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No. 05A295

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN DOE, ET AL., APPLICANTS

v.

ALBERTO GONZALES, ET AL.

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

_____

# MEMORANDUM IN OPPOSITION TO APPLICATION TO VACATE STAY PENDING APPEAL

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**STATEMENT**

The Federal Bureau of Investigation (FBI) is currently engaged in a secret counter-terrorism investigation. As part of that investigation, the FBI is seeking relevant information from an electronic communication service provider through issuance of a National Security Letter (NSL). In order to preserve the secrecy and effectiveness of such investigations, a federal statute prohibits the provider from publicly disclosing information about receipt of the NSL. The government is currently appealing from an injunction that

would permit the provider publicly to disclose its identity as an NSL recipient during the course of the ongoing investigation. The court of appeals has stayed the injunction and expedited the appeal. The applicants now ask this Court for an order that would vacate the stay and allow the provider to violate the statute by immediately disclosing its identity and thereby moot the government's pending appeal.

The application to vacate the stay should be denied. The Second Circuit has carefully considered the competing considerations and has determined that a stay is essential to prevent, during the pendency of the appeal, the very disclosure that Congress determined to bar in a statutory scheme designed to protect the national security. At the same time, the Second Circuit set an expedited briefing schedule to ensure a prompt decision of the merits of applicants' First Amendment claim. The orderly process of litigation that the court of appeals has prescribed should be permitted to proceed, not vitiated through extraordinary action by this Court. That is particularly true because the government's interest in protecting the confidentiality of its investigation is compelling (and remains so despite media reports of applicants' identity), while applicants' interest in participating in the public debate over legislative

revision to the statutory provisions authorizing NSLs will suffer no substantial impairment if the stay is left in place.

1. The President of the United States has charged the FBI with primary responsibility for conducting counterintelligence and counter-terrorism investigations in the United States. See Exec. Order No. 12333 §§ 1.14(a), 3.4(a), 46 Fed. Reg. 59941 (1981). The FBI is currently engaged in extensive investigations into threats, conspiracies, and attempts to perpetrate terrorist acts and foreign intelligence operations against the United States and its interests abroad. C.A. App. A-90 to A-91. The FBI's experience with counterintelligence and counter-terrorism investigations has shown that electronic communications play a vital role in advancing terrorist and foreign intelligence activities and operations. Id. at A-94. Accordingly, pursuing and disrupting terrorist plots and foreign intelligence operations often require the FBI to seek information relating to the electronic communications of particular individuals.

The statutory provision at issue in this case, 18 U.S.C. 2709, was originally enacted by Congress in 1986 to assist the FBI in its counterintelligence and counter-terrorism investigations. Section 2709 empowers the FBI to issue a type of administrative subpoena

commonly referred to as a National Security Letter or "NSL." Section 2709 is one of several federal statutes that authorize the FBI or other government authorities to issue NSLs in connection with foreign counterintelligence and counter-terrorism investigations. See 12 U.S.C. 3414(a)(1), 3414(a)(5); 15 U.S.C. 1681u, 1681v; 50 U.S.C. 436.

Section 2709 authorizes the FBI to request "subscriber information" and "toll billing records information," or "electronic communication transactional records," from wire or electronic communication service providers. 18 U.S.C. 2709(a). Section 2709 does not provide the FBI with authority to seek the content of any wire or electronic communication. See S. Rep. No. 541, 99th Cong., 2d Sess. 44 (1986). In order to issue an NSL, the FBI Director or his designee must certify that the information sought is "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." 18 U.S.C. 2709(b)(1)-(2). When an NSL is issued in connection with an investigation of a "United States person," the Director or his designee must also certify that the investigation is "not conducted solely on the basis of activities protected by the first amendment." Ibid.

