COURT OF APPEALS, STATE OF COLORADO Colorado State Judicial Building Two East 14th Avenue Denver, Colorado 80203	
Denver District Court Honorable J. Stephen Phillips Case Number: 00CV1761	
TATTERED COVER Plaintiff-Appellee v. CITY OF THORNTON, Defendant-Appellant	▲ COURT USE ONLY ▲
Thomas B. Kelley (Colo. Reg. No. 1971) FAEGRE AND BENSON, LLP 2500 Republic Plaza 370 Seventeenth St. Denver, CO 80202 (303) 592-9000	Case Number: 2000CA2150

BRIEF OF *AMICI CURIAE*
AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION,
MOUNTAINS AND PLAINS BOOKSELLERS ASSOCIATION,
AMERICAN LIBRARY ASSOCIATION, FREEDOM TO READ FOUNDATION,
THE ASSOCIATION OF AMERICAN PUBLISHERS,
THE INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION,
THE PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC.,
THE PUBLISHERS MARKETING ASSOCIATION, PEN AMERICAN CENTER,
AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS,
COLORADO FREEDOM OF INFORMATION COUNCIL,
THOMAS JEFFERSON CENTER FOR FREEDOM OF EXPRESSION,
NATIONAL COALITION AGAINST CENSORSHIP,
AND FEMINISTS FOR FREE EXPRESSION,
IN SUPPORT OF THE APPEAL FILED BY TATTERED COVER, INC.
TO REVERSE THE PARTIAL DENIAL OF A PRELIMINARY INJUNCTION

INTEREST OF AMICI

Amici, through their counsel Jenner & Block, respectfully submit this brief in support of the plaintiff-appellant Tattered Cover, Inc. ("Tattered Cover"). *Amici* urge the Court to reverse the trial court's order that law enforcement officers can intrude into a bookstore's customer purchase records, where the defendants have failed to demonstrate that they have a compelling need for the information that outweighs the critical First Amendment rights at stake. Permitting the government in this case to search the premises of a bookstore for customer purchase records will chill patrons of both bookstores and libraries in the exercise of their First Amendment rights.

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

Amicus MOUNTAINS AND PLAINS BOOKSELLERS ASSOCIATION ("MPBA") is a nonprofit trade association of independent booksellers, book wholesalers, publishers, and other industry professionals located throughout the Rocky Mountain region. Formed over 30 years ago, MPBA has over 500 members, 275 of which are bookstores. The primary purpose of MPBA is to support independent booksellers in our region and to raise awareness of the value of independent businesses within our communities. It is part of MPBA's

mission statement to promote literacy and defend freedom of speech and of the press as guaranteed by the First Amendment.

Amicus AMERICAN LIBRARY ASSOCIATION, INC. ("ALA"), founded in 1876, is a nonprofit, educational organization committed to the preservation of the American library as a resource indispensable to the intellectual, cultural, and educational welfare of the nation. ALA's direct membership includes more than 4,200 organization members and more than 54,500 individual members. ALA and its members are committed to ensuring that library patrons have access to the lawful reading material of their choice, unfettered by unwarranted governmental intrusion.

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

Amicus THE ASSOCIATION OF AMERICAN PUBLISHERS ("AAP") is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and nonprofit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary and professional markets, and computer software and electronic products and

services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Amicus THE INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION ("IPDA") is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

Amicus THE PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC. ("PBAA") is an association of magazine and paperback book publishers who rely on newsstand sales and who distribute magazines and books through independent national distributors, wholesalers, and retailers throughout the United States and Canada.

Amicus THE PUBLISHERS MARKETING ASSOCIATION ("PMA") is a nonprofit trade association representing more than 2,000 publishers across the United States and Canada. The PMA represents predominantly nonfiction publishers and assists members in their marketing efforts.

Amicus PEN AMERICAN CENTER is a 2,600-strong association of literary writers working to promote free expression and advance literature and reading. PEN's mission is to protect writers, their rights, and their books whenever they are threatened. Through programs defending free expression and access to literature, PEN supports and encourages a more vigorous community of letters, consisting of both writers and readers. PEN American Center is the largest of 131 PEN Centers around the world, which comprise the global literary network of International PEN.

Amicus THE AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS ("ASJA") is the national organization of leading independent nonfiction writers, with more than 1,000 members across the country. The mission of the ASJA is to promote the welfare and rights of writers and to defend against censorship and other actions that would abridge free communication. As book authors, the ASJA's members have a strong interest in defending against any action that would chill the special relationship between writer and reader.

