**No. _____**

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

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

*Appellants*,

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,

*Appellees*.

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On Emergency Application to Vacate Stay
Entered By The United States Court Of Appeals
For The Second Circuit

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# APPELLANTS' EMERGENCY APPLICATION TO VACATE STAY

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**FILED UNDER SEAL**

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## CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, appellants confirm that none of the appellants have parent companies nor do any publicly held companies own ten percent or more of their stock.

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## INTRODUCTORY STATEMENT

At issue in this case is an FBI-imposed gag under 18 U.S.C. § 2709(c) that is preventing plaintiff-appellant Library Connection (hereinafter "plaintiff" or "John Doe") from participating in an urgent public debate of extraordinary importance to this nation – the debate over whether to limit or expand the FBI's power under the Patriot Act to obtain personal records without court approval. Specifically, the gag is preventing John Doe from disclosing that it received a National Security Letter from the FBI demanding library records. John Doe seeks this Court's intervention to lift a stay entered by the Court of Appeals pending the government's appeal of a district court decision granting plaintiffs preliminary relief from the gag. 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. B, at 26 (*Doe v. Gonzales*, No. 05-1256) (hereinafter "Op.").

Defendants sought and obtained a stay from the Second Circuit that – if not lifted by this Court – would effectively foreclose John Doe from participating in the Patriot Act debate. That debate is happening right now. During the week of October 10th, 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 John Doe and to gag it. John Doe is a crucial messenger in the debate because it is the only known NSL recipient that can provide firsthand knowledge of the FBI's use of NSLs to demand library records. The public, the media, and members of Congress have expressed a strong and immediate interest in hearing John Doe speak.

The government has argued throughout this litigation that the gag on John Doe's speech is justified by a single, compelling national security interest: that disclosure of John Doe's identity as the recipient of the NSL would harm the underlying counterterrorism investigation by tipping off a target. As the district court observed, the government provided no evidence that the disclosure of Doe's identity would have this effect. Whether the government's argument had merit at one time, in any event, it has no merit now. The day after the Court of Appeals granted the stay pending appeal, the parties learned that *The New York Times* had correctly confirmed John Doe's identity, and the parties subsequently learned that there were five additional instances in which John Doe's identity had been available to the public for approximately twenty days on federal court websites. John Doe moved promptly to vacate the stay, invoking a long line of authority holding that there is no conceivable justification for suppressing truthful information that has already been made public. Without any opinion or explanation, the Court of Appeals denied the motion.

Now that John Doe's identity has been widely disseminated, the government's sole basis for the gag has wholly evaporated, and there is no conceivable further justification for employing the government's coercive powers to silence American citizens during a national political debate of historic consequence. John Doe accordingly moves this Court to vacate the stay and to remand for further proceedings and to thereby permit John Doe and its representatives to participate meaningfully in the Patriot Act debate before that debate has concluded.

## JUSRISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction under the All Writs Act, 28 U.S.C. § 1651. A "Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding the issue of the stay." *Western Airlines, Inc. v International Brotherhood of Teamsters,* 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (citation omitted).

## BACKGROUND AND PROCEEDINGS BELOW

On August 9, 2005, plaintiff Library Connection, joined by plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation, filed this lawsuit to challenge the constitutionality of 18 U.S.C. § 2709, a statute that authorizes the 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 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).

In July 2005, an FBI agent served an NSL on plaintiff John Doe. John Doe is a consortium of 26 libraries in Connecticut serving more than 288,000 library card-holders as well as many other library users who do not hold library cards. App. C, at 1 (*Doe v. Gonzales*, No. 05-1256, Sealed Portion of Ruling) (hereinafter "Sealed Op."). John Doe provides Internet access for use by staff and patrons at 19 of its member libraries. *Id*. John Doe also administers an automated library system known as CONNECT, which member libraries use for circulation and cataloguing of library material and for tracking community borrowing and library usage. CA 53, ¶3 (Christian Decl.)

