UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
No. 11-2511 and No. 12-1159

IN RE: REQUEST FROM THE UNITED KINGDOM PURSUANT TO THE TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS,

UNITED STATES

Petitioner - Appellee,

v.

ED MOLONEY; ANTHONY MCINTYRE,

Movants - Appellants

and

ED MOLONEY; ANTHONY MCINTYRE,

Plaintiffs - Appellants,

v.

ERIC H. HOLDER, JR., Attorney General; JOHN T. McNEIL, Commissioner,

Defendants - Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS IN SUPPORT OF APPELLANTS

Peter B. Krupp, First Cir. No. 51561
LURIE & KRUPP, LLP
One McKinley Square
Boston, MA 02109
617-367-1970 ext. 101

Jonathan M. Albano, First Cir. No. 34321
Robert E. McDonnell, First Cir. No. 56450
BINGHAM MCCUTCHEN LLP
One Federal Street
Boston, MA 02110-1726
617.951.8000

Sarah Wunsch, First Cir. No. 28628
ACLU OF MASSACHUSETTS
211 Congress Street, 3rd Floor
Boston, MA 02110
617-482-3170, ext. 323

RULE 29(c)(1) DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, The American Civil Liberties Union of Massachusetts ("ACLUM") submits this corporate disclosure statement. ACLUM is a not for profit organization. It has no parent corporation and no corporation owns ten percent or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Rule 29(c)(4) Statement

ACLUM a non-profit membership organization of over twenty thousand members and supporters, is the state affiliate of the American Civil Liberties Union. Its mission is to protect civil rights and civil liberties in the Commonwealth. ACLUM often participates in cases involving freedom of expression, including the right to receive information, both through direct representation and as amicus curiae. *See, e.g., Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Rotkiewicz v. Sadowsky*, 431 Mass. 748 (2000); *Pyle v. School Committee of South Hadley*, 423 Mass. 283 (1996); *American Soc'l Ass'n v. Chertoff*, 588 F.Supp.2d 166 (D. Mass. 2008).

ACLUM's interest in this case is based on its concern that the district court's denial of a motion to intervene filed below will have a detrimental effect on the First Amendment activities of academics, as well as on others who gather information of legitimate public concern for dissemination to the public. Whatever the Court's ultimate ruling on whether disclosure of the information at issue should be required, ACLUM believes that the academics who gathered that information under a pledge of confidentiality should be permitted to intervene and participate in the outcome of the case.

ACLUM also is concerned that if the ruling below is affirmed it may make it more difficult for all those who hold confidential information about individuals -- an increasingly common event in the modern digital age -- to have a right to be heard in opposition to efforts by public or private parties to compel the disclosure of such information.

Finally, ACLUM is concerned about the government's position in this case that governments who are parties to Mutual Law Assistance Treaties should have greater rights than United States federal and local law enforcement authorities to

subpoena documents without judicial review. ACLUM has moved for leave to file this brief under Fed. R. App. P. 29.

Rule 29(c)(5) Statement

No party's counsel authored any of the brief, nor did any party or party's counsel contribute money to prepare or submit this brief. Only the *amicus curiae*, its members, or its counsel contributed money to prepare or submit this brief.

ARGUMENT

This appeal arises out of the denial of a motion to intervene by Ed Moloney ("Moloney") and Anthony McIntyre ("McIntyre") (collectively, the "Applicants"). The Applicants sought intervention in the Trustees of Boston College's ("BC") action to quash subpoenae seeking records of confidential interviews from BC's Belfast Project that might refer to the 1972 abduction and killing of Jean McConville.

BC sponsored the Belfast Project to preserve important historical information and provide insight into the minds of people personally engaged in violent conflict to gain understanding about Northern Ireland's "Troubles" and other conflicts. To accomplish this, the Project taped interviews of members of the Provisional Irish Republican Army, Sinn Fein, the Ulster Volunteer Force, and other paramilitary and political organizations.

Moloney directed the Project, and McIntyre interviewed IRA members. The Project and its participants signed confidentiality agreements providing that, absent interviewee consent, access to interview records would be completely embargoed until after the interviewee's death.

The Applicants asserted two interests supporting intervention: the confidentiality obligations they assumed as a condition of obtaining information; and the risk to their and the interviewees' personal safety should disclosure occur.