Amicus COLORADO FREEDOM OF INFORMATION COUNCIL is a coalition of media, legal, and business professionals, and citizens groups interested and active in assuring citizens the full panoply of rights of free expression guaranteed by the First Amendment. The Council's membership includes the Colorado Bar Association, the Colorado Broadcasters Association, the Colorado Cable Television Association, Denver Women in Communications, the Journalism Educators, Colorado Common Cause, the Colorado Judicial Institute, the Colorado Library Association, the Colorado Parent-Teachers Association, the Colorado Press Association, the League of Women Voters of Colorado, the Press Photographers of Colorado, the Public Relations Society of America, and the Society of Professional Journalists. The governing bodies of the Council's member organizations have not necessarily approved or endorsed the position taken by the Council in this matter.

Amicus THOMAS JEFFERSON CENTER FOR FREEDOM OF EXPRESSION ("Center") is a nonprofit, nonpartisan organization in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press against threats in many forms. The Center has participated actively in the litigation of First Amendment issues, and has

filed *amicus curiae* briefs in the United States Supreme Court and in the federal courts of appeals, as well as in various state courts.

Amicus NATIONAL COALITION AGAINST CENSORSHIP ("NCAC") is an alliance of 51 national organizations, including religious, educational, professional, artistic, labor, and civil rights groups. United by a conviction that freedom of thought, inquiry, and expression are indispensable to a healthy democracy, they work to educate their members and the public about the dangers of censorship and how to oppose it. The positions advocated by the NCAC in this brief do not necessarily reflect the positions of its participating organizations.

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

INTRODUCTION

Amici strongly oppose any governmental action that burdens First Amendment rights and hampers the public's access to expressive material. *Amici* represent entities whose public trust (in the case of libraries) or commercial survival (in the case of, for example, booksellers) absolutely depends on strict protection of First Amendment liberties. *Amici*, in representing the interests of their members, understand firsthand the critical importance of the free communication of ideas to ensure a diverse, informed, and dynamic society. Governmental

action that burdens the exercise of First Amendment rights endangers the core principles of an open, democratic society.

Search warrants or subpoenas directed to bookstores or libraries demanding information about the reading habits of their patrons significantly threaten the exercise of First Amendment rights. Governmental inquiry and intrusion into the reading choices of bookstore customers and library patrons will chill their constitutionally protected rights to receive information. Knowing that their reading selections can subject them to questioning by government or law enforcement officials will certainly have an impact on the types of books that bookstore customers and library patrons choose to read. They inevitably will avoid books dealing with controversial topics or setting forth new ideas.

Allowing the government to execute any part of the search warrant at issue in this proceeding would have a devastating impact on First Amendment rights. The trial court correctly concluded that the government's attempt to secure *all* of a particular customer's records was unconstitutional and an unwarranted intrusion.[1/] The trial court erred, however, by allowing the officers access to invoice information without requiring them to establish a compelling need for the records that could outweigh the important interests at stake.

Under controlling case law, the government should not be permitted access to bookstore customer records unless it is able to demonstrate that it has a compelling need for the requested information, that there is a substantial nexus between the information sought and the subject of its criminal investigation, and that it has exhausted other avenues to obtain the information in

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1/ As the trial court explained, "as to the general demand for all purchasing records for a one-month period the [necessary] criteria are not met." Trial Court Order at 4 (Oct. 28, 2000) (v.1, p.222).

ways that do not burden First Amendment rights. That showing was not made in this case. The government essentially is attempting to determine whether an individual read a book about how to make methamphetamines in order to prove that the individual in fact committed that crime. Although the trial court appropriately refused to approve the government's broad demand for all of the individual's purchasing records over a one-month period, it wrongly determined that Tattered Cover must reveal which books the individual purchased on a particular invoice because the court did not demand the requisite compelling need. Merely reading a book is not a crime. The defendants have not made the necessary showing that could justify the severe intrusion on First Amendment rights created by the search warrant at issue. Accordingly, *amici* urge the Court to reverse the trial court's denial of a preliminary injunction as to information tied to the particular invoice, and order the trial court to enjoin in full the execution of the search warrant issued against the Tattered Cover.

