UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

[redacted]
AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs,

v.

ALBERTO GONZALES, in his official capacity as Attorney General of the United States;
ROBERT MUELLER, in his official capacity as Director of the Federal Bureau of Investigation;
[redacted] in his official capacity as [redacted], Federal Bureau of Investigation,

Defendants.

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

Civ. Action No. 3:05cv1256 JCH

SEALED CASE

August 16, 2005

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

ANNETTE M. LAMOREAUX
American Civil Liberties Union
of Connecticut Foundation
32 Grand Street
Hartford, CT 06106
Ph: 860-247-9823

ANN BEESON
JAMEEL JAFFER
MELISSA GOODMAN
American Civil Liberties Union
Foundation
125 Broad Street, 17th Floor
Ph: (212) 549-2500

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Plaintiffs respectfully submit this Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction.

PRELIMINARY STATEMENT

Plaintiffs [redacted] the American Civil Liberties Union ("ACLU"), and the American Civil Liberties Union Foundation ("ACLUF") have filed this lawsuit to challenge the constitutionality of 18 U.S.C. § 2709, a statute that authorizes the Federal Bureau of Investigation ("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. In [redacted], an agent of defendant FBI served an NSL on plaintiff [redacted]. Because the NSL gags [redacted] and its counsel from "disclosing to any person" that the FBI has demanded information, plaintiffs filed their Complaint initially under seal.

Another district court has previously 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). Plaintiffs in this case ultimately seek the same relief. In the current motion, however, plaintiffs request preliminary relief on a narrow issue related to the application of the gag provision to them. Specifically, plaintiffs seek a preliminary injunction that would prohibit defendants from enforcing the gag provision against plaintiffs for disclosing *the mere fact that the FBI has used an NSL to demand sensitive information from plaintiff* [redacted]. Plaintiffs are entitled to preliminary relief because 1) they are likely to succeed in arguing that the gag is an unconstitutional prior restraint that is far from narrowly tailored to achieve any compelling government interest; and 2) their First Amendment rights will be irreparably harmed absent a preliminary injunction. The gag is preventing plaintiffs from disclosing information that is vital to the ongoing public and congressional debate about the Patriot Act, but that cannot

possibly jeopardize national security or any ongoing investigation. Plaintiffs believe that preliminary relief from the broad gag is crucial because Congress is expected to finalize legislation in the next month that could limit or expand a number of Patriot Act provisions, including Section 2709. If the public and members of Congress were aware that the FBI is using the NSL provision to demand records about library patrons, it would undoubtedly be more inclined to adopt additional safeguards that would limit the NSL power. Every day that plaintiffs are kept from speaking irreparably harms their First Amendments rights and those of the public. For these reasons, explained more fully below, plaintiffs respectfully ask the court to grant their motion for a preliminary injunction.

STATEMENT OF FACTS

A. The Challenged Statute

In its current form, as amended by the Patriot Act, Section 2709 authorizes the FBI to issue NSLs ordering "electronic communication service providers" ("ECSPs") to disclose "subscriber information," "toll billing records information," and "electronic communication transactional records" upon a certification that the information sought is "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." Pub. L. 107-56, Title V, § 505(a), 115 Stat. 365 (Oct. 26, 2001) (codified as 18 U.S.C. § 2709). An "electronic communication service" is "any service which provides to users thereof the ability to send or receive wire or electronic communications." *Id.* § 2510(15). Such services include not only what are commonly known as "Internet service providers," but also universities, businesses, public interest organizations, and public libraries.

Section 2709 does not require the FBI to meet a probable cause or individualized suspicion requirement of any kind before issuing an NSL. *See* 18 U.S.C. § 2709. Because

Section 2709 was amended by the Patriot Act to remove any requirement of individualized suspicion, the FBI may now use NSLs to demand sensitive information about innocent people. *See* Pub. L. 107-56, Title V, § 505(a), 115 Stat. 365 (Oct. 26, 2001). Section 2709 does not require the FBI to obtain judicial authorization before issuing an NSL, and does not specify any means by which the recipient of an NSL can challenge the letter's validity. *See* 18 U.S.C. § 2709.

Section 2709's gag provision prohibits a person served with an NSL from disclosing to any other person that the FBI has sought or obtained records. *See* 18 U.S.C. § 2709(c) ("No wire or electronic communication service provider, or officer, employee, or agent thereof, shall disclose to any person that the [FBI] has sought or obtained access to information or records under this section."). The gag provision, which on its face prohibits even consultation with counsel, applies in every case, whether or not the government can demonstrate a need for secrecy. The gag provision is indefinite and persists even after any legitimate need for secrecy has expired.

