IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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| JOHN DOE; AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION, | ) | |
| Plaintiffs-Appellees, | ) | |
| v. | ) | No. ____________ |
| ALBERTO GONZALES, in his official capacity as Attorney General of the United States; ROBERT MUELLER, in his official capacity as Director of the Federal Bureau of Investigation; JOHN ROE, Federal Bureau of Investigation, in his official capacity, | ) | (No. 3:05cv1256 JCH) (D. Conn.) |
| Defendants-Appellants. | ) | |

MEMORANDUM IN SUPPORT OF
EMERGENCY MOTION FOR STAY PENDING EXPEDITED APPEAL

## INTRODUCTION

When the Federal Bureau of Investigation investigates international terrorism and clandestine foreign intelligence activities, 18 U.S.C. § 2709 authorizes the FBI to issue National Security Letters ("NSLs") to obtain relevant subscriber information and transactional records from wire and electronic communication service providers. To protect the integrity of such sensitive investigations, Section 2709 prohibits recipients of NSLs from disclosing that the government has sought or obtained information from the recipient pursuant to the NSL. Absent such a prohibition, disclosure of information about the NSL, including the identity of the NSL's recipient, can seriously jeopardize the investigation itself – for example, by alerting the target of the investigation that his activities are

subject to scrutiny, and allowing the target to hide, move his activities to another provider, provide misinformation to the government, or otherwise frustrate the FBI's investigation. Disclosure can also cause more general harm to the government's counter-terrorism and counterintelligence efforts by allowing terrorist organizations and foreign intelligence operatives to monitor the government's investigatory activities and look for information and patterns that can be used to evade detection and otherwise frustrate future investigations.

The district court in this case has now entered an injunction that permits the recipient of an NSL in an ongoing FBI counter-terrorism investigation to make public its own identity, on the theory that the recipient has a First Amendment right to disclose that it has received an NSL even if the investigation is still underway. As the district court itself acknowledged in its opinion, once the recipient of the NSL has made its identity public, the recipient "cannot be made anonymous again." Opinion at 28 (copy attached). The target of the investigation will be put on immediate notice that records are being sought from his provider, and thus that his activities are potentially subject to official scrutiny, and he will be able to take any number of steps to attempt to frustrate the investigation. At the same time, this Court's own ability to review the district court's injunction will be effectively frustrated, because the Court will be unable to grant any meaningful relief even if it concludes that the district court is in error.

In view of the gravity of the district court's constitutional ruling, the immediate and irreparable harm to the government that will result if the injunction goes into effect, and the inability to obtain meaningful appellate review thereafter, the government asked the district court to stay its injunction pending appeal. The district court declined to do so, but issued a temporary stay of the injunction that will remain in effect until the end of the day on September 20, 2005, in the "expectation that the defendants will file an expedited appeal and submit an application for a stay

pending appeal to the Court of Appeals." Op. at 29 (copy attached).

To preserve this Court's capacity to review the district court's injunction, and to prevent the governmental and public interests served by the statutory non-disclosure requirement from being forfeited before this Court can act, the government asks the Court to grant a full stay pending appeal, and to extend the current temporary stay if necessary while the Court considers the underlying stay request. In conjunction with this request, the government invites the Court to expedite the briefing and argument of this appeal to whatever extent that the Court views as appropriate.

## STATEMENT OF THE CASE

### I. 18 U.S.C. § 2709

Electronic communications play an increasingly important role in counterintelligence and counter-terrorism investigations. See S. Rep. No. 99-541, p. 44 (1986), reprinted in 1996 U.S.C.C.A.N. 3598 (concluding that information about such communications is "highly important to the successful investigation of counterintelligence cases"); Declaration of David W. Szady, Assistant Director, Counterintelligence Division, FBI ("Szady Decl.") ¶14 (copy attached). Congress enacted Section 2709 in 1986 to assist the FBI in obtaining information about these communications.

