

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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.

**APPELLEES' MEMORANDUM IN
OPPOSITION TO APPELLANTS'
EMERGENCY MOTION FOR
STAY PENDING EXPEDITED
APPEAL**

No. _____

(No. 3:05cv1256 JCH)
(D.Conn.)

**APPELLEES' MEMORANDUM IN OPPOSITION TO APPELLANTS'
EMERGENCY MOTION FOR STAY PENDING EXPEDITED APPEAL**

Defendants-appellants (hereinafter "defendants" or "the government") appeal from the district court's decision granting a preliminary injunction to lift an FBI-imposed gag that is preventing plaintiffs-appellees (hereinafter "plaintiffs") from participating in the vital public debate about the Patriot Act. Specifically, the gag is preventing plaintiff Library Connection from disclosing its identity as an organization that received a National Security Letter demanding library records. The district court rightly held that the gag is an unlawful prior restraint that is preventing "the very people who might have information regarding investigative abuses ... from sharing that information with the

public.” App. A, at 26 (*Doe v. Gonzales*, No. 05-1256) (hereinafter “Op.”). Defendants now seek a stay that would effectively foreclose plaintiffs from participating in a political debate of extraordinary national importance – the debate over whether to limit or expand the FBI’s power under the Patriot Act to monitor the activities of innocent people. That debate is happening right now.

In the next week or two, Congress is expected to pass legislation that would limit or expand provisions of the Patriot Act, including the National Security Letter provision that was used to demand records from plaintiffs and to gag them. If the stay is granted, citizens will be prevented from engaging in core political speech, and Congress and the public will be deprived of information about the FBI’s use of its new powers precisely when that information is most needed. The resulting irreparable harm would threaten the democratic process, and thus go far beyond the harm presumed whenever the government suppresses truthful speech. In support of a stay, defendants offer no evidence of any harm to the specific investigation involved here, and instead rely on purely hypothetical arguments that stand in marked contrast to the concrete and immediate harm to plaintiffs’ free speech rights. For these reasons, explained fully below, defendants’ request for a stay should be denied. In the alternative, the court should set an expedited briefing schedule that would resolve this appeal next week.

BACKGROUND AND PROCEEDINGS BELOW

On August 9, 2005, plaintiffs filed this lawsuit to challenge the constitutionality of 18 U.S.C. § 2709, a statute that authorizes the Federal Bureau of Investigation (“FBI”) to demand the disclosure of a wide range of sensitive and constitutionally protected information, including the identity of a person who has borrowed particular books from a

public library or who has engaged in anonymous speech on the Internet. *See* 18 U.S.C. § 2709 (“Section 2709”), as amended by the USA PATRIOT Act, Pub. L. 107-56, 115 Stat. 272 (Oct. 26, 2001) (“Patriot Act”). In its current form, Section 2709 allows the FBI to issue such demands to “electronic communication service providers” in the form of National Security Letters (NSLs). Section 2709(c) permanently gags those served with NSLs from disclosing to any other person that the FBI sought or obtained information from them. Another district court has previously held that Section 2709 violates the First and Fourth Amendments and has enjoined its enforcement. *See Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004) (staying injunction pending appeal), *appeal docketed*, No. 05-0570 (2d Cir. Feb. 3, 2005).

Plaintiff Library Connection is a consortium of twenty-six libraries in Connecticut serving over 288,00 library card-holders as well as many other library users who do not hold library cards. App. B, at 1 (*Doe v. Gonzales*, No. 05-1256, Sealed Portion of Ruling) (hereinafter “Sealed Op.”). Library Connection provides Internet access for use by staff and patrons at nineteen of its member libraries. *Id.* at 1. Library Connection also administers an automated library system known as CONNECT, which member libraries use for circulation and cataloging of library material and to track community borrowing and library usage. App. C, ¶3 (Christian Decl.)

