

Under Seal

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse at Foley Square 40 Centre Street, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Caption [use short title]

Docket Number(s): 05-4896-cv

Motion for: Emergency closure of hearing

John Doe et al.,
Plaintiffs-Appellees

Set forth below precise, complete statement of relief sought:
Close hearing set for 3:00 pm on
September 28 to the public,
or in the alternative, conduct
hearing telephonically

v.
Alberto Gonzales et al.,
Defendants-Appellants.

MOVING PARTY: Alberto Gonzales et al.
 Plaintiff Defendant
 Appellant/Petitioner Appellee/Respondent

OPPOSING PARTY: John Doe et al.

MOVING ATTORNEY: Scott R. McIntosh
[name of attorney, with firm, address, phone number and e-mail]
Department of Justice
950 Pennsylvania Ave NW, Room 97259
Washington DC 20530
Phone 202-514-4052
scott.mcintosh@usdoj.gov

OPPOSING ATTORNEY [Name]: Ann Beeson
[name of attorney, with firm, address, phone number and e-mail]
ACLU Foundation
125 Broad Street 15th Floor
New York, New York 10004
212-509-2500
amb@aclu.org

Court-Judge/Agency appealed from: District of Connecticut

Please check appropriate boxes:

Has consent of opposing counsel:
A. been sought? Yes No
B. been obtained? Yes No
Is oral argument requested? Yes No
(requests for oral argument will not necessarily be granted)
Has argument date of appeal been set? Yes No
If yes, enter date _____

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? Yes No N/A
Has this relief been previously sought in this Court? Yes No

Requested return date and explanation of emergency:
3:00 pm on September 28, when
hearing will be held

Signature of Moving Attorney: [Signature]
Date: 9/21/05

Has service been effected? Yes No
[Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED** **DENIED**.

FOR THE COURT:
ROSEANN B. MacKECHNIE, Clerk of Court

Date: _____

By: _____

FILED UNDER SEAL

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.)	No. 05-4896-cv
)	
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,)	
)	
Defendants-Appellants.)	
)	
)	

MEMORANDUM IN SUPPORT OF UNOPPOSED EMERGENCY MOTION
TO CLOSE HEARING OR CONDUCT TELEPHONIC HEARING

This Court has scheduled a hearing at 3:00 p.m. tomorrow, September 28, to hear the plaintiffs-appellants' emergency motion to vacate the stay pending. The defendants-appellants hereby move for this Court to close the scheduled hearing to the public or, in the alternative, to conduct the hearing telephonically in a non-public manner. This relief is required because the grounds for the plaintiffs' motion cannot be discussed in open court without disclosing the very information that the stay is intended to preserve from disclosure. As discussed further below, the plaintiffs do not oppose the granting of this relief.

The plaintiffs' motion rests on the recent publication in the New York Times of an article that undertakes to identify plaintiff John Doe. The plaintiffs argue that the publication of the New York Times article effectively lets "the cat out of the bag" and eliminates any basis for continuing to stay the district court's preliminary injunction. The government is opposing that motion on the ground that neither the article itself nor the temporary presence of information about Doe's identity on judicial web sites has defeated the government's interest in preventing Doe from disclosing its own identity.

It will be exceedingly difficult, if not impossible, for the parties and the court to discuss the basis for the plaintiffs' motion in open court without effectively confirming the substance of the New York Times article and thereby conclusively identifying Doe. Simply identifying the New York Times article as the basis for the motion would effectively make clear to any member of the audience, including members of the press who may be in attendance, that Doe was correctly identified in the article, since there would be no conceivable reason for the plaintiffs to move to lift the stay on the basis of the Times article if that article were incorrect. Likewise, virtually any questions that the Court might pose regarding the impact of the Times article, and virtually any answer that the parties might give to such questions, would notify the audience of the article's accuracy. More generally, the plaintiffs' "cat out of the bag" argument cannot be meaningfully discussed without disclosing what event is claimed to have let the cat out of the bag, and thereby confirming the import of the article.

For these reasons, the government requests that the Court close tomorrow's hearing to the public so that the Court and the parties can discuss the motion candidly without disclosing the very information that is the subject matter of the stay and the appeal. If the Court denies the motion, the

closure of the hearing will protect the efficacy of the denial. And if the Court instead grants the motion, it can make a transcript of the hearing available at an appropriate time to the public, thereby serving whatever interest the public may have in knowing what went on during the hearing.

Alternatively, the government requests that the Court conduct the hearing telephonically, in a manner that confines the discussion to the participants. The hearing was originally set for telephonic argument, and reverting to that arrangement would eliminate the risk – indeed, the near-certainty – that the hearing itself will effectively reveal the information that is at stake in this appeal.

Counsel for the government has informed Ms. Ann Beeson, counsel for the plaintiffs, of the government's intention to seek this relief. Ms. Beeson has informed counsel for the government that the plaintiffs do not oppose the government's motion, but note that any court considering whether to deny the public access to judicial records or proceedings 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); *United States v. Alcantara*, 396 F.3d 189, 201 (2d Cir. 2005).

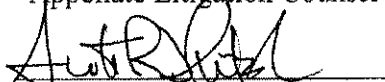
Respectfully submitted,

Deputy Attorney General

PETER D. KEISLER
Assistant Attorney General

GREGORY G. KATSAS
Deputy Assistant Attorney General

DOUGLAS N. LETTER
Appellate Litigation Counsel

A handwritten signature in black ink, appearing to read "Scott R. McIntosh", is written over a horizontal line.

SCOTT R. McINTOSH
Special Counsel, Appellate Staff
Civil Division, Room 7259
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
202-514-4052

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2005, I filed and served the EMERGENCY MOTION TO CLOSE HEARING OR CONDUCT HEARING TELEPHONICALLY by causing one copy to be transmitted to the Court by fax and by causing one copy to be sent by fax and electronic mail to:

Ann Beeson
Jameel Jaffer
Melissa Goodman
National Legal Department
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
212-549-2500



Scott R. McIntosh