ARGUMENT

Crucial First Amendment values are at stake in this case. The Tattered Cover, like all bookstores and libraries, serves as "a mighty resource in the free marketplace of ideas." Minarcini v. Strongsville City Sch. Dist., 541 F.2d 577, 582 (6th Cir. 1976). Bookstores and libraries are engaged in constitutionally protected expressive activity in distributing books and other expressive materials presumptively protected by the First Amendment. Bookstore and library patrons too are engaged in constitutionally protected expressive activity. A person goes to a bookstore or library to seek knowledge, explore new worlds, and expand horizons. Indeed, the well-established constitutional right to receive information, see, e.g., Reno v. ACLU, 521 U.S.

844, 874 (1997),[2/] is vigorously enforced in the context of a bookstore or public library, "the quintessential locus of the receipt of information." Kreimer v. Bureau of Police for the Town of Morristown, 958 F.2d 1242, 1255 (3d Cir. 1992). The ability of the bookstore and library to provide access to information and the ability of the patron to receive that information are fundamental First Amendment rights that must be zealously guarded and protected.

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

2/ See also, e.g., Board of Educ. v. Pico, 457 U.S. 853, 867 (1982) (First Amendment right to receive ideas "follows ineluctably from the *sender's* . . . . right to send them" and is also "a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom"); Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972); Stanley v. Georgia, 394 U.S. 557, 563-64 (1969); Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Lamont v. Postmaster General of the United States, 381 U.S. 301 (1965).

3/ See McIntyre, 514 U.S. at 341-43 (discussing history and importance of anonymous expressive activity, and citing cases); Talley v. California, 362 U.S. 60 (1960) (invalidating law prohibiting distribution of "any handbill in any place under any circumstances" unless it contains names and addresses of those who prepared, distributed or sponsored it); Bates v. City of Little Rock, 361 U.S. 516 (1960) (striking down ordinance requiring organization to disclose its membership list); Shelton v. Tucker, 364 U.S. 479 (1960) (striking down statute compelling school teachers as condition of employment to disclose names and addresses of all organizations to which they belonged or contributed to within past five years); NAACP v. Alabama, 357 U.S. 449 (1958) (overturning civil contempt order for failing to disclose membership lists); Thomas v. Collins, 323 U.S. 516 (1945) (holding that statute preventing solicitation of union employees

and, in particular, the need to safeguard the privacy and confidentiality of one's reading habits, as discussed below.

It is also a well-established principle of First Amendment jurisprudence that a person's constitutional rights are violated not only with an outright ban on the exercise of First Amendment rights, but also when obstacles are placed in the way of the exercise of those First Amendment rights.[4/] If successful, government efforts to obtain confidential, private information about a bookstore customer's reading practices – like the police's efforts in this case – will have a dangerously broad chilling effect on the exercise of basic First Amendment liberties. Bookstore and library patrons will curtail their expressive activity if they fear that their reading habits might be scrutinized by the government and possibly, as is evidently the case here, form the basis of a criminal investigation. As Justice Douglas explained,

> A requirement that a publisher disclose the identity of those who buy his books, pamphlets, or papers is indeed the beginning of surveillance of the press. . . . Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears. Then the spectre of a

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without registration "contravenes the Constitution").

4/ See, e.g., United States v. Playboy Entertainment Group, Inc. 529 U.S. 803, 812 (2000) ("It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans."); Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 809 (1996) (Kennedy, J., concurring in part and dissenting in part) ("[T]he possibility the Government could have imposed more draconian limitations on speech never has justified a lesser abridgment. Indeed, such an argument almost always is available; few of our First Amendment cases involve outright bans on speech."); United States v. National Treasury Employees Union, 513 U.S. 454, 468 (1995) (invalidating statute barring receipt of honoraria by government employees, even though statute did not "prohibit any speech"); Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992) (striking down law imposing minimal fee on parade permits); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991) (invalidating statute that imposed financial burden on speech but did not ban any expression).

> government agent will look over the shoulder of everyone who reads. . . . If the lady from Toledo can be required to disclose what she read yesterday and what she will read tomorrow, fear will take the place of freedom in the libraries, bookstores, and homes of the land. Through the harassment of hearings, investigations, reports, and subpoenas government will hold a club over speech and over the press.