In July 2005, an FBI agent served an NSL on plaintiff Library Connection. The NSL “directed [Library Connection] to provide to the Federal Bureau of Investigation (FBI) any and all subscriber information, billing information and access logs of any person or entity” related to a particular IP Address for a specified time period. App. C (Christian Decl., Attachment). The NSL states that 18 U.S.C. § 2709(c) “prohibits any

officer, employee or agent of [Library Connection] from disclosing to any person that the FBI has sought or obtained access to information or records under these provisions.” *Id.* Library Connection “strictly guards the confidentiality and privacy of its library and Internet records, and believes it should not be forced to disclose such records without a showing of compelling need and approval by a judge.” *Id.*, ¶7 (Christian Decl.). Thus, rather than comply with the NSL, Library Connection retained counsel to challenge the constitutionality of the NSL and the NSL statute. *Op.* at 4. Because of the gag, Library Connection and its agents, the American Civil Liberties Union and American Civil Liberties Union Foundation (hereinafter, collectively “ACLU”) are prohibited from disclosing that the FBI has demanded sensitive records about library patrons from Library Connection. *Id.* at 4.

On August 16, 2005, plaintiffs moved for a preliminary injunction on a narrow issue related to the application of the gag provision to them. Specifically, plaintiffs sought a preliminary injunction that would prohibit defendants from enforcing the gag provision against plaintiffs for disclosing the mere fact that the FBI has used an NSL to demand information from plaintiff Library Connection. Plaintiffs did not seek to disclose any information about the subject of the NSL or any other specific details about the NSL’s issuance. Plaintiffs submitted four declarations in support of their motion. *See* App. C (Christian Decl.); App. D (Chase Decl.); App. E. (Romero Decl.); App. F (Sheketoff Decl.).

On September 9, 2005, after hearing oral argument and reviewing *ex parte* classified evidence submitted by the government, the District Court for the District of Connecticut granted plaintiffs’ motion for a preliminary injunction and enjoined

defendants from enforcing the gag provision with regard to Doe's identity. Op. at 29.

The district court first found that plaintiffs are suffering irreparable harm because,

Considering the current national interest in and the important issues surrounding the debate on renewal of the PATRIOT Act provisions, it is apparent to this court that the loss of Doe's ability to speak out now on the subject as a NSL recipient is a real and present loss of its First Amendment right to free speech that cannot be remedied. Doe's speech would be made more powerful by its ability to put a "face" on the service of the NSL, and Doe's political expression is restricted without that ability. Doe's right to identify itself is a First Amendment freedom independent from Doe's right to speak generally about its views on NSLs. Doe's statements as a known recipient of a NSL would have a different impact on the public debate than the same statements by a speaker who is not identified as a recipient.

Id. at 9. The district court then held that plaintiffs had demonstrated a clear likelihood of success on the merits because the gag was an unconstitutional prior restraint and content-based restriction on speech that failed strict scrutiny. *Id.* at 13. The district court found that the government had failed to meet its heavy burden to demonstrate that it had a compelling interest in barring the disclosure of Doe's identity. *Id.* at 17. Though the district court acknowledged the government's general interest in protecting national security, it held that "[n]othing specific about this investigation has been put before the court that supports the conclusion that revealing Does' identity will harm it." *Id.* 17.

Although the district court granted plaintiffs' motion for a preliminary injunction, the court stayed its ruling until September 20, 2005, with the "expectation that defendants will file an expedited appeal and submit an application for a stay pending appeal to the Court of Appeals." *Id.* at 29. On Friday, September 16, 2005, defendants filed their notice of appeal and an emergency motion for stay pending expedited appeal.

ARGUMENT

I. Standard of Review

Consideration of whether to issue a stay of an order of a district court pending appeal requires the Court to evaluate four factors: “the likelihood of success on the merits, irreparable injury if a stay is denied, substantial injury to the party opposing a stay if one is issued, and the public interest.” *Mohammed v. Reno*, 309 F.3d 95, 100 (2d Cir. 2002). Here, all four factors weigh heavily against granting a stay. Any stay would cause substantial – indeed, irreparable – injury to the First Amendment rights of plaintiffs and the public. A fully informed public debate about the National Security Letter power, on the eve of congressional action to expand or limit it, is clearly in the public interest. In contrast, the government has not demonstrated a likelihood of success on the merits and has not met its burden to prove that lifting the gag will harm any specific governmental interest. For these reasons, a stay is not warranted.