Section 2709 empowers the FBI to issue administrative subpoenas, known as National Security Letters or "NSLs," to providers of wire and electronic communication services as part of authorized counterintelligence and counter-terrorism investigations. Section 2709 is one of several federal statutes that authorize the federal government to issue NSLs in connection with counterintelligence and counter-terrorism investigations. See 12 U.S.C. §§ 3414(a)(1) and 3414(a)(5); 15 U.S.C. §§ 1681u-1681v; 50 U.S.C. § 436. Subsections (a) and (b) of Section 2709 authorize the FBI to request "subscriber information" and "toll billing information," or "electronic communication transactional records," and direct wire or electronic communication service providers

to comply with such requests. An NSL cannot be issued unless the Director of the FBI, or a designee "not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau Field Office," certifies that the information sought is "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities" and that any such investigation "is not conducted solely on the basis of activities protected by the First Amendment." 18 U.S.C. § 2709(b). While Section 2709 authorizes the FBI to seek subscriber and transactional information, it does not authorize the FBI to request the contents of any communication. See 18 U.S.C. § 2709(a)-(b); see also S. Rep. 99-541 1, 44 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3598.

To ensure the confidentiality and effectiveness of counterintelligence and counter-terrorism investigations, Section 2709(c) establishes a non-disclosure rule concerning the FBI's request for records. Section 2709(c) provides that "[n]o wire or electronic service provider or officer, employee or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section." In turn, Section 2709(d) places limits on the FBI's own dissemination of information and records obtained pursuant to NSLs.

## II. The Need for Confidentiality in Counter-Terrorism and Counterintelligence Investigations

Congress has repeatedly recognized the need for secrecy when conducting counterintelligence and counter-terrorism investigations, and each of the statutes allowing issuance of NSLs includes a non-disclosure provision similar to Section 2709(c). As Congress has explained, "the FBI could not effectively monitor and counter the clandestine activities of hostile espionage agents and terrorists if they had to be notified that the FBI sought their * * * records for counterintelligence investigations," and the "effective conduct of FBI counterintelligence activities requires such non-

disclosure." H. Rep. 99-690(I) at 15, 18, reprinted in 1986 U.S.C.C.A.N. 5341, 5345 (regarding 12 U.S.C. § 3414(a)(5)); see also H. Rep. 95-1383 at 228 (July 20, 1978), reprinted in 1978 U.S.C.C.A.N. 9273, 9359 (non-disclosure requirement "assure[s] the absolute secrecy needed for the investigations covered by [the provision]") (regarding 12 U.S.C. § 3414(a)(3)).

The FBI likewise has concluded that secrecy is essential to the functioning of counterintelligence and counter-terrorism investigations. Counterintelligence and counter-terrorism investigations are long-range, forward-looking and prophylactic in nature: the agency aims to anticipate and disrupt clandestine intelligence activities and terrorist attacks on the United States before they occur. Szady Decl. ¶ 8. Because counterintelligence and counter-terrorism investigations are directed at groups taking efforts to keep their own activities secret, it is essential that targets not learn that they are the subject of investigation. Id. If targets learn that they are the subjects of investigation, they can be expected to take action to avoid detection or disrupt the government's intelligence gathering efforts. Id. ¶9. Likewise, knowledge about the scope or progress of a particular investigation allows targets to determine the FBI's degree of penetration of their activities and to alter their timing or methods. Id. ¶10. The same logic applies to knowledge about the sources and methods the FBI is using to acquire information. Id. ¶¶10, 13, 25-26.

These concerns apply with full force to NSLs. Disclosing the recipient of an NSL issued as part of a particular counter-terrorism or counterintelligence investigation, or repeatedly disclosing the names of entities that receive NSLs, can alert terrorist and foreign intelligence organizations that operatives using certain electronic service providers or types of providers are potentially compromised, leading them to change operatives, change providers, or otherwise alter their activities to avoid detection. Id. ¶¶20-25. Knowledge about the recipient of an NSL or the particular information sought or obtained also can allow terrorist organizations or foreign intelligence agencies

to deduce which of their members have decided to cooperate with the government, leading not only to a change in tactics but also to potential reprisals against family members of the suspected cooperator. Id. ¶30. Even where terrorist groups or intelligence agencies do not make use of targeted providers, knowledge about which providers the FBI seeks information from, or otherwise where the FBI is obtaining information from NSLs, can help them to avoid such providers and sources in the future. Id. ¶29. Indeed, apart from disclosing the name of the ultimate target of an investigation, disclosing the name of the recipient of an NSL is the most potentially harmful revelation possible in connection with an NSL. Id.

