *In re Sealing & Non-Disclosure*, 562 F. Supp. 2d 876, 883 (S.D. Tex. 2008) (listing the same four distinguishing features).

⁸² 18 U.S.C. § 2705(b) (2012 & Supp. III 2016).

⁸³ *Id.*

at risk, rather than to punish.⁸⁴ Furthermore, the court enforces this judicial restriction through its contempt power, rather than by criminal statute.⁸⁵ Because the court enforces this gag order through contempt proceedings, it follows that the litigant has no ability to assert constitutional invalidity as a defense.⁸⁶ Consequently, the characteristics of § 2705(b) gag orders readily exhibit each of the markers of prior restraint,⁸⁷ and thus the statute is subject to strict scrutiny.⁸⁸

The Supreme Court has declared that “any system of prior restraint . . . comes to this Court bearing a heavy presumption against its constitutional validity.”⁸⁹ To overturn this presumption, the government must establish that “(1) the activity restrained poses a clear and present danger or a serious and imminent threat to a compelling government interest; (2) less restrictive means to protect that interest are unavailable; and (3) the restraint is narrowly-tailored to achieve its legitimate goal.”⁹⁰

C. *Countervailing Governmental Interests Do Not Justify Perpetual Gag Orders*

In analyzing whether § 2705(b) passes constitutional muster, this article begins and ends with a common requirement for the justification of both

⁸⁴ See *id.* (stipulating that the court should only issue the gag order if it believes that notification of the existence of the warrant, subpoena, or court order might endanger a life or otherwise jeopardize an investigation).

⁸⁵ See *In re* U.S. for Nondisclosure Order Pursuant to 18 U.S.C. § 2705(b) for Grand Jury Subpoena #GJ2014032122836, No. MC 14–480 (JMF), 2014 WL 1775601, at *4 (D.D.C. Mar. 31, 2014) (exercising its inherent power, the court decided that Twitter should intervene in the case regarding a requested § 2705(b) gag order).

⁸⁶ See *Bernard*, 619 F.2d at 469 (“While the unconstitutionality of a statute may be raised as a defense to prosecution for its violation, a litigant who disobeys an injunction is precluded from raising its constitutional invalidity as a defense in contempt proceedings.”).

⁸⁷ See *In re* Sealing & Non-Disclosure, 562 F. Supp. 2d 876, 883 (S.D. Tex. 2008) (stating that “[e]ach of these tell-tale markers of prior restraint is readily exhibited by the [indefinite Section 2705(b)] non-disclosure orders at issue”).

⁸⁸ See *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558–59 (1975) (stating that “[t]he presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties”).

⁸⁹ *Id.* at 558 (internal quotation marks omitted); see also *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1305 (1983) (holding the same and that the government “carried a heavy burden of showing justification for the imposition of such a restraint”).

⁹⁰ *In re Sealing*, 562 F. Supp. 2d at 882 (citing *United States v. Brown*, 250 F.3d 907, 915–18 (5th Cir. 2001)).

prior restraints and restrictions on content-based speech: the necessity for the government to show that the statute serves to advance a compelling governmental interest for which it is narrowly tailored.⁹¹ Under § 2705(b), the statute lists five countervailing governmental interests that may justify the court's issuance of a gag order concerning the § 2703 electronic surveillance.⁹² Specifically, the statute states:

The court shall enter such an order if it determines that there is reason to believe that notification of the existence of the warrant, subpoena, or court order will result in—

- (1) endangering the life or physical safety of an individual;
- (2) flight from prosecution;
- (3) destruction of or tampering with evidence;
- (4) intimidation of potential witnesses; or
- (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial.⁹³

To be clear, this article does *not* stand for the proposition that the First Amendment rights of cloud computing service providers should always trump the above-listed governmental interests. In fact, in some circumstances a narrowly-tailored § 2705(b) gag order may be necessary to further one or more of these compelling interests.⁹⁴ This necessity, however, has an expiration date that the statute fails to acknowledge. Such a failure results in the majority of gag orders remaining in effect forever, which raises an all-important question—Do any of those governmental interests justify an *indefinite* ban on speech?⁹⁵ The simple answer is no.