The NSL "directed [John Doe] 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. A (National Security Letter). The NSL states that 18 U.S.C. § 2709(c) "prohibits any officer, employee or agent of [John Doe] from disclosing to any person that the FBI has sought or obtained access to information or records under these provisions." *Id.* John Doe "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." Court of Appeals Appendix ("CA") 53, ¶25 (Christian Decl.). Thus, rather than comply with the NSL, John Doe retained counsel to challenge the constitutionality of the NSL and the NSL statute. Op. at 4. Because of the gag, John Doe 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.*

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 the government 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 argued that their need for preliminary relief was acute because the gag is preventing them from disclosing firsthand information that is vital to the ongoing public and congressional debate about the Patriot Act. Congress is in the final stages of passing legislation that could limit or expand a number of Patriot Act provisions, including Section 2709.

On September 9, 2005, after hearing oral argument and reviewing *ex parte* classified evidence submitted by the government, the U.S. District Court for the District of Connecticut granted plaintiffs' motion for a preliminary injunction and enjoined the government from enforcing the gag provision with regard to John Doe's identity. Op. at 29. The district court first found that plaintiffs are suffering irreparable harm:

> 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*.

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, the government filed its notice of appeal and an emergency motion for stay pending expedited appeal. Plaintiffs opposed the motion. On September 20, 2005, after hearing oral argument, the court of appeals granted the government's motion for a stay pending appeal. Though the court of appeals set an expedited schedule for the appeal, with oral argument tentatively scheduled during the week of October 31st, that schedule will not resolve the appeal in time for John Doe to speak before Congress finalizes legislation to limit or expand the Patriot Act.

The day after the Court of Appeals granted the government a stay pending appeal, the parties learned that *The New York Times* had correctly reported John Doe's identity, and they subsequently learned that there were at least five additional instances in which

John Doe's identity had been available to the public for approximately 20 days on federal court websites. Four disclosures were made in documents widely available on the district court website, and one disclosure was made on the national PACER website.[1] The government itself was directly responsible for the document disclosures, whereas the national PACER disclosure can be attributed to court error.

Specifically, on August 31, 2005, the government filed a redacted version of Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction on the public docket in the District of Connecticut, after the government *itself* had reviewed and redacted the document according to the sealing procedures agreed upon by the parties. The government, however, failed to redact Library Connection's name in three discrete places within the document, and failed to redact Peter Chase's name (Library Connection's Vice President) in another place. App. H (unredacted excerpts from Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction). This document was available for approximately 20 days, until September 21, on the district court website, and was also widely distributed to the media and the public through the ACLU's website. App. F at ¶¶ 13-15 (Goodman Decl.).[2]

In addition, on September 21, 2005, *The New York Times* reported that a "search of a court-operated Web site offered a pointer to the plaintiffs' identity. There, a case numbered 3:2005cv-1256 is listed under the caption, 'Library Connection Inc. v.

[1] PACER "is a service of United States Judiciary. The PACER Service Center is run by the Administrative Office of the United States Courts." "Frequently Asked Questions," http://pacer.psc.uscourts.gov/faq.html#GP1.

[2] On September 21, 2005, the district court removed the document that disclosed Library Connection's identity from the public docket over plaintiffs' objection. The district court also removed the reference to Library Connection that could be found on the PACER system, as reported by *The New York Times*. App. F at ¶¶ 13-15 (Goodman Decl.).

Attorney General.'" App. G. *The New York Times* had correctly discovered that the plaintiffs' identity was available on the PACER web site, at http://pacer.psc.uscourts.gov/pacerdesc.html. App. F at ¶¶ 8-9 (Goodman Decl.). Since August 31, 2005, Library Connection's identity as the John Doe plaintiff in this case was revealed to any member of the public who simply went to the PACER Service Center webpage and searched for this case by docket number. *Id.* at ¶ 9.

Plaintiffs immediately moved to vacate the stay on the ground that the *sole fact* that the stay was designed to suppress had been widely and irrevocably disseminated to the public. In response, the government insisted, improbably, that the stay retained its utility because the court had removed the identifying information from PACER shortly after its publication in *The New York Times* and because the subject of the NSL most likely could not have "confirmed" the article's accuracy against the court website. Notwithstanding the transparent weakness of the government's rationale for continued enforcement of the stay, the Court of Appeals denied plaintiffs' motion without opinion or explanation. App. E. Plaintiffs now move this Court to vacate the stay.