III. The Present Litigation

This case arises out of an ongoing FBI counter-terrorism investigation. In the course of that investigation, the FBI served an NSL on a recipient who has been referred to publicly in this case as John Doe. Information regarding the identity of Doe and the information sought by the NSL is set forth in the sealed complaint and the sealed portion of the district court's opinion, which are being submitted to this Court under separate cover.

Doe has not complied with the NSL. Instead, Doe, the American Civil Liberties Union, and the American Civil Liberties Union Foundation filed this suit on August 9, 2005. The plaintiffs contend that Section 2709 is facially unconstitutional under the First, Fourth, and Fifth Amendments. The plaintiffs further contend that the non-disclosure requirement in Section 2709(c) violates the First Amendment. The plaintiffs' constitutional claims are similar to those now before this Court in Doe v. Gonzales, No. 05-0570.

After initially filing their complaint under seal, the plaintiffs prepared a redacted version of the complaint, in consultation with the government, for public release. The redactions were intended to allow the plaintiffs to make public as much information about the litigation as possible without

disclosing Doe's identity or the target of the NSL itself. Among other things, the redacted complaint (copy attached) discloses to the public that Doe is "a member of the American Library Association" and "believes that it should not be forced to disclose" any of "its library and Internet records." Complaint ¶¶ 2, 49. Immediately following the release of the redacted complaint, the ACLU issued a press release reiterating that the NSL seeks information from an organization with library records. See <www.aclu.org/SafeandFree/SafeandFree.cfm?ID=18957&c=262>. In turn, a number of media organizations, including the New York Times and the Washington Post, have published articles to the same effect. See, e.g.,"FBI, Using Patriot Act, Demands Library's Records," New York Times, Aug. 26, 2005, p. A12, available online at <www.nytimes.com/2005/08/26/politics/26patriot.html>; "Library Challenges FBI Request," Washington Post, Aug. 26, 2005, p. All, available online at <www.washingtonpost.com/wp-dyn/content/article/2005/08/25/AR2005082501696.html>. Thus, the public is fully aware that an NSL has been served on a member of the American Library Association that has library records, and the government has not objected to the disclosure of that information. What remains confidential – and what Section 2709(c) prohibits from being disclosed – are the identity of the recipient of the NSL and the target of the NSL.

The plaintiffs moved for a preliminary injunction to allow them to disclose the NSL recipient's identity. In support of this motion, the plaintiffs claimed that the non-disclosure provision prevents them from informing Congress, which is currently considering legislative revisions to Section 2709, about the kind of institution that has received the NSL in this case. Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction ("PI Mem.") at 10. They also claimed that the non-disclosure provision prevents the recipient from informing libraries and their patrons about the supposed "threat to intellectual freedom" posed by Section 2709. Id. at 8. And they similarly claimed that the non-disclosure provision prevents the recipient from

"discuss[ing] and develop[ing] standardized procedures and policies for responding to the receipt of future NSLs" with libraries and library associations. Id. at 9.

The government opposed the motion on the ground that the plaintiffs are not likely to prevail on the merits of their First Amendment claim and that the balance of harms weighs decisively against allowing the plaintiffs to make a public disclosure that would give notice to the target of the NSL that his activities may be the object of an ongoing government investigation. The government pointed out that the release of the redacted complaint, and the ensuing press release and news coverage, provide the public and Congress with the very information about the application of Section 2709 that the plaintiffs claim they are currently unable to disclose. The government further pointed out that disclosing the identity of the specific recipient of the NSL would contribute nothing to the public and Congressional debate over Section 2709, but could put the target of the NSL on notice about the government's investigation and therefore could compromise the investigation itself.