B. The Parties

Plaintiff [redacted] Decl. ¶3. [redacted] serve over 288,000 library card-holders, as well as many other library users who do not hold library cards. *Id.* [redacted] provides a number of services to [redacted] *Id.* It administers a[redacted] circulation and cataloging of library materials, and to track community borrowing and library usage. *Id.* [redacted] also provides Internet access for use by staff and patrons at [redacted]. *Id.* ¶4.

[redacted] possess a wide array of sensitive information about library patrons, including information about the reading materials borrowed by library patrons and about Internet usage by library patrons. [redacted] Decl. ¶7. [redacted] "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." [redacted] Decl.¶ 25. As [redacted], the [redacted] explains, "I believe that a free society depends on having spaces where people can explore various ideas, thoughts, and documents, both paper and electronic, without anyone, and especially without the government, keeping track of what they are looking at." *Id.* ¶15.

As a member of the American Library Association ("ALA"), [redacted] abides by ALA's policies on the confidentiality of information about library patrons. [redacted] Decl. ¶12. ALA is the oldest and largest library association in the world, with 64,000 members. *Id.* ¶13. Protecting library patron privacy and confidentiality has long been an integral part of the mission of libraries, because reader privacy is essential to the exercise of free speech, free thought, and free association. *Id.* In a library, the right to privacy is the right to open inquiry without having the subject of one's interest examined or scrutinized by others. *Id.* Librarians recognize an ethical responsibility to protect the privacy of library users. *Id.* ALA opposes "any use of governmental prerogatives that lead to the intimidation of individuals or groups and discourages them from exercising the right of free expression guaranteed by the First Amendment." American Library Association, Policy 53.4, adopted Feb. 2, 1973. The American Library Association has specifically opposed the expanded surveillance provisions of the Patriot Act as "a present danger to the constitutional rights and privacy rights of library users."

American Library Association, Resolution on the USA Patriot Act and Related Measures That Infringe on the Rights of Library Users, adopted January 29, 2003.

[redacted] is also a member of the Connecticut Library Association (CLA). [redacted] Decl. ¶11. [redacted] who is the [redacted] of [redacted] Board of Directors, currently serves as th[redacted] Decl. ¶¶1, 6. In that position [redacted] regularly plans and participates in events and programs to educate the library community and the public about threats to intellectual freedom. *Id.* ¶¶6, 8. [redacted] efines "'intellectual freedom' in the library context as the right of patrons to use public libraries as a space to explore different ideas, even controversial and unpopular ones, in privacy and absent the risk of government surveillance or monitoring." *Id.* ¶9. He believes that, "in order to participate in the democratic process, citizens need access to a wide variety of viewpoints on different topics." *Id.* [redacted] 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. [redacted] Decl. ¶25.

Plaintiff ACLU is a nationwide, non-profit, non-partisan organization with over 500,000 members dedicated to the constitutional principles of liberty and equality. Romero Decl. ¶2. The primary mission of the ACLU, which is a 501(c)(4) organization, is to educate the public about the civil liberties implications of pending and proposed legislation in Congress and in state and local legislatures; to directly lobby legislators and to provide analyses of such pending or proposed legislation; and to mobilize our members and other activists to lobby their legislators. *Id.* The ACLU Foundation is a separate 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil liberties cases, and educates the public about civil liberties issues. *Id.* ¶3. In the past two years, one of the core priorities of the ACLU

and the ACLUF has been to stem the backlash on civil liberties that has taken place in the name of national security. *Id.* ¶7. In particular, the ACLU and the ACLUF have been the leading voice of opposition to certain provisions Patriot Act. *Id.* Through their combined public education, litigation, and lobbying efforts, the ACLU and the ACLUF continue to play a critical role in influencing the public debate over the Patriot Act. *Id.* Lawyers for the ACLUF represent [redacted] in this action. *Id.* ¶21; [redacted] Decl. Exh. A.