United States v. Rumely, 345 U.S. 41, 57-58 (1953) (Douglas, J., concurring).[5/]

In Colorado, the government has to overcome an even greater hurdle before infringing such rights. The Colorado Supreme Court repeatedly has held that the state constitution ensures its citizens even greater freedom of speech than does the United States Constitution. See, e.g., Bock v. Westminster Mall Co., 819 P.2d 55, 59 (Colo. 1991).[6/] In Bock, the Colorado Supreme Court summed up the longstanding tradition: "For more than a century, this Court has held that Article II, Section 10 provides greater protection of free speech than does the First Amendment." Id. Therefore, the search warrant sought to be implemented in this case plainly violates not only the First Amendment of the United States Constitution, but also the broader protective standard of Article II, Section 10 of the Colorado Constitution.

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

6/ See also People ex rel. Tooley v. Ford, 773 P.2d 1059, 1066 (Colo. 1989); People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc., 697 P.2d 348, 356 (Colo. 1985); Parrish v. Lamm, 758 P.2d 1356, 1365 (Colo. 1988); People v. Berger, 185 Colo. 85, 89, 521 P.2d 1244, 1246 (1974); In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics, 132 Colo. 591, 592, 296 P.2d 465, 466-67 (1956); Cooper v. People ex rel. Wyatt, 13 Colo. 337, 22 P. 790 (1889).

Given these fundamental concerns, courts have held law enforcement officials to precise and demanding standards when First Amendment issues arise in criminal investigations. Indeed, the Supreme Court has required search warrants implicating First Amendment interests to conform to the Fourth Amendment's strictures with "scrupulous exactitude." Zurcher v. Stanford Daily, 436 U.S. 547, 564 (1978) (internal quotation marks omitted). When evaluating the constitutionality of searches and seizures of expressive materials, courts have held that more stringent procedural safeguards apply than to searches and seizures of non-expressive materials, such as drugs, where no First Amendment concerns are raised. See, e.g., Roaden v. Kentucky, 413 U.S. 496, 501-02 (1973); A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 211-12 (1964); Marcus v. Search Warrants of Property, 367 U.S. 717, 731 (1961).

It is imperative, therefore, that the governmental entity seeking disclosures that burden expressive rights demonstrate "a compelling need for the materials it seeks and whether there is a sufficient connection between that information and the grand jury's investigation." In re Grand Jury Subpoena to Kramerbooks & Afterwords, Inc., 26 Media L. Rep. (BNA) 1599, 1601 (D.D.C. 1998). The need to balance First Amendment rights against law enforcement demands has arisen most often in the context of subpoenas directed to bookstores or libraries seeking customer or patron use information. In that context as well, the United States Supreme Court has held that "'grand juries must operate within the limits of the First Amendment.'" United States v. Dionisio, 410 U.S. 1, 12 (1973) (quoting Branzburg v. Hayes, 408 U.S. 665, 708 (1972)). See also Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963) (holding that government must make a compelling interest showing where compliance with legislative investigative subpoena of business records burdens First Amendment right to free association).

As the Supreme Court has held, "justifiable governmental goals may not be achieved by unduly broad means having an unnecessary impact on protected rights of speech, press, or association." Branzburg v. Hayes, 408 U.S. 665, 680-81 (1972).[7/] Thus, demands for information from law enforcement officials that are likely to chill the exercise of First Amendment rights require the court to balance those constitutional rights against the government's asserted interests. Butterworth v. Smith, 494 U.S. 624, 630-31 (1990) (citing Branzburg, 408 U.S. at 690-91); Branzburg, 408 U.S. at 710 (Powell, J., concurring); Gibson, 372 U.S. at 545. The Supreme Court has held that the investigation must proceed "step by step . . . [and] an adequate foundation for inquiry must be laid before proceeding in such manner as" may inhibit First Amendment freedoms. 372 U.S. at 557.[8/]

In In re Grand Jury Subpoena to First National Bank, 701 F.2d 115, 117 (10th Cir. 1983), the Court of Appeals for the Tenth Circuit held that to overcome the deterrent effect on First

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7/ See In re Grand Jury Proceedings, 776 F.2d 1099, 1102-03 (2d Cir. 1985) (grand jury subpoena to appear and testify implicates First Amendment right to freedom of association); In re Grand Jury Subpoena to First Nat'l Bank, 701 F.2d 115, 117 (10th Cir. 1983) (grand jury subpoena duces tecum implicating right to freedom of association); United States v. Citizens State Bank, 612 F.2d 1091, 1094 (8th Cir. 1980) ("[W]hen the one summoned has shown a likely infringement of First Amendment rights, the enforcing courts must carefully consider the evidence of such an effect to determine if the government has shown a need for the material sought."); Bursey v. United States, 466 F.2d 1059, 1083 (9th Cir. 1972) (grand jury subpoena to appear and testify implicating First Amendment rights to freedom of the press and to association); see also SEC v. McGoff, 647 F.2d 185, 191 (D.C. Cir. 1981) (concluding that "some balancing or special sensitivity is required" in view of First Amendment implications of agency subpoena duces tecum directed at newspaper publisher).

