CASE NO. 09-_____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELECTRONIC FRONTIER FOUNDATION,

PLAINTIFF-RESPONDENT,

V.

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE and
DEPARTMENT OF JUSTICE,

DEFENDANTS-MOVANTS.

OPPOSITION TO EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR TEMPORARY STAY PENDING DECISION OF SOLICITOR GENERAL REGARDING APPEAL OF ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA THE HONORABLE JEFFREY WHITE, DISTRICT JUDGE CIVIL NOS. 3:08-cv-01023-JSW AND 3:08-cv-08-2997-JSW

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INTRODUCTION

This case arises from several Freedom of Information Act (FOIA) requests submitted by the Plaintiff-Respondent Electronic Frontier Foundation (EFF) to the Defendants-Movants Office of the Director of National Intelligence (ODNI) and Department of Justice (DOJ). The requests seek information concerning lobbying efforts to and by those agencies to ensure telecommunications providers are not held responsible for their participation in a massive, well-documented warrantless surveillance program through which the United States government has unlawfully gathered information about millions of ordinary Americans.

The agencies have filed an emergency motion for a stay of the order granting summary judgment in EFF's favor. The Court should deny the government's request for a stay to decide whether or not it wishes to prosecute an appeal of the District Court's Sept. 24, 2009 Order.[1] First, the government has failed to satisfy the procedural requirements to seek a stay pending appeal before the Ninth Circuit. Second, even if it had satisfied those requirements, the government has not demonstrated that it should be granted a stay because it has failed to show a strong likelihood of success on the merits of an appeal or that it will be irreparably injured in the absence of 45 days to contemplate whether or not to appeal. The harm the gov-

[1] While the government filed a notice of appeal last night, this act does not mean it has decided to appeal. The government has represented to EFF that it is only seeking more time for the Solicitor General to decide whether to pursue the appeal.

ernment claims it will suffer from disclosure is speculative at best unless and until it decides to pursue an appeal.

Furthermore, the balance of hardships favors EFF, which will suffer irreparable harm if this Court grants the motion. As the District Court found when deciding EFF's motion for a preliminary injunction to compel the government to respond to some of EFF's FOIA requests, "irreparable harm exists where Congress is considering legislation that would amend the [Foreign Intelligence Surveillance Act] and the records may enable the public to participate meaningfully in the debate over such pending legislation." *Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence*, 542 F. Supp. 2d 1181, 1187 (N.D. Cal. 2008). The value of the information that EFF seeks is particularly time-sensitive because Congress is currently considering two pieces of legislation that would repeal retroactive immunity for the telecommunications companies that facilitated the government's warrantless surveillance program.

Finally, the public interest will benefit from the timely release of the requested records. The congressional and public debate over retroactive immunity would benefit from disclosure of the material EFF requested. Thus, the government's emergency motion for a stay should be denied.

STATEMENT OF FACTS

A. The Warrantless Surveillance Program

"Following the terrorist attacks on September 11, 2001, President George W. Bush authorized the National Security Agency ('NSA') to conduct a warrantless communications surveillance program." *Al-Haramain v. Bush*, 507 F.3d 1190, 1192 (9th Cir. 2007). The day after this program was first reported in the *New York Times* (Hofmann Decl. Ex. 2),[2] President Bush confirmed the program in a radio address. Hofmann Decl. Ex. 3. Shortly thereafter, the *New York Times* reported that the NSA's surveillance activity was far more extensive than President Bush had admitted:

> The National Security Agency has traced and analyzed large volumes of telephone and Internet communications flowing into and out of the United States as part of the eavesdropping program that President Bush approved after the Sept. 11, 2001, attacks to hunt for evidence of terrorist activity, according to current and former government officials.