C. The National Security Letter Served on [redacted]

On [redacted] FBI agent [redacted] of the FBI [redacted] Division, telephoned [redacted] to inform him that the FBI would be serving an NSL on [redacted] Decl. ¶16. [redacted] did not describe the substance of the letter, and did not notify [redacted] about the NSL's non-disclosure provision. *Id.* [redacted] asked [redacted] who could receive service of the NSL, and [redacted] told him that [redacted] as [redacted] of [redacted] would receive service. *Id.*

On [redacted] and another [redacted] delivered the NSL (hereinafter [redacted] NSL") to [redacted] Decl. ¶17. The letter, which is dated [redacted] is on FBI letterhead and signed by defendant [redacted] FBI [redacted] Division. *Id.*; [redacted] Decl. Exh. A. The NSL states that [redacted] "hereby directed 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 [redacted] Decl. ¶19; [redacted] Decl. Exh. A. The NSL does not specify any procedure by which [redacted] can challenge the validity of the NSL. [redacted] Decl. ¶23. The NSL states that 18 U.S.C. § 2709(c) "prohibits any

officer, employee or agent of [redacted] from disclosing to any person that the FBI has sought or obtained access to information or records under these provisions." [redacted] Decl. ¶21.

D. The Impact of the Gag on the Plaintiffs

The application of the gag in this case is preventing [redacted] the ACLU, and the ACLUF from disclosing the mere fact that the FBI used an NSL to demand sensitive records from [redacted] Romero Decl. ¶¶21-24, 27-30; [redacted] Decl. ¶¶11-20; [redacted] Decl. ¶¶28-36. The gag is preventing [redacted] from informing its [redacted] and their patrons, as well as other libraries and library associations, about the pressing threat to intellectual freedom posed by the NSL provision [redacted] Decl. ¶¶11-17; [redacted] Decl. ¶¶31-32. Before [redacted] was served with an NSL, [redacted] directors were unaware of the NSL provision of the Patriot Act. [redacted] Decl. ¶11 [redacted] Decl. ¶27. They were not aware that libraries could be construed as "electronic communication service providers" and thus fall under the purview of the NSL statute. *Id.* Indeed, "the existence of the NSL provision and its applicability to libraries is not generally known within the library community." *Id.; see also* Romero Decl. ¶26.

But for the gag, [redacted] would inform other libraries and library associations that the FBI is now using the NSL power to demand records about library patrons, and that libraries can be subject to the NSL provision. [redacted] Decl. ¶¶11-17; [redacted] Decl. ¶¶31, 32. [redacted] has not done so for fear that serious sanctions will be imposed. [redacted] Decl. ¶15; [redacted] Decl. ¶¶28, 30, 35. Yet [redacted] believes that disclosing these facts is necessary for libraries to "make informed choices about the ways in which they provide . . . Internet access to the public." *Id.* ¶14. Moreover, [redacted] wants to contact other

libraries and library associations, both locally and nationally, to discuss and develop standardized procedures and policies for responding to the receipt of future NSLs. [redacted] Decl. ¶15; [redacted] Decl. ¶¶31-32. Since the [redacted] NSL was served, [redacted] has received phone calls from libraries asking questions about the Patriot Act. [redacted] Decl. ¶16. For fear of violating the gag, he has "remained silent about any and all aspects of the NSL power, including its mere existence." *Id.*

[redacted] directors are also gagged from informing library patrons about the NSL. [redacted] Decl. ¶¶13, 20. Library patrons are "generally not aware that the FBI can demand their electronic and paper records without their knowledge and consent." *Id.* ¶13. This information is critical to many library patrons, because many library patrons "take the right of privacy within libraries very seriously," and "use books and computers within libraries under the assumption that what they read and view is private and free from government monitoring." [redacted] Decl. ¶20; *see also* [redacted] Decl. ¶15. But for the gag, [redacted] would disclose the threat that NSLs pose to intellectual freedom, and discuss that threat with other libraries, library associations, and the public [redacted] Decl. ¶¶ 11, 13-14, 16-17, 20; [redacted] Decl. ¶¶28-29, 31, 33, 35.

The gag is also preventing plaintiffs from disclosing information about the NSL to Congress, who is currently considering legislation to amend Section 2709 and other provisions of the Patriot Act. Romero Decl. ¶¶21-24, 27-30; [redacted] Decl. ¶¶35-36; *see also* [redacted] Decl. ¶¶18-20. The question of whether the FBI has used Patriot Act provisions to obtain information about library patrons has been of extraordinary interest in the library community, in the media, and in Congress. Romero Decl. ¶24; [redacted] Decl. ¶20; [redacted] Decl. ¶¶32, 36. Plaintiffs, ACLU, and ACLUF have worked closely with librarians and library associations in publicizing

the threat the Patriot Act poses to intellectual freedom in libraries, and has specifically publicized the threat posed by the NSL power. Romero Decl. ¶¶17-21, 24. On a number of occasions, the government has said publicly that it has never used Patriot Act provisions against a library. Romero Decl. ¶25; [redacted]ecl. ¶36; *see also* Stan Harris and Gaines Cleveland, *USA PATRIOT Act: Responding to Library Concerns,* United States Attorneys' Bulletin, Vol. 52, No. 4, p.45, July 2004, at http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5204.pdf.