**ARGUMENT**

In determining whether to stay an order of a trial court pending appeal, appellate courts are guided by 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 maintaining the stay. The stay has caused and will continue to 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 undeniably in the public interest. As the only known recipient of a National Security Letter demanding library records, John Doe and its representatives are perhaps the most powerful messengers for educating the public and Congress about the dangers of the NSL power and its permanent gag. 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 – in particular because vacating the stay would permit the disclosure of no fact that has not already been widely disseminated. For these reasons, the stay should be vacated and the matter remanded for further proceedings.

## I. The Government is Unlikely to Succeed on Appeal and Will Not Be Irreparably Injured by the Further Disclosure of a Widely Disseminated Fact.

Throughout this litigation, the government has argued vigorously that the prior restraint on speech at issue here was justified by a single, compelling national security imperative: that disclosure of plaintiff's identity as the recipient of the NSL would harm the underlying counterterrorism investigation by tipping off the target. As the district court persuasively held, that rationale was dubious from the start. Now that plaintiff's identity has been widely disseminated, the government's sole basis for gagging plaintiff has wholly evaporated, and there is no conceivable further justification for employing the government's coercive powers to silence American citizens during a national political debate of historic consequence.

This Court and lower courts have repeatedly held, in a long and unbroken line of cases, that once speech has been publicly disseminated and confirmed by official sources,

there can be no justification for restraining its further publication. *See, e.g., Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1306 (1983) (noting that Court has not "permitted restrictions on the publication of information that would have been available to any member of the public"); *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97, 103 (1979) (noting previous holding that "once the truthful information was publicly revealed or in the public domain the court could not constitutionally restrain its dissemination") (internal quotation marks omitted); *Oklahoma Pub. Co. v. District Court In and For Oklahoma County*, 430 U.S. 308, 309 (1977) (per curiam) ("[T]he press may not be prohibited from 'truthfully publishing information released to the public in official court records.'") (citation omitted); *see also Virginia Dept. of State Police v. The Washington Post*, 386 F.3d 567, 579 (4th Cir. 2004) (holding that government had no compelling government interest in keeping information sealed where the "information ha[d] already become a matter of public knowledge"); *Snepp v. United States,* 444 U.S. 507, 512 n.8 (1980) (suggesting that government would have no interest in censoring information already "in the public domain"); *McGehee v. Casey,* 718 F.2d 1137, 1141 (D.C. Cir. 1983) (noting that "[t]he government has no legitimate interest in censoring . . . information . . . derive[d] from public sources"); *United States v. Marchetti,* 466 F.2d 1309, 1313 (4th Cir. 1972) (noting that First Amendment "precludes . . . restraints with respect to information which is . . . officially disclosed").

Here, the government's position is further weakened by its repeated failures to ensure that the purportedly sensitive information was not published and disseminated. The government failed to redact John Doe's identity in not just one but *four* places in a document it filed on the public docket. *See* App. F. These disclosures were available on

the district court's web site, and widely disseminated to the media, for twenty days. As this Court has recognized, where the government seeks to suppress confidential information, it must make an affirmative effort to ensure that information is not disclosed. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 1047 (1975) (noting that where a need for secrecy or confidentiality exists, the government must "respond by means which avoid public documentation or other exposure of private information"). Indeed, the most recent blunders are not the first instances in this litigation in which the government has failed to redact identifying information in documents filed on the public docket. *See* App. D at ¶¶ 4-5 (Goodman Decl.). If disclosure of John Doe's identity constituted a legitimate threat to the nation's security, as the government has asserted in justifying the permanent gag at issue here, one would expect substantially more diligence from the Department of Justice and the FBI in protecting that information from disclosure.[3]

Now that Library Connection has been publicly identified as the John Doe plaintiff in this action, the prior restraint on speech is utterly useless as a national security measure – though highly effective as an impermissible means to exclude a critical voice from the national debate about the Patriot Act. In evaluating the constitutionality of any restraint on speech, a court must determine "how effectively a restraining order would operate to prevent the threatened danger." *Nebraska Press Assoc. v. Stuart*, 427 U.S.