Hofmann Decl. Ex. 4. The press continued to reveal the broad scope of the government's surveillance operation. On February 6, 2006, for instance, *USA Today* reported, "[t]he National Security Agency has secured the cooperation of large telecommunications companies, including AT&T, MCI and Sprint, in its efforts to eavesdrop without warrants on international calls by suspected terrorists, according

[2] Declaration of Marcia Hofmann ("Hofmann Decl.") (N.D. Cal. No. 08-02997 Dkt. 44), which describes each exhibit cited here, is attached. The exhibits themselves are docketed with the District Court at 44-1 (Exs. 1-5); 44-2 (Exs. 6-10); and 44-3 (Exs. 11-15).

to seven telecommunications executives." Hofmann Decl. Ex. 5.

Since the NSA's massive and illegal warrantless surveillance program was first revealed, more than 40 lawsuits have been filed throughout the United States seeking to hold the government and cooperating telecommunications carriers responsible for violating the law and the privacy of countless citizens and customers. All of these lawsuits were consolidated in the Northern District of California as *In re National Security Agency Telecom Records Litig*. ("In re NSA MDL") (N.D. Cal. No. 06-1791-VRW).[3]

B. The Campaign to Shield Telecommunications Carriers From Liability for Their Role in Unlawful Surveillance Activity

On August 5, 2007, President Bush signed into law the Protect America Act, which amended the Foreign Intelligence Surveillance Act (FISA). In an article published the same day the Protect America Act became law, the *New York Times* reported "pressure from the telecommunications companies on the Bush administration has apparently played a major hidden role in the political battle over the surveillance issue over the past few months." Hofmann Decl. Ex. 6. Despite this pressure, the Protect America Act, which was set to expire in February 2008, did not include retroactive immunity for telecommunications companies. The White House, however, pushed for immunity in any future bill. Hofmann Decl. Ex. 7. In

[3] EFF is Co-Lead Coordinating Counsel in the *In Re NSA* MDL litigation.

an August 22, 2007 interview discussing the government's warrantless surveillance activities with the *El Paso Times*, Director of National Intelligence McConnell stated:

> [U]nder the president's program, the terrorist surveillance program, the private sector had assisted us. Because if you're going to get access you've got to have a partner and they were being sued.

Hofmann Decl. Ex. 8. As reported by *Newsweek*, "[t]he nation's biggest telecommunications companies, working closely with the White House, have mounted a secretive lobbying campaign to get Congress to quickly approve a measure wiping out all private lawsuits against them for assisting the U.S. intelligence community's warrantless surveillance programs." Hofmann Decl. Ex. 9.

Congress allowed the Protect America Act to expire on February 16, 2008, without reaching an agreement to extend the controversial law. *See Elec. Frontier Found.*, 542 F. Supp. 2d at 1186. (During February 2008, DOJ and ODNI made repeated public references to communications and other exchanges with representatives of telecom carriers, asserting that they might refuse to cooperate with even lawful government surveillance requests unless the companies received immunity in additional pending legislation to amend the FISA. For example, in a February 15, 2008, interview with Jim Angle on Fox News, Director McConnell said, "The companies are telling us if you can't protect us, the cooperation you need is not going to be there." Hofmann Decl. Ex. 10. Moreover, a February 23, 2008, press release jointly issued by DOJ and ODNI said, "although our private partners are co-

operating for the time being, they have expressed understandable misgivings about doing so in light of the on-going uncertainty and have indicated that they may well discontinue cooperation if the uncertainty persists." Hofmann Decl. Ex. 11. Similarly, on February 26, 2008, a "Senior Administration Official" said in a press conference:

> I, and colleagues of ours, both in ODNI and DOJ, have been working very closely with general counsel's offices in the various providers, because they've been asking about this looming potential expiration [of the Protect America Act] for some time and what its implications will be. ... they're concerned about it and they might—they may well withdraw that cooperation if the situation doesn't get cleared up with permanent legislation.

