IN THE

United States District Court

FOR THE DISTRICT OF NEW JERSEY

No. 06 Civ. 2683 (FLW-TJB)

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

ANNE MILGRAM, *in her official capacity as Acting Attorney General of New Jersey,* **CATHLEEN O'DONNELL**, *in her official capacity as Deputy Attorney General of New Jersey,* **STEPHEN B. NOLAN,** *in his official capacity as Acting Director of the New Jersey Division of Consumer Affairs,* **AT&T CORP., VERIZON COMMUNICATIONS INC., QWEST COMMUNICATIONS INTERNATIONAL, Inc., SPRINT NEXTEL CORPORATION,** *and* **CINGULAR WIRELESS LLC,**

Defendants.

BRIEF OF AMICUS CURIAE PUBLIC ADVOCATE OF NEW JERSEY IN SUPPORT OF DEFENDANT ATTORNEY GENERAL OF NEW JERSEY'S MOTION TO DISMISS

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PRELIMINARY STATEMENT

Amicus curiae, the Public Advocate of New Jersey, respectfully submits this brief in support of the motion by Defendant, the Attorney General of New Jersey, to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(6), or in the alternative to abstain from entertaining jurisdiction.[1]

* * *

After it was reported in the public media that the National Security Agency had been secretly collecting the domestic phone call records of tens of millions of Americans, using data secretly provided voluntarily and without judicial warrant by various telephone service providers,[2] the Attorney General of New Jersey, pursuant to the powers granted under the New Jersey Consumer Fraud Act, N.J.S.A. § 56:8-1 et seq., issued administrative subpoenas to co-defendants AT&T Corp., Verizon Communications Inc., Qwest Communications International, Inc., Sprint Nextel Corporation, and Cingular Wireless LLC [hereinafter the "telephone companies"]. These subpoenas were

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1 Amicus will address any issues raised by the United States' cross motion for summary judgment, filed this day, including discussion of the "state secret" privilege, in a separate brief to be submitted with Defendant's Opposition according to the schedule established by prior order of the Court.

2 "NSA has massive database of Americans' phone calls," USA TODAY, May 10, 2006, available at http://www.usatoday.com/news/washington/2006-05-10-nsa_x.htm (last visited September 7, 2006).

issued to determine whether the telephone companies did, or did not, release information in a manner both contrary to the privacy statements contained in their own consumer agreements (which would in turn constitute a violation of the Consumer Fraud Act), and also inconsistent with the New Jersey Constitution, which protects phone billing records from unauthorized disclosure. State v. Hunt, 91 N.J. 338 (1982).[3]

Subsequent to the initial media reports, various telephone companies, including co-defendants in this case, have made public statements either denying involvement in this arrangement or declining substantive comment.[4] Federal securities law, however, allows companies to refrain from properly accounting for their use of assets in matters involving national security, when properly authorized by an agency or department head acting under authorization by the President. 15 U.S.C. § 78m(b)(3)(A).

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[3] Unlike federal Fourth Amendment cases, which do not afford an expectation of privacy to pen register or phone call data records, Smith v. Maryland, 442 U.S. 735 (1979), New Jersey law does recognize such a privacy interest in phone billing and similar information under the New Jersey Constitution. State v. Hunt, 91 N.J. 338.

[4] "Verizon says it isn't giving call records to NSA," USA TODAY, May 16, 2006, available at http://www.usatoday.com/news/washington/2006-05-16-verizon-nsa_x.htm) (last visited September 6, 2006); "Callers Can't Hide", FORBES, May 11, 2006, available at http://www.forbes.com/intelligentinfrastructure/2006/05/11/wireless-nsa-voip_cx_df_0511security.html (last visited September 7, 2006)(T-Mobile denies giving phone records to NSA without warrant); USA TODAY, May 10, 2006, supra note 2 (Qwest Communications declined to cooperate with NSA without warrant).

On May 5, 2006, shortly before public reports of the NSA call database program, the President delegated to the Director of National Intelligence the authority to make such a dispensation. 71 Fed. Reg. 27,941-27,943 (May 5, 2006).

On June 14, 2006, on the eve of an action by the Attorney General in New Jersey Superior Court to enforce the administrative subpoenas, the United States filed this civil action against the Attorney General, other officers in the New Jersey Department of Law and Public Safety, as well as the telephone companies who received the subpoenas, seeking to prohibit enforcement.