[3] In opposition to plaintiffs' emergency motion to vacate the stay in the Second Circuit, defendants argued that these mistakes resulted from the short deadline they were given by the district court to prepare the redactions. Defendants' argument and declaration to that effect are highly misleading. In fact, the district court had directed the parties to consult and prepare redacted versions several days previously on a phone conference with the parties, and defendants had failed to comply with that directive until the day before the hearing on plaintiffs' motion for a preliminary injunction. In addition, the defendants could have easily reviewed the documents more closely after they were filed, and did not.

539, 562 (1976). When a prior restraint is futile or ineffective because the public already has access to the information, the restraint on speech cannot pass constitutional muster. *See, e.g., Florida Star v. B.J.F.,* 491 U.S. 524, 535 (1989) (noting that "punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance" a state interest); *Globe Newspaper Co. v. Superior Ct. for Norfolk County,* 457 U.S. 596, 610 (1982) (noting that mandatory closure of courtroom in sex-offense cases "hardly advances [the government's] interest in an effective manner" because press and public could learn identity of sex-offense victims from variety of other sources); *Daily Mail.,* 443 U.S at 104-05 (rejecting restraint where suppressed information had already been announced on three radio stations, because it was obvious that restraint "d[id] not accomplish its stated purpose"); *see also* Eric B. Easton, *Closing the Barn Door After the Genie is Out of the Bag: Recognizing a "Futility Principle" in First Amendment Jurisprudence*, 45 DePaul L. Rev. 1, 11-25 (Fall 2005).

Once information is publicly disclosed in court documents and disseminated to the public, "[t]he genie is out of the bottle." *Gambale v. Deutsche Bank,* 377 F.3d 133, 144 (2004). Because a court does not "have the power, even were [it] of the mind to use it if [it] had, to make what has . . . become public private again," *id.*, maintaining the stay in this case is both futile and needlessly coercive. The Court and the government simply "have not the means to put the genie back." *Id.* Put another way, "Once the cat is out of the bag, the ball game is over." *Id.* (citing *Calabrian Co. v. Bangkok Bank Ltd.*, 555 F.R.D. 82 (S.D.N.Y. 1972)).

Even prior to the public dissemination of John Doe's identity, the government had failed to offer a compelling justification for the permanent gag. The government

suggested, for example, 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 failed to demonstrate 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 cardholder 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 (emphasis added). The district court concluded that "the information that is before the court suggests strongly that revealing John Doe's identity will not harm the investigation." Op. at 17. Thus, even prior to the widespread disclosure of John Doe's identity, the government had failed to demonstrate a compelling interest in enforcing the challenged gag.

In fact, the government did not offer *any* specific rationale for prohibiting plaintiffs from disclosing John Doe's identity. The government dedicated considerable energy to explaining why secrecy might be necessary in some cases. But the question is whether the statute is constitutional *as applied here*. This question the government simply ignored. As the district court explained:

> 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 persuade the court that disclosing Doe's identity would harm the underlying investigation. Op. at 17-18.

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*, this 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* 457 U.S. at 607-08. The Court elaborated:

> [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.*, 491 U.S. at 539-540; *Capital Cities Media, Inc.*, 463 U.S. at 1307; *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 692 (6th Cir. 2002); *McGehee*, 718 F.2d at 1148.

All of this is well-settled law. Indeed, in its reply brief filed with the court of appeals in *Gonzales v. Doe,* which involves a facial challenge to section 2709(c), the government 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, in another case, the government acknowledged the propriety of the case-by-case inquiry it now seeks to short-circuit.

The district court, affording due deference to the government's legitimate interest in conducting national security investigations, Sealed Op. at 1, and even permitting the *ex parte* submission of secret evidence to ensure that the government's concerns received the most thorough consideration, concluded that the government had fallen short of its burden. The court's decision was correct. The subsequent disclosure of John Doe's identity in the press and on federal court websites have rendered the decision incontrovertible.