8/ See also Shelton v. Tucker, 364 U.S. 479, 488-90 (1960); McGoff, 647 F.2d at 191 (citing Branzburg v. Hayes and Zurcher v. Stanford Daily, and holding that in order to accommodate First Amendment rights of freedom of the press and of association, administrative subpoena requesting business records from newspaper publisher cannot request documentation relating to "editorial policy" or news gathering).

Amendment rights resulting from compelled disclosure of membership lists, the government must demonstrate a compelling interest and a substantial relationship between the material sought and legitimate governmental goals. Before any bookstore or library can be compelled to produce information about its patrons' reading selections, the same standards must be met. In this case, however, although the trial court held a full evidentiary hearing, the law enforcement authorities have not demonstrated – and indeed could not – that there exists either a compelling need for the information or a reasonable nexus between the demand and the search warrant request.

Amici believe the trial court, relying on precedent established in subpoena matters, correctly recognized that "exacting scrutiny" is necessary to examine the interests of law enforcement against the First Amendment interests at stake here. Trial Court Order at 3-4 (v.1, p.221-22). However, the court then inexplicably lowered its standard, ultimately requiring only that the government show a "legitimate and significant government interest in acquiring the information." Id. at 3 (v. 1, p. 221). Given the vital First Amendment interests at stake, the trial court was wrong to demand so little from the government. Had the trial court properly required that the government show a compelling need for the information pertaining to the particular invoice, it would have fully granted the injunction against execution of the search warrant.

The United States Supreme Court has held that "[t]he moving party has the initial task of demonstrating to the Court that he has some valid objection to compliance with the subpoena." United States v. R. Enterprises, Inc., 498 U.S. 292, 305 (1991) (Stevens, Marshall, and Blackmun, JJ. concurring). The Supreme Court has held that valid objections include a showing "that compliance with the subpoena would intrude significantly on . . . privacy interests, . . . [or]

the movant might demonstrate that compliance would have First Amendment implications." Id. The Tattered Cover plainly has made that showing in this case. A request by law enforcement for records showing the purchases made by a customer – even when tied to a particular invoice – implicates the customer's privacy interests and First Amendment rights. It also has an impact on Tattered Cover's constitutionally protected First Amendment interests.

Because the First Amendment rights of the Tattered Cover and the customer plainly are implicated with the search warrant at issue, the government must articulate its interest in receiving the purchase records. Under Supreme Court precedent, the Court is then required to assess whether the subpoena impermissibly burdens constitutional rights by "balanc[ing] the burden of compliance, on the one hand, against the governmental interest in obtaining the documents on the other." R. Enterprises, 498 U.S. at 303 (Stevens, Marshall and Blackman, J.J., concurring). In striking this balance, courts are instructed to look to "the context." New Jersey v. T.L.O., 469 U.S. 325, 337 (1985); see also R. Enterprises, 498 U.S. at 299.

The context includes the degree to which the subpoena burdens First Amendment interests. As the burdensome nature of the request increases, the balance tips in favor of quashing the subpoena, and the government must show a greater degree of relevance and need for the information requested if the subpoena is to be enforced. R. Enterprises, 498 U.S. at 304 ("A more burdensome subpoena should be justified by a somewhat higher degree of probable relevance than a subpoena that imposes a minimal or nonexistent burden.") (concurring opinion).[9/] See Branzburg, 408 U.S. at 680-81 (noting that grand jury subpoena should not be

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9/ See, e.g., In re Grand Jury Subpoena, 829 F.2d 1291, 1296-1301 (4th Cir. 1987) (applying heightened scrutiny in Rule 17(c) balance because of First Amendment concerns); In re Grand Jury Matters, 751 F.2d 13, 18 (1st Cir. 1984) (requiring government to show need "with

enforced when its impact on First Amendment rights is "unnecessary" (emphasis added)). Requiring the government to demonstrate compelling need and relevance provides a necessary safeguard against intentional or unintentional abuse of law enforcement techniques that burden speech.