The district court denied intervention on two grounds. First, the court considered the Applicants' interests too speculative to satisfy intervention requirements. The court reached that conclusion "[w]ithout devoting discussion to the rule" on which its decision was based. *United States v. Trustees of Boston College*, __ F.Supp.2d __, 2011 WL 6287967 *18 (D. Mass. 2011) (citation omitted). Second, the court found that BC "adequately represented any potential interests claimed by the Intervenors." *Id.*

The district court's incorrect denial of intervention contributed to the court's second error: enforcing the subpoenae. The court endorsed the government's effort to establish a rule denying academics (and journalists) the right to personally defend confidentiality commitments made to obtain information on matters of legitimate public concern. It is one thing for academics and journalists to accept in a given case that a court might order disclosure by favoring the public's need for evidence over the public's interest in the free flow of information. Going forward, however, prohibiting academics from defending their pledges of confidentiality -- even when their own personal safety is at risk -- would be an alarming and unprecedented infringement on First Amendment interests.

The district court's decision has ramifications far beyond this case. In the modern digital age, sensitive private information increasingly is provided to third parties. It is essential that those who assume confidentiality obligations in exchange for obtaining such information have the right to be heard in opposition to attempts by public or private parties to compel disclosure. As Justice Sotomayor recently stated:

> [T[he premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties . . . is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. . . . I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to [constitutional] protection.

Jones v. United States, __ U.S. __, 132 S.Ct. 945, 957 (2012) (Sotomayor, J., concurring).

In addition to posing a significant threat to First Amendment and privacy interests, the district court's decision overlooked well-established intervention principles. It prejudiced the Applicants by prohibiting them from participating and presenting both valuable evidence and a perspective that might have prevented the district court's enforcement error.

A. The District Court Incorrectly Applied the Standards of Rule 24(a).

Under Fed.R.Civ.P. 24(a)(2), a party seeking intervention as of right must demonstrate three things: 1) direct and substantial interest in the litigation's subject matter; 2) an inability to protect that interest absent intervention; and 3) inadequate representation by an existing party. *International Paper Co. v. Inhabitants of the Town of Jay, Me.*, 887 F.2d 338, 342 (1st Cir. 1989) (citation omitted). *See also Cotter v. Massachusetts Ass'n of Minority Law Enforcement Officers*, 219 F.3d 31, 34 (1st Cir. 2000) (reversing intervention denial).

"On appeal from the denial of intervention as of right, it is commonly said that review of the district court decision is for 'abuse of discretion,' but this may be a misleading phrase. Decisions on abstract issues of law are always reviewed *de novo*; and the extent of deference on 'law application' issues tends to vary with the circumstances." *Cotter, supra*, at 34 (quotation omitted). "In all events, Rule 24(a)(2)'s explicit standards 'considerably restrict[ ] the [district] court's discretion.'" *Id.* (citations and internal quotations omitted; brackets in original). *See also Ungar v. Arafat*, 634 F.3d 46, 51 (1st Cir.2011).

1. The Applicants Legitimate First Amendment Interests May Be Impaired Absent Intervention.

The Applicants' interest in protecting their pledge of confidentiality presents a "textbook case" for intervention. *In re Grand Jury Subpoena*, 274 F.3d 563 (1st Cir. 2001), held that a company's former attorney and former officers had the right

to intervene to move to quash a grand jury subpoena served on the company. Although the company waived all claims of privilege, the intervenors asserted privilege under an oral joint defense agreement. *Id.* at 569. This Court affirmed the denial of the intervenors' motion to quash but, at the same time, affirmed that intervention was proper.

> Colorable claims of attorney-client and work product privilege qualify as sufficient interests to ground intervention as of right. . . . Clearly, those interests would be forfeited if [the corporation] were to comply with the grand jury subpoena and, as matters now stand, [the corporation] has no incentive to protect the intervenors' interests. Consequently, this is a textbook example of an entitlement to intervention as of right.

Id. at 570. *See also In re Sealed Case*, 237 F.3d 657, 663-64 (D.C. Cir. 2001) (parties with an interest in maintaining confidentiality meet the requirements for intervention as of right).

The Applicants' First Amendment interests in protecting their confidential relationships with sources gives them a stake in this action entitling them to intervene as of right. The First Amendment protects all activities whereby information is gathered, digested and disseminated in order to "enable members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). *See generally Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) ("Without some protection for seeking out the news, freedom of the press could be eviscerated.").