Hofmann Decl. Ex. 12. Nevertheless, supporters of further FISA amendments continued to cite the purported carrier threats to stop "cooperation" with lawful surveillance orders as critical for their arguments to make the telecoms unaccountable. *See, e.g.,* Hofmann Decl. Ex. 13.

The FISA Amendments Act (FAA), codified at 50 U.S.C. § 1885 *et seq.*, was enacted by Congress on July 9, 2008, and signed into law the following day. Pub. L. No. 110-261, 122 Stat. 2436 (2008). The FAA purports to extend retroactive legal immunity to telecoms that have facilitated the government's warrantless surveillance program. *See* 50 U.S.C. § 1885a. The plaintiffs in the *In re NSA* MDL have challenged the constitutionality of the FAA and, after dismissal pursuant to

the FAA, an appeal is currently being briefed to this Court.[4]

On September 17, 2009, Senator Russ Feingold and seven other senators introduced the JUSTICE Act, S.1686. Section 303 of the JUSTICE Act would eliminate Section VIII of the FAA, which granted retroactive legal immunity for telecommunications companies that participated in the warrantless wiretapping program. Just last week, on September 29, 2009, Senator Christopher Dodd and three other senators introduced S.1725, or the Retroactive Immunity Repeal Act, which would similarly repeal the grant of carrier immunity. Both bills were introduced as part of the debate over the reauthorization of the USA PATRIOT Act, parts of which are set to expire on December 31, 2009.

C. EFF's FOIA Requests For Records About the Telecom Lobbying Campaign and Requests for Expedited Processing

On December 21, 2007 and April 24, 2008, EFF faxed FOIA requests to ODNI and DOJ, asking for records concerning "briefing, discussions, or other exchanges" that agency officials had with members of Congress or with telecom representatives concerning amendments to FISA. *Elec. Frontier Found.,* 542 F. Supp. 2d at 1184; *see also* Order at 2-3 (08-1023 Dkt. 90; 08-2997 Dkt. 72 (collectively "Sept. 24 Order")). In each of its letters, EFF formally requested that the processing of these requests be expedited, and the agencies granted EFF's requests.

[4] The lead case is *Hepting v. AT&T*, Ninth Cir. Case No. 09-16676.

When the agencies did not respond to the requests in a timely manner, EFF filed suit seeking the immediate processing and release of all improperly withheld records (Case Nos. 08-1023 and 08-2997). Recognizing the extraordinary public interest in the documents requested, the District Court issued a preliminary injunction requiring the defendants to expedite the processing of EFF's December 2007 requests. *Elec. Frontier Found.,* 542 F. Supp. 2d at 1183.[5]

The Movants processed each of EFF's requests, but withheld a significant material in whole or in part. Sept. 24 Order at 3-4. The government moved for summary judgment on December 10, 2008, and EFF filed a cross motion for summary judgment on January 13, 2009, challenging only withholdings related to unclassified communications between and among executive agencies, Congress, the White House, and telecoms concerning amendments to FISA, and the identities of individual agents or representatives of the carriers within those communications.

Shortly thereafter, on his first full day in office, President Obama issued a *Memorandum for Heads of Executive Departments and Agencies*, 74 Fed. Reg. 4683 (Jan. 21, 2009). The Obama FOIA Memo provides that "[a]ll agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government.

[5] The parties negotiated a processing schedule for the April 2008 requests, enforcing expedited processing without a motion. *See* 08-1023 Dkt. 62.

The presumption of disclosure should be applied to all decisions involving FOIA." *Id*. On May 12, 2009, after applying the new guidelines, the defendants emailed EFF a small number of additional records identified for "discretionary release."

On September 24, 2009, the District Court denied the government's motion for summary judgment and granted EFF's cross motion, ordering the government to produce all improperly withheld documents by October 9, 2009. Sept. 24 Order at 10. On September 30, 2009, the government filed a motion to stay the order for 60 days, which the District Court denied. Oct. 7 Order (08-cv-02997 Dkt. 79).

