LEGAL DEPARTMENT

ACLU AMERICAN CIVIL LIBERTIES UNION FOUNDATION

April 7, 2006

[redacted]

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)

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Dear Ms. MacKechnie:

The appellees submit this letter brief pursuant to the Court's order of March 15, 2006, directing the parties to address the impact of the USA Patriot Improvement and Reauthorization Act ("Reauthorization Act" or "Act") on these two consolidated appeals. Pub. L. 109-177, 120 Stat. 192 (Mar. 9, 2006) (amending 18 U.S.C. § 2709(c) and adding 18 U.S.C. § 3511). With respect to 05-0570, plaintiffs believe that the Act provides further rationale for affirming the decision below to the extent it enjoined the government from enforcing 18 U.S.C. § 2709(c). With respect to No. 05-4896, the government has in essence abandoned its appeal by withdrawing its opposition to the precise relief ordered by the district court. *See* Letter from Douglas N. Letter & Scott R. McIntosh to Roseann B. MacKechnie (Mar. 29, 2006) (hereinafter "Gov't Ltr."), at 5. Accordingly, this Court should simply dismiss that appeal. Vacatur of the judgment below is plainly inappropriate under controlling Supreme Court authority.

Effect of Reauthorization Act on 05-0570

Plaintiffs agree with the government that the new law's provisions generally apply to NSLs issued before enactment of the Reauthorization Act[1] and that, notwithstanding changes made by the Act, this Court retains authority to decide this appeal. *See N.E. Fla. Chap. of Assoc'd Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 662 & n.3 (1993) (court retains jurisdiction after amendment of challenged statute where amended statute "disadvantage[s] [plaintiffs] in the same fundamental way" and "gravamen of [plaintiffs'] complaint" remains the same).

Plaintiffs disagree, however, with the government's suggestion that the Reauthorization Act addresses the NSL provision's constitutional deficiencies. In fact, with respect to the NSL gag scheme, the Reauthorization Act simply replaced

[1] The Act's provision imposing criminal penalties, Act § 117, does not apply retroactively. That provision is not at issue in this appeal.

a statute that was silent as to judicial review with a statute that contemplates judicial review that is constitutionally inadequate at best and, in many cases, wholly illusory.[2]

A. The amended gag scheme imposes a prior restraint and is therefore presumptively invalid.

The Reauthorization Act has not altered the basic character of an NSL gag order. Such an order still prohibits an NSL recipient from disclosing to any person (now with the limited exception of counsel and others to whom disclosure is necessary to comply with the NSL) the fact he or she has received the NSL. 18 U.S.C. § 2709(c)(1) (as amended by Act § 116(a)). Thus the gag order remains a prior restraint that stifles speech, on the basis of its content, before it occurs. *See Alexander v. United States*, 509 U.S. 544, 550 (1993). As plaintiffs discussed in their brief filed on July 25, 2005 (Pl. Br.), at 11-13, a prior restraint is "the most serious and least tolerable infringement on First Amendment rights," *Nebraska Press Ass'n v. Stewart*, 427 U.S. 539, 559 (1976), and as such "comes to this Court bearing a heavy presumption against its constitutional validity," *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

B. The amended gag scheme violates the First Amendment because it enables the executive unilaterally to impose a content-based restraint on speech and because it places the burden on the speaker to challenge the restraint.

The Reauthorization Act's provision for limited and contingent judicial review of gag orders cannot save the NSL gag scheme from constitutional invalidity. The Supreme Court has held that "(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court." *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 321 (2002); *see also Freedman v. Maryland*, 380 U.S. 51, 58 (1965) ("[B]ecause only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint.").

The Reauthorization Act's judicial review provisions fall far short of these minimum constitutional standards. The period for which the gag remains in force

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[2] Because the Reauthorization Act added provisions permitting NSL recipients to challenge NSLs, 18 U.S.C. § 3511(a) (as inserted by Act § 115(2)), plaintiffs do not pursue their Fourth Amendment claims here. Plaintiffs note that the district court did not rule on the Fourth Amendment claims; it found such a ruling unnecessary in light of its determinations that the gag provision (i) violated the First Amendment and (ii) was not severable from the rest of the statute. Plaintiffs urge this Court to affirm the district court's ruling insofar as it enjoined the government from relying on the gag provision, 18 U.S.C. § 2709(c).

pending judicial review is neither "specified" nor necessarily "brief," and the "burden of going to court" rests on the speaker rather than the censor. Although the Act requires that the government, prior to the imposition of a gag, certify the need for a gag according to specified criteria, *see* 18 U.S.C. § 2709(c)(1) (as amended by Act § 116(a)), no court reviews that initial certification to determine if a gag is in fact warranted and, if so, what the scope of the gag should be and how long the gag should endure.[3] Instead, the executive imposes the gag unilaterally, *id.* § 2709(c)(2), and it is left to the recipient of an NSL, assuming the recipient has the resources and motivation, to seek review, *id.* § 3511(b)(1) (as inserted by Act § 115(2)). This scheme is plainly unconstitutional. *See, e.g., Blount v. Rizzi*, 400 U.S. 410, 418, 421 (1971); *Freedman*, 380 U.S. at 59-60.

C. The amended gag scheme violates the First Amendment because it requires reviewing courts to rubber-stamp gag orders imposed by the executive.