On Friday, September 9, the district court issued a preliminary injunction that provides that "the defendants are hereby stayed from enforcing 18 U.S.C. § 2709(c) against the plaintiffs with regard to Doe's identity." Op. at 29. Based on the record before it, the court found that "the investigation clearly relates to national security"; that "[t]he government has a legitimate interest and duty in undertaking an investigation that includes this NSL"; and that "it is clear to the court that the NSL was not issued solely on the basis of First Amendment activities." Id. at 16. Despite these determinations, the district court ruled that the plaintiffs are likely to establish that Section 2709(c) is unconstitutional as applied to the public disclosure of Doe's identity in this case. Id. at 10-27. The court further ruled that the plaintiffs will be irreparably harmed by the inability to identify Doe as the recipient of the NSL. Id. at 8-10. Although the government had requested a full stay pending appeal, the district court stayed its preliminary injunction only until September 20, 2005, to permit

the government to seek a stay pending appeal from this Court.

## ARGUMENT

The temporary stay issued by the district court will expire at the end of the day on September 20.[1] If this Court does not extend the stay before that deadline passes, a violation of Section 2709(c) will occur that cannot be undone, and the government's right to appellate review of the preliminary injunction permitting that violation will be lost. In contrast, if this Court continues the stay pending resolution of an expedited appeal, the Court will preserve its own ability to provide meaningful appellate review of the decision below, and expedition will allow the Court to do so in a manner that accommodates the plaintiffs' asserted interests in prompt disclosure. Under these circumstances, the logic of granting a stay pending appeal is manifest. And an examination of the factors that govern the issuance of stays pending appeal reinforces that logic. The injunction should therefore be stayed pending appeal, just as the injunction in Doe v. Gonzales, No. 05-0570, has been stayed pending the appeal in that case.

### I. The Balance Of Harms Weighs Strongly In Favor Of A Stay Pending Appeal

An application for a stay pending appeal requires this Court to assess the appellant's likelihood of success on appeal, the prospect of irreparable injury to the appellant in the absence of a stay, the existence of "substantial injury" to the opposing party if a stay is granted, and the public interest. Mohammed v. Reno, 309 F.3d 95, 100 (2d Cir. 2002). The requisite degree of likelihood of success depends on "the court's assessment of the other [stay] factors." Id. at 101 (internal quotation marks omitted). Thus, the more strongly the balance of harms tilts in favor of the moving party, the less likelihood of success on appeal need be shown. Id. We therefore begin by addressing

[1] In a conference call with counsel for the parties on September 13, the district judge's deputy confirmed that the stay will remain in effect until the end of the day on the 20th.

the injuries to the government and the public interest that will be incurred if the plaintiffs are allowed to disclose Doe's identity while this appeal is pending and the investigation remains underway.

A. Disclosure Threatens Serious and Irreparable Harm to the Governmental and Public Interest in Effective Counter-Terrorism and Counterintelligence Efforts

The non-disclosure provision of Section 2709(c) represents Congress's considered judgment that disclosing the operational details of counter-terrorism and counterintelligence investigations is inherently harmful to those vital investigative efforts. See, e.g., H.R. Rep. No. 99-690(I) at 15, 18, reprinted in 1986 U.S.C.C.A.N. 5341, 5345. As explained at length in the declaration of Assistant Director Szady, the FBI's own experience confirms Congress's judgment. See Szady Decl. ¶¶ 9-10, 19-30. The combined judgments of these two branches of the federal government, which are charged with ensuring the nation's security and have the relevant expertise to make such judgments, are entitled to deference by the courts. See, e.g., Center for Nat'l Sec. Studies v. United States Dep't of Justice, 331 F.3d 918, 928 (D.C. Cir. 2003) ("[i]t is abundantly clear that the government's top counterterrorism officials are well-suited to make [the] predictive judgment" about how disclosure of information will harm national security, while "[c]onversely, the judiciary is in an extremely poor position to second-guess the executive's judgment in this area of national security").

As explained by Assistant Director Szady, disclosure of information regarding an NSL can lead to a wide variety of harms. Disclosures can alert the subject of an investigation that he is under scrutiny, giving him the opportunity to take steps to avoid further detection, evade arrest, or disrupt the intelligence gathering process. Id. ¶¶ 9, 20. Knowledge that a particular individual is under potential scrutiny enables terrorist and foreign intelligence organizations to substitute operatives, to warn other members of the undertaking, and to disseminate false information through the subject of the investigation. Id. ¶ 21. Moreover, disclosure of information about a particular NSL, in

conjunction with information about other NSLs, gives terrorist and foreign intelligence organizations the means to piece together the government's individual inquiries and determine the scope, focus, and progress of particular investigations, as well as disclosing the government's information-gathering methods and capabilities. Id. ¶¶ 25-26.