II. Any Stay Would Irreparably Harm Plaintiffs’ First Amendment Rights and Threaten the Public Interest in a Fully Informed Debate on Renewal of the Patriot Act.

As the district court recognized, “there is a current and lively debate in this country over renewal of the PATRIOT Act.” Op. at 8. The gag invalidated by the district court, which will be prolonged if this Court grants a stay, is preventing the public from obtaining vital firsthand information from plaintiffs that is necessary for a fully informed debate about the government’s expanded power to spy on innocent Americans. The public and Congress have expressed a strong and immediate interest in hearing plaintiffs speak. Plaintiffs are substantially and irreparably harmed by their inability to identify themselves as the recipients of an NSL and to engage fully and personally in this

national debate. See *Bronx Household of Faith v. Bd. of Educ. of New York*, 331 F.3d 343, 349 (2d Cir. 2003) (“Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed.”). The public interest and the irreparable harm to plaintiffs’ First Amendment rights weigh strongly against granting defendants’ request for a stay.

Congress is poised to finalize Patriot Act reauthorization legislation imminently. Both the House and the Senate have passed legislation to reauthorize the Patriot Act. See H.R. 3199, 109th Cong. (2005); See S. 1389, 109th Cong. (2005). The House and Senate are scheduled to meet in conference in the next week or two to reconcile their versions of the reauthorization bills and to finalize the legislation. See Declan McCullagh, *Patriot Act Debate Will Resume in Fall*, CNET NEWS.COM, Aug. 1, 2005 (reporting that “both the House of Representatives and the Senate have approved different versions of legislation to renew the controversial [Patriot Act],” and that “negotiations will resume in earnest when Congress returns after Labor Day”); *Federal Court Finds Patriot Act Gag on Connecticut Library is Unconstitutional*, LIBRARY JOURNAL, Sept. 13, 2005.

During the conference, the conferees will debate whether Section 2709 should be limited or expanded. The public and Congress need firsthand information about the FBI’s use of Section 2709 now, before the legislation becomes final. See *Elrod v. Burns*, 427 U.S. 347, 374 n.29 (1976) (noting the importance of “[t]he timeliness of political speech”); *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (the First Amendment protects not only the freedom to speak but also the freedom to “receive information and ideas”).

The FBI’s ability to use its new Patriot Act surveillance powers has been the subject of extraordinary public debate since the Act was passed. See *American Civil*

Liberties Union v. Department of Justice, 265 F. Supp. 2d 20, 24 (D.D.C. 2003) (“Ever since it was proposed, the Patriot Act has engendered controversy and debate.”).

Whether the FBI can use those surveillance powers to obtain information from libraries has been particularly controversial. *See, e.g.*, Eric Lichtblau, *Libraries Say Yes, Officials Do Quiz Them About Users*, N.Y. TIMES, Jun. 20, 2005, at A11 (noting that the “library issue has become the most divisive in the debate on whether Congress should expand or curtail government powers under the Patriot Act”). The debate has intensified in the past year as Congress considers whether to limit or expand the new powers.¹ Yet the debate has been skewed by the near-total lack of any firsthand information about the use of Patriot Act powers. Many members of Congress have complained that the government has denied them even basic information about its use of the statute.² Indeed, the Department of Justice recently refused to provide to all members of Congress the number

¹ *See, e.g.*, *Patriot Act Reauthorization Before the Senate Judiciary Comm.* (Mark-Up) 109th Congress, (July 21, 2005); *USA Patriot and Terrorism Prevention Reauthorization Act of 2005 Before the House Rules Comm.*, 109th Congress (July 20, 2005); *Patriot Act Reauthorization before the House Judiciary Comm.* (Mark-Up), 109th Congress (July 13, 2005); *Patriot Act Reauthorization Before the Senate Select Comm. on Intelligence* (Closed Mark-Up), 109th Congress (July 13, 2005); *Reauthorization of the USA PATRIOT Act Before the House Judiciary Comm.*, 109th Congress (June 10, 2005); *Reauthorization of the USA PATRIOT Act Before House Judiciary Comm.*, 109th Congress (June 8, 2005); *USA Patriot Act Before the Senate Select Intelligence Comm.* (Closed Mark-up), 109th Congress (June 7, 2005).