This Court recently reaffirmed that the First Amendment protects the right to gather information on matters of legitimate public concern:

> It is firmly established that the First Amendment's aegis … encompasses a range of conduct related to the gathering and dissemination of information. [It] … "goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First Nat'l Bank v. Bellotti*, 435 U.S. 765,

> 783 (1978); *see also Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is ... well established that the Constitution protects the right to receive information and ideas."). An important corollary to this interest in protecting the stock of public information is that "[t]here is an undoubted right to gather news 'from any source by means within the law.'" Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681–82 (1972)).

Glik v. Cunniffe, 655 F.3d 78, 82 (2011).

It is beyond doubt that confidentiality promotes the exchange of valuable information. *See United States v. Roviaro*, 353 U.S. 53, 59 (1957) ("The [informer's] privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation."); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) ("the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry"); *Talley v. California*, 362 U.S. 60, 64-65 (1960) ("[t]here can be no doubt that ... an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression").[1]

This Court has held that First Amendment interests afford qualified protections against forced disclosure of confidential information held by those who gather and disseminate newsworthy information, whether those individuals are traditional members of the press or academics. *See Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 598-99 (1st Cir. 1980); *In re Cusumano*, 162 F.3d 708, 714 (1st Cir. 1998); *see also In re Special Proceedings*, 373 F.3d 37, 45

[1] Indeed, this Court has held that even attempts to compel testimony about non-confidential sources trigger First Amendment concerns and may, depending upon the facts presented, require that the subpoena be quashed. *United States v. The LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988).

(1st Cir.2004) (applying balancing test to a special prosecutor's motion to compel). "[C]ompelling the disclosure of . . . research materials would infrigidate the free flow of information to the public, thus denigrating a fundamental First Amendment value." *Cusumano*, 162 F.3d at 717. *See generally Cotter*, 219 F.3d at 35 ("even a small threat that the intervention applicants' [interests] could be jeopardized would be ample reason for finding that their ability to protect their interest 'may' be adversely affected"); *Banco Popular de Puerto Rico v. Greenblatt*, 964 F.2d 1227, 1233 (1st Cir. 1992) (considering public interest in litigation as factor favoring intervention). As a matter of law, Applicants have important First Amendment interests in this action that "may" be "impair[ed] or impede[d]" if they are not allowed to intervene. Fed. R. Civ. P. 24(a)(2).

The government nevertheless maintains that the Applicants are not entitled to any judicial review. In the government's view, the Mutual Legal Assistance Treaty between the U.S and the U.K authorizes a foreign power, acting with the Executive's unreviewable stamp of approval, to compel citizens to produce confidential information for prosecutions abroad, unless the subpoena offends constitutional guarantees or violates a federally recognized privilege.

The government's argument that the First Amendment interests asserted by the Applicants do not rise to the level of a privilege entitled to judicial protection under the MLAT is, as this Court has explained in a similar context, unhelpful semantics.

> Whether or not the process of taking First Amendment concerns into consideration can be said to represent recognition by the Court of a 'conditional', or 'limited' privilege is … largely a question of semantics. The important point … is that courts faced with enforcing requests for the discovery of materials used in the preparation of journalistic reports should be aware of the possibility that the unlimited or unthinking allowance of such requests will impinge upon First Amendment rights. In determining … limits … upon the granting of such

> requests, courts must balance the potential harm to the free flow of information that might result against the asserted need for the requested information. . . . Given the sensitivity of inquiry in this delicate area detailed findings of fact and explanation of the decision would be appropriate."

Bruno & Stillman, 633 F.2d at 595-596, 598 (footnotes omitted).

If the government has its way, its desired straightjacket on judicial review would apply to investigations and prosecutions by any foreign country party to an MLAT, including cases such as:

- Russia's prosecution of a dead man, Sergei Magnitsky, who died in prison from the effects of his imprisonment and torture by the Russian Government. http://www.nytimes.com/2012/02/08/world/europe/russia-to-retry-sergei-magnitsky-posthumously.html;

- The prosecution of Nobel Prize winner Liu Xiaobo by the Chinese government for "inciting subversion of state power." http://www.nobelprize.org/nobel_prizes/peace/laureates/2010/xiaobo.html;

- The recent arrests and prosecutions of non-governmental organizations, including civil rights groups, by the Egyptian government. http://www.emirates247.com/news/region/ngo-trials-politically-motivated-egypt-rights-groups-2012-02-15-1.443299; and

- The sex discrimination case recently dismissed by a Russian judge who stated that "If we had no sexual harassment we would have no children." http://www.telegraph.co.uk/news/worldnews/europe/russia/2470310/Sexual-harrassment-okay-as-it-ensures-humans-breed-Russian-judge-rules.html.