Even when other details of an NSL remain confidential, disclosure of the identity of the NSL recipient is itself sufficient to jeopardize the integrity of the investigation. Knowledge that a particular provider of electronic communication service has been served with an NSL provides a warning to any terrorist or foreign intelligence operative who has made use of that service that his activities may be compromised. Id. ¶ 29. The operative or his organization can respond by abandoning use of the service or using it to provide misinformation. Id. More generally, terrorist and foreign intelligence groups can avoid providers who are known to have received such requests and thereby conceal their activities. Id. And as already noted, once the subject of an investigation is alerted to the possibility that he is under surveillance, he can flee or otherwise evade the government's efforts to disrupt his activities.

These injuries are not only serious but irreversible. As this Court has observed, once information that should remain confidential has been publicly disclosed, "[t]he genie is out of the bottle," and even when the disclosure is the result of a legal error by the district court, "[w]e have not the means to put the genie back." Gambale v. Deutsche Bank AG, 377 F.3d 133, 144 & n.11 (2d Cir. 2004). Here, once Doe has been allowed to disclose its identity, the target of the NSL be on notice that his actions are potentially compromised, offering him the opportunity to hide, flee, provide misinformation, or otherwise frustrate the investigation. See Szady Decl. ¶¶ 9-11, 20-22, 29. At the same time, the disclosure will alert terrorist and foreign intelligence organizations to avoid this recipient in the future and will provide such groups with useful information about the

geographic focus and methodology of the FBI's counter-terrorism and/or counterintelligence investigations generally. See id. ¶¶ 12-13. None of these consequences can be undone once the disclosure takes place. And if a stay is not granted, disclosure of the information will effectively defeat this Court's own jurisdiction to review the preliminary injunction.

### B. The Non-Disclosure Requirement Does Not Prevent the Plaintiffs from Engaging in Public Debate Over Section 2709

In contrast, granting a stay pending an expedited appeal will not cause even remotely comparable harm to the interests invoked by the plaintiffs. The plaintiffs' central rationale for demanding immediate disclosure of the Doe's identity, as opposed to waiting for the district court to reach a final judgment on the plaintiffs' constitutional claims, is that the inability to identify Doe supposedly prevents the plaintiffs from taking part in ongoing public and Congressional debate regarding Section 2709. Thus, the plaintiffs argued below that the non-disclosure requirement prevents Doe from "lobby[ing] Congress for additional safeguards" to be added to Section 2709; from "educat[ing] and organiz[ing]" the "library community"; from "coordinat[ing] procedures for responding to NSLs"; and from alerting "patrons and the general public to the dangers posed by the Patriot Act." Reply Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction ("PI Reply") at 8-9.

Even a casual examination of Section 2709(c) is sufficient to dispose of these claims. By its terms, Section 2709(c) provides only that the recipient of an NSL may not disclose that the government "has sought or obtained access to information or records" from the recipient under the section. The non-disclosure provision does not prevent the recipient of an NSL, or anyone else, from taking part in public debate regarding the scope, application, and desirability of Section 2709. NSL recipients remain perfectly free to "lobby Congress for additional safeguards," to "educate and

organize" the "library community" or any other sector of the public, to "coordinate procedures for responding to NSLs," and to call the attention of one and all to the supposed "dangers" presented by Section 2709 (PI Reply at 8-9). The mere inability of an NSL recipient to disclose that it has received an NSL places no impediment whatsoever in the way of these undertakings.

The course of this litigation itself confirms the hollowness of the plaintiffs' claims. As shown above, the plaintiffs have already publicly stated that an NSL has been served on a member of the ALA, and major news organizations have reported that Section 2709 is being used to seek records from a library. Thus, to the extent that the plaintiffs wish to call the attention of the public and Congress to the potential applicability of Section 2709 to libraries, they have already done precisely that – without having to identify the entity that has received the NSL in this case. The ALA itself lobbies Congress on behalf of its members and is free to note that one of its members has been served with an NSL; the ability to identify which member adds nothing to that effort.