² *See* App. E, ¶25, 32 (Romero Decl.); PATRIOT FOIA; Eric Lichtblau, *Senator Faults Briefing on Antiterrorism Law*, N.Y. TIMES, Apr. 13, 2005, at A17 (reporting that Senator Arlen Specter (R-Pa) complained that the DOJ refused to reveal specific information about the use of the Patriot Act, even in closed-door briefings to Congress); *see also* Dana Priest, *Panel Questions Patriot Act Uses*, WASH. POST, Apr. 28, 2005, at A7 (quoting Senator Olympia J. Snowe (R-Maine) stating, “I think we need to have more public disclosure in examining and assessing [the Patriot Act’s] impact.”); *id.* (quoting Senator Ron Wyden (D-Ore.) stating, “We are to some extent doing oversight in the dark.”).

of NSLs issued by the FBI under Section 2709. *See* Letter of William E. Moschella, Assistant Attorney General to Senator Richard J. Durbin, dated Sept. 8, 2005.

Because the government refuses to provide even basic statistics about its use of new Patriot Act powers, let alone detailed information, the only other sources of information are organizations and individuals from whom the government has demanded information. But many Patriot Act provisions, including Section 2709, gag such people from even disclosing the mere fact that they have received an FBI demand for records. The government has thus succeeded in using the Patriot Act itself to exclude the most important voices in the Patriot Act debate: those with first-hand knowledge about how the government is using its controversial new powers. As the district court noted, “only people who possess non-speculative facts about the reach of broad, federal investigatory authority are barred from discussing their experience with the public.” *Op.* at 26. Any stay that extends the gag on plaintiffs would further skew the debate and thereby harm the public interest.

The Supreme Court has recognized 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.” *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977). Speech that criticizes the exercise of government power is not only fully protected by the First Amendment; it is essential to self-governance. *Stromberg v. California*, 283 U.S. 359, 369 (1931) (“the opportunity for free political discussion ... is essential to the security of the Republic [and] ... a fundamental principle of our constitutional system”); *Gentile v. State Bar of Nevada*, 501

U.S. 1030, 1034 (1991) (“There is no question that speech critical of the exercise of the State’s power lies at the very center of the First Amendment.”); *Wood v. Georgia*, 379 U.S. 375, 392 (1962); *Associated Press v. United States*, 326 U.S. 1, 20 (1945). A stay is clearly against the public interest because it would limit speech critical of the government and skew public debate about expanded executive powers.

The government’s assertion that plaintiffs have nothing more to add to the Patriot Act debate is flatly contradicted by the intense interest in the case from the media, from Congress, and from the public. Because of the dearth of firsthand information, and the particular public concern about FBI demands for library records, this case has already engendered widespread media coverage.³ *The New York Times* alone has published four articles about the case and has speculated about whether Library Connection is the John Doe plaintiff.⁴ Close to 8,000 people have signed a petition calling on Attorney General Gonzales to “let John Doe speak.” See <http://action.aclu.org/letjohndoespeak>. A number of newspaper editorials have called for the gag to be lifted.⁵ Members of Congress have

³ See, e.g., *Federal Court Finds Patriot Act Gag on Connecticut Library is Unconstitutional*, LIBRARY JOURNAL, Sept. 13, 2005; John Christofferson, *Judge Lifts Gag Order on Librarian in Patriot Act Case*, ASSOCIATED PRESS, Sept. 11, 2005; *Judge Removes Gag in Patriot Act Case*, WASH. TIMES, Sept. 10, 2005; Lynne Tuohy, *Judge Loosens Library Gag*, HARTFORD COURANT, Sept. 10, 2005; Dan Eggen, *Library Challenges FBI Request*, WASH. POST, Aug. 26, 2005; Audrey Hudson, *ACLU Suit Seeks to Bar FBI Access to Library Data*, WASH. TIMES, Aug. 26, 2005; Eric Lichtblau, *F.B.I., Using Patriot Act, Demands Library’s Records*, N.Y. TIMES, Aug. 26, 2005; Chris Sanders, *Library Sues Over Controversial Patriot Act*, REUTERS, Aug. 26, 2005; Michael J. Sniffen, *Suit Seeks to Bar FBI Library Data Access*, WASH. POST, Aug. 25, 2005.

