No. 05A295

IN THE
SUPREME COURT OF THE UNITED STATES

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.

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

APPELLANTS' REPLY IN SUPPORT OF EMERGENCY APPLICATION TO VACATE STAY

FILED UNDER SEAL

ANNETTE M. LAMOREAUX
ACLU of Connecticut Foundation
32 Grand Street
Hartford, CT 06106
(860) 247-9823 x 211

ANN BEESON
Counsel of Record
JAMEEL JAFFER
MELISSA GOODMAN
STEVEN R. SHAPIRO
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

Counsel for Appellants

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Plaintiffs-Appellants (hereinafter "plaintiffs") submit this brief reply to respond to two erroneous arguments presented by the government. First, the government contends that plaintiffs' Emergency Application to Vacate Stay is deficient because plaintiffs do not assert a "reasonable probability" that this Court would ultimately grant review of the case on the merits. Memorandum in Opposition to Application to Vacate Stay Pending Appeal (hereinafter "Gov't Br."), at 20. Were the Second Circuit ultimately to hold that 18 U.S.C. § 2709(c) is unconstitutional as applied to plaintiffs, however, it is virtually inconceivable that the government would not seek certiorari. Moreover, this Court routinely grants certiorari when a lower court strikes down a federal statute. *See* ROBERT L. STERN, & EUGENE GRESSMAN, SUPREME COURT PRACTICE 244 (8th ed. 2002) (noting that "[w]here the decision below holds a federal statute unconstitutional . . . certiorari is usually granted because of the obvious importance of the case," and citing cases).

Second, the government argues that a Circuit Justice cannot vacate a stay and lift a prior restraint in the circumstances presented here because "the case will become moot." Gov't Br. at 21. If the government's contention were true, a Circuit Justice would *never* be empowered to lift a prior restraint on speech. In fact, Circuit Justices have acted with expedition on numerous occasions to lift prior restraints in similar circumstances. *See, e.g., CBS Inc. v. Davis,* 510 U.S. 1315 (1994) (Blackmun, J., in chambers) (staying a prior restraint); *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1304 (1983) (Brennan, J., in chambers) (staying a prior restraint, and noting that this Court has "recognized the special importance of swift action to guard against the threat to First Amendment values posed by prior restraints"); *M.I.C., Ltd. v. Bedford Township,*

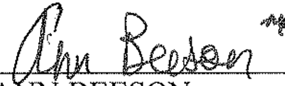
463 U.S. 1341 (1983) (Brennan, J., in chambers) (staying a prior restraint); *Nebraska Press Ass'n v. Stuart,* 423 U.S. 1327, 1329-30 (1975) (Blackmun, J., in chambers) (issuing a partial stay of a prior restraint, noting that action by a Circuit Justice was warranted because the harm caused by the prior restraint "with each passing day [was] irreparable," and stating that he could not "accept that this Court, or any individual Justice thereof, is powerless to act upon the failure of a State's highest court to lift what appears to be, at least in part, and unconstitutional prior restraint of the press").

The justification for vacating the stay in this case could not be stronger. The stay is suppressing speech that has already been disclosed in *The New York Times*, confirmed on federal court websites, and widely disseminated to and discussed by the public. *See* Appellant' Emergency Application to Vacate Stay, App. G. (Alison Leigh Cowan, *Librarians Must Stay Silent in Patriot Act Suit, Court Says,* N.Y. TIMES, Sept. 21, 2005, at B2, available at http://www.nytimes.com/2005/09/21/nyregion/21library.html); *see also Librarians Demonstrate Silently Against the Patriot Act,* LIBRARY JOURNAL, Oct. 3, 2005, at http://www.libraryjournal.com/article/CA6262249.html (noting that *The New York Times* reported that "court records suggest" Doe is Library Connection); *ALA Joins Challenge to Patriot Act in U.S. Supreme Court*, available at http://www.ala.org/Template.cfm?Section=News&template=/ContentManagement/ContentDisplay.cfm&ContentID=105771 (American Library Association press release noting that the *amicus curiae* brief filed in support of plaintiffs' application "emphasizes the fact that a library already has been identified in a September 21 *New York Times* story"); Motion for Leave to File Brief *Amicus Curiae* in Support of Application to Vacate Stay Pending Appeal and for Leave to File Said Brief on 8.5"-By-11" Paper, at 3 (*Doe v.*

Gonzales, No.05A295). Most importantly, the stay is gagging the only National Security Letter recipient with firsthand knowledge of an FBI demand for library records from participating in a crucial political debate about expanded government surveillance powers – a debate that is likely to conclude in the next week when Congress finalizes legislation to expand or limit the Patriot Act.

Accordingly, plaintiffs respectfully ask the Court to vacate the stay entered by the Court of Appeals.

Respectfully submitted,



ANN BEESON
Counsel of Record
JAMEEL JAFFER
MELISSA GOODMAN
STEVEN R. SHAPIRO
American Civil Liberties Union Foundation

ANNETTE LAMOREAUX
ACLU of Connecticut Foundation

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