To maintain the secrecy and effectiveness of counterintelligence

and counter-terrorism investigations, 18 U.S.C. 2709(c) provides that "[n]o wire or electronic communication service provider or officer, employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section." Each of the other statutes that authorizes the issuance of NSLs includes a similar non-disclosure requirement. See 12 U.S.C. 3414(a)(1); 12 U.S.C. 3414(a)(5); 15 U.S.C. 1681u; 15 U.S.C. 1681v; 50 U.S.C. 436(b). Those provisions reflect Congress's recognition that "the FBI could not effectively monitor and counter the clandestine activities of hostile espionage agents and terrorists if they had to be notified that the FBI sought their * * * records for counterintelligence investigations." H.R. Rep. No. 690(I), 99th Cong., 2d Sess. 15 (1986); see also H.R. Rep. No. 1383, 95th Cong., 2d Sess. 228 (1978) (discussing 12 U.S.C. 3414(a)(3) and explaining that the non-disclosure requirement "assure[s] the absolute secrecy needed for the investigations covered by [the provision]"). Congress has imposed similar non-disclosure requirements in connection with the use of other investigative techniques in counterintelligence and counter-terrorism investigations. See 50 U.S.C. 1802(a)(4)(A), 1822(a)(4)(A), 1842(d)(2)(B), 1861(d)(2).

2. This case arises out of an authorized FBI counter-terrorism investigation, the background of which is described in a classified declaration submitted to the district court. Pursuant to that investigation, the FBI delivered an NSL issued under Section 2709 to an electronic communication service provider that has been identified in this litigation as John Doe. C.A. App. A-24. Doe is a consortium of Connecticut libraries that provides its member libraries with a variety of services, including Internet access. Id. at A-9, A-16 to A-17.

The NSL directed Doe to provide the FBI with "any and all subscriber information, billing information and access logs of any person or entity" associated with a particular IP address at a particular time. C.A. App. A-24. As required by 18 U.S.C. 2709(b), the FBI certified in the NSL that the information sought was relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities. Ibid. The basis for that certification is explained in the FBI's classified declaration. The NSL informed Doe that 18 U.S.C. 2709(c) prohibited Doe and its officers, agents, and employees from "disclosing to any person that the FBI has sought or obtained access to information or records under these provisions." Ibid.

Doe did not comply with the NSL. Instead, Doe, the American Civil Liberties Union, and the American Civil Liberties Union Foundation (the applicants in this Court) filed suit in federal district court, seeking an injunction against enforcement of 18 U.S.C. 2709 in this or any other case. See C.A. App. A-7 to A-22 (complaint); id. at A-21 to A-22 (prayer for relief). Applicants' complaint, which was filed under seal, alleged that Section 2709 is facially unconstitutional under the First, Fourth, and Fifth Amendments. Id. at A-8, A-21. The applicants further alleged that the non-disclosure requirement in Section 2709(c) violates the First Amendment. See ibid.

In consultation with the government, the applicants subsequently prepared a redacted version of the complaint for public release. See C.A. App. A-25 to A-40. The redactions were intended to allow the applicants to make public as much information about the litigation as possible without disclosing Doe's identity or the target of the underlying investigation that prompted issuance of the NSL. The redacted complaint alleges, inter alia, that Doe is "a member of the American Library Association" (id. at A-35) and "believes that it should not be forced to disclose" any of "its library and Internet records" (id. at A-26). Immediately after the release of the

redacted complaint, the ACLU issued a press release reiterating that the NSL seeks information from an organization with library records. See C.A. App. A-102 to A-104. A number of media organizations, including the New York Times and the Washington Post, subsequently published articles to the same effect. See, e.g., id. at A-105 to A-107.

3. Applicants moved in the district court for a preliminary injunction against enforcement of the statutory prohibition on disclosure of Doe's identity. They contended that the non-disclosure provision prevents them from informing Congress, which is currently considering legislative revisions to 18 U.S.C. 2709, about the kind of institution that has received the NSL in this case. They also argued that the non-disclosure provision prevents Doe from informing libraries and their patrons about the claimed threat to intellectual freedom posed by Section 2709, and from discussing and developing standardized procedures and policies for responding to the receipt of future NSLs.

The government opposed the motion for preliminary injunctive relief, arguing that the applicants are not likely to prevail on the merits of their First Amendment claim and that the balance of harms weighs decisively against allowing a public disclosure that would

give notice to the target of the NSL that his activities may be the object of an ongoing government counter-terrorism investigation. The government pointed out that the release of the redacted complaint, and the ensuing press release and news coverage, have provided the public and Congress with substantially the same information about the application of Section 2709 that the applicants claim they are currently unable to disclose. The government further noted that disclosing the identity of the specific recipient of the NSL would not meaningfully further the public and congressional debate about Section 2709, but could alert the target of the NSL to the government's investigation and therefore could compromise the investigation itself.