INTEREST OF AMICUS CURIAE

The Department of the Public Advocate, first created in 1974, and re-established on January 17, 2006, 2005 N.J. Laws c.155, codified at N.J.S.A. § 52:27EE-1 et seq., is charged generally and comprehensively with representing the "public interest," including, when necessary, intervention or initiation of legal proceedings. N.J.S.A. § 52:27EE-59(b). The "public interest" as used in the statute is broadly defined as "an interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A. § 52:27EE-12.

Moreover, the Public Advocate, through its Division of Rate Counsel, is specifically charged with appearing on behalf of ratepayers before any board charged with the regulation or control of any utility -- most notably the Board of Public Utilities -- regarding service provided by that utility. N.J.S.A. § 52:27EE-48. The Board of Public Utilities in turn has general supervisory and regulatory powers over utilities, including the power to require every public utility "to comply with the laws of the State." N.J.S.A. § 48:2-16(a). The Public Advocate understands that the Board of Public Utilities has received complaints regarding the reported data collection practices at issue here, which complaints are currently pending.

The Public Advocate also has institutional interests that bear on this case.[5] The Governor of New Jersey has designated

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[5] In this case, the objectives of co-defendant, the Attorney General, and amicus curiae the Public Advocate are substantially similar. The Department of the Public Advocate, however, is an independent department of state government, whose mission is not identical to that of the Attorney General. As the New Jersey courts have explained in contrasting the Public Advocate's authority with that of the Attorney General:

> It would appear that the Attorney General must determine whether the State is interested in any situation. The Public Advocate, on the other hand, must determine whether the public interest demands legal representation in various matters. . . .
>
> The Legislature obviously thought that there may be times when the state interest and public interest are not synonymous and that both interests needed a legal spokesman. The office of the Public Advocate is not unconstitutional and its function does not duplicate

the Office of the Public Advocate as the civil liberties ombudsman "to address civil liberties issues related to homeland security and preparedness." Executive Order No. 5, ¶ 5 (Apr. 16, 2006), 38 N.J. Reg. 1623(b). The Public Advocate is empowered to issue administrative subpoenas similar to those at issue in this case "in any matter under the investigation of the office." N.J.S.A. § 52:27EE-5(f).

In deciding to enter this case, therefore, the Public Advocate has identified at least two issues that affect a broad public interest:

(1) The privacy interest in phone billing records and similar documents, an interest given particular expression in New Jersey law. See supra note 3.

(2) The interest in correct application of the principles of federalism, as embodied in the United States Constitution, and the proper respect due by the federal government to the official actions of the executive

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that of the Attorney General, although their positions may coincide in certain instances, as here, to a degree.

Van Ness v. Borough of Deal, 139 N.J. Super. 83, 94 (Ch. Div. 1975), rev'd on other grounds, 145 N.J. Super. 368 (App. Div. 1976), rev'd in part, 78 N.J. 174 (1978). Accord Mt. Laurel v. Department of Public Advocate, 83 N.J. 522, 533-34 (1980)(citing Borough of Deal).

branch of the State of New Jersey in the discharge of official duties.

It is for these reasons that the Public Advocate has entered this case, for the vindication of the "public interest."

SUMMARY OF ARGUMENT

Before the Court considers the issues of privacy and national security that might eventually be presented in this case, it must first resolve two essential predicate questions: (1) Is there subject matter jurisdiction? and (2) Has the plaintiff stated a cognizable claim upon which relief can be granted?

There exists no federal question jurisdiction in this case because no federal issue is presented as part of a well-pleaded complaint. (Point I). And there is no cause of action, whether express or implied, in favor of the United States in its capacity as a civil plaintiff. Therefore, this action should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). (Point II).

Even if there were subject matter jurisdiction to hear this matter and a civil cause of action for the United States to invoke, principles of federalism and judicial restraint favor abstention in this case, under the principles of Younger v. Harris, 401 U.S. 37 (1971), and related doctrines. Respect for the sovereignty of the State of New Jersey requires that this

matter be returned to its proper forum: the Superior Court of New Jersey.