⁴ See Alison Leigh Cowan, *Plaintiffs Win Round in Lawsuit on Patriot Act*, N.Y. TIMES, Sept. 10, 2005; Alison Leigh Cowan, *Hartford Libraries Watch as U.S. Makes Demand*, N.Y. TIMES, Sept. 2, 2005; Alison Leigh Cowan, *At Stake in Court: Using the Patriot Act to Get Library Records*, N.Y. TIMES, Sept. 1, 2005; *Connecticut Librarians See Lack of Oversight Biggest Danger in Antiterror Law*, N.Y. TIMES, Sept. 3, 2005.

⁵ *Editorial*, CONNECTICUT POST, Aug. 31, 2005; *Editorial*, DETROIT FREE PRESS, Aug. 31, 2005; *Editorial*, N.Y. TIMES, Aug. 27, 2005.

issued statements of concern over the gag. *See, e.g.*, Letter to Colleagues from Rep. Sanders, Rep. Nadler, Rep. Otter, “Federal Court Rules PATRIOT Act Gag Order Against Librarian Unconstitutional” (Sept. 15, 2005); Statement of Sen. Feingold, “On the ACLU Lawsuit Challenging FBI’s Use of National Security Letters” (Aug. 25, 2005). The American Library Association, with over 64,000 members, testified about the urgent need for John Doe, one of its members, to offer firsthand testimony to Congress about the NSL power. App. F, ¶ 1 (Sheketoff Decl.). The public interest in letting John Doe speak now is far from speculative – it is real and acute. The public interest thus weighs strongly against granting a stay that would prolong the gag.

Equally important, the government’s request for a stay would substantially – indeed, irreparably – harm the First Amendment rights of John Doe and its representatives. The Supreme Court has recognized that “[t]he loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod*, 427 U.S. at 373; *Bronx Household of Faith*, 331 F.2d at 349; *Green Party of New York State v. New York State Bd. of Elections*, 389 F.3d 411, 418 (2d Cir. 2004). The fact that others have been able to speak about John Doe and the lawsuit does not alleviate the First Amendment harm. John Doe and its representatives unquestionably have a First Amendment right to speak for themselves. They have the right to craft their own message and advocate in the way they desire. *Cf. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1993) (recognizing the “fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message”).

John Doe and its representatives, almost all of whom are librarians, want to tell their own stories. They want to explain, in personal terms, what it was like to have the FBI show up at their door with a demand for library records, and how it felt to be told they couldn't speak about it to anyone. They want to lobby Congress for additional safeguards to be added to the Patriot Act. App. C, ¶36 (Christian Decl.); *see also* App. D, ¶18 (Chase Decl.). They want to educate and organize their fellow librarians, library associations, and the larger library community, and coordinate procedures for responding to NSLs. App. C, ¶¶29, 31-33 (Christian Decl.); App. D, ¶¶11, 14-17 (Chase Decl.). They want to alert their patrons and the general public to the dangers posed by the Patriot Act. App. C, ¶35 (Christian Decl.); App. D, ¶13, 20 (Chase Decl.). They want to have full and frank discussions with their staff and board. App. C, ¶28, 30 (Christian Decl.); App. D, ¶19 (Chase Decl.). They want to be able to discuss this situation with own their families. App. C, ¶34 (Christian Decl.); App. D, ¶19 (Chase Decl.).

In particular, if the stay is denied, John Doe and its representatives would immediately lobby Congress for additional safeguards to be added to the Patriot Act.

John Doe's Executive Director testified before the district court that

The gag provision has . . . prevented me from disclosing the fact that Library Connection has been served with an NSL to my representatives in Congress. I have read and viewed many newspaper and television reports on the Patriot Act in general and on the reauthorization of the Patriot Act in particular. . . . But for the gag, I would contact my Congressional representatives and inform them that Library Connection received an NSL. I find it ironic and undemocratic that, prior to receiving an NSL, I would have been allowed to question my congressional representatives about the NSL power but now that I have actual, first-hand, knowledge of the NSL power and its application, I am prohibited from sharing that information even with those elected representatives whose jobs include monitoring laws such as the Patriot Act.