ARGUMENT

I. The Government Has Not Satisfied the Procedural Requirements to Seek a Temporary Stay Pending Appeal.

The government purports to request a "limited" stay of the District Court's September 24, 2009, order granting summary judgment in EFF's favor. The Federal Rules of Appellate Procedure (FRAP) do not authorize the stay requested by the Movants in this case. Granting such a stay would allow the government an end-run around the requirements of the Rules.

Although the Movants filed a "protective" notice of appeal just hours after they filed the emergency motion before the Court, the Solicitor General has yet to make her determination of whether to actually maintain an appeal. In its motion, the government stated that it "is not presently seeking a full-blown stay pending appeal." Emergency Mot. at 16. Rather, the government's position was, and re-

mains, that "[g]iven the specific purpose [of allowing the Solicitor General time to decide whether to formally appeal this matter] and limited scope of such a temporary stay, there is no reason for this request to be judged against the standards for stays pending the court's full consideration of an appeal." Emergency Mot. at 16.

FRAP 8 provides for "a stay of the judgment or order of a district court pending appeal." The government has moved for a stay of the judgment of the District Court asking that it be held not to the standards of Rule 8, which provides for such a stay, but under some other unarticulated standard under the All Writs Act, 28 U.S.C. § 1651(a). However, "[w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Penn. Bureau of Correction v. U.S. Marshals Svc.*, 474 U.S. 34, 43 (1985); *see also Kushner v. Winterthur Swiss Ins. Co.*, 620 F.2d 404, 406 (3rd Cir. 1980) (The FRAP "set forth the requirements a litigant must observe if the merits of the appeal are to be considered properly by the United States Courts of Appeals. They have the force and effect of statutes.") (citing 28 U.S.C. §§ 2071-72 (the Rules Enabling Act)). Because the motion seeks a remedy virtually identical to that provided by FRAP 8, but does not satisfy the procedural or substantive requirements of that rule, the government's attempt to end-run the Rules should be denied.

Furthermore, the government has not complied with the procedural requirements of FRAP 8. Before a party may request that this Court stay the order of a

district court, it "must ordinarily move first in the district court for ... a stay of the judgment or order of a district court pending appeal." FRAP 8(a)(1). If, as here, the movant has not applied in the district court for a stay pending appeal, it must "show that moving first in the district court would be impracticable." FRAP 8(a)(2)(A)(i). The government has not attempted to show that moving for a stay in district court would have been impracticable. Indeed, the District Court's October 7 order specifically left open the possibility of such a motion.[6]

II. The Government Has Failed to Demonstrate That It Is Entitled to a Temporary Stay Pending the Solicitor General's Determination Regarding Whether to Take an Appeal.

The FRAP do not contemplate a stay pending a litigant's determination of whether to take an appeal. They do, however, provide for a stay *pending* appeal. FRAP 8. Under the well-established test for such a stay, the Court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v.*

[6] The Emergency Motion boils down to a request for this Court to review the District Court's denial of a stay to allow the government more time to consider an appeal. The Ninth Circuit "review[s] denial of a motion for stay for an abuse of discretion." *MacKillop v. Lowe's Mkt., Inc*., 58 F.3d 1441, 1446 (9th Cir.1995); *U.S. v. Peninsula Comm., Inc.*, 287 F.3d 832, 838 (9th Cir. 2002). Because the government has not shown any abuse of discretion, the motion must be denied.

Braunskill, 481 U.S. 770, 776 (1987); *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008); *Humane Soc'y of the United States v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008).

"[T]he issues of likelihood of success and irreparable injury represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Humane Soc'y,* 523 F.3d at 991. If a movant fails to meet the "minimum showing" of a threat of an immediate irreparable injury, this Court "need not decide whether [the movant is] likely to succeed on the merits." *Oakland Tribune, Inc. v. Chronicle Publ'g Co.,* 762 F.2d 1374, 1376 (9th Cir. 1985). A movant "must do more than merely allege imminent harm" to obtain a stay; he "must *demonstrate* immediate threatened injury as a prerequisite to ... relief." *Caribbean Marine Servs. Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988) (emphasis in original). The government has not satisfied the standard.