Even if the Reauthorization Act's judicial review *procedures* comported with *Freedman*, the standard of review prescribed in the Act fails to meet constitutional standards. The Act permits reviewing courts to set aside gag orders only where "there is *no reason* to believe that disclosure may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of an person." 18 U.S.C. § 3511(b)(2), (b)(3) (as inserted by Act § 115(2)) (emphasis added). But the First Amendment does not permit the imposition of a content-based restriction on speech simply because there is *some* reason to believe the restriction will prevent specific harms. Rather, the First Amendment requires the restriction to be narrowly tailored to serve a compelling interest. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000).

The amended NSL gag scheme is unconstitutional because it compels reviewing courts to evaluate gag orders under a lesser standard than is required by the First Amendment. Plainly, the measure of meaningful judicial review is not whether the subject of an NSL gag order may walk into a courthouse and file a motion; it is whether he may call upon a court for an adjudication of his rights *under the First Amendment*. The enactment of the Reauthorization Act has not changed the fact that such adjudication remains unavailable. *Cf. Blount v. Rizzi*, 400 U.S. 410, 419-20 (1971) (striking down obscenity-regulation scheme because, *inter alia*, judicial review provision instructed courts to assess whether the government had "probable cause" to detain materials rather than whether they were in fact obscene under the First Amendment).

Moreover, in many cases, the judicial review contemplated by the Reauthorization Act is not simply inadequate but utterly illusory. The Act instructs

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[3] Even after amendment, the NSL provision authorizes gag orders that are overbroad. *See* Pl. Br. 18-20 (noting that even where a narrow gag may be warranted, government may have no legitimate interest in preventing recipient of NSL from disclosing its own identity, particularly if the recipient is a large entity with thousands of subscribers or customers).

that, where any of a set of specified government officials certifies that lifting a gag "may" endanger national security or interfere with diplomatic relations, the reviewing court must take such a certification as *conclusive* absent bad faith. 18 U.S.C. § 3511(b)(2), (b)(3) (as inserted by Act § 115(2)). This near-complete deference is a far cry from the substantive constitutional evaluation characteristic of proper judicial review under the First Amendment.

The Reauthorization Act's judicial review provisions raise serious concerns not only under the First Amendment but under separation of powers principles as well. "Congress may not legislatively supersede [the Supreme Court's] decisions interpreting and applying the Constitution." *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (striking down statute supplanting constitutionally required *Miranda* rules). By requiring courts to evaluate the content-based NSL gag orders under the "no reason to believe" standard rather than the strict scrutiny mandated by the First Amendment, and by requiring courts to afford executive certifications "conclusive" weight, the amended NSL gag scheme impermissibly infringes on "the province of the Judicial Branch, which embraces the duty to say what the law is." *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *cf. In re Wash. Post Co.*, 807 F.2d 383, 392 (4th Cir. 1986) ("A blind acceptance by the courts of the government's insistence on the need for secrecy . . . would impermissibly compromise the independence of the judiciary and open the door to possible abuse.").

D. The amended gag scheme is not narrowly tailored because its preclusion provision effectively ensures that some prior restraints will endure long after any legitimate need for secrecy has dissipated.

Even after amendment, the gag scheme remains unconstitutional because it precludes judicial review altogether in some circumstances. Under the Act's terms, if the recipient of an NSL challenges the gag in court one year or more after the government's demand for records, and that challenge is unsuccessful, then "the recipient shall be precluded for a period of one year" from filing another petition challenging the gag order. 18 U.S.C. § 3511(b)(3) (as inserted by Act § 115(2)). This provision defies the narrow tailoring required under strict scrutiny by rendering a set of gag orders categorically exempt from judicial review regardless of the government's interest in maintaining those particular gags throughout the year. Thus where the subject of a gag order unsuccessfully challenges the order but the government's compelling interest in secrecy dissipates the following month (perhaps because the government itself has publicly disclosed the information at issue), the recipient would for the next eleven months be unconstitutionally subject to a gag not supported by any governmental interest – let alone an interest that is "compelling" for purposes of the First Amendment. The preclusion provision provides yet another reason why the amended gag scheme is unconstitutional.

Effect of Reauthorization Act on 05-4896

The government's concession that it "will not oppose" modifying the gag order at issue in No. 05-4896 to permit disclosure of the NSL recipient's identity,

see Gov't Ltr., at 5, is tantamount to abandonment of its appeal in that case: the government no longer opposes the precise relief granted by the district court. SPA-31 ("The defendants are hereby enjoined from enforcing 18 U.S.C. § 2709(c) against the plaintiffs with regard to Doe's identity."). The Court should therefore dismiss the appeal in No. 05-4896.

The government's argument that it is entitled to vacatur is foreclosed by *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994). Here, as in *Bancorp*, the judgment at issue "is not unreviewable, but simply unreviewed by [the appellant's] own choice." *Id.* at 25. The government's plea not to "leave an unreviewed ruling of unconstitutionality on the books," Gov't Ltr., at 5, flies in the face of the Supreme Court's admonition that "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole." *Id.* at 26. Moreover, "[t]o allow a party who steps off the statutory path [of appeal from an adverse judgment] to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would – quite apart from any considerations of fairness to the parties – disturb the orderly operation of the federal judicial system." *Id.* at 27; *see also id.* at 26 (stating that "the party seeking relief from the status quo" of the judgment below bears the burden of demonstrating "equitable entitlement to the extraordinary remedy of vacatur" and that the "voluntary forfeiture of review constitutes a failure of equity that makes the burden decisive, whatever respondent's share in the mooting of the case might have been").

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The appeal in No. 05-4896 has become moot by reason of the government's own voluntary action – its concession that it no longer opposes the relief granted by the district court. Plaintiffs respectfully submit that the appropriate course is simply to dismiss this appeal.

Respectfully submitted,

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