On September 9, 2005, the district court issued a preliminary injunction under which the government was "enjoined from enforcing 18 U.S.C. § 2709(c) against the applicants with regard to Doe's identity." C.A. Spec. App. SPA-31. The court acknowledged that "the investigation clearly relates to national security"; that "[t]he government has a legitimate interest and duty in undertaking an investigation that includes this NSL"; and that "the NSL was not issued solely on the basis of First Amendment activities." Id. at SPA-18. The district court nevertheless concluded that the

applicants are likely to establish that Section 2709(c) is unconstitutional as applied to their public disclosure of Doe's identity in this case. Id. at SPA-12 to SPA-29. The court further held that the applicants were irreparably harmed by the application to them of the statutory ban on disclosure of Doe's identity. Id. at SPA-10 SPA-12.

The district court issued a temporary stay of its injunction to permit appellate review. C.A. Spec. App. SPA-29 to SPA-31. The court explained, inter alia, that the government "would * * * be irreparably harmed should the preliminary injunction enter and the circuit court later reverses [the district] court" because "[o]nce revealed, Doe cannot be made anonymous again." Id. at SPA-30.

4. The government filed a notice of appeal from the preliminary injunction and moved in the Second Circuit for a stay pending appeal. On September 20, 2005, the court of appeals granted the government's motion. The court explained: "Although there is a question as to the likelihood of [the government's] success on the merits and some injury to [applicants] if a stay is granted, the [government] ha[s] demonstrated that [it] will suffer irreparable harm and the public interest [will be] significantly injured if a stay is not granted." Application App. D. The court established an expedited briefing

schedule under which all briefing will be completed by October 11, 2005. Ibid.

Two days later, the applicants moved in the court of appeals for vacatur of the stay. The applicants contended that, in light of the intervening publication of a newspaper article in the Ne York Times identifying the library consortium that received the NSL as the plaintiff in this case, based on information from a court-operated website, the stay no longer served its purpose. The government opposed the motion, arguing that Doe's public confirmation of its own identity would do greater damage than the prior media reports. The court of appeals denied the motion to vacate the stay "on the ground that the additional circumstances relied upon by [the applicants] do not materially alter the balance of harms * * * ." Application App. E.

**ARGUMENT**

**THE APPLICATION TO VACATE THE STAY PENDING APPEAL SHOULD BE DENIED**

Although a Circuit Justice has the power to dissolve a stay entered by a court of appeals, this Court's "cases make clear that this power should be exercised with the greatest of caution and should be reserved for exceptional circumstances." CFTC v. British

American Commodity Options Corp., 434 U.S. 1316, 1319 (1976) (Marshall, J., in Chambers). As Justice Powell explained:

> Respect for the judgment of the Court of Appeals dictates that the power to dissolve its stay, entered prior to adjudication of the merits, be exercised with restraint. A Circuit Justice should not disturb, except upon the weightiest considerations, interim determinations of the Court of Appeals in matters pending before it. The reasons supporting this reluctance to overturn interim orders are plain: when a court of appeals has not yet ruled on the merits of a controversy, the vacation of an interim order invades the normal responsibility of that court to provide for the orderly disposition of cases on its docket. Unless there is a reasonable probability that the case will eventually come before this Court for plenary consideration, a Circuit Justice's interference with an interim order of a court of appeals cannot be justified solely because he disagrees about the harm a party may suffer. The applicants, therefore, bear an augmented burden of showing both that the failure to vacate the stay probably will cause them irreparable harm and that the Court eventually either will grant certiorari or note probable jurisdiction.

Certain Named and Unnamed Non-Citizen Children and Their Parents v. Texas, 448 U.S. 1327, 1330-1331 (1980).

In this case, the court of appeals struck a careful balance between the interests of the opposing parties by granting a stay pending appeal while placing the case upon a highly expedited briefing schedule. See Applic. App. D. In ruling on the application to vacate the stay, the question is not (as applicants apparently assume, see Applic. 8) whether Members of this Court would have

balanced the competing factors in the same manner as did the Second Circuit panel. Rather, the question is whether applicants have identified the sort of exceptional circumstances that would warrant intervention by this Court in a case currently pending before the court of appeals. Applicants cannot make that showing.