The district court expressed the view that "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." Op. at 10. But there is no reason whatsoever to expect that to be so. Doe has no "tale to tell" about the details of the NSL in this case; the injunction simply allows Doe to identify itself as the recipient of the NSL. There is no reason to think that the public or Congress will regard Doe's general views about the wisdom of Section 2709 as more persuasive simply because of the bare fact that Doe has been served with an undescribed NSL.

## II. The Government Has A Substantial Likelihood of Prevailing On Appeal

### A. The Government Has A Compelling Interest in Preserving the Secrecy of Counter-Terrorism and Counterintelligence Investigations

As the foregoing discussion shows, the balance between the harm to the government and the

public interest from immediate disclosure of Doe's identity decisively outweighs the impact of non-disclosure on the asserted First Amendment interests of the plaintiffs. That kind of disparity "suggests that the degree of likelihood of success [on appeal] need not be set too high." Mohammed, 309 F.3d at 102. But even if a more demanding showing regarding the merits were called for, that showing would readily be satisfied here, particularly when it is borne in mind that – as the district court itself acknowledged – the plaintiffs themselves must carry a heightened burden to obtain the kind of mandatory and irreversible injunctive relief awarded by the district court. Op. at 7.

The district court's preliminary injunction rests on the premise that the First Amendment entitles Doe to disclose the fact that it has received an NSL to the public at large, including the target of the NSL, and to do so even if the government's investigation is still underway. That premise is fundamentally misconceived. The First Amendment does not disable the government from protecting the confidentiality of counter-terrorism and counterintelligence investigations, either as a general matter or in the circumstances of this case. Section 2709 does not seek to restrict the disclosure of information that a private party has independently obtained, but instead merely seeks to ensure that persons who obtain information about a confidential investigation through their participation in it do not jeopardize the investigation by disclosing the information. The courts have repeatedly recognized that the government has greater latitude to restrict the disclosure of information in this context than it does in other settings. See Butterworth v. Smith, 494 U.S. 624, 631-32 (1990); Seattle Times Co. v. Rhinehart, 467 U.S. 20, 27 (1984); Hoffman-Pugh v. Keenan, 338 F.3d 1136, 1139-40 (10th Cir. 2003); Kamasinski v. Judicial Review Council, 44 F.3d 106, 110-12 (2d Cir. 1994); In Re Subpoena to Testify Before Grand Jury Directed to Custodian of Records, 864 F.2d 1559, 1564 (11th Cir. 1989); First Am. Coalition v. Judicial Review Bd., 784 F.2d 467, 479 (3d Cir. 1986); see also Doe v. Ashcroft, 334 F. Supp.2d 471 (S.D.N.Y. 2004), appeal pending, No.

05-0570 (2d Cir.).

In Rhinehart, for example, the Supreme Court rejected a First Amendment challenge to a court order that prohibited a party from disclosing particular information obtained through civil discovery. Because the information was obtained solely by virtue of the party's participation in the litigation and the court's own processes, and the order did not restrict the disclosure of any "traditionally public source of information," the Supreme Court held that the restriction was subject to intermediate scrutiny rather than strict scrutiny, and sustained the restriction under that standard. 467 U.S. at 32-33. Similarly, in Butterworth, the Supreme Court drew a constitutional distinction between a prohibition on a witness's disclosure of the facts underlying his own grand jury testimony, which the Court found to be unconstitutional, and a permanent and categorical ban on disclosure of the testimony of other witnesses learned through participation in the grand jury, which the Court left undisturbed. See 494 U.S. at 631-33; id. at 636 (Scalia, J., concurring) ("Quite a different question is presented * * * by a witness' disclosure of the grand jury proceedings, which is knowledge he acquires not 'on his own' but only by virtue of being made a witness").

