

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

**LIBRARY CONNECTION, INC.;**  
**AMERICAN CIVIL LIBERTIES UNION;**  
**AMERICAN CIVIL LIBERTIES UNION**  
**FOUNDATION,**

Plaintiffs,

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;  
**MICHAEL J. WOLF**, in his official capacity  
as Special Agent in Charge, Federal Bureau of  
Investigation,

Defendants.

**REPLY MEMORANDUM OF LAW IN  
SUPPORT OF PLAINTIFFS' MOTION  
FOR A PRELIMINARY INJUNCTION**

Civ. Action No. 3:05cv1256 JCH

**SEALED CASE**

August 30, 2005

**REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION  
FOR PRELIMINARY INJUNCTION**

Annette M. Lamoreaux (ct25769)  
ACLU of Connecticut Foundation  
32 Grand Street  
Hartford, CT 06106  
Ph: 860-247-9823 x 211  
Fax: 860-728-0287  
E-mail: annettel@acluct.org  
Cell: 860-299-6724

Ann Beeson (phv0484)  
Jameel Jaffer (phv0522)  
Melissa Goodman (phv0483)  
American Civil Liberties Union Foundation  
National Legal Department  
125 Broad Street, 17th Floor  
New York, NY 10004  
Ph: 212-549-2601  
Fax: 212-549-2651  
E-mail: annb@aclu.org

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Defendants' entire brief confuses the question before the Court. That question is whether plaintiffs are entitled to a preliminary injunction to lift the gag *in this particular case* – the gag that prevents plaintiffs from disclosing the mere fact that the FBI used a National Security Letter to demand records from Library Connection. Because defendants have failed to offer any justification for this specific gag, let alone a compelling one, plaintiffs have shown a clear likelihood of success in their claim that the gag is an unconstitutional prior restraint. Plaintiffs' free speech rights are irreparably harmed every day the gag continues. The need for preliminary

relief is acute because plaintiffs want to participate in the public debate about the Patriot Act as Congress decides whether to limit or expand the very power used to gag them.

**I. Plaintiffs have demonstrated a clear likelihood of success on the merits because the government has not demonstrated a compelling need for secrecy in this particular case.**

The government's brief is striking for its failure to supply any argument whatsoever for the application of section 2709(c) in this case. The issue before the Court is not whether section 2709(c) is constitutional on its face or whether the statute could be constitutional as applied in other contexts. The issue is whether the statute is constitutional *as applied here*. This question, the only question before the Court, the government simply ignores.

As the Supreme Court has emphasized, 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 two days ago before the Second Circuit in *Gonzales v. Doe*, another challenge to section 2709, 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 (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”).

In lieu of actually defending the gag it has imposed here, the government offers two arguments, neither of which satisfies strict scrutiny. First, the government points to hypothetical cases in which secrecy *might* be constitutionally defensible. Govt. Br. 8-10, 21, 25-26; Szady Decl. ¶¶20-30. For example, the government argues that “[d]isclosure of the FBI’s issuance or use of a particular NSL *could* compromise counterintelligence and counterterrorism investigations in a variety of ways.” Szady Decl. ¶19 (emphasis added). The government also suggests that disclosure of the name of a recipient of an NSL “*might* jeopardize a counter-

terrorism or counterintelligence investigation” because “a terrorist or foreign intelligence organization with agents using the service provider in question *may* thereby learn which of its communications are potentially compromised, and *could* instruct its agents not to use, or to give disinformation to, such providers.” *Id.* ¶29 (emphasis added). *See also* Govt. Br. 8-9. But the government stops at generalities, and fails to present any argument for secrecy in *this* case.<sup>1</sup>

The government presents no evidence on whether the NSL pertains to an active investigation, what kind of investigation may be underway, whether the records involve a suspect or an innocent person, or how the mere disclosure of Library Connection’s name might jeopardize any active investigation. In fact, the declaration submitted by David W. Szady says nothing at all about the NSL served on Library Connection. The declaration is almost identical to the affidavit Mr. Szady submitted to support the facial constitutionality of the NSL gag provision in *Doe v. Ashcroft* before the Southern District of New York. Especially in the absence of any contrary facts, it is highly implausible that disclosing Library Connection’s identity, without disclosing more details regarding the NSL, could tip off any hypothetical