App. C, ¶36 (Christian Decl.); *see also* App. D, ¶20 (Chase Decl.).

Plaintiffs believe that, if they could participate directly in the debate, Congress would be more inclined to adopt additional safeguards. Both versions of the Patriot Act reauthorization legislation contain amendments to the NSL provision. Neither bill would prevent the use of NSLs against libraries. Nor would either bill allow a library, or any other NSL recipient, to disclose the mere fact that it had been served with an NSL, even where such disclosure would not harm any investigation. John Doe's representatives want to personally mobilize the library community to amend the Patriot Act to address their concerns. *See* App. C, ¶35 (Christian Decl.); App. D, ¶20 (Chase Decl.). It is particularly troubling that for every moment that plaintiffs are gagged from disclosing that the FBI has used an NSL to demand information from a consortium of libraries, the President, the Justice Department, and Members of Congress are actively engaged in a vigorous campaign not just to reauthorize the Patriot Act, but to create new, expanded surveillance powers. Granting the government's request for a stay would continue to skew the debate.

A stay would also irreparably harm plaintiffs because the gag is preventing John Doe and its representatives from engaging in *any* public education or advocacy about the NSL power, even if they do not identify themselves as recipients of an NSL. They fear they will be asked questions about the case that they will be unable answer without risking penalties for violating the gag. *See* App. C, ¶35 (Christian Decl.); *see also id.* at ¶¶29, 309; *see also id.* ¶11. Peter Chase is Vice President of Library Connection and Chair of CLA's Intellectual Freedom Committee and has been an active public advocate for intellectual freedom in libraries for 12 years. Before learning of the NSL, Mr. Chase

did not know that NSLs could be used to demand library records. App. D, ¶11 (Chase Decl.). Any detailed public comment about the use of NSLs in libraries could imply that he is the recipient and could thus risk violating the gag. Plaintiffs' fear about speaking even generally about NSLs is well-founded given the government's own actions in this case. The government took the position that plaintiffs could not attend the district court oral argument in their own case due to the risk of inadvertently violating the gag provision, even though mere attendance would not have required plaintiffs to speak at all. The government has also required plaintiffs to redact totally innocuous information from briefs in this case – information that does not directly disclose Library Connection's identity. *See* App. G (illustrating redactions in plaintiffs' Complaint of the terms "library system," "member libraries," and a direct quotation from Conn. Gen. Stat. §11-25).

Given the ambiguity over the scope of the gag, John Doe's representatives continue to decline invitations to speak publicly about the Patriot Act's effect on libraries. For example, Mr. Chase refrained from attending a recent CLA meeting because he knew the Association would be considering a resolution about this case, and he was afraid he would inadvertently reveal that he was a representative of John Doe. Ironically, when Mr. Chase recently declined another invitation to speak about the Patriot Act, Kevin O'Connor, counsel to defendants in this case, accepted the offer to replace him. Any stay would further exacerbate the obvious irreparable harm to the First Amendment rights of John Doe and its representatives to engage in core political speech.

III. The Government is Unlikely to Succeed on Appeal and Will Not Suffer Irreparable Injury in the Absence of a Stay.

The government is unlikely to succeed on this appeal because it cannot demonstrate that the challenged gag is narrowly tailored to a compelling interest. Nor

can the government demonstrate that it would be injured in the absence of a stay.

Accordingly, this Court should deny the government's motion.

As the district court recognized, the gag on plaintiffs' speech constitutes a prior restraint because it stifles speech before it occurs. Op. at 11 ("Section 2709(c) unquestionably prohibits speech in advance of it having occurred"); *see also Alexander v. United States*, 509 U.S. 544, 550 (1993) (A prior restraint "forbid[s] certain communications when issued in advance of the time that such communications are to occur") (internal quotation marks omitted); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975).

The Supreme Court has repeatedly held that prior restraints are presumptively unconstitutional and are "the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stewart*, 427 U.S. 539, 559 (1976); *see also New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931). As a prior restraint, the gag challenged here is subject to the strictest constitutional scrutiny.