There may be room for disagreement about the extent to which the First Amendment protects academics and journalists from compelled disclosure. But, there should be no suggestion that the Constitution surrenders its citizens to foreign powers with fewer safeguards than are afforded to citizens subpoenaed by domestic law enforcement authorities. *See generally Hamdi v. Rumsfeld*, 542 US 507, 532 (2004) ("It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those

times that we must preserve our commitment at home to the principles for which we fight abroad.")

2. The Applicants Have Legitimate Personal Safety Interests that May Be Impaired Absent Intervention.

The Applicants' independent interest in their personal safety may be impaired absent intervention. The government belittled this concern, claiming that the Applicants' "decision to publicize the issuance of the subpoenae … belies any claim of [personal safety] risk." *See* Government's Opposition to Motion to Quash and Motion for an Order to Compel Belfast Project (Dist. Ct. Document 7) at 2. "If there was a substantial risk of retribution," the Government predicted, the "effort to publicize the subpoenae would compound the purported problem, rather than mitigate it." *Id.*

This is reminiscent of an argument that might have been made by Joseph K.'s accusers in Kafka's *The Trial*. A witness's decision to fight the government's behind-closed-doors decisions affecting the witness's welfare is not grounds, in this country at least, to impeach the witness's motives for applying to the court for relief. The Supreme Court, explaining the positive role that public access to preliminary criminal hearings plays in the judicial process, has said:

> the absence of a jury, long recognized as "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge," *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968), makes the importance of public access to a preliminary hearing even more significant. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980)).

Press-Enterprise v. Superior Court, 478 U.S. 1, 12-13 (1986).

The Applicants cannot be faulted for rejecting the government's assumption that the interviewees and others involved in Northern Ireland's conflicts would not

learn of a judicial hearing in Boston. Nor can they be faulted for believing it imprudent -- at best -- to create the impression that they are willing government informers.[2]

The Government cavalierly remarks that "the Price interview by Boston College has been widely known for more than a year and nothing has happened" to Price, Moloney, McIntyre and others." (Gov't at 17). The Government ignores the fact that what was "widely known" is that Price and others gave their information under terms of the strictest confidentiality with their interviews only to be disclosed at death. Non-disclosure, of course, provides Price and other interviewees their greatest protection. So long as they are alive, their information will not be disclosed. Killing them, however, would lift the confidentiality embargo. If disclosure is made, there is a grave risk that retaliation will follow. The Government, unfortunately, has got the practical life-and-death import of this situation completely backwards.

A culture of death to informants pervades both sides of The Troubles, and it has, unfortunately, survived The Good Friday Agreement. The Police Ombudsman for Northern Ireland remarked in a 2007 Report on collusion between the Royal Ulster Constabulary (RUC) and loyalist paramilitaries:

> There are significant risks to the lives of people who are publicly revealed to be, or to have been, paramilitary informants. Northern Ireland has a history of the murder of those who were even suspected of being informants. The most recent murder is thought to be that of a self-confessed informant, who died in 2005.

---

[2] As pointed out by BC below, the government also mistakenly asserted that "according to one news report" a reporter has been "permitted [by Dolours Price] to listen to portions of Ms. Price's Boston College interviews." (Memorandum of Trustees of Boston College in Reply to Government's Opposition to Motion to Quash Subpoenas and in Opposition to Government's Motion to Compel (Leave to File Granted on July 11, 2011) at 6-7 (District Court Document 10).

"Statement by the Police Ombudsman for Northern Ireland on her investigation into the circumstances surrounding the death of Raymond McCord Junior and related matters," 22 January 2007 ("Ombudsman's 2007 Report").