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<sup>1</sup> The government’s offer to present the Court with *ex parte* and *in camera* evidence at some point in the future is inappropriate and would present additional constitutional problems. Govt. Br. 32 n.3. The deadline set by the court for briefing has passed, and the preliminary injunction hearing is set for tomorrow. The use of secret evidence to determine the merits of a dispute is prohibited by the courts. *Ass’n for Reduction of Violence v. Hall*, 734 F.2d 63, 67 (1st Cir. 1984) (“Our system of justice does not encompass *ex parte* determinations on the merits of cases in civil litigation.”); *see also Vining v. Runyon*, 99 F.3d 1056, 1057 (11th Cir., 1996) (“[o]ur adversarial legal system generally does not tolerate *ex parte* determinations on the merits of a civil case”); *Abourezk*, 785 F.2d at 1061 (“a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions”). The consideration of *ex parte* material in determining the merits of a dispute is also antithetical to our system of justice. *See, e.g., Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring) (noting that “fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights”); *Allende v. Shultz*, 605 F. Supp. 1220, 1226 (D.Mass. 1985) (“the very nature of the adversary system demands that both parties be given full access to any information which may form the basis for a judgment”); *Abourezk v. Reagan*, 785 F.2d 1043, 1060-62 (D.C. Cir. 1986).

suspect. Library Connection serves over 288,00 library cardholders, as well as many other library users that do not have library cards. Christian Decl. ¶3.

The government's second argument, equally unpersuasive, is that "national security" or "counterterrorism" investigations *always* justify a blanket and permanent gag. *See* Govt. Br. 20-21. But the government does not satisfy its burden under the First Amendment merely by invoking national security in the abstract. *United States v. United States District Court for the Eastern Dist. of Mich.*, 407 U.S. 297, 314 (1972); *New York Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring); *Worrell Newspapers of Indiana, Inc. v. Westhafer*, 739 F.2d 1219, 1223 (7th Cir. 1984) *aff'd*, 469 U.S. 1200 (1985); *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 514 (S.D.N.Y. 2004); *see also* Pl. Br. 15-16. Similarly, the fact that an investigation involves "counterterrorism" or "counterintelligence" does not justify imposing limitless secrecy. Govt. Br. 7-10, 21-27; Szady Decl. ¶¶ 31-35. The government states that this NSL concerns a counterterrorism investigation, Govt. Br. 2, but counterterrorism investigations are in fact *criminal* investigations, and the government has, for over two centuries, conducted criminal investigations without the need for blanket secrecy.

Contrary to what the government suggests, Govt. Br. 19, secrecy is the exception in the context of grand jury subpoenas. Govt. Br. 19. The grand jury subpoena rule forecloses the government from silencing a witness except on a case-by-case showing of necessity to a court. *See, e.g., United States v. Sell Eng'g, Inc.*, 463 U.S. 418, 425 (1983); *In re Grand Jury Subpoena*, 103 F.3d 234, 239 (2d Cir. 1996); *In re Grand Jury Proceedings (Fernandez Diamante)*, 814 F.2d 61, 70 (1st Cir. 1987). This is true even though grand juries routinely investigate the most serious crimes, including crimes related to terrorism. *See, e.g., United States v. Awadallah*, 349 F.3d 42, 45 (2d Cir. 2003) ("In the days immediately following

September 11, 2001, the United States Attorney for the Southern District of New York initiated a grand jury investigation into the terrorist attacks.”). In *Doe v. Ashcroft*, Judge Marrero effectively explains why *per se* broad gag orders are inconsistent with our First Amendment freedoms:

The Government's claim to perpetual secrecy surrounding the FBI's issuance of NSLs . . . presupposes a category of information, and thus a class of speech, that, for reasons not satisfactorily explained, must forever be kept from public view . . . . In general, as our sunshine laws and judicial doctrine attest, democracy abhors undue secrecy, in recognition that public knowledge secures freedom. Hence, an unlimited government warrant to conceal, effectively a form of secrecy *per se*, has no place in our open society.

*Doe v. Ashcroft*, 334 F. Supp. 2d at 519-20.<sup>2</sup>

None of the cases cited by the government supports the gag at issue here. The government relies principally on *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), and *Kamasinski v. Judicial Review Council*, 44 F.3d 106 (2d Cir. 1994). Both *Rhinehart* and *Kamasinski*, however, involved individuals who were gagged only after they affirmatively availed themselves of judicial process. *Rhinehart* involved a gag that restricted a litigant from disclosing information he obtained through the discovery process. 467 U.S. at 27. *Kamasinski* involved a gag that prevented complainants to a judicial review council from disclosing the existence of a judicial review inquiry pending the council's probable cause determination. 44 F.3d at 109. Unlike the plaintiff in *Rhinehart*, plaintiffs here did not ask for the information that