The government has not offered a compelling justification for the gag challenged here. The government suggests that, as a general matter, the gag provision is meant to ensure that terrorists do not learn that they are surveillance targets, but the government has not suggested – let alone demonstrated – that this is a significant concern in the circumstances presented here. As the district court noted,

Library Connection's member libraries serve over 288,000 library card holders as well as many other library users who do not hold library cards. Of its members, nineteen utilize internet service provided by Library Connection, which service is the reason for the NSL. Even if the court assumed that the nineteen libraries are the smallest of the 26, and only cardholders (and employees) may

use the library computers to access the internet), the universe of people who could be the subject of the investigation would likely be in the tens, if not hundreds, of thousands. In addition, while the NSL has a specific date of use of the internet, plaintiffs do not seek to disclose that. Thus, ungagging the plaintiffs will reveal that sometime in the unknown past, someone who may or may not have been a card holder of that unknown library, used an internet service at one of 19 libraries located in various cities and towns in Connecticut.

Sealed Op. at 1-2. The district court concluded that “the information that is before the court suggests strongly that revealing Doe’s identity will not harm the investigation.”

Op. at 17. Accordingly, the government does not have a compelling interest in enforcing the challenged gag. And, for the same reasons, the government would not suffer from the denial of a stay.

In fact, the government did not offer *any* specific rationale for prohibiting plaintiffs from disclosing Doe’s identity. The government dedicates considerably energy to explaining why secrecy might be necessary in some cases. The question before the district court, however, and the issue on this appeal, is not whether the gag provision is constitutional on its face or whether the statute could be constitutional as applied in other contexts. The question is whether the statute is constitutional *as applied here*. This question the government simply ignores. As the district court wrote:

Even affording the government deference in its judgment about national security concerns, the court cannot conclude on the record in this case that, *in these circumstances*, the government has a compelling interest in barring the disclosure of Doe’s identity. Nothing specific about this investigation has been put before the court that supports the conclusion that revealing Doe[’s] identity will harm it. The record supplied by the defendants suggests that the disclosure of Doe’s identity “may” or “could” harm investigations related to national security generally. *See Szady Decl.* at ¶¶ 20-29. Just such a speculative record has been rejected in the past by the Supreme Court in the context of a claim of national security. *See New York Times Co.*, 403 U.S. at 725-26 (Brennan, J., concurring).

Op. at 17. Notably, even the classified evidence submitted by the government and reviewed by the district court *ex parte* did not convince the court that disclosing Doe's identity would harm the underlying investigation. Op. at 17-18.

Apparently recognizing that it has provided no specific rationale for the gag challenged here, the government now argues that "the risks posed by disclosing confidential information about NSLs are categorical and pervasive in nature" and that "no additional proof is needed to support the inference that the present case presents the same risks as all other NSL cases." Govt. Mem. at 18. But the government does not satisfy its burden under the First Amendment merely by invoking national security in the abstract. *See, e.g., United States v. United States District Court for the Eastern Dist. of Mich.*, 407 U.S. 297, 314 (1972). As the Supreme Court has said, "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured." *Turner Broad. Sys.*, 512 U.S. at 664 (internal quotation marks omitted).

More generally, the First Amendment does not permit the government to restrict speech on the basis of categorical, non-particularized arguments. Rather, in the face of an as applied challenge, the government is required to show a *particularized* need for the challenged restraint. In *Globe Newspaper Co. v. Super. Ct. for the County of Norfolk*, 457 U.S. 596, 598 (1982), the Supreme Court considered the constitutionality of a statute that categorically barred public access to the testimony of sex-offense victims under the age of 18. Although the Court acknowledged the State's compelling interests in protecting victims from further trauma and encouraging victims to come forward, it held

that neither interest justified a blanket closure in every case. *See id.* at 607-08. The

Court wrote:

[A]s compelling as [the State's] interest is, it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. . . . [The statute] cannot be viewed as a narrowly tailored means of accommodating the State's interest: That interest could be served just as well by requiring the trial court to determine on a case-by-case basis whether the State's legitimate concern for the well-being of the minor victim necessitates closure.

