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March 29, 2006

Ms. Roseann B. MacKechnie
Clerk, United States Court of Appeals
for the Second Circuit
United States Courthouse
40 Foley Square
New York, NY 10007

Re: John Doe v. Alberto Gonzales, No. 05-0570-cv
John Doe v. Alberto Gonzales, No. 05-4896-cv (consolidated)

Dear Ms. MacKechnie:

The appellants submit this letter brief pursuant to the Court's order of March 15, 2006, which directs the parties to address the impact of the USA Patriot Improvement and Reauthorization Act of 2005 ("Reauthorization Act" or "Act") on these two consolidated appeals. For reasons explained below, the new legislation provides additional grounds for reversal of the judgment in No. 05-0570 and permits the Court to vacate the judgment and dismiss the appeal in No. 05-4896.

1. The Reauthorization Act's NSL Provisions

The plaintiffs' claims in these cases focus on three aspects of § 2709: the availability of pre-enforcement judicial review of NSLs, the permissibility of disclosing an NSL to the recipient's counsel, and the scope, duration, and application of the nondisclosure requirement. The Reauthorization Act's NSL provisions address each of these elements.

A. Pre-enforcement Judicial Review. – Section 115 of the Act expressly authorizes pre-enforcement judicial review of NSLs. Specifically, any recipient of an NSL "may * * * petition [a district court] for an order modifying or setting aside the request" for information. 18 U.S.C. § 3511(a) (added by Act § 115). The district court is authorized to "modify[] or set[] aside the request" if the court determines that compliance "would be unreasonable, oppressive, or otherwise unlawful." Id. If a recipient fails to comply with an NSL, the Attorney General may apply to a district court for an order compelling compliance. Id. § 3511(c).

B. Disclosure to Counsel. – Section 116 of the Act expressly authorizes the recipient to disclose the NSL to the recipient’s counsel. Specifically, the law now provides that the general prohibition on disclosure does not apply to disclosure to “an attorney to obtain legal advice or legal assistance with respect to the request * * * .” 18 U.S.C. § 2709(c)(1) (as amended by Act § 116(a)).

C. Imposition of the Nondisclosure Requirement. – Previously, the general prohibition against disclosure of NSLs in § 2709(c) took effect automatically upon the issuance of an NSL and applied to all NSLs. Section 116 of the Act makes the imposition of the nondisclosure requirement contingent on a pre-issuance determination of need by the government. Specifically, the nondisclosure requirement applies only if the Director of the FBI or other specified FBI officials certify that “otherwise there may result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person * * * .” 18 U.S.C. § 2709(c)(1) (as amended by Act § 116(a)). When such a certification is made, the NSL itself must notify the recipient of the nondisclosure requirement. Id. § 2709(c)(2).

D. Judicial Review of the Nondisclosure Requirement. – At any time following receipt of an NSL, the recipient may petition a district court for an order “modifying or setting aside a nondisclosure requirement imposed in connection with such a request.” 18 U.S.C. § 3511(b)(1) (added by Act § 115). If the petition is filed one year or more after the issuance of the NSL, the government must either recertify the need for nondisclosure within 90 days or terminate the nondisclosure requirement. Id. § 3511(b)(3). The district court may grant relief from the nondisclosure requirement if it finds “no reason to believe” that disclosure may cause any of the harms underlying the certification. Id. § 3511(b)(2), (b)(3). If, in response to the petition, the Director of the FBI or other specified senior government officials certify that disclosure might harm national security or diplomatic relations, that determination is conclusive unless the court finds that it was made in bad faith. Id. In contrast, the bad-faith standard is inapplicable, regardless of who makes the certification, for certifications that disclosure might interfere with an investigation or endanger life or physical safety. Id.

2. Effect of the Reauthorization Act’s NSL Provisions on The Present Appeals

A. Applicability of the New NSL Provisions to the Pending NSLs

The extent to which new laws are applicable to pre-existing controversies is governed by Landgraf v. USI Film Products, 511 U.S. 244 (1994). Under Landgraf, “prospectivity [is] the appropriate default rule,” and new legislation is not to be applied retroactively “absent clear congressional intent favoring such a result.” 511 U.S. at 272. The application of a statute is considered to be retroactive if “it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.” Id. at 280. However, retroactivity concerns are not present “[w]hen the intervening statute authorizes or affects the propriety of prospective [i.e., injunctive] relief.” Id. at 273. Similarly, the application of new procedural rules to pending cases ordinarily does not raise retroactivity concerns. Id. at 275; Salahuddin v. Mead, 174 F.3d 271, 275 n.2 (2d Cir. 1999)

(“numerous provisions, typically those relating to procedural or jurisdictional matters, can be applied to a pending action without being said to apply ‘retroactively’”).

