UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN DOE, INC.; JOHN DOE; AMERICAN CIVIL LIBERTIES UNION; and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs,

v.

ERIC HOLDER, Jr., in his official capacity as Attorney General of the United States; ROBERT MUELLER III, in his official capacity as Director of the Federal Bureau of Investigation; and VALERIE CAPRONI, in her official capacity as Senior Counsel to the Federal Bureau of Investigation,

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR DISCLOSURE OF GOVERNMENT'S *EX PARTE* FILING OR, IN THE ALTERNATIVE, TO REQUIRE THE GOVERNMENT TO PRODUCE AN UNCLASSIFIED SUMMARY

04 Civ. 2614 (VM)

INTRODUCTION

On May 27, 2009, this Court entered a scheduling order requiring the government to file "papers in support of the continuing need for nondisclosure of the National Security Letter" by June 17, and requiring plaintiffs to file a response by July 1.[1] On June 17, however, the government did not file any document to which plaintiffs can actually respond. Instead, it filed with the Court (i) a certification asserting without explanation that disclosure of even the mere fact that Doe received an NSL could result in a laundry list of harms; (ii) an *ex parte* affidavit by an unspecified affiant; and (iii) a letter from the government's counsel stating without explanation that the government's *ex parte* affidavit satisfied the government's constitutional

[1] *Doe v. Holder*, No. 04-2614 (S.D.N.Y. May 27, 2009) (scheduling order) (dkt. no. 166).

burden.[2] The government could have supplied its affidavit to plaintiffs under a protective order, but it has not. Nor has it supplied plaintiffs with a redacted version of the affidavit or even with a summary of its contents. The government proposes that this Court should uphold the gag order – a gag order that has already been in place for more than five years and that relates to an NSL that was withdrawn more than two years ago – on the basis of evidence that it proposes should be withheld altogether not only from the public but from plaintiffs and plaintiffs' counsel as well.

The government's proposal is unacceptable on its face, and this Court should reject it. Due process requires that plaintiffs be afforded a meaningful opportunity to respond to the government's arguments, even if the government's arguments (and underlying evidence) are properly classified. Courts routinely accommodate the government's interest in protecting sensitive information by crafting appropriate protective orders, requiring the government to grant security clearance to counsel, and/or requiring the government to produce redacted versions or unclassified summaries of its papers. Due process mandates that plaintiffs be given an opportunity to respond to the government's arguments, but plainly plaintiffs cannot respond to arguments that they cannot see.[3]

Accordingly, plaintiffs hereby move this Court to require the government to disclose its *ex parte* affidavit to plaintiffs' counsel or, in the alternative, to require the government to supply plaintiffs with an unclassified summary of the affidavit. Any summary should of course be sufficiently detailed to permit plaintiffs meaningfully to respond to the government's arguments.

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[2] *See* Letter from Jeffrey Oestericher to Judge Marrero (June 17, 2009); Decl. of Jeffrey Oestericher, *Doe v. Holder*, No. 04-2614 (S.D.N.Y. June 18, 2009) (dkt. no. 167).

[3] In this motion, plaintiffs focus on the due process implications of *ex parte* evidence. Reliance on *ex parte* evidence, however, also implicates the press and the public's First Amendment and common law right of access to civil proceedings and judicial documents. *See Lugosch v. Pyramid Co. of Onodaga*, 435 F.3d 110, 121 (2d Cir. 2006); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004); *United States v. Abuhamra*, 389 F.3d 309 (2d Cir. 2004).

Plaintiffs also ask this Court to stay the proceedings contemplated by the Court's May 27 order until the issues raised in the instant motion are resolved.

I. IN KEEPING WITH DUE PROCESS REQUIREMENTS, THE COURT SHOULD ORDER THE GOVERNMENT TO DISCLOSE ITS *EX PARTE* AFFIDAVIT TO PLAINTIFFS' COUNSEL.