## II. Maintaining the Stay Would Irreparably Harm Plaintiffs' First Amendment Rights and Threaten the Public Interest in a Fully Informed Debate About 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 has been prolonged by the Court of Appeals' grant of 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. John Doe is a crucial messenger in the Patriot Act debate because it is the only known NSL recipient that can provide firsthand knowledge to Congress and the public about the FBI's use of NSLs to demand library records. 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 in favor of vacating the 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); S. 1389, 109th Cong. (2005). The House and Senate are scheduled to meet in conference during the week of October 10th 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").

To understand the particular value and urgency of John Doe's speech, it is important to consider the history of the Patriot Act debate. 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."). The debate has intensified in the past year as Congress considers whether to limit or expand the new powers.[4] 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

[4] *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).

them even basic information about its use of the statute.[5] Indeed, the Department of Justice recently refused to provide to all members of Congress the number of NSLs issued by the FBI under Section 2709. *See* App. J (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, let alone detailed information, about its use of new Patriot Act powers, 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. 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. John Doe is thus a much-needed messenger in the Patriot Act debate because it can provide Congress and the public with a first-hand account of the use of Patriot Act powers. Maintaining the stay and thereby extending the gag on John Doe would further skew the debate and thereby harm the public interest.

John Doe would also be a uniquely powerful voice in the debate because it is the first organization to confirm that the FBI has used Patriot Act powers to demand library records. As *The New York Times* put it, the "library issue has become the most divisive in the debate on whether Congress should expand or curtail government powers under the

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[5] *See* 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.").

Patriot Act." *See, e.g.,* Eric Lichtblau, *Libraries Say Yes, Officials Do Quiz Them About Users,* N.Y. TIMES, Jun. 20, 2005, at A11; *see also* Adon M. Pallasch, *U.S. Attorney to Debate ACLU Official on Patriot Act Provision,* CHICAGO SUN TIMES, Jun. 26, 2005, at pg. 32 (noting that provision of the Patriot Act that "allow[s] federal investigators to seize people's library records" is the Patriot Act's "most controversial provision"). Prior to this case becoming public, the government had said publicly on a number of occasions that it had never used Patriot Act provisions against a library. *See* CA 67-8, ¶2 (Romero Decl.); *see also* Ca 63-4, ¶36 (Christian Decl.). In a September 2003 speech, then Attorney General Ashcroft characterized concerns voiced by libraries and librarians about the use of the Patriot Act as "baseless hysteria." Norman Oder, *Ashcroft Agrees to Release Report on FBI Library Visits,* LIBRARY JOURNAL, Oct. 15, 2003, at http://www.libraryjournal.com/article/CA325063.html. Emily Sheketoff, of the American Library Association, testified in the district court about the importance of having a representative from the library community testify personally about the impact of the Patriot Act on libraries. She explained that the Justice Department had "publicly mocked librarians' concerns." CA 85, ¶8 (Sheketoff Decl.). In the face of that dismissive attitude, ALA faced an "an uphill battle to convince Members of Congress that our fears were indeed valid and not mere 'hysteria.'" *Id.* at ¶9. To overcome the apathy caused by the Justice Department's past assurances, Congress and the public need to hear directly from library service providers and librarians who have "first-hand evidence about the impact of law enforcement interest in library records." *Id.* at ¶16.

This Court has long 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 democratic self-governance. *Stromberg v. California*, 283 U.S. 359, 369 (1931) ("[T]he 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). Maintaining the stay is plainly contrary to the public interest because it would limit speech critical of the government and skew public debate about expanded executive powers at the very moment when full and open debate is most necessary.

The government's pat assertions that plaintiffs have nothing more to add to the Patriot Act debate are flatly contradicted by the intense interest in the case from the media, from Congress, and from the public. This case has already engendered widespread media coverage.[6] *The New York Times* alone has published five articles about the case since it became public in late August, first speculating and later

[6] *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; 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.

confirming that Library Connection is the John Doe plaintiff.[7] More than 25,000 people have signed a petition calling on Attorney General Gonzales to "Let John Doe Speak." *See* http://action.aclu.org/letjohndoespeak; *see also* "*Librarians Protest Patriot Act,*" The Chronicle of Higher Education: Wired Campus Blog, Sept. 28, 2005, at http://wiredcampus.chronicle.com/2005/09librarians_prot.html. A number of newspaper editorials have condemned the government's gag on John Doe.[8] Several members of Congress have called for the gag to be lifted and have indicated that plaintiffs' full and public participation in the debate would provide valuable insight in ongoing congressional deliberations over the NSL power. *See* App. I (statements of Senators Russ Feingold and Dick Durbin and Representatives Bernie Sanders and Jerrold Nadler, Sept. 28, 2005). 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 maintaining a stay that would prolong the gag.