A. The Government Has Failed to Make a Strong Showing That It Is Likely to Prevail on the Merits of Any Appeal It May Pursue.

The government is unable to make a strong showing that it is likely to succeed on the merits of an appeal. While it repeats the same arguments that were tried and found wanting by the District Court, Emergency Mot. at 16-20, it cannot point to any legal precedent that suggests the probability of a different outcome on appeal, and does not even attempt to show the finding of fact were clear error. Indeed, the government frankly admits that it has nothing new to say. Emergency

Mot. at 16 ("the arguments previously made to the district court have a substantial prospect of succeeding on the merits, for the reasons stated to the district court"); *compare* EFF's Cross Motion for Summary Judgment (08-02997-JSW Dkt. 44).

As the District Court recognized, EFF is likely to succeed on the merits of any appeal the government may pursue. While the government claims that this case "presents novel and significant questions under FOIA," Emergency Mot. at 9, the District Court reached its conclusion by applying well-settled precedent to the facts in this case. Sept. 24 Order at 7-10. The government's ultimate dissatisfaction with the result reflects nothing about its likelihood of success on appeal, but rather disappointment with the District Court's decision.[7] Accordingly, because the government has failed to make a strong showing of a likelihood of success on the merits of any appeal it might take, this Court should deny the request for a stay. *Armstrong v. Executive Office of the President*, 877 F. Supp. 750, 752 (D.D.C. 1995) (denying motion for a stay where, among other shortcomings, the defendant agency's likelihood of success on the merits of an appeal was "*de minimis*").

B. The Government Has Failed to Show It Will Be Irreparably Harmed If the Court Does Not Grant a Stay Until November 8.

The government has not demonstrated that it will be irreparably harmed if

[7] *See* Oct. 7 Order at 3:1-5 ("Defendants reargue points previously asserted to the Court and, in essence, merely express their disagreement with the Court's decision.").

the Court does not grant the requested stay to allow the Solicitor General additional time to decide whether to pursue an appeal. In fact, the harm the government claims it will suffer is speculative. After all, the government will suffer no injury whatsoever if the Solicitor General ultimately decides not to appeal some or all of the issues in this case.[8] As the Attorney General has noted, "[t]imely disclosure of information is an essential component of transparency." Attorney General Eric Holder, *Memo. for Heads of Exec. Dep'ts and Agencies re the FOIA* at 3, March 19, 2009.[9] Indeed, the government indicates that the Solicitor General has yet to actually decide whether to pursue an appeal. As the District Court found, such a decision would be contrary to the stated policy of the Obama Administration. Sept. 24 Order at 10.

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[8] While the government contends that "stays pending appeal in FOIA cases are routinely granted" by both district and appeals courts, Emergency Mot. at 12, none of the cases it cites appears to involve a stay pending an "appeal determination" by the Solicitor General, but rather stays requested once appeals had been filed and were pending. *Senate of the State of Cal. v. Moshacher*, 968 F.2d 974, 975 (9th Cir. 1992) (noting the Court "stayed the injunction pending appeal"); *Minnis v. USDA*, 737 F.2d 784, 785 (9th Cir. 1984) ("[w]e stayed action pending this appeal"); *Neely v. FBI*, 208 F.3d 461, 463 (4th Cir. 2000) ("we stayed the order pending appeal"); *Ferguson v. FBI*, 957 F.2d 1059, 1060 (2d Cir. 1992) (noting that an appeals panel had granted "motion for a stay pending appeal of the district court's order"); *HHS v. Alley*, 129 S. Ct. 1667 (2009) (injunction "stayed pending final disposition of the appeal" by the circuit court).