ARGUMENT

"All who come before the court are equals in the eyes of the law. The United States, as plaintiff, has no special or different status than any other party. In fact, in its role as plaintiff, it carries the burden of persuasion." United States v. R. J. Reynolds Tobacco Co., 416 F. Supp. 313, 316 (D.N.J. 1976). Thus, in civil cases, the courts "hold the Attorney General to the same pleading requirements we demand of a private litigant." United States v. City of Philadelphia, 644 F.2d 187, 206 (3d Cir. 1980).

Before this Court addresses the merits of the weighty privacy and national security issues that would be presented by the parties, faithful adherence to concepts of justiciability requires that two predicates be established: (1) that the Court has jurisdiction and (2) that the plaintiff has a cause of action. These prerequisites to justiciability are missing in this case.

I. THERE IS NO FEDERAL QUESTION JURISDICTION UNDER 28 U.S.C. § 1331.

The Complaint asserts two bases for this Court's subject matter jurisdiction: 28 U.S.C. § 1331, the section bestowing general federal question jurisdiction, and 28 U.S.C. § 1345,

which bestows jurisdiction in civil cases when the United States is a plaintiff. Complaint ¶ 2. Neither of these contentions can sustain this action in this Court.

The entire gravamen of the Complaint is that the Supremacy Clause negates the power of the Attorney General of New Jersey to issue and enforce the subpoenas in question:

> The Subpoenas, and any responses required thereto, are invalid under, and preempted by, the Supremacy Clause of the United States Constitution, Art. VI, Cl. 2, federal law, and the Federal Government's exclusive control over foreign intelligence gathering activities, national security, the conduct of foreign affairs, and the conduct of military affairs.

Complaint ¶ 46. Thus, the United States' entire basis for relief is that the state action in this case is pre-empted by federal law.

It is axiomatic, however, that under 28 U.S.C. § 1331, the federal issue must appear on the face of the well-pleaded complaint, and that federal issues raised as affirmative defenses do not give rise to § 1331 jurisdiction. "A defense that raises a federal question is inadequate to confer federal jurisdiction." Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 808 (1986).

In particular, under the well-pleaded complaint rule, a federal claim does not arise merely by anticipating a preemption defense. See Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983); Louisville & N.R. Co. v.

Mottley, 211 U.S. 149 (1908). "By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby." Franchise Tax Board, 463 U.S. at 12 (quoting Gully v. First National Bank, 299 U.S. 109, 116 (1936)); see also Hawkins v. Leslie's Pool Mart, Inc., 184 F.3d 244, 256 & n.4 (3d Cir. 1999)(federal preemption is an affirmative defense).

In this case, the proper underlying coercive action would be an action to enforce an administrative subpoena brought pursuant to N.J. Ct. R. 1:9-6 (Enforcement of Subpoena of Public Officer or Agency). The Attorney General's authority to issue the subpoena in the first instance is granted by N.J.S.A. § 56:8-4. Obviously, both these sources of authority emanate from state law, and causes of action arising under them do not give rise to federal question jurisdiction under 28 U.S.C. § 1331. When the United States alleges that federal law supersedes the State's authority to issue and enforce these subpoenas, it raises federal preemption as a quintessential affirmative defense.

The United States' claim of subject matter jurisdiction under 28 U.S.C. § 1331 is therefore wholly baseless.[6]

[6] Invocation of the Declaratory Judgment Act, 28 U.S.C. § 2201(a), has no bearing on the jurisdictional issue. The Declaratory Judgment Act is procedural only and does not create

II. THE UNITED STATES, AS A CIVIL PLAINTIFF, HAS NOT STATED A VALID CAUSE OF ACTION.

The second basis asserted for jurisdiction, 28 U.S.C. § 1345 (United States as a plaintiff), requires more extended discussion. While the identity of the federal government as the party initiating this action is not disputed as a procedural matter, the invocation of § 1345 merely begs both the jurisdictional question under Fed. R. Civ. P. 12(h)(3) as well as the merits of the Rule 12(b)(6) determination: Is the United States in this case a proper plaintiff, as to which a valid civil cause of action pertains? If the answer to this question is no, this case should be dismissed on the merits under Rule 12(b)(6).[7]

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jurisdiction or a cause of action where none otherwise exists. See Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950) ("The operation of the Declaratory Judgment Act is procedural only. . . . Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction."); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937). In particular, the Declaratory Judgment Act does not create the opportunity to evade the well-pleaded complaint rule, and in a declaratory judgment action affirmatively asserting a federal defense, the underlying coercive action must present the issue arising under federal law for § 1331 jurisdiction to exist. Franchise Tax Board, 463 U.S. at 16.