Killing those proven to be or suspected of being informants continues on both the Catholic and Protestant sides of The Troubles. In 2005, Jim Gray, the East Belfast brigadier of the Ulster Defense Association (UDA), a significant loyalist paramilitary group, was killed by two unidentified gunmen after being expelled from the UDA for drug dealing and on suspicion of being a police informant. Loyalist revelers burned Gray in effigy at a street disco after his killing.[3]

Also in 2005, Denis Donaldson was exposed as a 20-year paid informant to the British security forces. Donaldson had joined the IRA in the 1960's and held positions in both it and Sinn Fein. Warned by the Police Service of Northern Ireland (PSNI) that his informant status would be revealed, Donaldson confessed to Sinn Fein and resigned his posts. Sinn Fein president Gerry Adams publicly announced the developments, followed by a public apology from Donaldson.[4] Four months later, Donaldson was found shot to death in a remote farm cottage in County Donegal.[5] Three years later, The Real IRA (a group at odds with the Provisional IRA's support of the Good Friday Agreement), claimed responsibility: "we could show – unlike the Provos – that we weren't prepared to tolerate traitors.

---

[3] *See* "Jim Gray (UDA Member," http://en.wikipedia.org/w/index.php?title=Jim_Gray_(UDA_member)&printable=yes (retrieved February 27, 2012).

[4] *An Phoblacht*, 5 January 2006 (www.anphoblacht.com/news/detail/12505) (retrieved February 27, 2012).

[5] *BBC News*, 4 April 2006 (www.news.bbc.co.uk/2/hi/uk_news/northern_ireland/4877516.stm)(retrieved February 27, 2012).

We would prove that while the Provos shirked their duty under the green book [IRA rule book], true and faithful republicans would not."[6]

IRA volunteers must say absolutely nothing about membership or operations. The *IRA Green Book* declares on its opening page: "Don't talk in public places: you don't tell your family, friends, girlfriends or workmates that you are a member of the IRA. Don't express views about military matters. In other words you say nothing to any person."[7] Elsewhere, it describes the fifth point of guerrilla strategy as "defending the war of liberation by punishing criminals, collaborators and informers."

Brendan Hughes summed up the risk that anyone who talks about his IRA service faces:

> [T]here's a Republican repression of anyone who dares to object or who dares to question the leadership line. . . . we've been told all along that this is not a leadership-led movement, this is a movement led by the rank and file. That's a load of bollocks. This is a movement led by the nose by a leadership that refuses to let go and anyone who objects to it, anyone who has an alternative, is either ridiculed, degraded, shot or put out of the game altogether.

E. Moloney, *Voices From the Grave* at 288 (Public Affairs 2010).

As will be shown, the Northern Ireland police did not even investigate the death of Jean McConville for more than two decades. Now, in the name of solving a 40-year-old murder, the Government risks subjecting multiple participants in the Belfast Project to the ultimate retaliation. The forced turnover of interview

---

[6] *Sunday Tribune* 12 April 2009, reprinted at http://stakeknifeira.blogspot.com/2011/07/stakeknife-how-real-ira-killed-denis.html (retrieved February 27, 2012).

[7] Downloaded at www.scribd.com/doc/15914572/IRA-Green-Book-Volumes-1-and-2

materials will convert the interviewees and their interviewers into informants. Under these circumstances, there is nothing contingent or speculative about the Applicants' interest in protecting their personal safety.[8]

3. The Applicants' Interests Will Not Be Adequately Represented By Boston College.

An intervenor need only show than that his interest "*may* be" inadequately represented by other parties. This burden is to be "treated as minimal." *See Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (emphasis supplied); *Conservation Law Found of New England v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992; *Flynn v. Hubbard*, 782 F.2d 1084, 1090 (1st Cir. 1986) (Coffin, J., concurring).

In *Trbovich*, the Court reversed the denial of a motion to intervene because Rule 24 "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." 404 U.S. at 538 n.10. The intervenor was a union member challenging an election. Although the action had been filed by the Secretary of Labor, the Court held that "[e]ven if the Secretary is performing his duties, broadly conceived, as well as can be expected, the union member may have a valid complaint about the performance of 'his lawyer.'" 404 U.S. at 539. *See also Conservation Law Found.*, 966 F.2d at 44 (commercial fishermen "may see their

---

[8] The district court cited *Arafat*, 634 F. 3d 46, in support of its holding that the Applicants' interest was too speculative to warrant intervention. In *Arafat*, however, the applicant for intervention "want[ed] to challenge [an] injunction while at the same time insisting that the injunction does not apply to it." 643 F.3d at 52. As this Court observed, "Having one's cake and eating it, too, is not in fashion in this circuit." *Id.* (citation and quotations omitted). The Applicants do not make any such claim here.

own interest in a different perhaps more parochial light" than the Secretary of Commerce).