Analysis of context must also include an evaluation of the nexus between the criminal investigation and the material sought. R. Enterprises, 498 U.S. at 306. It is not sufficient for the government to make a bald, unsubstantiated statement of need that the demand for information is necessary to an investigation. Where a demand for information burdens First Amendment rights, the Court must determine whether a sufficient nexus has been shown in the particular case at issue. See R. Enterprises, 498 U.S. at 303 (Stevens, Marshall, and Blackmun, JJ., concurring); Branzburg, 408 U.S. at 710 (Powell, J., concurring) (stating that "[t]he balance of these vital constitutional and societal interests" is to be made "on a case-by-case basis"); see generally NAACP v. Alabama, 357 U.S. 449, 464 (1958) (concluding that the government must demonstrate both substantial relationship between material sought and its interest). It is critical that the government demonstrate that the nexus to the investigation is real. The government should not be permitted to proceed if the information requested bears "only a remote and tenuous

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some particularity" because timing of subpoena posed "such potential for harm" to defendants and their right to counsel); In re Grand Jury Proceedings, 707 F. Supp. 1207, 1219 (D. Haw. 1989) (quashing subpoena because "the government has failed to proffer sufficient evidence of fraud permeating the works of the celebrity artists to justify the great magnitude of the subpoena request"); In re Grand Jury Proceedings Witness Bardier, 486 F. Supp. 1203, 1214 (D. Nev. 1980) (quashing subpoena because demand was "so onerous in its burden as to be out of proportion to the end sought"); In re Grand Jury Investigation, 459 F. Supp. 1335, 1343 (E.D. Pa. 1978) (refusing to quash subpoena because "[court] cannot say that the documentation requested in this instance is excessive relative to the scope of the investigation").

relationship to the subject of the investigation." Branzburg, 408 U.S. at 710. Furthermore, the police must demonstrate that they have exhausted other avenues for investigating the crime.

Application of these principles to the issue presented by the Tattered Cover compels a finding that execution of the entire search warrant should have been enjoined. The Tattered Cover was targeted for an intrusive search warrant even after the police were informed that the bookstore would move to quash an initial subpoena for the same information. Although fully aware of the First Amendment issues at stake in the matter, law enforcement officials in this case ignored the important constitutional issues and affirmatively took steps to secure a search warrant from a source unaware of the First Amendment issues. They abandoned other avenues of investigation, focusing all their efforts on determining whether a suspect had purchased particular books at the Tattered Cover.

The Tattered Cover is not the first bookstore or library to be placed in the position of responding to a demand for information for customer or patron records. The chilling effect of such a demand was demonstrated clearly in a similar case in Washington, D.C. Independent Counsel Kenneth Starr issued a subpoena to several bookstores in Washington, D.C., during his investigation of the relationship between President Clinton and Monica Lewinsky. Independent Counsel Starr sought information about the book purchases of Monica Lewinsky for a specified period of time from an independent bookstore. Customers of the store reacted strongly. Having heard on the news that Kramerbooks was served with a grand jury subpoena demanding Ms. Lewinsky's purchase records, patrons contacted Kramerbooks and strongly protested any agreement by Kramerbooks to release such information. Customers informed the bookstore that they would discontinue their patronage if it complied with the government demand for

information. The district court in that case found that "[m]any customers have informed Kramerbooks personnel that they will no longer shop at the bookstore because they believed Kramerbooks to have turned documents over to the OIC that reveal a patron's choice of books . . . [s]ales at the bookstore have also declined . . . and the store was picketed by a group of librarians." In re Grand Jury Subpoena to Kramerbooks & Afterwords, Inc., 26 Media L. Rep. (BNA) 1599, 1601 (D.D.C. 1998).

The federal district court in the Kramerbooks case held that the subpoena placed a burden on the First Amendment rights of both the bookstore and the customer. Recognizing that the Supreme Court precedent required a balancing of the First Amendment interests in the law enforcement process, the district court adopted the test utilized by most federal circuits, including the Tenth Circuit, in weighing the critical First Amendment rights involved in law enforcement investigations. The district court in the Kramerbooks case held that "it must determine whether the Office of Independent Counsel has a compelling need for the materials it seeks and whether there is a sufficient connection between that information and the grand jury's investigation." Id. The issue was resolved without any disclosure by the bookstore when Ms. Lewinsky agreed herself to reveal her book purchases to the Independent Counsel. If, however, Kramerbooks had disclosed the information, there is no doubt that the disclosure would have violated Ms. Lewinsky's First Amendment rights and placed a burden on the bookstore's continued ability to engage in expressive activity.