The ACLU and ACLUF continue to play a key role in informing congressional debate about the Patriot Act. Romero Decl. ¶¶14-15. The gag is preventing them from speaking truthfully about how the FBI is using its NSL power. Romero Decl. ¶¶11-12, 21-24, 27-30. But for the gag, plaintiffs would tell members of Congress that the FBI has used the NSL authority to obtain information from libraries. Romero Decl. ¶¶27-30; [redacted]Decl. ¶36. If Congress were aware that the FBI is using the NSL provision in this way, it would undoubtedly be more inclined to adopt additional safeguards that would limit the NSL power. Romero Decl. ¶¶27-29. The gag is limiting the ACLU's ability to effectively mobilize members and activists to advocate for stricter limits on Patriot Act powers. Romero Decl. ¶¶22, 30.

The public and members of Congress need to know that an NSL has been served on a library before Congress finalizes legislation to reauthorize the Patriot Act, which is expected to happen in early fall. Romero Decl. ¶28. Plaintiffs are concerned that, while they are gagged from disclosing the FBI's use of the NSL power agains[redacted] President Bush, Attorney General Alberto Gonzales, FBI Director Robert Mueller, and key members of Congress are engaged in a vigorous public campaign to reauthorize and expand the FBI's spying powers under the Patriot Act. *Id.* ¶32. The gag provision silences those who are most likely to oppose the Patriot Act – those who know from first-hand experience exactly how the FBI is

using its provisions. *Id.*: [redacted] Decl. ¶36. The First Amendment rights of [redacted] the ACLU, and the ACLUF will be irreparably harmed if this gag continues. Romero Decl. ¶32.

ARGUMENT

Because plaintiffs seek a preliminary injunction to prevent enforcement of a statute, plaintiffs must establish (i) a irreparable harm absent the injunction and (ii) a likelihood of success on the merits. *Freedom Holdings, Inc. v. Spitzer,* 408 F.3d 112, 114 (2d Cir. 2005) (internal quotation marks omitted); *see also Rodriguez v. Debuono*, 175 F.3d 227, 234 (2d Cir. 1999). Under these standards, plaintiffs are plainly entitled to preliminary injunctive relief.

I. Plaintiffs are likely to succeed in their claim that the FBI may not, consistent with the First Amendment, gag [redacted] from disclosing the mere fact that it has received a National Security Letter.

A. As a prior restraint and a content-based ban on protected speech, the gag is subject to strict scrutiny.

The gag imposed under Section 2709 prevents plaintiffs from disclosing the mere fact tha[redacted] has received an NSL. The gag thus operates as a classic prior restraint because it stifles speech before it occurs. *See, e.g., Alexander v. United States*, 509 U.S. 544, 550 (1993) (A prior restraint "forbid[s] certain communications when issued in advance of the time that such communications are to occur") (internal quotation marks omitted); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975) (noting that the distinction between a "prior restraint" and "limits on expression imposed by criminal penalties" is "deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand"). The Supreme Court has repeatedly held that prior restraints are presumptively unconstitutional, and are "the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stewart*, 427 U.S.

539, 559 (1976); *see also New York Times Co. v. United States,* 403 U.S. 713, 714 (1971) ("[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity") (per curiam); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931) (prior restraints may be issued only in "exceptional circumstances," such as when necessary to prevent the overthrow of the government); *see also Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1305 (1983); *Southeastern Promotions, Ltd.*, 420 U.S. at 558-59; *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). As a prior restraint and a content-based restriction on speech, the gag is subject to strict constitutional scrutiny. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640-41 (1994) (content-based restrictions subject to strict scrutiny); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (same); *Kamasinski v. Judicial Review Council*, 44 F.3d 106, 109 (2d Cir. 1994) (same).

The gag in this case is particularly dangerous because it suppresses political speech about government activities -- speech at the very core of the First Amendment's protection. *See* [redacted] Decl. ¶¶11-20; Romero Decl. ¶¶21-24, 27-30; [redacted] Decl. ¶¶28-36. The Supreme Court has 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) ("a central purpose of the First Amendment was to protect the free discussion of governmental affairs") (internal quotation marks omitted). Speech that criticizes the exercise of government power is not only fully protected by the First Amendment, it is essential to self-governance. As the Supreme Court has explained,

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that

> changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.