Just as the Applicants could not claim to be adequate representatives of BC, the University should not be expected to represent its own institutional interests while simultaneously representing the Applicants. Two points confirm that fact. First, BC did not oppose the Applicants' motion to intervene, or assert that it adequately represented their interests. Second, the different decisions reached by BC and the Applicants about whether to appeal the district court's order enforcing the first subpoena at issue demonstrate that "there is enough likelihood of conflict or divergence between the intervention applicants and [BC] to overcome the final adequate-representation proviso." *Cotter*, 219 F.3d at 35.

B. The District Court's Error Was Prejudicial.

The Applicants had the right to participate in the district court's consideration of the following issues:

1. The district court found that the subpoenaed materials were not readily available from a less sensitive source. But the only facts the court cited was that BC claimed that the sources received the "strictest assurances and beliefs in confidentiality" and a *New York Times* article reporting that the late Brendan Hughes had only admitted his affiliation with the IRA because of his personal trust in Project interviewer Anthony McIntyre. *Trustees of BC*, 2011 WL 6287967 *18. These facts show how important the pledge of confidentiality was to the Applicants' ability to gather information -- a factor that should support intervention -- but do not show that the PSNI lacks alternative sources to investigate the death of Jean McConville.

2. The district court acknowledged that BC "may [] be correct in arguing that the grant of these subpoenae will have a negative effect on their research into

the Northern Ireland Conflict, or perhaps even other oral history efforts." *Id.* It nevertheless concluded that the harm to the free flow of information was mitigated for three reasons, none of which support that holding:

a. The district court accepted the government's argument (quoting *Branzburg*) that "compelling production in this unique case is unlikely to 'threaten the vast bulk of confidential relationships' between academics and their sources." *Id.* That proposition says nothing about the effect in a particular case, which is why a case by case analysis and detailed findings are required in this area.

b. The district court found that "[i]t bears noting that there would be no harm to the free flow of information related to the Belfast Project itself because the Belfast Project stopped conducting interviews in May 2006." *Id.* Almost by definition, however, sources already have provided information to an academic or a journalist before the information is sought by the government or a private party. Indeed, in many cases, the information already has been published, but without attribution to the source. The principle underlying the First Amendment interests in these cases -- similar to the rationale protecting the government from unnecessary disclosure of criminal informers -- is that compelled disclosure inhibits ***future*** communications. Moreover, any threat to the personal safety of Project participants, as feared by BC and the proposed intervenors, likely would have significant effects beyond the Belfast Project and are no less burdensome on First Amendment interests.

c. For similar reasons, the district court erroneously concluded that the harm to the free flow of information was mitigated by the fact that "the Burns Library's original intent was to disseminate this information. … [and by the fact that] Moloney published a book and television documentary using two interviews from the Belfast Project in 2010." *Id.* First, as this Court previously

has ruled, "[w]hether the creator of the materials is a member of the media or of the academy, the courts will make a measure of protection available to him as long as he intended 'at the inception of the newsgathering process' to use the fruits of his research 'to disseminate information to the public.'" *Cusumano*, 162 F.3d at 714. A prerequisite for First Amendment protections thus was transformed into a factor favoring disclosure. In addition, the two interviews were of deceased persons, a disclosure entirely consistent with the Project's confidentiality terms. The record contains no evidence that any interviewee has disclosed their interviews to anyone.

3. The district court also found that the governmental interest in disclosure was significant because the information was sought "in reference to alleged violations of the laws of the United Kingdom, namely murder, conspiracy to murder, incitement to murder, aggravated burglary, false imprisonment, kidnapping, and causing grievous bodily harm with intent to do grievous bodily harm." *Id.* Given the risk that some countries might use MLAT requests to further political prosecutions, an assessment of the government interest underlying an MLAT request requires more than a recitation of unproven allegations, particularly when the request seems largely to concern a murder that occurred 40 years ago.

Here, the historical and political context in which the oral histories were assembled and now demanded, raise significant concerns whether this case involves "a governmental institution that has abused its proper function" or is "prob[ing] at will and without relation to existing need," the very situations which the *Branzburg* Court said deserved judicial scrutiny. 408 U.S. at 699-700.