## I. APPLICANTS CANNOT ESTABLISH A REASONABLE PROBABILITY THAT THE COURT WILL ULTIMATELY GRANT CERTIORARI IN THIS CASE

A. Counter-terrorism and counterintelligence investigations are conducted in secret because they cannot be conducted effectively in any other way. Such investigations are long-range, forward-looking, and prophylactic in nature; the government aims to anticipate and disrupt clandestine intelligence activities and terrorist attacks on the United States before they occur. C.A. App. A-91 to A-92. If targets learn that their activities are being investigated, they can take action to avoid detection or disrupt the government's intelligence-gathering efforts. Id. at A-92. Disclosures about the scope or progress of a particular investigation would also allow targets to determine the degree to which the FBI is aware of their activities and to alter the timing or methods of their operations. Id. at A-92 to A-93. Information about the sources and methods used by the FBI to acquire information, if made available to the public,

could similarly be used both by the immediate targets of an investigation and by other terrorist and foreign intelligence organizations. Id. at A-92 to A-94, A-97 to A-98. Cf. e.g., Department of the Navy v. Egan, 484 U.S. 518, 527 (1988) ("This Court has recognized the Government's 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business."); Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) (per curiam) ("The Government has a compelling interest in protecting * * * the secrecy of information important to our national security.").

Like its many statutory analogues (see pp. 4-5, supra), 18 U.S.C. 2709(c) is designed to further the government's compelling interest in the secrecy of counter-terrorism and counterintelligence investigations. When the FBI directs a third party to produce information concerning the target of such an investigation, that demand for production unavoidably alerts the third party to the existence of investigative activities that cannot safely be disclosed to the public at large. Provisions such as Section 2709(c) serve to confine knowledge of the ongoing investigation to the smallest feasible category of private parties -- i.e., those from whom the government has directly requested information. Such provisions,

moreover, impose minimal burdens on the third party's communicative activities, since they prohibit disclosure only of information that the third party acquired from the government itself. See pp. 14-17, infra.

In any individual case, the precise extent to which public disclosure of the issuance of an NSL will impair the underlying investigation may be difficult to determine. Congress, however, has directed that "[n]o wire or electronic communication service provider, or officer, employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section." 18 U.S.C. 2709(c) (emphasis added). Congress's decision to adopt a categorical rule is entitled to substantial respect from a reviewing court. The Second Circuit reasonably concluded that, at least until the merits of applicants' constitutional claims have been resolved by the court of appeals, that congressional judgment should be given continued effect.

B. Applicants identify no plausible reason to suppose that this Court is likely to grant certiorari at a future stage of this case. The constitutionality of 18 U.S.C. 2709(c) is supported by court of appeals decisions holding that a private party ordinarily has no

First Amendment right to disclose information about a secret government investigation that the party learned only through its own participation in the investigation.

In Kamasinksi v. Judicial Review Council, 44 F.3d 106 (2d Cir. 1994), for example, the court of appeals considered and rejected a First Amendment challenge to a Connecticut statute that restricted disclosure of information relating to confidential investigations of judicial misconduct. The statute provided that "any individual called by the [investigating] council for the purpose of providing information shall not disclose his knowledge of such investigation to a third party prior to the decision of the council whether probable cause exists," but it expressly permitted disclosure of information "known or obtained independently of any such investigation." Conn. Gen. Stat. § 51-51l. An individual who had filed a judicial misconduct complaint contended that the non-disclosure requirement violated the First Amendment. 44 F.3d at 109. The district court held that the statute was constitutional, and the Second Circuit affirmed that decision. Id. at 109-112.

In analyzing the constitutional challenge, the Second Circuit distinguished between different types of disclosures pertaining to allegations of judicial misconduct. See 44 F.3d at 110-112. The

court held that the State could not constitutionally prohibit an individual from disclosing "the substance of [his] complaint or testimony, i.e., [his] own observations and speculations regarding judicial misconduct." Id. at 110. The court concluded, however, could constitutionally bar disclosure either of "the fact that a complaint has been filed or that testimony has been given," or of "information gained through interaction with the [Judicial Review Council]." Id. at 110-111. The Court explained that "[t]he State's interest in the quality of its judiciary * * * is an interest of the highest order"; that this interest was furthered by conducting investigations of judicial misconduct on a confidential basis; and that prohibiting disclosure of information about a party's participation in the investigation, or of information learned though that participation, was a constitutionally permissible means of maintaining the confidentiality of the investigation. Id. at 110, 111-112.

