Office of the Attorney General
Washington, D. C. 20530

October 24, 2016

The Honorable Paul D. Ryan
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: *Free Speech Coalition, Inc.* v. *Attorney General*, 825 F.3d 149 (3d Cir. 2016)

Dear Mr. Speaker:

Consistent with 28 U.S.C. 530D, I write to advise you concerning the above-referenced decision of the United States Court of Appeals for the Third Circuit. A copy of the decision is attached.

This case concerns the constitutionality of the recordkeeping, labeling, and inspection provisions of 18 U.S.C. 2257 and 2257A, and Department of Justice regulations implementing those statutes. Sections 2257 and 2257A require certain producers of material depicting sexually explicit conduct or simulated sexually explicit conduct to collect, maintain, and describe the location of records of the identity and age of each performer in such materials, to ensure that the performers are not minors. The statutes further require producers to make the required records available for inspection by the government at all reasonable times, and they make it unlawful for a producer to knowingly fail to comply with that requirement. A regulatory provision, 28 C.F.R. 75.5, provides that inspections may proceed without notice or a warrant.

The plaintiffs in this case challenged various aspects of Sections 2257 and 2257A and the implementing regulations under the First and Fourth Amendments. After a trial, the district court rejected almost all of plaintiffs' claims. 957 F. Supp.2d 564 (E.D. Pa. 2013). It held, however, that when age-verification records are maintained in a producer's private home, an inspection of those records would violate the Fourth Amendment if the producer were not given advance notice of the inspection. *Id.* at 605-608. The district court accordingly held that 28 C.F.R. 75.5(b), which provides that "[a]dvance notice of record inspections shall not be given," cannot constitutionally be applied to inspections in private residences. The court did not grant plaintiffs' request for injunctive relief. 957 F. Supp.2d at 608-609. The Department decided not to appeal the adverse portion of the district court's ruling and transmitted a letter pursuant to 28 U.S.C. 530D regarding that determination. The plaintiffs, however, appealed the portions of the district court's decision rejecting their constitutional challenges.

The court of appeals vacated in part and remanded. 825 F.3d 149, 173-174 (3d Cir. 2016). First, relying on the Supreme Court's intervening decision in *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218 (2015), the court of appeals held that the challenged requirements trigger strict scrutiny under the First Amendment. The district court had upheld the requirements after applying intermediate scrutiny, so the court of appeals vacated and remanded for the district

court to apply strict scrutiny in the first instance. 825 F.3d at 164. Second, relying on the Supreme Court's intervening decision in *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015), the court of appeals held that Sections 2257 and 2257A and the implementing regulations are unconstitutional to the extent they allow for warrantless searches. 825 F.3d at 164-165, 173. Judge Rendell dissented from the panel's First Amendment ruling because she would have held that intermediate scrutiny applies. *Id.* at 173-177. She did not dissent from the Fourth Amendment holding. The government sought rehearing en banc on the First Amendment ruling, but the court of appeals denied en banc review on August 11, 2016.

The Department has decided not to file a petition for a writ of certiorari seeking review of the court of appeals' decision at this time. At the outset, the court's decision is interlocutory, as it remanded to the district court for further proceedings on the First Amendment question. The remand and any subsequent appeal thus could result in the challenged requirements being upheld. The Supreme Court ordinarily does not review nonfinal, interlocutory decisions. *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "to review the adverse rulings made by the Court of Appeals ... because the Court of Appeals remanded the case [and thus it] is not yet ripe for review by this Court"); *American Construction Co.* v. *Jacksonville, Tampa & Key West Railway Co.*, 148 U.S. 372, 384 (1893) (stating the general rule that "this court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order"); *VMI* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); see Stephen M. Shapiro, et al., *Supreme Court Practice* § 4.18, at 283 (10th ed. 2013) ("'[E]xcept in extraordinary cases, the writ is not issued until final decree.'") (quoting *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)). The court of appeals, moreover, did not enjoin the operation of the relevant provisions, and they therefore remain in effect pending the proceedings on remand.

The court of appeals has definitively held that the inspection provisions are unconstitutional under the Fourth Amendment to the extent they authorize warrantless inspections, and it remanded for the district court to enter a declaratory judgment to that effect. The Department has concluded, however, that Fourth Amendment issues do not warrant Supreme Court review at this time. The court of appeals' Fourth Amendment decision concerning the inspection provisions does not conflict with any decision of another court of appeals. It also does not conflict with any decision of the Supreme Court. Indeed, the court of appeals noted "the similarity between the inspection provisions [here] and the regulation at issue in *Patel*." 825 F.3d at 167. The court concluded that producers of sexually explicit images, like the hotel operators in *Patel*, are not in a "'closely regulated' industry." *Id.* at 169-171 (quoting *Patel*, 135 S. Ct. at 2454). And the court further concluded that warrantless inspections would be unreasonable even if the industry were closely regulated, as "inspection warrants could be required and privacy given a measure of protection with little if any threat to the effectiveness of the inspection system." *Id.* at 172 (quoting *United States* v. *Biswell*, 406 U.S. 311, 316 (1972)).

Additionally, the practical consequences of the ruling are limited. At least at this juncture, the underlying statutory recordkeeping system remains undisturbed, and every producer subject to the statutes must create and maintain the age-verification records required by the statutes. Moreover, "no inspection program has been in place since 2008," 825 F.3d at 165, and nothing in the court's ruling prevents the Department, in the future, from conducting inspections under Sections 2257(c) and 2257(f)(5), and their counterparts in Section 2257A, provided that the inspections comply with *Patel* and the panel's Fourth Amendment ruling. These and other provisions of the statutes, including Section 2257(g), provide authority for the Attorney General to issue new inspection regulations, and the Department is currently preparing to issue new proposed regulations, for notice and comment, to implement new inspection procedures under Sections 2257 and 2257A. The Department accordingly may resume inspections consistent with the court of appeals' decision without action by the Supreme Court.

The Department also does not believe, for example, that an administrative warrant scheme of the sort contemplated by *Patel*, 135 S. Ct. at 2454, would hamper effective records inspections. The court of appeals stated that "the record establishes that the type of records required to be maintained, given their scope as well as the need for indexing and cross-referencing, could not easily be recreated on short notice nor could violations be concealed," and that destroying records "would only compound any criminal violation." 825 F.3d at 172. The court also noted that law enforcement had in the past provided advance notice to some producers "without any reports of fabrication." *Id.*

In these circumstances, the Department has determined that a petition for certiorari seeking review of the court of appeals' decision is unwarranted. Such a petition would be due on November 9, 2016.

Please let me know if I can be of any further assistance in this matter.

Sincerely,

Loretta E. Lynch
Attorney General

Enclosure