This is an adversarial proceeding in which the Court must resolve an important constitutional question: whether the continuation of an FBI-imposed gag order that has been in place for more than five years is consistent with the First Amendment. It would be inconsistent with the most elementary principles of due process for this Court to decide this question on the basis of arguments and evidence that plaintiffs' counsel have not seen.[4]

A civil litigant's right to due process "encompasses the individual's right to be aware of and refute the evidence against the merits of his case." *Vining v. Runyon*, 99 F.3d 1056, 1057 (11th Cir. 1996) (internal quotation marks omitted). As the Second Circuit recognized in *Abuhamra*, 389 F.3d at 322, a "due process concern [is] raised when a court relies on *ex parte* submissions in resolving an issue that is the subject of an adversarial proceeding." This is because "due process demands that the individual and the government each be afforded the opportunity not only to advance their respective positions but to correct or contradict arguments or evidence offered by the other." *Id.*

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[4] The Second Circuit's recent decision, *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), sets forth the standard under which the Court should evaluate the constitutionality of the gag order. Once a senior FBI official certifies that disclosure may result in an enumerated harm, on judicial review, the government bears the burden of "persuad[ing] [the] district court that there is a good reason to believe that disclosure may risk one of the enumerated harms." *Id.* The gag order is invalid unless the court "find[s] that such a good reason exists." *Id.* at 876. The "good reason" standard requires the government to show a "reasonable likelihood" that, but for the gag order, the enumerated harm will occur, *id.* at 875, and it must show "that the link between disclosure and risk of harm is substantial," *id.* at 881. A reviewing court "cannot, consistent with strict scrutiny standards, uphold a nondisclosure requirement on a conclusory assurance that such a likelihood [of harm] exists." *Id.* at 881.

Thus, the courts have recognized a "firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions." *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986); *see also id.* at 1060 (expressing "grave concern" about district court's reliance on *ex parte* evidence because "[i]t is a hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment"); *Lynn v. Regents of Univ. of Cal.*, 656 F.2d 1337, 1346 (9th Cir. 1981) (finding use of the *ex parte* evidence "violated principles of due process upon which our judicial system depends to resolve disputes fairly and accurately"); *Vining*, 99 F.3d at 1057 (reversing lower court determination based on *ex parte* evidence because "[o]ur adversarial legal system generally does not tolerate *ex parte* determinations on the merits of a civil case" (internal quotation marks omitted)); *Ass'n for Reduction of Violence v. Hall*, 734 F.2d 63, 67 (1st Cir. 1984) ("Our system of justice does not encompass *ex parte* determinations on the merits of cases in civil litigation." (internal quotation marks omitted)); *Schiller v. City of New York*, 2008 WL 1777848 (S.D.N.Y. Apr. 14, 2008) (upholding Magistrate Judge's ruling refusing to permit government to submit declaration *ex parte*); *Hansberry v. Father Flanagan's Boys' Home*, 2004 WL 3152393, *4 n.9 (E.D.N.Y. Nov. 28, 2004) (refusing to consider evidence submitted *ex parte* in ruling on a summary judgment motion).[5]

Due process concerns are particularly acute where, as here, resolution of the central merits question could theoretically be based *entirely* upon secret evidence. In a civil challenge to the National Security Agency's warrantless wiretapping program, a district court judge recently assessed what due process required when resolution of the case centered upon one *ex parte*,

[5] The NSL statute contemplates the possibility that the government may submit *ex parte* evidence in challenges to NSL demands and gag orders. *See* 18 U.S.C. § 3511(e). However, this Court has already correctly held, in its September 2007 ruling in this case, that "the Court's authority to assess what process is due on a case-by-case basis is undisturbed by the language of § 3511(e)." *Doe v. Gonzales*, 500 F. Supp. 2d 379, 423 (S.D.N.Y. 2007).

classified document. *See In re Nat'l Sec. Agency Telecomm. Records*, 595 F. Supp. 2d 1077, 1089 (N.D. Cal. 2009).[6] Expressing concern that "the *entire remaining course of th[e] litigation* [would otherwise] be *ex parte*," the court held that plaintiffs' counsel would be "deprive[d] . . . of due process" unless they were "granted access to the court's rulings" and "some of [the government's] classified filings." *Id.* (emphasis added); *see also Abuhamra*, 389 F.3d at 330.

Reliance upon evidence that only one party is permitted to see is strongly disfavored for at least three distinct reasons. First, it undermines the fairness of the adversarial process. *See Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) ("fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights") (Frankfurter, J., concurring); *Allende v. Shultz*, 605 F. Supp. 1220, 1226 (D. Mass. 1985) ("the very nature of the adversary system demands that both parties be given full access to any information which may form the basis for a judgment"); *Abourezk*, 785 F.2d at 1060-61.