Stromberg v. California, 283 U.S. 359, 369 (1931).

The Patriot Act is one of the most hotly debated issues of our time because it expanded the government's ability to spy on ordinary Americans. The gag in this case seriously restricts First Amendment rights by prohibiting citizens from disclosing and criticizing the exercise of government power under the Patriot Act. *See Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 192 (1999) ("[T]he First Amendment requires [courts] to be vigilant . . . to guard against undue hindrances to political conversations and the exchange of ideas."); *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) (The First Amendment "enable[s] every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them."); *United Public Workers of America v. Mitchell,* 330 U.S. 75, 111 (1947) (Black, J., dissenting) ("Legislation which muzzles . . . citizens threatens popular government, not only because it injures the individuals muzzled, but also, because its harmful effect on the body politic in depriving it of the political participation and interest of . . . our citizens."); *Associated Press v. United* States, 326 U.S. 1, 20 (1945) (noting that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public").

B. The gag, which prevents plaintiffs from disclosing the mere fact that [redacted] has received a National Security Letter, is far from narrowly drawn to achieve any compelling government interest.

Because the gag imposed by the [redacted] NSL is presumptively invalid as a prior restraint on core political speech, it must be enjoined unless the government can show that the gag is narrowly tailored to a compelling government interest. *See, e.g., Ashcroft v. American Civil Liberties Union*, 124 S. Ct. 2783, 2790-91 (2004); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874-75 (1997). The plaintiffs are likely to succeed in their First Amendment claim because the government cannot meet this high burden. In fact, another district court within the Second Circuit has already held that Section 2709(c), which authorizes the gag in this case, fails to survive strict constitutional scrutiny. *See Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004). In a 120-page opinion, that court ruled that the entire NSL statute violated the First and Fourth Amendments, and enjoined the FBI from issuing National Security Letters to plaintiffs or others. (The court stayed enforcement of its judgment pending appeal.) *Id.* at 526-27. Specifically with regard to the gag provision, the Court first concluded that Section 2709(c) was a "pure[ ] form of prior restraint" and a content-based restriction that "closes off [an] 'entire topic' from public discourse." *Id.* at 512-13. Though the Court acknowledged the "Government's interest in protecting the integrity and efficacy of international terrorism and counterintelligence investigations," it found the gag provision was far from narrowly tailored to address that interest. *Id.* at 513-14. Indeed, the Court found the scope of the gag provision to be "uniquely extraordinary" because it "*permanently* prohibits not only the recipient [of an NSL] but its officers, employees or agents, from disclosing the NSL's existence to '*any* person', in *every* instance in which an NSL is issued and irrespective of the circumstances prevailing at any given

point in time." *Id.* The court explained why such a broad gag provision posed grave dangers to our First Amendment freedoms:

> The Government's claim to perpetual secrecy surrounding the FBI's issuance of NSLs . . . presupposes a category of information, and thus a class of speech, that, for reasons not satisfactorily explained, must forever be kept from public view, cloaked by an official seal that will always overshadow the public's right to know. In general, as our sunshine laws and judicial doctrine attest, democracy abhors undue secrecy, in recognition that public knowledge secures freedom. Hence, an unlimited government warrant to conceal, effectively a form of secrecy *per se,* has no place in our open society. Such a claim is especially inimical to democratic values for reasons borne out by painful experience. Under the mantle of secrecy, the self-preservation that ordinarily impels our government to censorship and secrecy may potentially be turned on ourselves as a weapon of self-destruction.

Id. at 519-20. Accordingly, the Court struck down the gag provision on its face.

Plaintiffs believe this Court should ultimately strike down the gag provision on its face for the same reasons articulated in *Doe v. Ashcroft.* For the purposes of the present motion for preliminary relief, however, the Court need not go that far. It is obvious that the government has no compelling interest – indeed, it is hard to imagine any interest at all – in gagging [redacted]om disclosing the mere fact that it has received a National Security Letter. The government's general invocation of national security is plainly insufficient. *Doe v. Ashcroft*, 334 F. Supp. 2d at 514; *see also United States v. United States District Court for the Eastern Dist. of Mich.,* 407 U.S. 297, 314 (1972) ("The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent."); *New York Times,* 403 U.S. at 719 (Black, J., concurring) ("The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment."); *Worrell Newspapers of Indiana, Inc. v. Westhafer*, 739 F.2d 1219, 1223 (7th Cir. 1984) *aff'd*, 469 U.S. 1200 (1985). ("Even the

country's interest in national security must bend to the dictates of the First Amendment"). As the Supreme Court has said, "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured." *Turner Broad. Sys.*, 512 U.S. at 664 (internal quotation marks omitted).