[7] There is a doctrinal distinction between dismissal for want of jurisdiction and dismissal for failure to state a claim. "Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." Bell v. Hood, 327 U.S. 678, 682 (1946).

A. Congress Has Not Created A Private Cause Of Action By The United States Against A State.

The Complaint refers to various sources of federal law in support of its contention that the Attorney General's subpoenas should not be enforced.

- 50 U.S.C. § 403-1(i)(1) (conferring upon the Director of National Intelligence the authority to "protect intelligence sources and methods from unauthorized disclosure"). Complaint ¶ 16.
- 18 U.S.C. § 798 (making it a felony for any person to divulge classified information). Complaint ¶ 17.
- 50 U.S.C. § 402 note (stating that "nothing in this . . . or any other law . . . shall be construed to require disclosure of . . . any function of the National Security

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However, the Court noted further: "The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." Id. at 682-83.

Thus, applying the Bell rationale (which dealt with general federal question jurisdiction under § 1331) by analogy to this case (in which jurisdiction is claimed both under § 1331 and § 1345), if this Court determines that the Complaint's invocation of the United States as a plaintiff is "wholly insubstantial and frivolous" because the United States has no plausible cause of action, then it may dismiss this case for lack of jurisdiction. Even if the Court does not find such assertion of a civil cause of action to be frivolous, then as explained further below, the lack of such a cause of action should lead to dismissal on the merits pursuant to Rule 12(b)(6).

Agency, [or] of any information with respect to the activities thereof.”). Complaint ¶ 18.

- 50 U.S.C. § 403(b)(1) (designating Director of National Intelligence as the “head of the intelligence community” of the United States). Complaint ¶ 30.

What assiduous examination of these statutory provisions does not reveal, however, is any language by which Congress has created a private right of action in favor of the United States to enforce their terms. These provisions create no express statutory civil cause of action that permits the United States to sue one of the several States or its officers for actions taken in the exercise of the police powers of the State.

There is in fact no statute by which Congress has conferred a general right of action upon the federal government to invoke the jurisdiction of the federal courts to enforce alleged constitutional or federal statutory limitations against an officer of state government. When Congress intends to empower the United States to enforce such norms in a civil action, it so provides through express language creating such a right.[8] But Congress has declined, for very good reason, to enact a general

[8] See, e.g., 42 U.S.C. § 1973bb (United States may bring civil action to enforce voting rights); 42 U.S.C. § 1997a (rights of institutionalized persons); 42 U.S.C. § 2000a-5 (segregation and discrimination in public schools and places of public accommodation); 42 U.S.C. § 12188(b) (rights of individuals with disabilities).

statute empowering the United States through the Department of Justice to bring individual civil actions enforcing its notion of constitutional and federal statutory norms upon state officers.

The Supreme Court has stated and restated -- and recently with increased vigor -- that "private rights of action to enforce federal law must be created by Congress." Alexander v. Sandoval, 532 U.S. 275, 286 (2001) (private individuals do not have right to sue to enforce regulations, promulgated under Title VI of Civil Rights Act of 1964, proscribing activities having disparate impact on racial groups); Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979) (remedies available are those "that Congress enacted into law"). And as Justice Scalia emphasized in Sandoval, absent express statutory language creating a civil right of action, successful discovery of such a private action is a daunting, and in most cases impossible task:

> The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. "Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals."

Sandoval, 532 U.S. at 286-87 (citations omitted) (quoting Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in judgment)).

Sandoval's principal teaching is that only express language by Congress contained in the text of the relevant statute itself suffices to create a private cause of action. 532 U.S. at 288 ("We therefore begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI."). "Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink." Id. at 287. Sandoval expressly rejected the prior methodology by which a right of action could be implied through any context other than the text of the statute itself.[9] The Court also rejected the argument that statutes that were enacted at a time Congress might have thought that the courts would be

[9] In J.I. Case Co. v. Borak, 377 U.S. 426 (1964), an earlier Court had expressed a greater liberality in construing statutes, by noting that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose" expressed by a statute. The Court, however, abandoned that approach in Cort v. Ash, 422 U.S. 66, 78 (1975), and adopted instead a four-factor test by which Congress' intent to create a right of action might be identified through context. Even the four-factor test of Cort v. Ash, however, has now been effectively replaced by the more straightforward approach of Sandoval, which places dispositive weight on whether the statute contains language that creates a private cause of action.

more receptive to implied rights of action should be construed in light of the "contemporary legal context." Id. at 287-88.