The investigation into the abduction and death of Jean McConville by the PSNI) and its predecessor, the RUC, was, simply, a NON-investigation -- at least until the matter became grist for political opponents of Gerry Adams.

An IRA squad abducted and later killed Mrs. McConville in December 1972. As the late Brendan Hughes informed the Belfast Project in a confidential 2001 interview:

> I sent . . . a squad over to the house to check it out and there was a transmitter in the house. We retrieved the transmitter, arrested her, took her away, interrogated her, and she told [us] what she was doing. . . .[W]e let her go with a warning [and] confiscated the transmitter. A few weeks later, . . . another transmitter was put into her house . . . she was still co-operating with the British; she was getting paid by the British to pass on information. . . . [S]he was arrested again and taken away. . . .

Voices From the Grave at 129.

Despite being informed about McConville's abduction, the police did nothing other than make perfunctory entries into the RUC's logs. After his mother's abduction, one of Mrs. McConville's sons attempted to secure aid from both the police and the British Army. According to a 2006 investigation conducted by the Northern Ireland Police Ombudsman, Mrs. McConville's son

> sought advice from a local politician, and was told to report his mother's abduction to the police. This he did within two days at Hastings Street Police Station. He also went to Albert Street Barracks and told the army that "the woman they had picked up the night before had been abducted. On both occasions he was told that the matter would be looked into but nothing happened.

Police Ombudsman for Northern Ireland, *Report into the complaint by James and Michael McConville regarding the police investigation into the abduction and murder of their mother Mrs. Jean McConville*, July 18, 2006 ("Ombudsman's 2006 Report").

Although the police received multiple reports about the abduction, the Police Ombudsman's investigators were "unable to find any trace of any investigation into Mrs. McConville's abduction during the 1970's and 1980's." (Ombudsman's 2006 Report at 6) No investigation at all took place until 1995. Then, a limited

file was created; four McConville children were interviewed; and three people were arrested and released without charge. The police who worked the McConville's neighborhood in 1972 were questioned, and "none could recall any investigation being carried out." *Id. at* 7 One detective conceded "that because of the situation in Northern Ireland at the time, enquiries in the area were restricted to the most serious cases," of which McConville abduction apparently was not one. *Id.* at 6.

Even three decades later, police cooperation with the Ombudsman's investigation was less than complete. "The Senior Investigating Officer who led the [1995] review team Chief Inspector C has retired and refused to cooperate with the Police Ombudsman's investigation." *Id.* at 7. This lack of cooperation smacks of the same resistance that elements of the RUC gave to the Ombudsman's 2007 Report into collusion between the RUC and Loyalist paramilitary groups. In that report, the Ombudsman summarized murders and other mayhem committed by Ulster Volunteer Force (UVF) "informants" who were being managed by the RUC. Crimes included, among other things, the killings of various Catholics in Belfast. Strikingly, the Ombudsman reported that the "main difficultly" encountered during the investigation was the lack of RUC cooperation:

> The Police Ombudsman was particularly concerned that retired senior officers, who had significant responsibilities within Special Branch and who undoubtedly could have assisted this enquiry, refused to do so. Among those who refused were two retired Assistant Chief Constables, seven Detective Chief Superintendents and two Detective Superintendents. No senior officer has taken total responsibility for the management of Informant 1 during the period under investigation.

Ombudsman's 2007 Report at 36. The 162-page report recounts in detail how over ten years in the 1990's the UVF "informant" committed numerous murders and

other crimes while being "handled" by RUC personnel with full knowledge of the mayhem.

The sorry record of the PSNI and the RUC should be taken into the balance when considering the First Amendment concerns at risk in this case. Put to the test in an investigation demanded by the children of Jean McConville, the PSNI and RUC personnel who cooperated had to concede a complete dereliction of duty. They had allowed the McConville trail to grow stone cold. The case was ignored not simply over a year or two, but over more than two decades.

This saga of non-performance by the police does not justify a chilling invasion of the Belfast Project's oral history efforts. As the District Court noted, this case implicates "the free flow of information in our society and the essential role that our institutions of higher education here play in that." (Dec. 22, 2011 transcript at p. 7-8) The Court observed that the materials collected under a promise of strict confidentiality by Moloney and McIntyre have "valid academic interests. They're of interest to the historian, sociologist, the student of religion, the student of youth movements, academics who are interested in insurgency and counterinsurgency, in terrorism and counterterrorism. They're of interest to those who study the history of religions." *Id.* at 8. It was also crystal clear to the court that the information would never have been gathered had there been a risk of its disclosure to British authorities. *Id*. The PSNI/RUC's self-inflicted wound, their sorry record of non-performance over more than 40 years, does not justify an invasion of academic freedom and the likely destruction of much of this valuable historic research. Academic freedom should not pay the price for the constable's incompetence.