[9] *Available at* http://www.usdoj.gov/ag/foia-memo-march2009.pdf. *See also Memo. for Heads of Exec. Dep'ts and Agencies concerning the FOIA*, 74 Fed. Reg. 4683 (Jan. 21, 2009).

"Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction," nor, under the preliminary injunction standard, a stay pending appeal. *Caribbean Marine Servs.*, 844 F.2d at 674 (citing *Goldie's Bookstore, Inc. v. Sup. Court*, 739 F.2d 466, 472 (9th Cir. 1984)). The injury the Court should consider when deciding whether to grant a stay is not the speculative harm that might follow from disclosure of the withheld documents—unless and until the Solicitor General decides to pursue an appeal, that harm is pure conjecture. Rather, the relevant harm is the government having two weeks rather than 45 days to ruminate over whether to appeal. That harm is negligible in light of the irreparable harm to EFF's statutory rights under the FOIA and the strong public interest in informed legislative debate, detailed more fully *infra* in Section II D.

The government has filed a notice of appeal. It is therefore now entitled to move for a short stay before the District Court on its argument that disclosure of the requested documents would moot an appeal. However, the government has neither moved for a stay pending an appeal before the District Court nor demonstrated that moving for such a stay would have been impracticable. FRAP 8(a)(2)(A). That question is not properly before the Ninth Circuit.[10]

[10] Should this Court determine that this matter is properly before the Ninth Circuit and a delay is warranted, it should fashion a conditional stay that will preserve the parties' rights, serve the public interest, and recognize the need for expedition in this case. Such a stay should require the government to reach its decision to pursue

(Footnote continued)

C. EFF Will Suffer Irreparable Harm If the Court Stays the District Court's September 24 Order Until November 8.

Because "stale information is of little value," a stay of the length sought by the government will substantially and irreparably injure EFF. *See Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988). EFF submitted the oldest of the FOIA requests at issue here nearly two years ago. ODNI and DOJ granted expedited processing for all the requests pursuant to the FOIA and applicable agency regulations, recognizing the urgency to inform the public about the subject of the requests.[11]

As the District Court found when it granted EFF's motion for a preliminary injunction in April 2008 to ensure the first round of requests were processed in an expeditious manner, "Plaintiff has met its burden of demonstrating that it will suf-

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an appeal and file a proper FRAP 8 motion no later than October 15, 2009, in order for the stay to remain in effect. EFF respectfully requests that this Court provide for expedited consideration of any such appeal. If, however, the Solicitor General decides not to pursue an appeal, any stay should expire immediately. *Cf. Ctr. for Int'l Envtl. Law*, 240 F. Supp. 2d at 24 (granting stay "only for a limited time and on the condition that defendants seek expedited consideration from the court of appeals"); *People for the Am. Way Found. v. Dep't of Educ.*, 518 F. Supp. 2d 174, 179 (D.D.C. 2007) (conditioning stay on, *inter alia*, government's filing a notice of appeal and petitioning appeals court for expedited consideration).

[11] The FOIA clearly establishes the circumstances in which an agency must process a request in an expedited manner where there is "a compelling need." 5 U.S.C. § 552(a)(6)(E)(i). "Compelling need" includes, "with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v).

fer irreparable injury in the absence of relief." *Elec. Frontier Found.*, 542 F. Supp. 2d 1181 at 1185 (08-1023 Dkt. 34). More than a year and a half later, the government still has not produced most of the documents requested by EFF. Further delay continues to compromise EFF's statutory rights to expedited treatment and the requested material itself. *See* Oct. 7 Order at 2:6-10.