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<sup>2</sup> The government also contends terrorist and foreign intelligence organizations have the capacity to piece together “seemingly innocuous items of public information” about past investigations in order to avoid detection in future investigations. Govt Br. 9; *see also id.* at 25, 32-33. The courts have never accepted this “mosaic” argument, however, in circumstances analogous to those presented here. Typically, the government has invoked the “mosaic” argument as a shield – as a means of withholding information. Here, by contrast, the government invokes the mosaic argument as a sword – as a means of compelling a private citizen not to speak. *See McGehee*, 718 F.2d at 1147 (“Th[e] difference between seeking to obtain information and seeking to disclose information already obtained raises McGehee’s constitutional interests in this case above the constitutional interests held by a FOIA claimant.”).

the government now seeks to suppress. *Cf. Rhinehart*, 467 U.S. at 32 (“continued court control over the discovered information does not raise the same specter of government censorship that such control might suggest in other situations.”); *see also First Amendment Coalition v. Judicial Inquiry and Review Board*, 784 F.2d 467, 478 (3d Cir. 1986) (“The situation [here] is also unlike *Seattle Times* in that plaintiffs did not seek to avail themselves of the Board’s processes.”). Unlike the plaintiffs in *Kamasinski*, plaintiffs here did not ask the government to initiate the investigation they now seek to discuss. *Cf. Kamasinski*, 44 F.3d at 110-111. Moreover, in *Kamasinski* the Second Circuit expressly found that the First Amendment *disallowed* the government from suppressing the kind of communication at issue here – communication about government activity. 44 F.3d at 110 (noting that “[p]enalizing an individual for publicly disclosing complaints about the conduct of a government official strikes at the heart of the First Amendment,” and finding this restriction unconstitutional).

Finally, the government suggests that the court should automatically defer to its claims that national security interests justify the gag in this case. Govt. Br. 22-23, 27-28, 32-33. Yet, the court’s role in safeguarding individual liberties in the face of the government’s national security interest is well-established. *See, e.g., 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.”); *see also Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004) (noting that even with regard to the “war” on terrorism, the Constitution “envisions a role for all three branches when individual liberties are at stake.”). As another court noted in striking down the NSL statute on its face, “It is precisely times like these that demand heightened vigilance, especially by the judiciary, to ensure that, as a people and as a nation, we steer a principled

course faithful and true to our still-honored founding values.” *Doe v. Ashcroft*, 334 F. Supp. 2d at 478.

**II. Plaintiffs’ First Amendment rights will be irreparably harmed if they cannot immediately disclose that Library Connection was served with an NSL.**

“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Capital Cities Media, Inc.* 463 U.S. at 1304; Pl. Br. 17-18. Gagging plaintiffs from disclosing the mere fact that Library Connection has been served with an NSL unquestionably impairs plaintiffs’ First Amendment rights to share non-sensitive information with the public and Congress. It is not just plaintiffs’ First Amendment rights that are impaired every moment the gag remains in place, but also the public’s right to obtain vital information about the Patriot Act. *See* Pl. Br. 19-20, 22-23.

The government has made no serious attempt to respond to plaintiffs’ argument that they are irreparably harmed if the gag is not lifted in time to allow plaintiffs to fully participate in the Patriot Act debate in the next few weeks. Pl. Br. 9, 18-23. Pointing to a press release and two newspaper articles, the government argues that “plaintiffs are free to communicate to Congress and the public.” Govt. Br. 24; *see also id.* at 2, 23. But as the government knows, Library Connection remains completely gagged, unable to speak at all about the mere fact the FBI used an NSL to demand records from them. It is not sufficient to say that Library Connection can be gagged because the ACLU can speak (in limited ways) for them. Library Connection and its executive board members, all of whom are librarians, want to speak for themselves. They want to lobby Congress for additional safeguards to be added to the Patriot Act. Christian Decl. ¶36; *see also* Chase Decl. ¶18. They want to educate and organize their fellow librarians, library associations, and the larger library community, and coordinate procedures for responding to

NSLs. Christian Decl. ¶¶29, 31-33; Chase Decl. ¶¶11, 14-17. They want to alert their patrons and the general public to the dangers posed by the Patriot Act. Christian Decl. ¶35; Chase Decl. ¶13, 20. They want to have full and frank discussions with their staff and board. Christian Decl. ¶¶28, 30; Chase Decl. ¶19. They want to be able to discuss this situation with own their families. Christian Decl. ¶34; Chase Decl. ¶19. Under the First Amendment, Library Connection has a right to speak for itself, craft its own message, and advocate in the way it desires. *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”).