Other courts of appeals, applying similar constitutional analysis, have likewise rejected First Amendment challenges to prohibitions on the disclosure of information obtained through participation in secret government proceedings. In Hoffman-Pugh v. Keenan, 338 F.3d 1136 (10th Cir. 2003), the Tenth Circuit rejected

a First Amendment challenge to a Colorado statute that sought to preserve the secrecy of grand jury proceedings by prohibiting witnesses from disclosing "what transpires or will transpire before the grand jury." 338 F.3d at 1139 (quoting State v. Richard, 761 P.2d 188, 192 (Colo. 1988)). The Tenth Circuit explained that "a [constitutional] line should be drawn between information the witness possessed prior to becoming a witness and information the witness obtained through her actual participation in the grand jury process." Id. at 1140. In In re Subpoena to Testify before Grand Jury Directed to Custodian of Records, 864 F.2d 1559 (11th Cir. 1989), the Eleventh Circuit drew the same line in rejecting a First Amendment challenge to a federal grand jury closure order. Id. at 1564.

In a related context, this Court has also recognized that restrictions on a party's disclosure of information obtained through participation in confidential proceedings stand on a different and firmer constitutional footing than restrictions on the disclosure of information obtained by independent means. In Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), the Court upheld a judicial order that prohibited parties to a civil suit from disclosing sensitive financial information obtained through pretrial discovery. See id. at 27-29. In rejecting a First Amendment challenge to the order, the

Court noted that the parties "gained the information they wish to disseminate only by virtue of the trial court's discovery processes," which themselves were made available as a matter of legislative grace rather than constitutional right. Id. at 32. The Court reasoned that "control over [disclosure of] the discovered information does not raise the same specter of government censorship that such control might suggest in other situations." Ibid. The Court added that the order was "not the kind of classic prior restraint that requires exacting First Amendment scrutiny" because it "prevent[ed] a party from disseminating only that information obtained through the use of the discovery process" and left the party free to disseminate any information "gained through means independent of the court's processes." Id. at 33-34.[1]

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[1] In Butterworth v. Smith, 494 U.S. 624 (1990), this Court held that Florida could not constitutionally prohibit a grand jury witness from disclosing the substance of his testimony after the term of the grand jury had ended. See id. at 629-636. The Court's holding appears to be limited to restrictions on a witness's disclosure of the substance of his testimony -- i.e., the information that he obtained independently and then communicated to the grand jury -- rather than to a witness's public statement that he testified in the grand jury proceedings. See id. at 632 (distinguishing Rhinehart on the ground that "[h]ere * * * we deal only with [the witness's] right to divulge information of which he was in possession before he testified before the grand jury, and not information which he may have obtained as a result of his participation in the proceedings of the grand jury"); id. at 636 (state interests involved "are not

C. In order to satisfy the requirements for vacatur of the court of appeals' stay order, applicants must demonstrate a "reasonable probability" that this Court will ultimately decide to adjudicate the merits of the parties' dispute. See pp. 10-11, supra. That requirement reflects the fact that the authority of this Court (or of a Circuit Justice) to vacate a court of appeals' stay order rests on 28 U.S.C. 1651(a), which authorizes the issuance of "all writs necessary or appropriate in aid of [this Court's] * * * jurisdiction[]." See Coleman v. Paccar Inc., 424 U.S. 1301, 1303 (1976) (Rehnquist, J., in Chambers) ("[I]f I have authority as Circuit Justice to vacate the stay [entered by the court of appeals], it must be on the ground that the vacation of the stay is 'in aid of this Court's jurisdiction' to review by certiorari a final disposition on the merits."); id. at 1302-1303 (discussing 28 U.S.C. 1651); cf. Bagley v. Byrd, 534 U.S. 1301, 1302 (2001) (Stevens, J.,

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sufficient to overcome [the witness's] First Amendment right to make a truthful statement of information he acquired on his own"); ibid. (Scalia, J., concurring) ("Quite a different question is presented * * * by a witness' disclosure of the grand jury proceedings, which is knowledge he acquires not 'on his own' but only by virtue of being made a witness."). In any event, the Court's holding in Butterworth is limited to the period of time after the grand jury has been discharged. See id. at 632-633. The federal investigation that precipitated the NSL at issue in this case currently remains ongoing.

in Chambers) (citing 28 U.S.C. 1651(a) for the proposition that "a stay is warranted only when 'necessary or appropriate in aid of [our] jurisdictio[n]'").