Second, consideration of *ex parte* evidence creates an unacceptable risk of error. *See, e.g.*, *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1069 (9th Cir. 1995), *vacated on other grounds*, 525 U.S. 471 (1999) ("the very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error"); *Lynn*, 656 F.2d at 1346 ("The [judicial] system functions properly and leads to fair and accurate resolutions, only when vigorous and informed argument is possible. Such argument is not possible, however, without disclosure to the parties of the evidence submitted to the court."); *Doe v. Gonzales*, 386 F. Supp. 2d 66, 70 (D. Conn. 2005) ("*Library Connection*") ("For good reason, our system of justice relies on the adversarial process to bring to the attention of the finder of fact the strengths and deficiencies in parties' litigation postures."); *Kiareldeen v. Reno*,

[6] The Ninth Circuit dismissed the government's interlocutory appeal of this ruling on February 27, 2009 in *Al-Haramain Islamic Found., Inc. v. Obama*, No. 09-15266 (N.D. Cal. Feb. 27, 2009).

71 F. Supp. 2d 402, 413 (D.N.J. 1999) (the "[u]se of secret evidence creates a one-sided process by which the protections of our adversarial system are rendered impotent").

Third, the rule against consideration of *ex parte* evidence to decide the merits of a dispute furthers the appearance of fairness in judicial decision-making. *See, e.g., Abourezk,* 785 F.2d at 1060 (open proceedings "preserve both the appearance and the reality of fairness"). As Justice Frankfurter wrote:

> Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

Joint Ant-Fascist Refugee Comm., 341 U.S. at 171-72 (Frankfurter, J., concurring). In sum, "reliance on secret evidence raises serious issues about the integrity of the adversarial process, the impossibility of self-defense against undisclosed charges, and the reliability of government processes initiated and prosecuted in darkness." *Kiareldeen*, 71 F. Supp. 2d at 413.

The rule against secret evidence means that a party must ordinarily choose between making evidence available to its adversary or forgoing reliance on the evidence altogether. *See, e.g., Abourezk*, 785 F.2d at 1061 (either "the other side must be given access to the [classified] information," or "the court may not rely upon the information in reaching its judgment"); *Vining*, 99 F.3d at 1058 (ordering that the district court should either share discoverable *ex parte* evidence with plaintiff or "it must reconsider [the] summary judgment motion without relying on the information"); *Ass'n for the Reduction of Violence*, 734 F.2d at 68 (same); *Allende*, 605 F. Supp. at 1226 (refusing, on due process grounds, to "examine" or "consider" any *ex parte* classified evidence submitted by the government in support of summary judgment motion); *Kinoy v. Mitchell*, 67 F.R.D. 1, 15 (S.D.N.Y. 1975) ("Either the documents are privileged, and

the litigation must continue as best it can without them, or they should be disclosed at least to the parties, in which case the Court will rule after full argument on the merits." (internal citations omitted)). The government may not use secret evidence offensively while at the same time insulating it from any adversarial testing. *Bane v. Spencer*, 393 F.2d 108, 109 (1st Cir. 1968) (stating that a defendant cannot wield information presented *ex parte* "as a sword to seek [a dispositive legal ruling] and at the same time blind plaintiff so that he cannot counter").

This rule against secret evidence applies even where the evidence in question is classified. As a District of Columbia district court stated in rejecting the constitutionality of the use of *ex parte* classified evidence in an immigration proceeding, the question is not whether the government has an interest in protecting national security information but rather "whether that interest is so all-encompassing that it requires that [the opposing party] be denied virtually every fundamental feature of due process." *Rafeedie v. I.N.S.*, 795 F. Supp. 13, 19 (D.D.C. 1992); *see also In re Nat'l Sec. Agency Telecomm. Records*, 595 F. Supp. 2d at 1089 (depriving plaintiffs' counsel of access to classified government filings and court rulings in civil challenge to government surveillance would violate due process); *Library Connection*, 386 F. Supp. 2d at 71 (examining *ex parte* evidence in challenge to NSL gag order because of time constraints but ordering government to process counsel for a security clearance because of due process concerns "about the plaintiffs' ability to participate fully in case"); *American-Arab Anti-Discrimination Comm.*, 70 F.3d at 1070 (consideration of undisclosed classified evidence in deportation proceeding violated due process); *Kiareldeen*, 71 F. Supp. 2d at 404, 414 (same); *Rafeedie*, 795 F. Supp. at 20 (same); *Naji v. Nelson*, 113 F.R.D. 548, 552-54 (N.D. Ill. 1986) (refusing to rule on summary judgment motion where it was supported by *ex parte* classified evidence); *Allende*, 605 F. Supp. at 1226 (holding summary judgment could not be granted on basis of *ex parte*