Similarly, in Gonzaga University v. Doe, 536 U.S. 273 (2002), the Court held that the absence of explicit statutory language creating a private right of action under the Family Educational Rights and Privacy Act of 1974 was fatal to private enforcement of that Act's proscription against unauthorized disclosure of student records. Even the statutory right of action broadly conferred by 42 U.S.C. § 1983, upon which the plaintiffs in Gonzaga also relied, was insufficient to save the cause of action. 536 U.S. at 283-84. Recognizing the confusion surrounding the lower courts' latitude to imply a civil remedy, the Court clarified that the relevant analysis in § 1983 cases is the same as in the implied right of action cases described in Sandoval:

> We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983. Section 1983 provides a remedy only for the deprivation of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. Accordingly, it is rights, not the broader or vaguer "benefits" or "interests," that may be enforced under the authority of that section. This being so, we further reject the notion that our implied right of action cases are separate and distinct from our § 1983 cases. To the contrary, our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983.

Gonzaga, 536 U.S. at 283. Indeed, "even where a statute is phrased in . . . explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private right but also a private remedy.'" Id. at 284 (quoting Sandoval, 532 U.S. at 286).

In the face of the Court's clear and unmistakable directive that only unambiguous and express language in the text of the statute is sufficient to infer Congressional intent to create a cause of action, the application of that doctrine to this case becomes clear. The United States cites no such remedy-creating statute, because there is none. Congress has not created a civil cause of action by which the United States can seek to enforce constitutional or federal statutory limitations on the State or its officers acting in their official capacity. The United States has therefore failed to state a cause of action, and this matter should be dismissed on the merits under Fed. R. Civ. P. 12(b)(6).

B. There Is No Implied Right Of Action In Favor Of The United States Against A State.

Absent an express cause of action, the only remaining avenue would be an implied cause of action, but even that possibility has now essentially been foreclosed by Merrill Dow and Sandoval. Nor does the fact that the purported plaintiff is the United States change the analysis. The leading case for

this proposition was decided by our own Court of Appeals, and thus represents the binding law of this Circuit. In United States v. City of Philadelphia, 644 F.2d 187, the Department of Justice brought a civil action against a city police department, seeking injunctive relief against allegedly unconstitutional, and indeed criminal, practices. Before it ever reached the merits of the constitutional arguments, however, the Third Circuit affirmed dismissal of the complaint, finding that the United States did not have statutory authority to initiate such an action, nor could such a cause of action be implied.

City of Philadelphia first rejected the contention that there was a "different and more liberal test for recognition of implied rights of action by the government." 644 F.2d at 191. The court expressly rejected the contention that there existed a "different standard for inferring rights of action in favor of the government than the standard applicable to private litigants." Id. The United States is therefore subject to the same stringent rules as any other party.

Then, rejecting the presumption that "statutory silence indicates congressional intent to create a cause of action by implication," the Court of Appeals adhered to the "elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." Id. at 192 (quoting Transamerica

Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979)). It therefore concluded that "The United States does not have the implied statutory authority to sue a local government or its officials to enjoin violations of citizens' constitutional rights." Id. at 199; see also United States v. Mattson, 600 F.2d 1295 (9th Cir. 1979) and United States v. Solomon, 563 F.2d 1121 (4th Cir. 1977) (both cases holding, before enactment of 42 U.S.C. § 1997a (conferring such a right), that the United States did not have authority to bring a civil action on behalf of mentally retarded patients to enjoin unconstitutional conduct by state hospitals).

