

FILED UNDER SEAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALBERTO GONZALES, in his official capacity as
Attorney General of the United States, ROBERT S.
MUELLER III, in his official capacity as Director of the
Federal Bureau of Investigation, and 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,
and AMERICAN CIVIL LIBERTIES UNION
FOUNDATION,

Plaintiffs-Appellees.

No. 05-0570-cv

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

No. 05-4896-cv

MEMORANDUM IN SUPPORT OF MOTION
FOR PARTIAL CLOSURE OF ORAL ARGUMENT

The defendants-appellants in the two above-captioned appeals hereby move to close a portion
of the consolidated oral argument in these appeals. The grounds for this motion are as follows:

1. These two appeals present challenges to the constitutionality of 18 U.S.C. 2709. That statute authorizes the government to issue national security letters (NSLs) that direct wire and electronic communication service providers to provide specified information relevant to an authorized counter-terrorism or counter-intelligence investigation. Section 2709 further provides that the recipient of an NSL may not disclose that the government has sought or obtained information pursuant to the statute.

2. In No. 05-0570-cv, the District Court for the Southern District of New York has issued a permanent injunction that prohibits the government from enforcing Section 2709 in all cases. In No. 05-4896-cv, the District Court for the District of Connecticut has issued a preliminary injunction that prohibits the government from enforcing the non-disclosure requirement of Section 2709 with respect to the plaintiffs' disclosure of the identity of the NSL recipient in that case. The government has appealed both of these orders, and the injunctions in both cases have been stayed pending appeal.

3. On September 20, 2005, the Court consolidated the appeals in No. 05-0570 and No. 05-4896 for purposes of oral argument. The consolidated argument has been placed on the Court's calendar for November 2, 2005.

4. On September 22, 2005, the plaintiffs in No. 05-4896 moved to vacate the stay in that case on the ground that the recipient of the NSL had been publicly identified in a newspaper article and a court-operated database. The court heard oral argument on that motion on September 28, 2005. The government moved to close the hearing to the public because the plaintiffs' arguments and the facts underlying them could not be discussed in open court without effectively revealing the very information about the recipient's identity that the government was appealing to keep secret. The Court granted the government's motion and closed the hearing in its entirety to the public.

5. The plaintiffs have renewed their arguments regarding the effect of the newspaper article and the judicial database as a ground for affirmance of the preliminary injunction in No. 05-4896. See Brief for the Plaintiffs-Appellees, No. 05-4896, at pp. 22-27. As a consequence, the forthcoming merits hearing on November 2, like the stay vacatur hearing on September 28, will require the parties and the court to address arguments and facts that cannot be discussed publicly without effectively disclosing the NSL recipient's identity.

6. Since the November 2 argument will also involve a number of additional issues that *can* be discussed publicly, there is no need for the argument to be closed in its entirety. Instead, it will be sufficient for the Court to provide for a partial closure of the argument, thereby providing an opportunity for the parties to address the matters that cannot be discussed publicly while allowing the public to observe the remainder of the argument.

7. The government has filed a consent motion to enlarge the consolidated argument time in these cases from fifteen minutes per side to thirty minutes per side. If the Court grants that motion, the government suggests that the Court reserve five minutes per side for discussion of the matters referred to in paragraph 4 above. Thus, the Court can hear argument in open court for fifty minutes (twenty-five minutes per side), then close the courtroom and hear argument for the remaining time (five minutes per side). If the Court does not enlarge the time for the argument, the amount of time devoted to the closed portion of the argument can be revised accordingly.

8. If the Court closes the specified portion of the argument to the public, the Court should also direct the Clerk to ensure that the corresponding portion of the Court's tape recording of the argument is not made available to the public following the argument.

The defendants-appellants therefore respectfully request that the Court close a portion of the forthcoming oral argument and that the corresponding portion of the argument recording not be made available to the public.

Respectfully submitted,

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 'S. R. McIntosh', written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2005, I filed and served the foregoing sealed MOTION FOR PARTIAL CLOSURE OF ORAL ARGUMENT by causing an original and four copies to be delivered to the Court by hand and by causing one copy to be sent by electronic mail and Fedex to:

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Scott R. McIntosh