classified evidence). Even in the face of national security concerns, due process mandates that "no party [should] be faced . . . with a decision against him based on evidence he was never permitted to see and to rebut." *Abourezk*, 785 F.2d at 1061.[7]

Where the government relies on classified evidence and that evidence is necessary to the resolution of a civil case, courts have ruled that the information must be shared with opposing counsel so that they are able to meaningfully participate in the proceeding. Where necessary, courts have ordered the government to grant opposing counsel security clearances. *See, e.g.*, *In re Nat'l Sec. Agency Telecomm. Records*, 595 F. Supp. 2d at 1089 (ordering government to process plaintiffs' counsel for "security clearances necessary to be able to litigate the case"); *Library Connection*, 386 F. Supp. 2d at 71 (directing the government to attempt "to provide plaintiffs with the opportunity for their lead attorney to seek to obtain the security clearance required to review and respond to the classified materials in connection with the resolution of th[e] case"); *Al Odah v. United States*, 559 F.3d 539 (D.C. Cir. 2009) (Guantanamo habeas counsel entitled to access to classified evidence); *In re Guantanamo Bay Detainee Litig.*, 2009 WL 50155 (D.D.C. Jan. 9, 2009) (same); *Parhat v. Gates*, 532 F.3d 834, 837 n.1 (D.C. Cir. 2008) (counsel given access to classified portion of court's ruling); *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174, 179-80 (D.D.C. 2004) (providing for security clearances for counsel); *see also Anderson v. ITT Industries Corp.*, 92 F. Supp. 2d 516, 519 (E.D. Va. 2000) (counsel given security clearance); *United States v. Lockheed Martin Corp.*, 1998 WL 306755, *5 (D.D.C. 1998) (same); *In re United States*, 1993 WL 262656, *2-3 (Fed. Cir. Apr. 19, 1993)

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[7] In *United States v. Aref*, 285 F. App'x 784, 794 (2d Cir. 2008), the Second Circuit found that the district court's consideration of an *ex parte* classified filing in a criminal case did not violate due process because, among other things, "there was little or no chance that Aref would be deprived erroneously of his private interest" and because "additional safeguards would probably have been of little value." Neither of those considerations apply here.

(same).[8] In other civil cases, sensitive evidence has been shared under a protective order. *See, e.g., In re Guantanamo Bay Detainee Litig.*, 2009 WL 50155 (D.D.C. Jan. 9, 2009); *In re Under Seal*, 945 F.2d 1285, 1287 (4th Cir. 1991) (protective order); *Heine v. Raus*, 399 F.2d 785, 787 (4th Cir. 1968) (protective order); *Air-Sea Forwarders, Inc. v. United States*, 39 Fed. Cl. 434, 436-37 (Fed. Cl. Ct. 1997) (protective order).[9]

Here, due process requires the government to disclose its *ex parte* affidavit to plaintiffs' counsel. Such disclosure can be accomplished pursuant to a protective order. (Plaintiffs note that there is already a protective order in this case, *see Doe v. Ashcroft*, 317 F.Supp.2d 488 (S.D.N.Y. 2004).) If security clearances are necessary, plaintiffs ask this Court to order the government to expedite applications from plaintiffs' counsel. *Cf. In re Nat'l Sec. Agency Telecomm. Records*, 595 F. Supp. 2d at 1089 (ordering government to "expedite the processing" of counsel's security clearance applications).

II. IN THE ALTERNATIVE, THE COURT SHOULD ORDER THE GOVERNMENT TO PROVIDE PLAINTIFFS' COUNSEL WITH AN UNCLASSIFIED SUMMARY OF ITS ARGUMENTS AND EVIDENCE.