Equally important, the continued enforcement of the stay would substantially – indeed, irreparably – harm the First Amendment rights of John Doe and its representatives. This 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

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[7] *See* Eric Lichtblau, *F.B.I., Using Patriot Act, Demands Library's Records,* N.Y. TIMES, Aug. 26, 2005; Alison Leigh Cowan, *At Stake in Court: Using the Patriot Act to Get Library Records,* N.Y. TIMES, Sept. 1, 2005; Alison Leigh Cowan, *Hartford Libraries Watch as U.S. Makes Demand,* N.Y. TIMES, Sept. 2, 2005; *Connecticut Librarians See Lack of Oversight Biggest Danger in Antiterror Law*, N.Y. TIMES, Sept. 3, 2005; App. G.

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

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. As this Court has noted,

> [T]he identity of the speaker is an important component of many attempts to persuade. A sign advocating "Peace in the Gulf" in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year old child's bedroom window or the same message on a bumper sticker of a passing automobile.

*City of Ladue v. Gilleo*, 512 U.S. 42, 56 (1994); *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, would like to tell their own stories. They would like to explain, in personal terms, how it felt 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 would like to educate and organize their fellow librarians, library associations, and the larger library community, and to coordinate procedures for responding to NSLs. CA 59-62, ¶¶29, 31-33 (Christian Decl.); CA 47-49, ¶¶11, 14-17 (Chase Decl.). They would like to alert their patrons and the general public to the dangers posed by the Patriot Act. CA 63, ¶35 (Christian Decl.); CA 47-8, 50-51, ¶13, 20 (Chase Decl.). They would like to have full and frank discussions with their staff and board. CA 59-60, ¶28, 30 (Christian Decl.); CA 50, ¶19 (Chase Decl.). They would like to be able to discuss this situation with own their families. CA 62-3, ¶34 (Christian Decl.); CA 57, ¶19 (Chase Decl.).

Most critically, if the stay were vacated, John Doe and its representatives would immediately lobby Congress for additional safeguards to be added to the Patriot Act. [9] 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.

CA 64-5, ¶36 (Christian Decl.); *see also* CA 50-51, ¶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

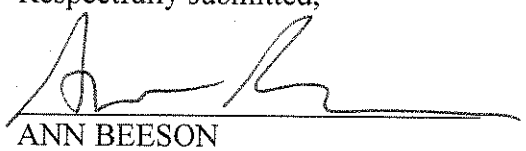
[9] The stay has further irreparably harmed plaintiffs because the gag has prevented John Doe and its representatives from engaging in *any* public education or advocacy about the NSL power. Especially now that John Doe's identity has been widely disseminated, there is no way that its representatives could appear publicly to discuss the Patriot Act without being asked by the press directly whether they are indeed representatives of the John Doe plaintiff. The only answer they could give, "I can't confirm or deny whether I am John Doe," would clearly establish that they are John Doe and thus risk violating the gag. While the government insists that John Doe can actively lobby Congress, its actions are significantly more equivocal about the scope of the gag. For example, the government took the position that plaintiffs could not attend the district court oral argument in their own case, even though mere attendance would not have required plaintiffs to speak at all. The government also continues to redact far more than the client's identity in legal documents in this case. 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.

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. 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 only to reauthorize the Patriot Act, but to create new, expanded surveillance powers. Maintaining the stay even as these efforts near their fruition will further distort the public debate while contributing nothing to the nation's security.

## CONCLUSION

For the reasons stated above, appellants respectfully ask the Court to vacate the stay entered by the Court of Appeals.

Respectfully submitted,



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October 3, 2005