Moreover, the value of the information that EFF requested from the government here is particularly time-sensitive because Congress is again considering retroactive immunity legislation, as described *infra* in Section II D. While the bills discussed below are not the same as those that were pending when the District Court granted EFF's motion for a preliminary injunction, their effect is substantially the same. Further delay will continue to harm the legislative and public debate over updating foreign intelligence surveillance law and EFF's ability to meaningfully take part in that debate. The goals of the FOIA, "efficient, prompt, and full disclosure of information," is only frustrated by additional delay in the government's compliance with the law. *See August v. FBI*, 328 F.3d 697, 699 (D.C. Cir. 2003) (*quoting Senate of the Commonwealth of Puerto Rico v. Dep't of Justice*, 823 F.2d 574, 580 (D.C. Cir. 1987) (emphasis in original)).

Finally, irreparable harm is presumed for violation of statutes, like FOIA, that provide for injunctions. *See* 5 U.S.C. § 552(a)(4)(B) (district court may "enjoin the agency from withhold agency records..."); *Silver Sage Partners, Ltd. v.*

City of Desert Hot Springs, 251 F.3d 814, 827 (9th Cir. 2001); *Smallwood v. Nat'l Can Co.*, 583 F.2d 419, 420 (9th Cir. 1978); *Burlington N. R.R. Co. v. Dep't of Revenue*, 934 F.2d 1064, 1074 (9th Cir. 1991). Thus, the stay should be denied.

D. The Public Interest Will Be Served By the Expeditious Release of Documents At Issue In This Case.

The public interest will be served by the denial of the stay and expeditious release of the records requested by EFF. The United States Senate is actively considering two bills that would repeal the grant of retroactive immunity that is the primary subject of EFF's FOIA requests. The District Court found when it granted EFF's motion for a preliminary injunction that "the requested information will be rendered useless in the effort to educate the American public about the issues pertinent to the legislation if such information is produced after Congress amends the law." *Elec. Frontier Found.*, 542 F. Supp. 2d at 1186. A new opportunity to amend the law has arisen, and for precisely that reason, the stay would harm the public interest.

As discussed in the Statement of Facts above, both the JUSTICE Act and the Retroactive Immunity Repeal Act would repeal the FAA's retroactive telecom immunity provisions. Both bills were introduced last month as part of the debate over the reauthorization of the USA PATRIOT Act, parts of which are slated to expire on December 31, 2009. The congressional activity surrounding that legislation is vigorous—indeed, the Senate Judiciary Committee reported PATRIOT

reauthorization legislation out of committee just yesterday. *See* Associated Press, *Senate Committee Approves Patriot Act Changes*, Oct. 8, 2009.[12] EFF's FOIA requests go to the heart of an already vigorous public and congressional debate that "cannot be based solely upon information that the Administration voluntarily chooses to disseminate." *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30, 41 n.9 (D.D.C. 2006). Furthermore, the information EFF seeks must be disclosed while debate is ongoing because that debate "cannot be restarted or wound back." *Elec. Frontier Found.*, 542 F. Supp. 2d at 1186, quoting *Gerstein v. CIA*, No. C-06-4643 MMC, 2006 WL 3462659 at *4 (N.D. Cal. Nov. 29, 2006).

The government has failed to show that the District Court clearly erred in finding "a strong public interest in disclosure of the identity of the individuals who contacted the government in an effort to expand the government's authority to gather intelligence and to protect telecommunications companies from legal liability for their role in governmental surveillance activity."

The Supreme Court has long recognized our democracy's interest in "the uninhibited, robust, and wide-open debate about matters of public importance that secures an informed citizenry." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 815 (1985) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (internal quotation marks omitted)); see also *Board of Educ. v. Pico*, 457

[12] *Available at* http://abcnews.go.com/Politics/wireStory?id=8782995

U.S. 853, 876 (1982) ("[T]he Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs."). The government should be permitted no further postponement in complying with the law, particularly considering the strong public interest in the requested documents.

CONCLUSION

For the reasons stated above, the Plaintiff-Respondent respectfully requests that this Court deny the government's emergency motion for a temporary stay.

Respectfully submitted,

DATED: October 9, 2009

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