The enclosed Declaration from Emily Sheketoff, Executive Director of the Washington Office of the American Library Association, confirms the desire of Congress and the public to hear directly from the librarians and library service providers who have “first-hand evidence about the impact of law enforcement interest in library records.” Sheketoff Decl. ¶16. Ms. Sheketoff also notes that the case “represents a valuable opportunity for librarians to learn what to expect from this type of request from law enforcement.” *Id.*

In addition, the gag continues to prevent plaintiff ACLU from disclosing innocuous, but key, information about the case, including the fact that the NSL actually demanded library patron records. Rather, the ACLU can only disclose that the FBI demanded information from an organization that “possess[es] a wide array of sensitive information about library patrons.” Compl. ¶48. In addition, the ACLU cannot disclose that an NSL was served on a “consortium . . . of libraries,” *id.* ¶5, or a “library system,” *id.* ¶66. Indeed, the ACLU cannot even disclose the words “member libraries,” or “library patrons” if referring to Library Connection. *See, e.g. id.*

¶46, 51. All of this information would interest members of Congress, the media, and the general public.

Plaintiffs need to speak *now* in order to influence Congress' decision about whether to limit or expand the Patriot Act. Pl. Br. 22-23. See *Elrod v. Burns*, 427 U.S. at 374 n.29 (noting that the "timeliness of political speech is particularly important"). For every moment plaintiffs are gagged, President Bush, FBI and Justice Department Officials and members of Congress are engaged in a vigorous campaign in support of the Patriot Act and new, more expansive surveillance powers. Romero Decl. ¶32; see also Eric Lichtblau, *F.B.I., Using Patriot Act, Demands Library's Records*, N.Y. TIMES, Aug. 26, 2005, at A11 (noting one government official, speaking on condition of anonymity, "cautioned against reading too much into the bureau's demand for the records in Connecticut," and quoting that official as stating, "Not all the facts have come out here. But national security letters are a legitimate investigative tool, and to draw conclusions without knowing what the underlying facts are, people have to be careful about that.").

In the absence of preliminary relief, citizens will be gagged from participating in one of the most important debates of our time – the debate about whether to limit or expand the FBI's powers under the Patriot Act to spy on innocent people. The resulting irreparable harm goes far beyond the harm presumed whenever the government suppresses truthful speech, it goes to the heart of our democratic system.

## CONCLUSION

For the foregoing reasons, plaintiffs respectfully ask the Court to grant their motion for a preliminary injunction, and to enjoin defendants from enforcing Section 2709(c) against the plaintiffs for disclosing the mere fact that the FBI served a National Security Letter on Library Connection.

Respectfully submitted,



Annette M. Lamoreaux (ct25769)  
ACLU of Connecticut Foundation  
32 Grand Street  
Hartford, CT 06106  
Ph: 860-247-9823 x 211  
Fax: 860-728-0287  
E-mail: [annettel@acluct.org](mailto:annettel@acluct.org)  
Cell: 860-299-6724

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Ph: 212-549-2601  
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E-mail: [annb@aclu.org](mailto:annb@aclu.org)

August 30, 2005

## CERTIFICATE OF SERVICE

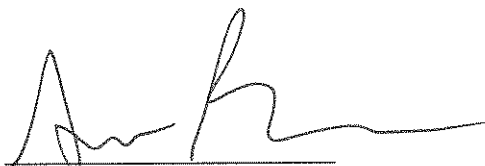
As per an agreement with defendants, I hereby certify that on August 30, 2005, I emailed a true and correct copy of the REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION to Lisa Perkins, at [lisa.perkins@usdoj.gov](mailto:lisa.perkins@usdoj.gov), and to Carlton Greene, at [carlton.greene@usdoj.gov](mailto:carlton.greene@usdoj.gov). Also on August 31, 2005, I caused the REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION to be sent by sent by federal express to the following counsel:

By Federal Express:

KEVIN J. O'CONNOR  
LISA PERKINS  
United States Attorney  
District of Connecticut  
New Haven Office  
Connecticut Financial Center  
157 Church Street, Floor 23  
New Haven, CT 06510

By Federal Express:

Carlton Greene  
U.S. Department of Justice  
Federal Programs Branch  
20 Massachusetts Avenue, NW  
Room 7230  
Washington, DC 20530



Ann Beeson  
American Civil Liberties Union  
Foundation  
National Legal Department  
125 Broad Street, 17th Floor  
New York, NY 10004  
Ph: 212-549-2601  
Fax: 212-549-2651  
E-mail: [annb@aclu.org](mailto:annb@aclu.org)