In those exceedingly rare circumstances in which *ex parte* evidence has been permitted, courts have given effect to the due process guarantee by fashioning alternatives to total secrecy. At a bare minimum, due process requires that the government provide a substitute disclosure that

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[8] The government asserts that its *ex parte* declaration has been classified at the Secret level. *See* Letter from Jeff Oestericher to Judge Marrero (June 17, 2009). Notably, in many cases – both criminal and civil – plaintiffs are granted clearance to see information that is classified at an even higher level than Secret. *See, e.g., In re Nat'l Sec. Agency Telecomm. Records*, 595 F. Supp. 2d at 1089 (ordering government to arrange for plaintiffs' counsel to apply for Top Secret/Sensitive Compartmented Information ("TS/SCI") clearance); *In re Guantanamo Bay Detainee Litig.*, 2009 WL 50155 (D.D.C. Jan. 9, 2009) (access to TS/SCI information).

[9] Counsel is routinely granted access to classified information in criminal cases as well. *See, e.g.*, Classified Information Procedures Act ("CIPA"), 18 U.S.C. app 3; *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 118 (2d Cir. 2008); *United States v. Pappas*, 94 F.3d 795, 797 (2d Cir. 1996).

explains the substance of its classified *ex parte* filing in an unclassified form. The need for a substitute disclosure is particularly acute where, as here, the government's *entire* argument and *all* of its evidence have been submitted *ex parte*.

The Second Circuit addressed precisely this issue in *Abuhamra*. Where the government had presented its entire argument for why an individual should be denied bail *ex parte*, the Second Circuit held that "due process does not permit total secrecy." *Abuhamra*, 389 F.3d at 331. The Court held that in the "rare circumstances" when receipt of *ex parte* information is permissible, the government must provide a "substitute disclosure" to opposing counsel. *Id.* at 322. At a minimum, this "substitute disclosure" must explain "the gist or substance of the reasons advanced in the government's sealed submission" and the "gist or substance of the government's [entire] *ex parte* submission." *Id.* at 329. In sum, the "government must either apprise [opposing counsel] of the substance of its sealed submission or forego the court's consideration of the evidence." *Id.* at 331.

Courts routinely require the government to provide to opposing counsel unclassified summaries of its *ex parte* filings. *See, e.g.*, *Al Odah*, 559 F.3d at 547 (Guantanamo habeas counsel entitled to "unclassified substitution" explaining government's classified evidence); *Ass'n for Reduction of Violence*, 734 F.2d at 68 (directing district court to redact or summarize the *ex parte* material); *Allende*, 605 F. Supp. at 1226 (rejecting classified *ex parte* evidence where "the defendants ha[d] offered neither a summary of the information contained in the classified materials . . . nor a detailed explanation for their inability to do so"); *Abourezk*, 785 F.2d at 1061. Other courts have required the release of redacted documents. *See, e.g., Naji*, 113 F.R.D. at 553 (requiring, at a minimum, that the government "disclose to plaintiffs all non-classified portions of the documents withheld"). Still other courts have required the government

to conduct a declassification review of the *ex parte* materials. *See, e.g., In re Nat'l Sec. Agency Telecomm. Records*, 595 F. Supp. 2d at 1089. In short, courts have wide latitude to control the introduction and protection of sensitive or classified information in the litigation process. *See, e.g., Webster v. Doe*, 486 U.S. 592, 604 (1988) (noting that "the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission"); *Abourezk*, 785 F.2d at 1060 (cautioning the district court on remand "to make certain that plaintiffs are accorded access to the decisive [classified] evidence to the fullest extent possible, without jeopardizing legitimately raised national security interests").[10]

Indeed, most statutes that contemplate consideration of *ex parte* evidence explicitly provide that some substitute disclosure of the substance of the *ex parte* material must be provided to opposing counsel. For example, CIPA, the law that governs the use of classified information in criminal proceedings, contemplates the provision of summaries or substitute

