

In *In Matter of Subpoena 2018R00776*, 2020 WL 113984 (3rd Cir. Jan. 10, 2020), the U.S. Court of Appeals for the Third Circuit held that an order barring a service provider from disclosing that it had produced subscriber data to a grand jury did not violate the First Amendment because the government's interest in maintaining grand jury secrecy was sufficiently strong for the nondisclosure orders to withstand strict scrutiny.

In this matter, ABC Corp., an electronic communications service provider, received a grand jury subpoena and a search warrant for data associated with one of its customer's employees, who was the subject of a grand jury investigation. Both the subpoena and search warrant were accompanied by nondisclosure orders (NDOs), which prohibited ABC Corp. from disclosing the existence of the data requests for a period of one year. *Id.* at *2–*3.

When the customer filed for bankruptcy, ABC Corp. moved the district court to modify the NDO so that it could notify the bankruptcy trustee of the existence of the subpoena and warrant. ABC Corp. argued that the NDOs were content-based restrictions and prior restraints that infringed on its First Amendment rights. The district court denied ABC Corp.'s motion, finding that the Stored Communications Act of 1986 (SCA) implicates the First Amendment rights of service providers. Without determining which level of scrutiny applied, the district court held that the NDOs "serve the compelling governmental interest of 'maintain[ing] the secrecy of the ongoing grand jury investigation and meet[ing] several of the requirements under § 2705(b)' " and thus pass strict scrutiny. *Id.* at *3 (quoting 18 U.S.C. § 2705(b)). The district court further held that the NDOs were narrowly tailored as they were limited to one year and were the least restrictive means for advancing the government's interest.

The SCA is "designed to protect legitimate law enforcement needs while minimizing intrusions on the privacy of system users as well as the business needs of electronic communications system providers." *Id.* at *1 (quoting 132 Cong. Rec. 27633 (1986) (statement of Sen. Leahy)). The SCA authorizes the government to compel an electronic service provider to produce a subscriber's information stored on remote servers. As a general rule, a service provider turning information over to a grand jury is a grand jury witness not subject to the general secrecy obligation. However, the SCA allows courts to issue NDOs prohibiting the service provider from disclosing the demand for information if disclosure would (1) endanger the life or physical safety of an individual, (2) cause flight from prosecution, (3) result in destruction of or tampering with evidence, (4) result in the intimidation of potential witnesses or (5) jeopardize an investigation or unduly delay a trial. *Id.* at *1–*2.

The Third Circuit determined that NDOs implicate First Amendment rights by restricting the service provider's speech. The NDOs at issue were content-based because they prohibited ABC Corp. from conveying information specifically about the grand jury investigation, thus drawing distinctions based on the message. Therefore, these NDOs were presumptively unconstitutional and subject to strict scrutiny. Furthermore, the Third Circuit determined that the NDOs constituted prior restraint, as they forbade ABC Corp. from speaking about its participation as a grand jury witness in advance of this participation. Prior restraints, the "most serious and the least tolerable infringement on First Amendment rights," are also presumptively unconstitutional and subject to strict scrutiny. *Id.* at *4.

The Third Circuit thus applied strict scrutiny, requiring the government to demonstrate that the restriction on speech (1) served a compelling government interest, (2) was narrowly tailored to achieve that interest and (3) was the least restrictive means of advancing that interest. The Third Circuit found that the government had a compelling interest in issuing the NDO: grand jury secrecy. *Id.* at *5. The Supreme Court has previously identified several reasons for maintaining this secrecy:

(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witness who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt. *Id.* at *6 (quoting *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 219 n.10 (1979)).

The Third Circuit next determined that the NDOs at issue were narrowly tailored to achieve the compelling government interest in maintaining grand jury secrecy. “Courts consistently distinguish between disclosure of information that a witness has independent of his participation in grand jury proceedings and information the witness learns as a result of his participation,” thus striking a balance between First Amendment rights and the interest in maintaining grand jury confidentiality. The NDOs prohibited ABC Corp. only from speaking about the existence of the government’s requests, and ABC Corp. had knowledge of this information only as a result of its participation as a grand jury witness. Furthermore, the NDOs did not prohibit ABC Corp. from discussing the requests abstractly: “The NDOs only proscribe speech that would reveal the existence of this particular grand jury investigation to a non-participant, a measure narrowly tailored to preserve the secrecy of this grand jury proceeding.”

Finally, the Third Circuit found that the speech restrictions in the NDOs were the least restrictive means to maintain grand jury secrecy. ABC Corp. proposed alternative, less restrictive measures, such as allowing it to notify the bankruptcy trustee without identifying the target email account. The Third Circuit found the alternatives to be impractical and likely ineffective. “Disclosure by an electronic service provider to a third party undermines the government’s interest in maintaining the confidentiality of an ongoing investigation.” *Id.* at *7. The Third Circuit refused to assess the trustworthiness of a would-be confidant chosen by a service provider: “Strict scrutiny does not demand that sort of prognostication.”

Thus, the Third Circuit affirmed the district court decision denying ABC Corp.’s motion to amend the nondisclosure orders.