Under these standards, the statutory provisions authorizing NSL recipients to seek pre-enforcement judicial review of NSLs (§ 3511(a)) and judicial review of non-disclosure requirements (§ 3511(b)) are applicable to the pending NSLs at issue in these appeals. Because pre-enforcement judicial review of NSLs has always been available, the pre-enforcement review mechanism in § 3511(a) does not represent a change in the law at all, and even if it did, its application here would not be retroactive because it is purely procedural and merely “authorizes * * * prospective relief.” Landgraf, 511 U.S. at 273, 275. The provision for judicial review of non-disclosure in § 3511(a) unquestionably represents a change in the law, but its application to the pending NSLs also is not retroactive because it too is a procedural provision governing prospective relief. Accordingly, to the extent that the plaintiffs are seeking to set aside the two particular NSLs in these cases and to be relieved from the non-disclosure requirement with respect to those NSLs, the plaintiffs’ suits now qualify as requests for relief under §§ 3511(a) and 3511(b).

The new requirement that the FBI make an initial certification of the need for non-disclosure when an NSL is issued (§ 2709(c)(1)) would clearly be impermissibly retroactive as applied to the pending NSLs, since the NSLs were issued long before the new legislation was enacted, at a time when § 2709(c) embodied a categorical statutory determination by Congress that disclosure was harmful in every case. In contrast, the requirement that the FBI make a further certification of need when disclosure is sought more than one year after the issuance of the NSL (§ 3511(b)(3)) is not retroactive as applied to the pending NSLs, since it imposes obligations on the FBI prospectively.

Finally, the express statutory authorization for NSL recipients to make disclosures to their counsel (§ 2709(c)(1)) is fully applicable to these cases. For reasons explained in the government’s brief in No. 05-0570, § 2709(c) has never prohibited disclosures to counsel. As a result, the new language in § 2709(c) represents a clarification rather than a change in the law.

B. Effect of the New NSL Provisions on the Pending Appeals

1. No. 05-0570. – The district court in No. 05-0570 issued a comprehensive injunction against the enforcement of § 2709 in all cases. That global injunction rests on two holdings by the district court: first, that § 2709 violates the Fourth Amendment by failing to provide NSL recipients with an opportunity for pre-enforcement judicial review, and second, that § 2709(c) violates the First Amendment by imposing a categorical and perpetual ban on disclosure in all cases, even when the justification for nondisclosure is assertedly no longer present. The concerns that underlie these holdings have now been eliminated by the Reauthorization Act’s NSL provisions. As a result, the Act provides additional grounds for reversal of the injunction and judgment below.

With respect to the Fourth Amendment, there can no longer be any argument about the availability of pre-enforcement judicial review, for even if (contrary to the government’s position) such review were not available before, the right to pre-enforcement review is now spelled out explicitly in 18 U.S.C. § 3511(a). Nor can it be argued any longer that the right to pre-enforcement review is compromised by the recipient’s supposed inability to disclose the NSL to its counsel, for

the right to disclose the NSL to counsel, which was always implicit in the text of § 2709(c), is now expressly set forth in § 2709(c)(1).

The district court thought that § 2709 effectively coerced recipients into forgoing pre-enforcement challenges because “neither the statute, nor an NSL, nor the FBI agents dealing with the recipient” notified the recipient that the NSL could be disclosed to the recipient’s counsel, and because the right to seek pre-enforcement review “is not apparent from the plain language of the statute, the NSL itself, or accompanying government communications * * * .” SPA-66-67; see also SPA-74 (“An NSL recipient would be unable to learn from the text of § 2709 that the [NSL] letter was not actually coercive”) (emphasis omitted). The enactment of provisions that expressly authorize disclosure to counsel and pre-enforcement challenges eliminates these concerns, just as the express authorization of pre-enforcement review of criminal subpoenas in Rule 17 eliminates any concern that recipients of a subpoena will be coerced into forgoing judicial review by the categorical language of such subpoenas. Any recipient of an NSL now has express statutory notice that he can disclose the NSL to counsel in order to seek “legal advice or legal assistance with respect to the request” (§ 2709(c)(1)) and that he and his counsel can obtain judicial review of the NSL before it is enforced (§ 3511(a)). Even before these statutory changes, the district court’s concerns about coercion were misconceived. Now, those concerns have been rendered completely obsolete. These provisions also suffice to dispose of the district court’s related concern that § 2709 “may, in a given case, violate a subscriber’s First Amendment privacy rights, as well as other legal rights, if judicial review is not readily available to an ISP that receives an NSL.” SPA-73 (emphasis added).