Though plaintiffs recognize that the government may have an interest in preventing disclosure of the subject or other details about a particular NSL in certain circumstances and for a limited time period, that interest cannot justify a gag on the mere fact that the government used its expanded NSL power to demand information from a particular organization about a third party. Here, plaintiffs do not wish to disclose the details of the [redacted] NSL. They wish only to disclose the mere fact that [redacted] received an NSL.

The NSL gag in this case also fails strict scrutiny because it is not narrowly drawn. Even where the government's interest is compelling,

> An order in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

Carroll v. President of Princess Ann County, 393 U.S. 175, 183-84 (1968) (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)); *see also Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Playboy Entm't Group,* 529 U.S. at 804 ("[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative"); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Even assuming the government could meets its burden of establishing a compelling government interest in prohibiting disclosure of certain details about the [redacted] NSL, which is far from

clear, the current gag prevents plaintiffs from disclosing wholly innocuous information about the mere fact that the FBI has used its new powers. The gag is thus far from narrowly tailored, and plaintiffs are likely to succeed in their claim that the gag fails strict scrutiny.

II. Plaintiffs' First Amendment rights will be irreparably harmed if they cannot disclose the mere fact that [redacted] was served with a National Security Letter.

A plaintiff demonstrates irreparable harm where "absent a preliminary injunction [he or she] will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Freedom Holdings, Inc.*, 408 F.3d at 114 (internal quotation marks omitted). The harms caused by an alleged violation of a constitutional right are presumed to be irreparable. *See Connecticut Dep't of Environmental Protection v. O.S.H.A.,* 356 F.3d 226, 231 (2d Cir. 2004) (that "the alleged violation of a constitutional right triggers a finding of irreparable injury"); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (noting the "presumption of irreparable injury that flows from a violation of constitutional rights"). A prior restraint or direct limit on speech is the paradigmatic irreparable injury that warrants the grant of a preliminary injunction.

As the Supreme Court has unequivocally stated, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The Second Circuit has also emphasized that "[w]here a plaintiff alleges injury from a rule or regulation that *directly limits* speech, the irreparable nature of the harm may be presumed." *Bronx Household of Faith v. Bd. of Educ. of New York,* 331 F.2d 342, 349 (2d Cir. 2003) (emphasis added); *Green Party of New York State v. New York State Bd. of Elections,* 389 F.3d 411, 418 (2d Cir. 2004) ("[W]here a First Amendment right has been violated, the irreparable harm requirement for the issuance of a preliminary

injunction has been satisfied."); *Beal v. Stern*, 184 F.3d 117, 123 (2d Cir. 1999) ("A statute that threatens freedom of expression to a significant degree by its nature gives rise to irreparable injury."); *Bery v. City of New York,* 97 F.3d 689, 693 (2d Cir. 1996) ("Violations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction.").

Plaintiffs are entitled to preliminary relief because the gag is irreparably harming their First Amendment rights. The gag is preventing plaintiffs from disclosing fully protected speech about the government's use of expanded powers under the Patriot Act to demand sensitive records from libraries. *See* [redacted] Decl. ¶¶11-20; [redacted] Decl. ¶¶28-36; Romero Decl. ¶¶21-24, 27-30. [redacted] wants to communicate this information to [redacted] and their patrons, to other libraries and library associations in [redacted] and around the country, to the general public, and to elected officials. *See* [redacted] Decl. ¶¶11-20; [redacted] Decl. ¶¶28-36. [redacted] is particularly concerned that many libraries around the country do not know the FBI can use the NSL power to demand sensitive records about library patrons. *See* [redacted] Decl. ¶11. But for the gag, Plaintiff [redacted] would disclose this information. [redacted] Decl. ¶¶11-20; [redacted] Decl. ¶¶38-36.