Applicants cannot satisfy that requirement. To the contrary, in the circumstances of this case, vacatur of the Second Circuit stay would effectively preclude this Court from exercising plenary review of applicants' constitutional challenge to the disclosure bar imposed by 18 U.S.C. 2709(c) because the case will become moot if applicants are allowed to confirm the identity of the library consortium that received the pertinent NSL. See C.A. App. SPA-30 (district court notes that, "[o]nce revealed, Doe cannot be made anonymous again"). Thus, far from serving "in aid of" this Court's jurisdiction, the order that applicants request would substantially undermine the Court's ability to resolve the constitutional issues presented by this case. For the same reason that prevention of mootness is "[p]erhaps the most compelling justification for a Circuit Justice to upset an interim decision by a court of appeals," New York v. Kleppe, 429 U.S. 1307, 1310 (1976) (Marshall, J., in Chambers), the prospect that intervention by this Court will produce mootness counsels heavily against vacatur of the Second Circuit stay.

D. Applicants contend that the governmental interest in

preventing disclosure is reduced in this case, and their own First Amendment claim correspondingly strengthened, because Doe's identity has previously been reported in the media and was temporarily ascertainable through examination of judicial websites. But as the courts have repeatedly recognized in the Freedom of Information Act context, "even if a fact has been the subject of media speculation, its official acknowledgement could damage national security." Public Citizen v. Department of State, 11 F.3d 198, 201 (D.C. Cir. 1993); Afshar v. Department of State, 702 F.2d 1125, 1130 (D.C. Cir. 1981). Here, although the New York Times reported information that it purported to derive from judicially operated websites, no such information is currently available from those websites or any other official source. Doe's own public confirmation that it was the recipient of the pertinent NSL would heighten, at least incrementally, the risk that the underlying investigation will be compromised. And while Doe's identity may have been potentially retrievable from judicial websites during a brief window of time, applicants have offered no evidence that the target of the investigation actually learned Doe's identity through examination of those websites. In any event, to the extent that applicants' constitutional claims depend on the idiosyncratic circumstances of

this case, the likelihood that this Court will ultimately grant certiorari to consider those claims on the merits is further reduced.

## II. THE BALANCE OF HARMS WEIGHS AGAINST VACATUR OF THE COURT OF APPEALS' STAY ORDER

Applicants argue that, particularly in light of media reports identifying Doe as the recipient of the pertinent NSL, the harm to applicants resulting from continued enforcement of 18 U.S.C. 2709(c) outweighs the harm to the government that vacatur of the Second Circuit stay would entail. That claim is incorrect.

A. As a legal matter, the interest of the Executive Branch in avoiding disclosure of information relating to national security is not forfeited by disclosures -- particularly, as here, entirely inadvertent and unauthorized disclosures -- by other Branches of the government. See, e.g., Frugone v. CIA, 169 F.3d 772, 774 (D.C. Cir. 1999); Fitzgibbon v. CIA, 911 F.2d 755, 765-766 (D.C. Cir. 1990); Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982). Indeed, in the FOIA context, the D.C. Circuit has held that the interests of a particular Executive Branch agency in avoiding disclosure of national security information are not lost even through a disclosure by another agency. Frugone, 169 F.3d at 774-775. And as a practical matter, Doe's self-identification as an NSL recipient

would establish that fact with greater certainty, and thus more greatly threaten the governmental interests protected by 18 U.S.C. 2709(c), than does a media report to the same effect.

B. The effect of vacating the court of appeals stay would be to preclude the enforcement, as applied to the facts of this case, of a provision of an Act of Congress. That interference with the prerogatives of a coordinate Branch is properly regarded as a significant harm. See Walters v. National Association of Radiation Survivors, 468 U.S. 1322, 1323 (1984) (Rehnquist, J., in Chambers) ("The presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered * * * in balancing hardships."). And, to the extent that the likelihood of interference with an ongoing investigation is otherwise subject to dispute, Congress's decision to impose a categorical bar on disclosure of an NSL recipient's identity, rather than to target a subset of such disclosures deemed especially likely to subvert law enforcement interests, should not lightly be set aside.