Relying on Butterworth, this Court in Kamasinksi upheld those portions of a Connecticut statute that prohibited a complainant from disclosing "the fact that a complaint was filed" with the investigative body (a commission), the "fact that testimony was given" by the complainant to the commission, and "any information that [the] individual learn[ed] by interaction with the [commission]." 44 F.3d at 110-111. And other courts have consistently upheld similar non-disclosure requirements based on the same principle. See Hoffman-Pugh, 338 F.3d at 1139-40 (upholding statute prohibiting disclosure of information learned through grand jury proceedings, including information sought by prosecution, "unless and until grand jury returned indictment," and reasoning that "Butterworth does not necessarily preclude a permanent disclosure prohibition * * *

where that prohibition is limited to the specific content of the witness' testimony before the grand jury as opposed to the witness' knowledge of events discussed in that testimony."); In Re Subpoena, 864 F.2d at 1562 (holding that (1) university which refused to comply with subpoena could be prohibited from disclosing information that would reveal direction of grand jury investigation, including documents sought by subpoena or names of individuals under investigation, (2) order was justified because "secrecy was essential to maintaining the effectiveness of the grand jury" investigation; and (3) narrow tailoring was not required for non-disclosure order); First Amendment Coalition, 784 F.2d at 479 (upholding state statute to extent it prohibited disclosure of proceedings of investigative board unless and until formal charges filed).

Section 2709(c) readily passes constitutional muster under these precedents. It is designed to vindicate the government's interest in shielding its counter-terrorism and counterintelligence investigations from the eyes of terrorists and foreign intelligence organizations. That governmental interest is a manifestly compelling one. See, e.g., Department of the Navy v. Egan, 484 U.S. 518, 527 (1988) ("This Court has recognized the Government's 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business"); Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) (per curiam) ("The Government has a compelling interest in protecting * * * the secrecy of information important to our national security"). Moreover, Section 2709(c) is tailored to advance that interest without unnecessarily restricting speech that does not implicate the government's legitimate interests in confidentiality. The statute applies only to disclosure of the fact that the government "has sought or obtained access to information or records under this section"; as shown above, it places no restriction on the ability of NSL recipients or others to engage in general public discussions regarding the scope, operation, and desirability of Section 2709. As explained by Assistant Director Szady, the risks attendant on

disclosure of that narrow class of information inhere in all cases under Section 2709. And while the non-disclosure obligation is permanent rather than temporary, that feature of the provision is justified by the forward-looking nature of counter-terrorism and counterintelligence investigations, and by the risk that terrorist and foreign intelligence organizations can use disclosures to piece together damaging information about the government's investigatory capacities and strategies even after the particular investigations in which the NSLs were issued have come to a close. See Szady Decl. ¶¶ 8, 11-13.

B. The Application of Section 2709(c) To Doe's Identity Is Constitutional

The district court held that Section 2709(c) is subject to strict scrutiny and that, as applied to the disclosure of Doe's identity, it fails to survive that scrutiny. Although a full discussion of the district court's errors must await plenary briefing of the government's appeal, even a brief review is sufficient to identify a number of flaws in the district court's reasoning. Among other things:

1) The district court erroneously held that Section 2709(c) constitutes a prior restraint. Opinion at 11-13. For First Amendment purposes, two kinds of speech restrictions constitute prior restraints: first, licensing schemes that condition the right to speak on the grant of an administrative license or other advance review and approval by the government, and second, judicial injunctions against particular speech or speakers. See, e.g., City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 757 (1988); Alexander v. United States, 509 U.S. 544, 550 (1993). Section 2709(c) involves neither of these kinds of restrictions, and it does not present the risk of abuse of discretionary authority that inheres in such restrictions. Rather than giving the government discretion to permit or forbid public disclosure, it categorically prohibits disclosure of the receipt of NSLs. Cf. Landmark Communications Inc. v. Virginia, 435 U.S. 829, 830, 838 (1978) (statute that provides for criminal punishment of persons who divulge truthful information regarding confidential

proceedings of judicial conduct commission "does not constitute a prior restraint"). Contrary to the district court's belief, Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963), is not an example of a prior restraint that did not involve a licensing scheme. Rather, as the Supreme Court's analysis in Bantam Books makes clear, the commission in that case effectively was operating an administrative licensing scheme by using selective threats to block the distribution of disfavored materials on a case-by-case basis. See 372 U.S. at 61-63, 67-70.