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[10] The rampant overclassification of government information is well-documented. *See, e.g., Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992, 1007 n.7 (9th Cir. 2009) ("Abuse of the Nation's information classification system is not unheard of."); *ACLU v. Dep't of Def.*, 389 F. Supp. 2d 547, 561 (S.D.N.Y. 2005) (there is "an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already knows, or that which is more embarrassing than revelatory of intelligence sources or methods"); Walter Pincus, *Intelligence Pick Calls Torture Immoral, Ineffective*, Wash. Post, Jan. 23, 2009 (reporting Retired Admiral Dennis C. Blair's confirmation hearing statement that: "There is a great deal of overclassification, some of it . . . done for the wrong reasons."); Erwin N. Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information*, Wash. Post, Feb. 15, 1989 at A25; (former Solicitor General who fought to keep the Pentagon Papers secret stating: "It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassificaton and that the principle concern of the classifiers is not with national security, but with governmental embarrassment of one sort or another."); Meredith Fuchs, *Judging Secrets: The Role the Courts Should Play in Preventing Unnecessary Secrecy*, 58 Admin. L. Rev. 131, 133-34 (2006) (noting that classification of information has nearly doubled since 2001 and citing instances in which "[o]fficials throughout the military and intelligence sectors have admitted that much of this classification activity is unnecessary"); National Commission on Terrorist Attacks Upon the United States, The 9/11 Commission Report 417 (G.P.O. 2004) ("Current security requirements nurture overclassification").

submissions. *See* 18 U.S.C. app. 3 § 4; *see also Abuhamra*, 389 F.3d at 331 (discussing CIPA). Similarly, the law that governs summary terrorism-related removal proceedings requires the government to provide unclassified summaries of any classified information upon which it relies. *See* 8 U.S.C. § 1534(e)(3); *see also* 50 U.S.C. § 1806(f) (providing that courts can order partial release of classified material previously submitted by government to the Foreign Intelligence Surveillance Court).

Here, the government has not provided plaintiffs with any substitute disclosure of the substance of its *ex parte* filing. But it is inconceivable that the government cannot provide an unclassified summary of its argument and evidence. *Cf. Abuhamra*, 389 F.3d at 325 ("we are skeptical of the government's claim that it would be impossible to provide [opposing counsel] with *any* redacted summary" of *ex parte* evidence). Even in this litigation, the government has previously offered many of its arguments for the gag order in documents filed on the public docket. A public declaration filed by David Szady in June 2004, for example, asserted that disclosure "of a particular NSL" could "alert the target that he or she is being investigated by the FBI," which could cause the target to "take action to avoid further investigation," to "destroy evidence of terrorist or espionage activity," to "manufacture false evidence to 'throw the FBI off the trail,'" to "flee the country," to "warn other co-conspirators," or enable the target to "discern what specific information the FBI knows about him or her." Decl. of David W. Szady ¶ 19, *Doe v. Holder*, No. 04-2614 (S.D.N.Y. July 20, 2004) (dkt. no. 49). The government made similar arguments – publicly – in the *Library Connection* litigation. Gov't Mem. in Supp. of Emergency Mot. for Stay Pending Expedited Appeal at 8, 11-12, *Library Connection*, No. 05-1256 (2d Cir. Sep. 14, 2005) (arguing that NSL gag order in that case was necessary because "public disclosure would give notice to the target of the NSL that his activities may be the object of an

ongoing government investigation"); *see also* Gov't Mem. in Opp'n to Emergency Mot. to Vacate Stay *Library Connection*, No. 05-1256 (2d Cir. Sep. 25, 2005) (arguing that disclosure of the mere fact that Library Connection received an NSL would tip off the target even after *The New York Times* disclosed Library Connection's identity as the NSL recipient).

If the Court finds that due process permits anything less than granting plaintiffs' counsel full access to the government's *ex parte* filing, it should order the government to provide plaintiffs with a substitute disclosure that explains the substance of its classified *ex parte* filing in unclassified form.

CONCLUSION

For the reasons stated above, plaintiffs' respectfully request that the Court order the government to provide plaintiffs' counsel with full access to its *ex parte* affidavit, under a protective order if necessary. If some material in the government's *ex parte* affidavit is properly classified, plaintiffs ask this Court to order the government to expedite security clearance applications from plaintiffs' counsel. In the alternative, plaintiffs request that the Court order the government to produce an unclassified summary of its *ex parte* declaration that is sufficiently detailed to permit plaintiffs meaningfully to respond to the government's arguments.

Plaintiffs also ask that the Court stay the proceedings contemplated by the Court's May 27 order until the issues raised by the instant motion have been resolved.

Respectfully submitted,

MELISSA GOODMAN (MG-7844)
JAMEEL JAFFER (JJ-4653)
LAURENCE M. SCHWARTZTOL (LS-1978)
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

ARTHUR N. EISENBERG (AE-2012)
New York Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004

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