C. Maintaining the Second Circuit stay in effect during the pendency of the government's appeal will not subject applicants to substantial harm. Applicants' core argument is that the statutory

prohibition on disclosure of Doe's identity will prevent them from participating effectively in ongoing public and congressional debate concerning the advisability of amending 18 U.S.C. 2709, related anti-terrorism provisions, or both. See, e.g., Applic. 20 ("Maintaining the stay * * * would limit speech critical of the government and skew public debate."); id. at 20-24. Applicants suggest that the stay rests on the premise that they "have nothing more to add to the Patriot Act debate." Id. at 20.

The text of 18 U.S.C. 2709(c) makes clear that applicants have substantially exaggerated that provision's effects. Under Section 2709(c), the only fact that an electronic communication service provider is barred from disclosing is that the FBI "has sought or obtained access to information or records under" 18 U.S.C. 2709. Section 2709(c) does not prevent the recipient of an NSL, or anyone else, from taking part in any public debate on the scope, application, and desirability of Section 2709. NSL recipients remain free to "lobby Congress for additional safeguards," to "educate and organize" the "library community" or any other sector of the public, to "coordinate procedures for responding to NSLs," and to call public attention to the "dangers" purportedly raised by Section 2709. An NSL recipient's inability to disclose that it has received an NSL

does not materially limit any of those endeavors.[2]

Under the terms of the district court's injunctive order, the government was enjoined only "from enforcing 18 U.S.C. § 2709(c) against the [applicants] with regard to Doe's identity." C.A. Spec. App. SPA-31. Pplicants themselves emphasize that they are not "seek[ing] to disclose any information about the subject of the NSL or any other specific details about the NSL's issuance." Applic. 5. In light of the restrictions on their communicative activities that applicants are willing to accept, the ban on disclosure of Doe's identity is particularly unlikely to impede applicants' ability to make their views known and to influence ongoing legislative and public debates. And there is no reason to think that Congress will find Doe's general views about the wisdom of Section 2709 more persuasive simply because of the bare fact that Doe has been served

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[2] Applicants have publicly stated that an NSL has been served on a member of the American Library Association, and major news organizations have reported that Section 2709 is being used to seek records from a library. Thus, to the extent that the applicants wish to call the attention of the public and Congress to the potential applicability of Section 2709 to libraries, they have already accomplished that objective -- without having to identify the entity that received the NSL in this case. The American Library Association lobbies Congress on behalf of its members and is free to note that one of those members has been served with an NSL; identification of the particular member would add nothing of substance to that effort.

with an undescribed NSL.[3]

D. In minimizing the harm to the government that vacatur of the Second Circuit stay would entail, applicants treat the prior media reports concerning Doe's identity as the practical equivalent of self-identification by Doe itself. Applicants ignore those materials entirely, however, in describing the burdens that 18 U.S.C. 2709(c) place upon their own efforts to influence public and congressional perceptions. If the news reports on which applicants rely established Doe's identity with the same certainty as would Doe's own self-identification, no substantial harm will be caused by prohibiting Doe from confirming what is (in the applicants' view) a settled factual proposition.

E. The government's appeal from the district court injunction is currently pending before the Second Circuit. The court of appeals considered applicants' motion to vacate the stay, and it concluded

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[3] Applicants assert that if the stay is lifted, they can "provide vital firsthand information to Congress and the public about the FBI's use of NSLs to demand library records." Applic. 16; see id. at 18 (applicants "can provide Congress and the public with a first-hand account of the use of Patriot Act powers"). As explained above, the only "firsthand information" that the lifting of the stay would allow the applicants to provide is Doe's name. The applicants have already disclosed the kind of institution that Doe is and the kind of records that it maintains, and they neither seek nor would be allowed to provide more specific information about the NSL itself.

that "the additional circumstances relied upon by [applicants] do not materially alter the balance of harms in favor of [the government]." Applic. App. E. Whether or not Members of this Court would have reached the same conclusion if sitting on the court of appeals, applicants have wholly failed to identify the sort of exceptional circumstances that might justify this Court's intervention in ongoing court of appeals litigation.

## CONCLUSION

The application to vacate the stay pending appeal should be denied.

Respectfully submitted.

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