2) The district court acknowledged that the record presented by the government "suggests that the disclosure of Doe's identity 'may' or 'could' harm investigations related to national security generally," but held that the government must provide additional proof that those harms will occur in this investigation itself. Op. at 17. Where, as here, the government shows that the risks posed by disclosing confidential information about NSLs are categorical and pervasive in nature, no additional proof is needed to support the inference that the present case presents the same risks as all other NSL cases. There is nothing impermissibly "speculative" (Op. at 17) about this kind of showing, and the district court's reliance on prior restraint precedents to demand more evidence (id.) falls along with the court's mistaken belief that Section 2709(c) constitutes a prior restraint. At a more general level, the district court's opinion is pervaded by a repeated, and wholly unjustified, unwillingness to give any deference to the expert judgment of the Executive Branch regarding the risks associated with disclosure of Doe's identity.

3) In the sealed portion of its opinion, the district court took note of the number of people who use the electronic communication services that are related to the NSL in this case. But in terms of the investigative impact of the disclosure of Doe's identity, what matters is not how many people make use of those services as a general matter, but how many of those users have reason to think that their activities are of interest to a counter-terrorism investigation. That number is almost certainly

an extraordinarily small one, and for that tiny number of users, the disclosure of Doe's identity would be an alarm bell.

4) In other contexts, courts have recognized that terrorist and foreign intelligence agencies can piece together seemingly innocuous information about the government's counterterrorism and counterintelligence inquiries and thereby determine the scope, focus, and progress of particular investigations. See, e.g., Halkin v. Helms, 598 F.2d 1, 8 (D.C. Cir. 1978); Halperin v. CIA, 629 F.2d 144, 150 (D.C. Cir. 1980). The district court reasoned that those cases are inapposite because the plaintiffs here are asserting a right to disclose information in their own possession, rather than a right to obtain information in the government's possession. Op. at 19-20. That response misses the point. The risks identified in cases like Halkin and Halperin turn on the nature of the information and the investigations at issue, not the nature of the legal claim being pressed by the plaintiffs, and the same risks are present here.

5) The district court held that, while the government has "a compelling interest in conducting its investigation in secret so that the target(s) of the investigation are not aware of it," that interest could not justify a prohibition against the disclosure of Doe's identity after the current investigation is over. Op. at 21-23. But even assuming arguendo that the government's legitimate interest in maintaining the secrecy of Doe's identity might lapse after the current investigation is complete, that hardly justifies an injunction that permits the disclosure of Doe's identity now, while the investigation is still underway and before the district court has reached final judgment on the merits.

6) Finally, the district court's efforts to distinguish the present case from this Court's decision in Kamasinski, supra, are wholly unavailing. The district court observed that here, unlike in Kamasinski, "the existence of an investigation is already public." Op. at 25. But that fact is irrelevant to the government's interest in preserving the continued secrecy of other information about

the investigation, such as the identity of the NSL's recipient. And the district court's stated concern that NSL recipients "who might have information regarding investigative abuses and overreaching are preemptively prevented from sharing that information with the public and with the legislators" (Op. at 26) is misconceived at two levels. As the district court itself acknowledged, the government "has a legitimate interest and duty in undertaking an investigation that includes this NSL"; and even if the NSL here were illegitimate, an injunction that simply permits Doe to disclose its identity would not advance the supposed interest in disclosing such abuse. In short, the district court's reasoning neither distinguishes Kamasinski nor justifies the injunction that the court entered.

## CONCLUSION

For the foregoing reasons, the district court's preliminary injunction should be stayed pending expedited appeal, and a temporary stay should be entered if necessary to preserve the status quo while the Court considers the underlying stay request.

Respectfully submitted,

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September 14, 2005

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2005, I filed and served the foregoing MOTION INFORMATION STATEMENT and MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDING EXPEDITED APPEAL, including all attachments, by causing an original and four copies to be delivered to the Clerk of the Court by hand and by causing one copy to be delivered in the same manner to:

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