The United States may well be reduced to arguing that it has an implied cause of action under federal common law to bring suit against a state. While a uniform federal rule may govern the question of whether such an action in favor of the United States exists or not, the uniform answer from the courts has been that it does not. "[E]xercise of judicial power to establish the new liability [in favor of the United States] . . . would be intruding within a field properly within Congress' control and as to a matter concerning which it has seen fit to take no action." United States v. Standard Oil Co., 332 U.S. 301, 316 (1947). In Standard Oil, a soldier was injured after being struck by a truck driven by an employee of the company. The government brought suit against the company to recover the

amounts expended for the soldier's hospitalization, pay while disabled, and for the loss of his services. The United States asked the Court to create a novel cause of action in its favor sounding in tort. The Court declined, based on separation of powers, and deferred to Congress:

> We would not deny the Government's basic premise of the law's capacity for growth, or that it must include the creative work of judges. Soon all law would become antiquated strait jacket and then dead letter, if that power were lacking. And the judicial hand would stiffen in mortmain if it had no part in the work of creation. But in the federal scheme our part in that work, and the part of the other federal courts, outside the constitutional area is more modest than that of state courts, particularly in the freedom to create new common-law liabilities, as Erie R. Co. v. Tompkins itself witnesses.

Id. at 313.

It is also of no consequence that in City of Philadelphia, the United States was seeking to promote the Fourteenth Amendment interests of private individuals, while here it may argue that it is vindicating an institutional interest in national security peculiar to itself as a governmental entity. Indeed, the fact that the United States may be seeking to vindicate its sovereign prerogatives against those of state government in this case makes the failure of Congress to provide an express statutory remedy even more significant.

In contests between the federal and state sovereignties on the proper allocation or exercise of power, the federal courts are not especially adept referees. Moreover, there is no entity

that has greater access to Congress than the federal Executive Branch to seek such statutory authorization, if Congress can be convinced to do so. Congress' decision not to involve the federal judiciary in such disputes, at least as a general matter, can hardly be explained automatically as oversight. The executive branch of the federal government also has an abundance of alternative mechanisms by which to seek to influence state officials other than coercive civil actions in federal court, including fiscal persuasions, federal-state intergovernmental agreements, and informal comity. As Judge Learned Hand aptly observed in another context: "[I]t does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves." James Baird Co. v. Gimbel Bros., Inc., 64 F.2d 344, 346 (2d Cir. 1933).

The Third Circuit was also clearly moved by principles of federalism and noted in language that is particularly relevant in this case:

> If the federal courts are bound by federalism concerns to leave to state courts issues of corporate governance and torts committed by federal officers, surely the Justice Department is equally bound to recognize strict limits to its power to intervene in the workings of the executive branch of local and state governments.

City of Philadelphia, 644 F.2d at 198. It would therefore be inappropriate for this Court to loosen the limits imposed by Our Federalism on the power of the federal government to engage in

such intervention in the workings of the executive branch of state government, by imputing the existence of a cause of action when Congress itself has not seen fit to do so.

Nor has it ever been held that the United States enjoys an implied cause of action to prevent dissemination of government information based on national security (although there is a dearth of cases that address the issue).[10] In perhaps the most renowned case in this area, the so-called "Pentagon Papers" case, New York Times Co. v. United States, 403 U.S. 713 (1971), the federal government sued to enjoin publication of material it contended would, in the Executive's judgment, harm national security. As is well known, after extremely accelerated review, taking place within the span of a few days, the Court issued a

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[10] One case that is sometimes cited for the proposition that the United States may bring an equitable action to enjoin disclosure of confidential information on national security grounds is easily explained. In United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972), the federal government sought injunctive enforcement of security agreements the employee signed upon accepting his job with the Central Intelligence Agency and upon his departure. In situations where the United States is acting as employer, however, it obviously enjoys, as does every employer, a common law cause of action to enjoin a breach of an employment contract. In this context, the United States may state a claim that survives a Rule 12(b)(6) motion. See United States v. San Jacinto Tin Co., 125 U.S. 273, 288 (1888) (suggesting that, in the absence of a Congressionally created right of action, the United States could only "institute such a suit . . . upon the same general principles which authorize a private citizen to apply to a court of justice for relief"). See generally, Edward A. Hartnett, The Standing Of The United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking For Answers In All The Wrong Places, 97 Mich. L. Rev. 2239 (1999).

somewhat terse per curiam opinion denying an injunction on First Amendment grounds, noting merely that the government had failed to meet the heavy burden of justifying a prior restraint on speech. Id. at 714.