Libraries have faced such demands as well in both criminal and civil contexts. Courts asked to adjudicate such matters consistently have recognized the need to protect this information from disclosure absent a compelling need for it. For example, a national commercial printing

company with a large plant in Saratoga Springs, New York, determined through an examination of its long distance bills that employees were misusing company computers. The company, Quad Graphics, determined that employees in Saratoga Springs were able to access headquarters computers in Wisconsin and dial in to a library to access the Internet for personal purposes. The company determined that it incurred $23,000 dollars in long distance and lost 1,770 hours of employee time through these Internet accesses. Quad also deciphered nine 13-digit identification numbers that were used to access the library system and filed a Freedom of Information Act request with the library seeking the names of the patrons holding those identification numbers. The library refused to disclose this information. Quad filed an action in court seeking to compel disclosure of the information by the library.

The court held that the library was not required to produce the identities of the library users. Quad Graphics, Inc. v. Southern Adirondack Library Sys., 664 N.Y.S.2d 225 (N.Y. Sup. Ct. 1997). As an initial matter, the court held that New York's confidentiality statute related to library records, which protected "names or other personally identifying details" of patrons, demonstrated the legislature's strong intent to protect this type of information from disclosure. Id. at 227. The court relied on the supporting legislative history in which the New York State Assembly stated: "The library, as the unique sanctuary of the widest possible spectrum of ideas, must protect the confidentiality of its records in order to insure its readers' right to read anything they wish, free from the fear that someone might see what they read and use this as a way to intimidate them." Id. The court recognized the company's need for information to identify the employees, but held that the requester simply had to find another avenue for the information sought.

The Tattered Cover is in a position where it must protect its customers' and its own First Amendment rights. Like Kramerbooks and libraries around the country, the Tattered Cover must safeguard the interests of its customers. If the Tattered Cover were forced to disclose this customer purchase information it would face the type of customer ire that was directed to Kramerbooks. See, e.g., Kyle Zinth, Hurray to Bookstore (Letter to the Editor), Denver Post, Apr. 21, 2000, at B6 ("If the Tattered Cover did give that information up, I for one, would never purchase another book from them, despite how much I love the store."). If a bookstore or library reveals customer book choices without an adequate showing by the government that such disclosure is required by a compelling need and nexus between the requested information and the investigation, then the burden on the First Amendment rights of readers and distributors of expressive materials will be great. Affidavit of Charles E. Robinson, ¶ 5 (v.1, p.118) ("If the government were successful in its attempt to force a venerable, nationally recognized bookstore like the Tattered Cover to reveal a customer's purchasing decisions without any showing of a compelling need for such information, I believe that many bookstore patrons would curtail their purchasing activity dramatically . . . and [it] would have a chilling effect on book selection across the country."); Affidavit of Judith F. Krug, ¶ 8 (v.1, p.115-16) ("There likely will be a pervasive chilling effect on individuals' First Amendment rights if the Tattered Cover is forced to disclose private purchasing decisions in response to either a subpoena or search warrant . . . as people will not feel free to make any book selections on sensitive topics if they believe those choices can be disclosed and can subject them to law enforcement scrutiny simply because of their reading habits."); Testimony of Judith F. Krug (v.2, p.189) ("[O]n a relatively regular basis, various law enforcement officers rediscover library circulation records as an investigatory tool. And when

this happens, generally it becomes public knowledge, and [the American Library Association] can be inundated with telephone calls and E-mail messages . . . that you're not really going to give up these records. And if you do, we will never use our local library again.").

Like the legislature in New York, the legislature in Colorado has recognized the inherently private nature of reading choices and the need to protect those choices from public disclosure. The Colorado legislature similarly provides that "a publicly-supported library or library system shall not disclose any record or other information which identifies a person as having requested or obtained specific materials or service or as otherwise having used the library." Colo. Rev. Stat. § 24-90-119 (1998). It is apparent that the Colorado State legislature recognized the inherently private nature of an individual's reading choices by providing that violation of the statute may result in conviction and assessment of a fine. As the affidavit of Judith Krug of the American Library Association demonstrates, nearly all state legislatures have passed legislation to protect the privacy of library patron use records. See Affidavit of Judith F. Krug, ¶ 6 (v.1, p.115).

