

ALBERTO GONZALES, in his official capacity as Attorney General of the United States; ROBERT MUELLER, in his official capacity as Director of the Federal Bureau of Investigation; MARION E. BOWMAN, in his official capacity as Senior Counsel to the Federal Bureau of Investigation,

Defendants-Appellants

v.

JOHN DOE; AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs-Appellees.

JOHN DOE; AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

**PLAINTIFFS-APPELLEES'
OPPOSITION TO DEFENDANTS-
APPELLANTS' MOTION FOR
PARTIAL CLOSURE OF ORAL
ARGUMENT**

No.05-0570-cv

SEALED

No. 05-4896-cv

**PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS-APPELLANTS'
MOTION FOR PARTIAL CLOSURE OF ORAL ARGUMENT**

Plaintiffs-Appellees (hereinafter "plaintiffs") write in response to Defendants-Appellants' Motion for Partial Closure of Oral Argument (hereinafter "Motion"). As Defendants-Appellants note, *see* Motion at ¶ 1, the federal statute at issue in both of the

consolidated case includes a non-disclosure provision. Because of that provision, some information in both cases is under seal. With respect to case No. 05-0570, the government agrees that all issues can be argued publicly.

The government, however, seeks to close a portion of the argument that will relate to case No. 05-4896-cv. Case No. 05-4896 concerns whether the government can constitutionally enforce the NSL gag provision against the plaintiffs for disclosing the mere identity of the NSL recipient in that case. The identity of the John Doe plaintiff remains under seal. Specifically, the government moves to close any discussion of the fact that the John Doe plaintiff has been correctly identified by *The New York Times* and other newspapers, and identified on federal court websites.¹

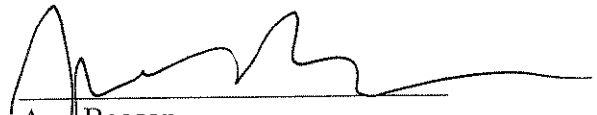
As plaintiffs argued in their Emergency Motion to Vacate Stay, plaintiffs believe that there is no conceivable justification to continue to prevent plaintiffs and their counsel from disclosing the identity of the John Doe Plaintiff because the cat is out of the bag. See Plaintiffs-Appellees' Memorandum in Support of Emergency Motion to Vacate Stay Pending Appeal at 4-11. Plaintiffs realize, however, that the stay is still in effect, and

¹ See, e.g., Alison Leigh Cowan, *Librarians Must Stay Silent in Patriot Act Suit, Court Says*, N.Y. TIMES, Sept. 21, 2005, at B2, available at <http://www.nytimes.com/2005/09/21/nyregion/21library.html>; see also Gina Holland, *Patriot Act Appeal Fails at Supreme Court*, ASSOCIATED PRESS, Oct. 7, 2005 (noting that Doe was "identified in a filing as the Library Connection"); *Librarians Demonstrate Silently Against the Patriot Act*, LIBRARY JOURNAL, Oct. 3, 2005, at <http://www.libraryjournal.com/article/CA6262249.html> (noting that *The New York Times* reported that "court records suggest" Doe is Library Connection); *ALA Joins Challenge to Patriot Act in U.S. Supreme Court*, available at <http://www.ala.org/Template.cfm?Section=News&template=/ContentManagement/ContentDisplay.cfm&ContentID=105771> (American Library Association press release noting that the *amicus curiae* brief filed in support of plaintiffs' application "emphasizes the fact that a library already has been identified in a September 21 *New York Times* story"); Motion for Leave to File Brief *Amicus Curiae* in Support of Application to Vacate Stay Pending Appeal and for Leave to File Said Brief on 8.5"-By-11" Paper, at 3 (*Doe v. Gonzales*, No.05A295).

thus that plaintiffs would be at risk of violating the statute if counsel confirmed the identity of the John Doe plaintiff during oral argument. Thus, because of the procedural posture of the case, plaintiffs do not object to the partial closure sought by the government.

Plaintiffs file this Opposition solely to urge the Court to grant Defendants-Appellants' Motion for partial closure only after making public, on-the-record findings of the need for closure. As this Court has recognized, a court considering whether to deny the public access to judicial records must make "specific, on the record findings [that] demonstrat[e] that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *In re New York Times, Co.*, 828 F.2d 110, 116 (2d Cir. 1987) (internal quotation marks and citations omitted); *see also Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13-14; *United States v. Amodeo*, 44 F.3d 141, 147 (2d Cir. 1995); *Doe v. Ashcroft*, 317 F.Supp.2d 488, 491 (S.D.N.Y. 2004). The duty to make specific findings attaches even where the parties themselves do not object to the denial of public access. *See, e.g., United States v. Alcantara*, 396 F.3d 189, 201 (2d Cir. 2005).

Respectfully submitted,



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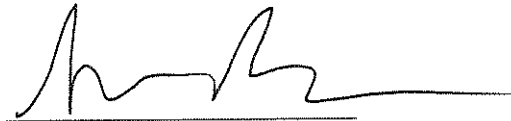
October 24, 2005

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2005, I filed and served the following documents: (1) Plaintiffs-Appellees' Opposition to Defendants-Appellants' Motion for Partial Closure of Oral Argument, by causing copies to be delivered via electronic mail and overnight courier to:

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