Inspection of the individual concurring and dissenting opinions, however, reveals that eight of the nine justices either wrote or joined in opinions that observed, with varying degrees of emphasis, that Congress had never authorized a civil action under these circumstances. See id. at 718-19 (Black, J., joined by Douglas, J., concurring, noting that the government did not even attempt to rely on any act of Congress, and rejecting the notion that the President or the courts on their own have the inherent power to fashion rules enjoining speech); id. at 730 (Stewart, J., joined by White, J., concurring, adverting to the fact that Congress had not passed nor did the government rely on any specific law authorizing civil proceedings in this field); id. at 731-32 & n.1 (White, J., joined by Stewart, J., concurring, noting that the government's request for an injunction against publication was not based on any statute); id. at 742 (Marshall, J., concurring, arguing that separation of powers principles prohibited government by injunction in which the courts and the Executive Branch can "make law" without regard to the action of Congress); id. at 753-54 (Harlan, J., joined by Burger, C.J., and Blackmun, J.,

dissenting, but noting that among the issues that "should have been faced" is whether the Attorney General is authorized to bring these suits in the name of the United States).

Taken together, the opinions in the Pentagon Papers case can be read to support the proposition that the President and the Attorney General do not have general statutory authority to invoke the judicial power of the federal courts to seek an injunction to prevent breaches of national security. The government's lack of such authority provides an alternative explanation for the Court's judgment against the government in the Pentagon Papers case.

What would admittedly be convenient for the Department of Justice in this case is a tool that, coincidentally, amicus Public Advocate enjoys: statutory authorization to initiate legal proceedings whenever he deems it to be in the broad public interest. N.J.S.A. § 52:27EE-59(b). But with all due respect, the New Jersey Legislature has seen fit to bestow that broad authority on the Public Advocate. Congress has not seen fit to do so with respect to the President or the United States Attorney General. Until it does so, it is not for the courts to commission the Federal Department of Justice as a roving interpreter of when the Article III judicial power is suitable for use by creating civil causes of action in favor of the United States. Since the Plaintiff cannot demonstrate the

existence of such a cause of action, it has failed to state a claim upon which relief can be granted, and the complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

III. PRINCIPLES OF FEDERALISM REQUIRE THIS COURT TO ABSTAIN.

Proper application of the principles of federalism are, in the view of amicus Public Advocate, just as essential a component of the "public interest" as the principles of individual privacy that are implicated in the merits of this case. Therefore, even if the United States were able to overcome the formidable jurisdictional and pleading deficiencies that warrant dismissal of the complaint, there exists a further reason why this Court should return this matter to the forum in which it belongs -- the Superior Court of New Jersey.

In Younger v. Harris, 401 U.S. 37 (1971), the Supreme Court instructed that federal courts should abstain from exercising jurisdiction, even if federal constitutional issues were present, when doing so would interfere with ongoing state criminal proceedings that themselves provide an adequate opportunity to present the federal issues. The first ground for the Younger decision was "the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law." The

Court, however, also offered a second explanation for its decision:

> This underlying reason . . . is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. . . . The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id. at 10. The action here, which seeks to prevent the Attorney General of New Jersey from exercising the enforcement powers granted to her under the New Jersey Consumer Fraud Act, would clearly "interfere with the legitimate activities of the States." Especially given New Jersey's state-created interest in privacy regarding phone billing records, this is clearly an instance in which vindication of that interest requires that the State of New Jersey is "left free to perform [its] separate functions in [its] separate ways."

Since Younger was decided, the Court has expanded its reach beyond traditional criminal proceedings, to include civil

proceedings that implicate a significant state interest. See, e.g., Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (abstention required in state civil nuisance action against adult theater); Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) (abstention required in state administrative proceeding); Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423 (1982) (abstention required in state disciplinary proceedings against an attorney); Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (abstention required in appeal of tort judgment between two private parties where state had interest in enforceability of court judgments).

Moreover, the Supreme Court has made clear that Younger abstention applies even when the federal action precedes the state proceeding, so long as the federal court has not yet entertained "proceedings of substance on the merits." Hicks v. Miranda, 422 U.S. 332, 349 (1975). This Court has not yet held substantive proceedings in this case, and, but for the filing of this action by the United States, the Attorney General would have moved to enforce her subpoenas under N.J. Court R. 1:9-6 in Superior Court.