⁹¹ See *id.* (stating that a prior restraint will only be upheld if “(1) the activity restrained poses a clear and present danger or a serious and imminent threat to a compelling government interest; . . . and (3) the restraint is narrowly-tailored to achieve its legitimate goal”); *cf.* *Boos v. Barry*, 485 U.S. 312, 321 (1988) (requiring the government to show that the content-based regulation was necessary to serve a compelling state interest for which it was narrowly drawn).

⁹² See 18 U.S.C. § 2705(b) (2012 & Supp. III 2016).

⁹³ *Id.*

⁹⁴ See, e.g., *In re Order of Nondisclosure*, 45 F. Supp. 3d 1, 8 (D.D.C. 2014) (granting the government's request to prohibit Yahoo! from notifying its subscriber of a grand jury subpoena because the success of the ongoing grand jury proceeding necessitated secrecy).

⁹⁵ See, e.g., *In re Sealing*, 562 F. Supp. 2d, at 895–96 (illustrating in Table A that from 1995 to 2007, 3,886 electronic surveillance orders were sealed by court order in the United States).

Beginning with the justification that disclosure would “seriously jeopardize[] an investigation,” it is apparent that such a justification would only be relevant when there is an ongoing investigation.⁹⁶ The Supreme Court reinforced this in *Butterworth v. Smith* when it held that a Florida statute indefinitely banning grand jury witnesses from disclosing their own testimonies violated the First Amendment rights of those witnesses.⁹⁷ The Court reasoned that, although the State had a significant interest in the secrecy of grand jury proceedings, once an investigation ends, there is no longer a need to keep information from the targeted individual.⁹⁸ Instead, the Court found that, because the ban on speech extended beyond the life of the underlying investigation, it had the potential to be wrongfully employed to silence those who knew of unlawful conduct on the part of public officials.⁹⁹

Furthermore, the government’s interest in avoiding “flight from prosecution; . . . destruction of or tampering with evidence; . . . intimidation of potential witnesses; . . . or unduly delaying a trial” similarly fall flat.¹⁰⁰ Each of these interests pertain to trial—its possibility and/or its occurrence. As such, one problem that arises with each of these justifications is that a trial must commence within a certain limitations period, depending upon the prosecuted offense.¹⁰¹ Thus, the expiration of a limitations period would absolutely eliminate the possibility of a trial, and with it the existence of the aforementioned governmental interests. Moreover, even if the government were to prosecute within the limitations period, there is no risk of destruction of or tampering with evidence once the government has admitted the evidence at trial. Additionally, a potential witness may not be intimidated if the opportunity to call witnesses has already come and

District Court, Southern District of Texas, Houston Division and that ninety-one percent remained sealed as of April 1, 2008.).

⁹⁶ 18 U.S.C. § 2705(b)(5).

⁹⁷ See *Butterworth v. Smith*, 494 U.S. 624, 635–36 (1990).

⁹⁸ See *id.* at 632 (“When an investigation ends, there is no longer a need to keep information from the targeted individual in order to prevent his escape—that individual presumably will have been exonerated, on the one hand, or arrested or otherwise informed of the charges against him, on the other.”).

⁹⁹ *Id.* at 635–36.

¹⁰⁰ 18 U.S.C. § 2705(b)(2)–(5).

¹⁰¹ See, e.g., *United States v. Roshko*, 969 F.2d 1, 9 (2d Cir. 1992) (dismissing the government’s indictment of defendant charged with conspiring to defraud the government because the five-year statute of limitations had run).

gone.¹⁰² Furthermore, there is no need to prevent flight from prosecution once the perpetrator has been fully prosecuted, nor is it necessary to prevent undue delay of a trial that has already concluded.¹⁰³ In other words, these are finite justifications attempting to support an infinite restriction on a vital Constitutional right.