Plaintiff ACLU, which has been the leading voice in opposing expanded surveillance powers under the Patriot Act, wants to disclose the information to its members, to the media, to the general public, and to Congress. *See* Romero Decl. ¶¶7-24; 27-30. In particular, plaintiffs wish to disclose the information immediately in order to contribute vital information to the public debate about whether to limit or expand Patriot Act powers. *Id.* ¶¶27-29. If Congress were aware that the FBI is using the NSL provision against libraries, it would be more inclined to

adopt additional safeguards that would limit the NSL power. *Id.* ¶28. Every moment the gag continues will exacerbate the irreparable harm to plaintiffs' First Amendment rights.

The need for preliminary relief in this case is particularly acute because the gag is infringing not just the rights of the plaintiffs to speak, but also the First Amendment rights of the public to obtain vital information about the Patriot Act. *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"); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace for ideas in which truth will ultimately prevail . . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences."). The FBI's ability to use its new Patriot Act surveillance powers has been the subject of extraordinary public debate.[1] *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."). Congress has held numerous hearings about the Patriot Act over the last year.[2] Yet the

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[1] *See, e.g.*, Loretta Waldman, *Patriot Act's Future Debated; 2 Republicans Have Different Views on Proposed Revisions,* HARTFORD COURANT, June 27, 2005, at B1; David Lightman, *Civil Liberties Watchdog Debated*, HARTFORD COURANT, July 24, 2005, at A1; *A Statute of Liberty?: Patriot Act, Designed To Protect, May Also Pry*, NEWSDAY, August 3, 2005, at A10; Eric Lichtblau, *Senator Faults Briefing on Antiterrorism Law*, N.Y. TIMES, Apr. 13, 2005, at A17; Dana Priest, *Panel Questions Patriot Act Uses,* WASH. POST, Apr. 28, 2005, at A7; *Provision in Patriot Act Is Rejected: Judge Curbs Access to Phone, Web Data*, THE BOSTON GLOBE, September 30, 2004, at A1; Editorial, *Judicial Pushback*, WASH. POST, October 11, 2004, at A22.

[2] *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*

government has done everything in its power to suppress even the most basic information about how the Patriot Act is being used. *See* Romero Decl. ¶¶25, 32. In early April 2005, Senator Arlen Specter (R-Pa) complained that the Department of Justice (DOJ) refused to reveal specific information about the use of the Patriot Act, even in closed-door briefings to Congress. Senator Specter noted that, "This closed-door briefing was for specifics ... [t]hey didn't have specifics." Eric Lichtblau, *Senator Faults Briefing on Antiterrorism Law*, N.Y. TIMES, Apr. 13, 2005, at A17; *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.").

The question of whether the FBI has used Patriot Act provisions to obtain information from libraries has been of extraordinary interest in the library community, in the media, and in Congress. *See* Romero Decl.¶24; [redacted] Decl. ¶20; [redacted] Decl. ¶¶32, 36; *see also* Eric Lichtblau, *Libraries Say Yes, Officials Do Quiz Them About Users,* N.Y. TIMES, Jun. 20, 2005, at A11 (noting that the "library issue has become the most divisive in the debate on whether Congress should expand or curtail government powers under the Patriot Act"); Adon M.

Senate Select Intelligence Comm.(Closed Mark-up), 109th Congress (June 7, 2005); *Patriot Act Reauthorization Before the Senate Select Comm. on Intelligence* (Closed Hearing), 109th Congress (May 26, 2005); *Oversight Hearing on the Implementation of the USA Patriot Act: Sections 505 and 804 Before the House Subcomm. on Crime, Terrorism, and Homeland Security*, 109th Congress (May 26, 2005); *Bill to Reauthorize Certain Provisions of the USA PATRIOT Act and for Other Purposes Before the Senate Select Comm. on Intelligence*, 109th Congress (May 24, 2005); *Open Hearing on USA PATRIOT Act Before the House Select Comm. on Intelligence*, 109th Congress (May 19, 2005); *Open Hearing on USA PATRIOT Act Before the House Select Comm. on Intelligence*, 109th Congress (May 11, 2005); *Continued Oversight of the USA PATRIOT Act Before the Senate Judiciary Comm.*, 109th Congress (May 10, 2005); *Oversight Hearing on the "USA PATRIOT Act: A Review for the Purpose of Its Reauthorization Before the House Judiciary Comm.*, 109th Cong. (Apr. 6, 2005); *Oversight of the USA PATRIOT Act Before the Senate Judiciary Comm.*, 109th Cong. (Apr. 5, 2005).