With respect to the First Amendment, the district court acknowledged that it is constitutionally permissible for the government to prohibit disclosures of NSLs in many circumstances. Nevertheless, the district court concluded that § 2709(c) was facially unconstitutional because the requirement applied automatically to all cases, for all time, regardless of changes in circumstance and without the possibility of judicial review. See SPA-83-119.

Here too, the district court’s constitutional concerns have been answered by the new legislation. The non-disclosure obligation no longer takes effect automatically, but instead requires a case-specific determination of need by the government. If the nondisclosure requirement is imposed in a particular case, the recipient is free to seek judicial relief from the restriction at any time. If relief is sought after a year or more has elapsed, the nondisclosure requirement must be lifted by the government itself unless the government determines that there is a continuing need for nondisclosure. And even if the requirement remains in effect, the district court is empowered to modify or lift it if the court determines that there is no reason to believe that disclosure will cause any of the identified harms. Although the standard of judicial review under § 3511(b) is deferential, that deference is fully warranted by the nature of the predictive judgments involved, as the district court itself recognized. See SPA-115-116. Thus, even if the district court were correct (which it was not) that the prior version of the nondisclosure requirement was unconstitutional, the revisions to the law eliminate what the district court thought to be the constitutional defects of its predecessor.

2. No. 05-4896. – Although the plaintiffs’ underlying suit in this case seeks broad relief from the operation of § 2709, the preliminary injunction that is now before this Court is much narrower: it only enjoins the government from enforcing the nondisclosure requirement in § 2709(c)

against the plaintiffs with respect to the NSL recipient's identity. SPA-31. The new statutory provisions regarding judicial review of nondisclosure requirement render it unnecessary for this Court to address the validity of that injunction and the constitutional holding on which it rests.

As explained above, with the enactment of 18 U.S.C. § 3511(b), the district court now has statutory authority that it did not previously possess to "modify or set aside" the nondisclosure requirement if it finds that there is no reason to believe that disclosure may result in the enumerated harms. At the same time, the FBI now has statutory authority that it did not previously possess to make case-by-case determinations regarding the need for nondisclosure. To the extent that the plaintiffs are seeking to modify the nondisclosure requirement with respect to disclosure of the NSL recipient's identity, the FBI has determined that it will not oppose that request. As a result, the district court is free to enter an immediate order under § 3511(b) modifying the nondisclosure requirement to allow the plaintiffs to disclose the recipient's identity.

As soon as the district court acts to allow disclosure of the NSL recipient's identity under § 3511(b), this appeal will become moot. At that point, the appropriate disposition by this Court will be to dismiss the appeal and vacate the preliminary injunction. Vacatur of preliminary injunction is appropriate under United States v. Munsingwear, Inc., 340 U.S. 36 (1950), and this Court's broad authority to "direct the entry of such appropriate judgment * * * as may be just under the circumstances." 28 U.S.C. § 2106. The district court's opinion is predicated on a feature of the statute – the automatic, categorical, and permanent imposition of the nondisclosure obligation – that Congress itself has now eliminated. There is no reason to leave an unreviewed ruling of unconstitutionality on the books, nor will there be any need to leave the preliminary injunction in place to protect the plaintiffs, since the plaintiffs will have the benefit of an unopposed order by the district court granting them the same relief as a statutory matter under § 3511(b). We therefore ask this Court to vacate the judgment below in conjunction with the dismissal of this appeal.

Respectfully submitted,

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LOCAL RULE 32(a)(1)(E) CERTIFICATE

I hereby certify that the PDF copy of the foregoing letter brief has been scanned for viruses and no virus has been detected.

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2006, I filed and served the foregoing unsealed LETTER BRIEF by causing ten copies to be sent by Fedex to the Clerk of the Court and by causing two copies to be served by electronic mail and Fedex to:

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