Consequently, the only justification remaining in the statute that might sustain an indefinite gag order is that of avoiding “endangering the life or physical safety of an individual.”¹⁰⁴ This justification, however, has one blatant shortcoming: the life or physical safety of an individual is only relevant while that individual is alive—i.e., a discrete period of time. Therefore, an infinite order of silence goes far beyond protecting the individual, and instead progresses into the realm of impinging upon the service provider’s First Amendment rights.

In sum, even when case-specific circumstances initially justify a § 2705(b) gag order as a means of satisfying a compelling governmental interest, the First Amendment demands that the court terminate the gag order as soon as secrecy is no longer required to satisfy that interest.¹⁰⁵ As explained above, an indefinite gag order will undoubtedly outlast any of the compelling governmental interests listed under § 2705(b)(1)–(5), because all have an expiration date. Thus, § 2705(b) fails to pass muster as either a lawful restriction of content-based speech or a prior restraint on speech.

IV. PROPOSED SOLUTION

Considering the above, it is apparent that Congress must do something about the limitless duration of the gag order authorized under § 2705(b).¹⁰⁶

¹⁰² See JAMES HEADLEY & COREY OSBORN, CONFIDENCE IN THE COURTROOM: UNDERSTANDING THE FEDERAL RULES OF EVIDENCE, at vii–ix (2010) (discussing the structure of a trial and the distinction between the evidentiary phase and closing arguments).

¹⁰³ See *Richardson v. United States*, 468 U.S. 317, 330 (1984) (stating that retrial of a trial that has ended in either an acquittal or a conviction is automatically barred); see also *Arizona v. Washington*, 434 U.S. 497, 505 (1978) (noting that “as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial”).

¹⁰⁴ 18 U.S.C. § 2705(b)(1).

¹⁰⁵ See *In re Grand Jury Subpoena For: @Yahoo.com*, 79 F. Supp. 3d 1091, 1094–95 (N.D. Cal. 2015) (denying the government’s request for an indefinite gag order because the government failed to show that it had a compelling interest significant enough to outweigh Yahoo!’s First Amendment right to free speech).

¹⁰⁶ Consequently, this article is not alone in proposing that Congress should amend the SCA. See, e.g., DeSousa, *supra* note 25, at 269; Courtney M. Bowman, Note, *A Way Forward After*

An adequate measure may be derived from examining analogous federal non-disclosures and their statutory and equitable safeguards.

A. *Statutory Limitations of Comparable Gag Orders*

In stark contrast to § 2705(b) of the SCA, other similar federal statutes and rules set specific time periods for their respective non-disclosures. One such federal statute is its parallel provision, § 2705(a), which applies to certain forms of process under § 2703(b)(1)(B).¹⁰⁷ This provision permits the government to delay its notice when “there is reason to believe” notification will trigger the same five adverse results listed in § 2705(b);¹⁰⁸ however, it only authorizes a delay of a definite and fixed duration—ninety days—and requires the government to justify any further delays in notification.¹⁰⁹ Similarly, § 2703 includes a provision requiring that records obtained in a search under § 2703 “shall be retained for a period of 90 days, which shall be extended for an additional 90-day period upon a renewed request by the governmental entity.”¹¹⁰

Another comparable provision with differing limitations is 18 U.S.C. § 2518, which requires that mandatory notice be provided to the targets of an order granting interception of wire, oral, or electronic communication “within a reasonable time but not later than 90 days” after the denial or expiration of an order.¹¹¹ In contrast, the SCA gag order has no expiration date, allowing it to remain in effect even upon the conclusion of the underlying investigation.¹¹² Ultimately, § 2705(b) governs very similar searches—searches of users’ electronic information stored on the cloud—yet it wholly lacks a vital constitutional safeguard akin to the one found in § 2518.¹¹³

Section 2705(b) also differs from analogous forms of process in the physical world. For example, Federal Rule of Criminal Procedure 41

Warshak: *Fourth Amendment Protections for E-mail*, 27 BERKELEY TECH. L.J. 809, 829 (2012); Christopher J. Borchert, et al., *Reasonable Expectations of Privacy Settings: Social Media and the Stored Communications Act*, 13 DUKE L. & TECH. REV. 36, 57 (2015).