The United States Congress similarly has recognized that an individual's choices with regard to expressive activities must be protected. For example, in response to a public uproar over the disclosure of the video rental records of Judge Robert Bork during his confirmation hearings before the Senate Judiciary Committee, Congress enacted the Video Privacy Protection Act, which prohibits the wrongful disclosure of information that would allow the identification of video materials or services obtained or requested by an individual. 18 U.S.C. § 2710; see also Dirkes v. Borough of Runnemede, 936 F. Supp. 235, 238 (D.N.J. 1996) (holding that "[t]he Video Privacy Protection Act is only the most recent example of . . . Congressional initiative"

reflecting the fact that "our society has firmly embraced the concept of privacy").[10/] The privacy concerns underlying the Act are identical to those presented here. Readers have the same interest in protecting their reading choices as renters of video materials. In each case, permitting disclosure of such information places an unacceptable burden on First Amendment rights.

The Tattered Cover is an independent bookstore with important constitutional interests at stake. The bookstore itself is not a target of the criminal investigation, yet it is faced with a demand for information about private customer purchases of expressive material. The government has not demonstrated a compelling need for the information or a nexus between the demand and the law enforcement investigation. The government has posited that it must know whether a customer purchased books on how to make a certain type of drug in an effort to demonstrate that the customer did indeed illegally manufacture that drug. But it is difficult to discern why the government needs to know about the customer's book purchases. Clearly under the First Amendment, neither buying nor reading a book is a criminal act. Cf. Stanley v. Georgia, 394 U.S. 557 (1969). Amici join in and adopt the analysis set forth in the Tattered Cover's Opening Brief that surveys the lack of probative evidence that the book purchase records represent and the myriad alternative means available to law enforcement to obtain equally or more probative evidence on the question of who had access to the methamphetamine lab. For example, law enforcement officials could have pursued physical evidence found at the suspect's premises to attempt to tie that individual to the illegal manufacture of drugs. In addition, they

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10/ Cf. Cable Communications Policy Act of 1984, Pub. L. No. 98-549 (recognizing right to privacy in context of disclosure of subscriber's cable viewing habits).

could have interviewed the various people who frequented or lived at those premises, as well as neighbors, who were knowledgeable about such facts.

No further facts are needed to decide this issue; the trial court held a full evidentiary hearing on the merits. That record demonstrates that the law enforcement officials in this case did not – and cannot – establish the compelling need and nexus necessary to make a demand for information that has such an obvious burden on First Amendment rights. The government should not be permitted to inspect a suspect's book purchases, whether or not a book dealer's invoice may show that the suspect bought particular publications, without meeting an appropriately demanding standard. Accordingly, this Court should order the trial court to enjoin the execution of the entire search warrant.

There is no doubt that if the Tattered Cover is forced to comply with the search warrant in this case for information about constitutionally protected activity, the exercise of First Amendment rights by its customers will be severely chilled. There will also be a nationwide impact on patrons and customers of libraries and bookstores everywhere. Based on their experiences with bookstore customers and library patrons throughout the nation, *amici* fear that disclosure of such information will have an enormous impact on the reading choices of citizens everywhere. Bookstore and library patrons will hesitate over their choice of reading materials, wondering whether merely reading a book about a certain topic will subject them to a law enforcement inquiry. Many of those patrons will decide not to read books on certain topics precisely because of a fear of disclosure and questioning about their selections. The First

Amendment rights of readers and distributors of information must be safeguarded from such intrusions by the government.

CONCLUSION

Amici respectfully request the Court to reverse in part and order the trial court to enjoin execution of the entire search warrant issued against the Tattered Cover for customer purchase records. Forced disclosure of any customer purchase records in this case would impermissibly burden the First Amendment rights of both the Tattered Cover and its customers.

Respectfully submitted,

Theresa Chmara
Lara M. Flint
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 639-6000

Thomas B. Kelley (Colo. Reg. No. 1971)
Steven D. Zansberg (Colo. Reg. No. 26634)
FAEGRE AND BENSON, LLP
2500 Republic Plaza
370 Seventeenth St.
Denver, CO 80202
(303) 592-9000

Counsel for *Amici*

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BY: One of their Attorneys

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