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"). On a number of occasions, the government has said publicly that is has never used Patriot Act provisions against a library. *See* Romero Decl. ¶2; *see also* [redacted] Decl. ¶36. 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. As recently as April 5, 2005, in testimony before the Senate Judiciary Committee, Attorney General Gonzalez again announced that the FBI had never used Section 215 of the Patriot Act, another provision that authorizes FBI demands for sensitive records, to seek information from a library. *See Oversight of the USA PATRIOT Act Before the Senate Judiciary Comm.*, 109th Cong. (Apr. 5, 2005) (statement of Attorney General Alberto Gonzalez); Dan Eggen, *Congress Urged to Renew Patriot Act*, WASH. POST. Apt. 6, 2005, at A17 (reporting that Attorney General Gonzales testified before the Senate Judiciary Committee that Section 215 had never been used to obtain records from a library); *Libraries, Gonzales Debate 215,* PITTSBURGH POST-GAZETTE, May 15, 2005, at pg. J-4 (reporting that the government "claims that no libraries have been the target of Patriot Act provisions since the law was passed in 2001"). While most of the government's comments have focused (perhaps disingenuously) on Section 215 of the Patriot Act, some comments have specifically disclaimed the use of the NSL provision against libraries. For example, the United States Attorney's Office issued a bulletin discounting the fear that libraries which "provide access to Internet and e-mail . . . may become the targets of a court order requiring the library to

cooperate in the monitoring of a user's electronic communications sent through the library's computers or networks." Stan Harris and Gaines Cleveland, *USA PATRIOT Act: Responding to Library Concerns,* United States Attorneys' Bulletin, Vol. 52, No. 4, p.45, July 2004, at http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5204.pdf. The bulletin insisted that the NSL provision "is directed at telephone and Internet service providers and the like – not libraries." *Id.* If the library community and the general public learned that the NSL power had been used against [redacted] the information would undoubtedly influence the public debate about whether the NSL power should be limited or expanded. *See* Romero Decl. ¶¶27-29.

It is vital for the public to learn about the FBI's use of the NSL power against a [redacted] as soon as possible because both the House and Senate have now passed legislation to reauthorize the Patriot Act. *See* H.R. 3199, 109th Cong. (2005); *See* S. 1389, 109th Cong. (2005). When Congress returns from its recess in the early fall, the House and Senate will meet in conference to reconcile their versions of the Patriot Act reauthorization bills. *See* Romero Decl. ¶28; *see also* 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]," that "pressure is mounting for politicians to agree on a single bill," and that "negotiations will resume in earnest when Congress returns after Labor Day"). Both versions contain amendments to the NSL provision. Neither bill would prevent the use of NSLs against libraries. Romero Decl. ¶28. Nor would either bill allow a library to disclose the mere fact that it had been served with an NSL. *Id.* If Congress were aware that the FBI is using the NSL provision against libraries, it would undoubtedly be more inclined to adopt additional safeguards that would limit the NSL power.

Id. Indeed, members of Congress have previously introduced bills that would explicitly prohibit the FBI from serving NSLs on libraries or would alter the standards for issuance of NSLs on libraries. *See* H.R. 3352, 108th Cong. (2003), S. 317, 109th Cong. (2005); H.R. 1526, 109th Cong. (2005).

The need for preliminary relief from the NSL gag is clearly acute given "[t]he timeliness of [the] political speech" the government is currently suppressing. *Elrod v. Burns,* 427 U.S. at 374 n.29. As the Supreme Court has repeatedly held, "even a short-lived 'gag' order in a case of widespread concern to the community constitutes a substantial prior restraint and causes irreparable injury to First Amendment interests as long as it remains in effect." *Capital Cities Media, Inc.* 463 U.S. at 1304. In light of the harm plaintiffs and the public will suffer should the gag continue, and the utter lack of any compelling government interest in gagging plaintiffs from disclosing the mere fact that [redacted] received an NSL, plaintiffs are entitled to preliminary relief from the NSL gag.

CONCLUSION

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

Respectfully submitted,

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

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

August 16, 2005

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2005, I caused true and correct copies of the Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction, Declaration of Anthony D. Romero, Declaration of [redacted] and Declaration of [redacted] to be sent to the following counsel:

By Hand:
Kevin J. O'Connor
United States Attorney
District of Connecticut
New Haven Office
Connecticut Financial Center
157 Church Street, Floor 23
New Haven, CT 06510

By Overnight Courier:
Sandra M. Schraibman
U S. Department of Justice
Federal Programs Branch
20 Massachusetts, NW
Room 7230
Washington, DC 20530

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