¹⁰⁷ 18 U.S.C. § 2705(a)(A).

¹⁰⁸ *See id.* § 2705(b).

¹⁰⁹ *Id.* § 2705(a).

¹¹⁰ *Id.* § 2703(f)(2).

¹¹¹ 18 U.S.C. § 2518(8)(d) (2006).

¹¹² *See id.* § 2705(b).

¹¹³ *Id.* § 2705(b).

requires an officer executing a warrant to search for and seize property to give a copy of the warrant and a receipt for the property taken to the person from whom it was taken.¹¹⁴ Specifically, for a warrant to use remote access to search electronic storage media and seize or copy electronically stored information, the officer must make reasonable efforts to serve a copy of the warrant and receipt on the person whose property was searched.¹¹⁵

Another example is 18 U.S.C. § 3103, which authorizes sneak and peek warrants for secret searches, but presumptively requires the government to notify the target of the search “within a reasonable period not to exceed 30 days after the date of its execution.”¹¹⁶ The statute permits extensions of this deferred notice, but subject to the condition that “extensions should only be granted upon an updated showing of the need for further delay” and that “each additional delay should be limited to periods of 90 days or less.”¹¹⁷

The bottom line is that, unlike § 2705(b), all of these comparable non-disclosures require a set duration (usually of up to ninety days) for the delay of notice to those whose property is searched, with any extension of the delay of notice (usually of up to ninety days) requiring a showing of supplemental evidence to support its necessity.¹¹⁸ It follows that Congress should implement similar safeguards under § 2705(b) to conform with the pattern it has set concerning the statute’s parallel provisions and other equivalent forms of process.

B. Equitable Limitations Set by Lower Courts

Furthermore, due to the inequities of indefinite non-disclosure orders, lower courts have stepped in and imposed their own time limits.¹¹⁹ The most pertinent instance occurred in *In re Sealing & Non-Disclosure* where

¹¹⁴FED. R. CRIM. P. 41(f)(1)(C).

¹¹⁵FED. R. CRIM. P. 41(f)(1)(B). The court will only allow a delay of this required notice if “the delay is authorized by statute.” FED. R. CRIM. P. 41(f)(3).

¹¹⁶18 U.S.C. § 3103a (2006).

¹¹⁷*Id.* § 3103a(b), (c).

¹¹⁸*See* 18 U.S.C. §§ 2705(a), 2518(8)(d), 2703(f)(2), 3103a(c); FED. R. CRIM. P. 41(f)(1); FED. R. CRIM. P. 41(f)(3).

¹¹⁹In fact, some district courts refuse to grant applications of indefinite gag orders under 18 U.S.C. § 2705(b). *See, e.g., In re Grand Jury Subpoena For: @Yahoo.com*, 79 F. Supp. 3d 1091, 1091 (N.D. Cal. 2015) (denying the request to gag Yahoo! until further order of the Court “because such an indefinite order would amount to an undue prior restraint of Yahoo!’s First Amendment right to inform the public of its role in searching and seizing its information . . .”).

the court, *sua sponte*, imposed a 180-day time limit on the non-disclosure of the electronic surveillance order at issue.¹²⁰ The court held that “[a]s a rule, sealing and non-disclosure of electronic surveillance orders must be neither permanent nor, what amounts to the same thing, indefinite.”¹²¹ The court reasoned that the values of openness and transparency that lie at the heart of the First Amendment should prevail once the criminal investigation underlying the gag order has ceased.¹²² As a result, the magistrate fashioned a 180-day time period as the default duration for non-disclosure of electronic surveillance orders because it was “short enough to respect the fundamental values at stake, and long enough not to cause an undue burden.”¹²³ Thus, in dealing with § 2705(b) itself, the court could not reconcile the existence of a gag order of indefinite duration with its duty to protect the First Amendment rights of the service providers involved.¹²⁴

In dealing with other similar statutes, lower courts have taken comparable steps to safeguard the constitutional rights of those affected. Specifically, the Second Circuit has instituted two limitations on covert-entry searches for only intangibles to prevent officers from “exceed[ing] the bounds of propriety without detection.”¹²⁵ First, the court should not allow the officers to withhold notice of the search unless they have made a showing of reasonable necessity for the delay.¹²⁶ Second, if a delay is authorized, the court should require the officers to provide notice of the search within a reasonable time after the covert entry.¹²⁷ Although reasonableness depends on the facts and circumstances of each case, “the issuing court should not authorize an initial notice delay of longer than

¹²⁰ 562 F. Supp. 2d 876, 895 (S.D. Tex. 2008).