Id. at 607-09 (footnotes omitted). *See also Florida Star v. B.J.F.*, 491 U.S. 524, 539-540 (1989); *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1307 (1983); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 692 (6th Cir. 2002); *McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983).

All of this is well-settled law. Indeed, in its reply brief filed only weeks ago before this court in *Gonzales v. Doe*, another challenge to the NSL provision, the government itself stated that “the proper recourse [in evaluating the NSL statute’s non-disclosure provision] is for district courts to entertain challenges to the non-disclosure requirement on a case-by-case basis, granting relief where – but only where – it can be shown that the compelling governmental interests underlying the non-disclosure requirement are not in jeopardy.” Reply Brief for the Defendants-Appellants at 25, *Gonzales v. Doe*, No. 05-0570 (2d Cir. filed Feb. 3, 2005) (appeal of *Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004)). Thus, even the government has conceded that in order to satisfy constitutional scrutiny, it must show a compelling interest and narrow-tailoring with regard to the need for secrecy in the particular case. *See also Doe v. Ashcroft*, 334 F. Supp. 2d 471, 524 (2004) (noting that the government’s arguments for secrecy should be accorded deference only where “it asserts that secrecy is necessary for national

security purposes in a *particular situation* involving *particular persons* at a *particular time*”). The government has not offered particularized arguments here.

As the district court recognized, the challenged gag also fails strict scrutiny because it is not narrowly drawn. The gag is permanent, though “[v]irtually every investigation has some end point.” Op. at 22. Moreover, the challenged gag is overbroad because it prevents plaintiffs from disclosing wholly innocuous information about the mere fact that the FBI has used its new powers. As the district court wrote,

All details relating to the NSL are subject to the gag order without any showing that each piece of information, if disclosed, would adversely affect national security. The defendants themselves did not believe that disclosure of the fact of the issuance of this NSL to an organization with library records, a fact clearly within the scope of § 2709(c), would harm national security by compromising their investigation. Further, there is nothing before the court that would suggest that prohibiting the disclosure of Doe’s identity serves the government’s interest in preventing the subject of the investigation or others from learning about it. Therefore, § 2709(c) is not narrowly tailored in its scope to serve the government’s interest.

Op. at 23.

The district court properly rejected the government’s other arguments. The government argued that the gag is justified because terrorist organizations “can and do piece together various, seemingly innocuous items of publicly available information, along with private information already in their possession, to determine the scope, focus, and progress of ongoing counterintelligence and counter-terrorism investigations.” Op. at 18. As the district court noted, however, this “mosaic” argument has never been found sufficient to override a private citizen’s First Amendment freedom of speech. Op. at 19. The district court also properly rejected the government’s reliance on *Kamasinski* and similar cases. As the court recognized,

2709(c) creates a unique situation in which the only people who possess non-speculative facts about the reach of broad, federal investigatory authority are barred from discussing their experience with the public. . . . The potential for abuse is written into the statute: the very people who might have information regarding investigative abuses and overreaching are preemptively prevented from sharing that information with the public and with legislators who empower the executive branch with the tools used to investigate matters of national security.

Op. at 26. *Kamasinki* did not raise these same concerns.

Finally, there is no merit to the government's contention that the district court failed to afford "any deference to the expert judgment of the Executive Branch regarding the risks associated with disclosure of Doe's identity." Govt. Mem. 18. In fact, the district court specifically recognized the government's legitimate interest in conducting national security investigations, and it *expressly* afforded the deference that the government claims it was denied. Sealed Op. at 1. But deference is not acquiescence, and the district court could not have constitutionally deferred to the government's conclusory contention that national security interests justify the gag in this case. *See, e.g., Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004) (noting that the Constitution "envisions a role for all three branches when individual liberties are at stake."); *In re Washington Post Co v. Soussoudis*, 807 F.2d 383, 392 (4th Cir. 1986) ("a blind acceptance by the courts of the government's insistence on the need for secrecy . . . would impermissibly compromise the independence of the judiciary and open the door to possible abuse.").

For the reasons stated above, defendants' request for a stay should be denied. In the alternative, the court should set an expedited briefing schedule that would resolve this appeal next week.

Respectfully submitted,



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