The issuance of the subpoenas by the New Jersey Attorney General pursuant to the state Consumer Fraud Act, and the enforcement action that should have been allowed to proceed in New Jersey Superior Court pursuant to N.J. Ct. R. 1:9-6, surely

involve the kinds of state interests that trigger Younger abstention. See Texas Ass'n of Bus. v. Earle, 388 F.3d 515 (5th Cir. 2004) (Younger abstention required when state attorney general issued grand jury subpoenas in investigation of possible violation of state election laws); Potomac Electric Power Co. v. Sachs, 802 F.2d 1527 (4th Cir. 1986) (Younger abstention required when state attorney general issued grand jury subpoenas in investigation of possible violation of state environmental protection laws).

In determining the substantiality of the state interest for purposes of Younger abstention, the federal courts "do not look narrowly to its interest in the outcome of the particular case -- which could arguably be offset by a substantial federal interest in the opposite outcome. Rather, what we look to is the importance of the generic proceedings to the State." New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 365 (1989). Here, the New Jersey Legislature has bestowed upon the Attorney General a critical role in the process of enforcing and implementing the state Consumer Fraud Act. N.J.S.A. § 56:8-4. It has also given the state Board of Public Utilities general supervisory and regulatory powers over utilities, including the power to require every public utility "to comply with the laws of the State." N.J.S.A. § 48:2-16(a). Having created a comprehensive and complex administrative scheme

for the enforcement of the Consumer Fraud Act, especially as applied to utilities, the State of New Jersey has a significant interest in seeing that its procedural mechanisms are vindicated. This interest precludes the assumption of jurisdiction by a federal court that is not part of this administrative scheme.

Thus, abstention is required not only under Younger v. Harris, but also under the related doctrine announced in Burford v. Sun Oil Co., 319 U.S. 315 (1943) (abstention appropriate when state has developed complex regulatory scheme that involves matter of public concern). See also Chiropractic America v. LaVecchia, 180 F.3d 99 (3d Cir. 1999) (applying Burford abstention in case of administrative regulation of no-fault auto insurance). As the Third Circuit noted in Lac D'Amiante Du Quebec v. American Home Assur. Co., 864 F.2d 1033 (3d Cir. 1988):

> [W]here a state creates a complex regulatory scheme, supervised by the state court and central to state interests, abstention will be appropriate if federal jurisdiction deals primarily with state law issues and will disrupt a state's efforts "to establish a coherent policy with respect to a matter of substantial public concern."

Id. at 1043 (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976)).

Here, the state interests involve not only the Attorney General's authority to enforce and administer the Consumer Fraud

Act through the Division of Consumer Affairs, but also the Superior Court's power to enforce and supervise the process of administrative subpoenas. The process of enforcing state administrative subpoenas is one in which the Superior Court has developed particular experience and expertise. See generally Sylvia Pressler, New Jersey Court Rules Annotated pp. 163-65 (2006 ed.) (discussing interpretation of N.J. Ct. R. 1:9-6). Questions about the breadth of the subpoenas, and their scope and necessity, are better left to the Superior Court to determine, pursuant to practices and procedures that it has developed and perfected.[11]

[11] Moreover, all the issues that the United States may wish to raise -- preemption, the state secrets privilege -- can be raised, and are more appropriately raised, in the context of the enforcement proceeding in Superior Court that would have taken place had the United States not filed this action. The state courts are completely competent to decide issues of federal constitutional and statutory law. And the United States can move to intervene under N.J. Ct. R. 4:330-3, and present its federal issues, as it has done successfully in the past in state cases involving national security concerns. See ACLU of N.J., Inc. v. County of Hudson, 352 N.J. Super. 44, 65 (App. Div. 2002) (applying rule of liberality in application by United States to intervene in action seeking release of information about federal detainees held in county jails).

CONCLUSION

Especially in matters of such importance and sensitivity, a federal court's first consideration must be to ensure that a case is heard in the proper forum. In this case, that forum is the Superior Court of New Jersey. For the reasons stated herein, amicus curiae Public Advocate of New Jersey respectfully suggests the absence of subject matter jurisdiction in the case consistent with Fed. R. Civ. P. 12(h)(3), and respectfully urges the Court to grant co-Defendant Attorney General's motion to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted.

September 8, 2006

Respectfully submitted,

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