¹²¹ *Id.*

¹²² *See id.* (stating that “[p]ublicity will not threaten the integrity of a criminal investigation that is no longer active”).

¹²³ *Id.* The government may also seek an extension of the non-disclosure for an additional 180 days, but the request must be based on a certification that the investigation is still active, or a showing of exceptional circumstances. *Id.*

¹²⁴ Notably, this conclusion has been commended by other lower courts dealing with § 2705(b) gag orders. *See, e.g., In re U.S. for Nondisclosure Order Pursuant to 18 U.S.C. § 2705(b)*, No. 14–480 (JMF), 2014 WL 1775601, at *2 (D.D.C. Mar. 31, 2014) (“Magistrate Judge Stephen Smith’s opinion in *In Re Sealing* is persuasive, and his conclusions regarding the First Amendment rights at issue when a gag order is issued are correct.”).

¹²⁵ *United States v. Villegas*, 899 F.2d 1324, 1336 (2d Cir. 1990).

¹²⁶ *Id.* at 1337.

¹²⁷ *Id.*

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seven days.”¹²⁸ Moreover, any extensions of this delay should not be granted solely based on the grounds presented for the initial delay; rather, “the applicant should be required to make a fresh showing of the need for further delay.”¹²⁹

Though these judicially-imposed durations cure the constitutional violations created by indefinite non-disclosures, they do not necessarily give rise to a uniform time period for the duration of delayed notice of a search. However, consideration of both the statutory durations of primarily ninety days and the 180-day time limit set by the *In re Sealing* does provide a concrete solution to the constitutional issue at hand. This article proposes that Congress should impose a ninety-day limitation on the duration of the § 2705(b) gag orders, with an option for renewal of up to ninety additional days upon a fresh showing of necessity. This ninety-day time frame serves two all-important functions: (1) it eliminates the unconstitutional effect of the previously indefinite restriction on speech, and (2) it provides uniformity throughout § 2705.¹³⁰ In addition, the opportunity for extension allows the government to reasonably protect its interests without wholly disregarding the constitutional rights of the service providers.

V. CONCLUSION

In sum, the gag orders imposed under § 2705(b) of the SCA violate the First Amendment because they indefinitely restrict content-based speech and serve as a prior restraint on speech. Though governmental interests are entitled due consideration by the court in determining the necessity of these gag orders, that necessity has an expiration date that the SCA fails to recognize. In response to such a flagrant violation of the First Amendment rights of service providers, Congress should amend 18 U.S.C. § 2705(b) to include a set duration of ninety days for any gag orders imposed under the statute, with an option for possible renewal of up to ninety additional days upon a new showing of necessity. Such an amendment would provide

¹²⁸ *Id.*

¹²⁹ *Id.* The court noted, however, that “extensions could not properly be granted indefinitely.” *Id.* at 1338.

¹³⁰ See Kimberly S. Cuccia, Note, *Have You Seen My Inbox? Government Oversteps the Fourth Amendment Again: Goodbye Telephones, Hello Email*, 43 VAL. U.L. REV. 671, 722 (2009) (“To curtail the effect of lack of notice, the unlimited preclusion for delay must be deleted from the SCA and a designated timeframe added, such as ninety days. This proposed change enhances the SCA . . . and leaves open the opportunity to merge section 2705(b) with section 2705(a)(4) . . .”).

meaningful constitutional protections to cloud computing service providers, while still accounting for the significant governmental interests the Act was designed to promote.