4. The denial of intervention also prevented the Applicants from being heard when the district court subsequently ruled on BC's motion to quash the

second set of subpoenae. *In re Request from the United Kingdom Pursuant to the Treaty Between the Government of the U.S. and the Government of the United Kingdom on Mut. Assistance*, 2012 WL 194432, (D. Mass. 2012). The order gives no indication that the balancing process included an examination of whether the information was sought as part of a legitimate murder investigation or an attempt to use the investigation to embarrass Adams. Moreover, the district court required that five transcripts be produced in their entirety even though only portions of the materials concerned McConville, the subject of the subpoena. Although BC is pursuing an appeal of this order, absent intervention, the Applicants will have no means to do so, further abridging their First Amendment rights.

C. The District Court Incorrectly Used The Unduly Deferential Standard Of Review Applicable To A Grand Jury Subpoena.

The district court incorrectly used a standard applicable to a grand jury subpoena to assess the reasonableness of a foreign request for evidence. *See United States v. R. Enterprises, Inc*., 498 U.S. 292, 297-99 (1991). Using such a standard undercuts the protections afforded judicial inquiry prior to the 2009 Foreign Evidence Request Efficiency Act, 18 U.S.C. § 3512, and which should continue to be available to review such requests.

Prior to the enactment of Section 3512, the procedural mechanism and protections attendant to foreign requests for information in civil and criminal cases were found in 28 U.S.C. §1782. Under that statute, the district court "is not required to grant discovery application simply because it has the authority to do so." *Intel Corp. v. Advanced Micro Devices, Inc*., ("*Intel*"), 542 U.S. 241, 264-65 (2004) (citation omitted). Instead, under Section 1782, if the requesting party makes a prima facie showing that it meets the requirements of Section 1782, the district court may then consider other factors, including whether the "request conceals an attempt to circumvent foreign proof-gathering restrictions or other

policies of a foreign country or the United States" or is "unduly intrusive or burdensome." *Intel*, 542 U.S. at 264-65. The district court's review of the motion to quash in this case did not address the factors authorized under Section 1782.

The first question here is whether, prior to the enactment of Section 3512, the Mutual Legal Assistance Treaty between the U.S. and the U.K. ("UK-MLAT") altered the standard applicable under Section 1782. It did not. To the contrary, the UK-MLAT incorporates the substantive law of the United States. For example, in Article 8 of the Annex to the Mutual Legal Assistance Treaty between the U.S. and the E.U. (which pertains to the UK-MLAT), the two countries agreed that "[a] person requested to testify or to produce documentary information or articles in the territory of the Requested Party may be compelled to do so in accordance with the requirements of the law of the Requested Party." This language authorizes a district judge to issue orders no greater, and subject to the same substantive protections, as would be required for a domestic matter.

While the district court noted that mutual legal assistance treaties are designed to speed the processing of requests by other nations, this is the very same purpose as the liberalizing amendments to Section 1782. *See, e.g., In re Application of Asta Medica, S.A.*, 981 F.2d at 5 (quoting S. Rep. No. 1580, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S. Code Cong & Ad News 3782). Nothing in the UK-MLAT suggests that judicial review, and the civil liberties of U.S. citizens, would be sacrificed for speedy cooperation with the U.K. Moreover, when the UK-MLAT was executed, it was anticipated that it would operate within the rubric of 28 U.S.C. §1782. According to the UK-MLAT Technical Analysis,

> it is not anticipated that the Treaty will require any new implementing legislation. The United States Central Authority expects to rely heavily on the existing authority of the federal courts under Title 28, United States Code, Section 1782, in execution of requests.

S. Exec. Rep. No. 104-23.

The district court relied on decisions from the Ninth and Eleventh Circuits to support its conclusion that the review available for requests made under a mutual legal assistance treaty is extremely limited. *See In re Search of Premises Located at 840 140th Avenue NE, Bellevue, Wash.*, 634 F.3d 557 (9th Cir. 2011), and *In re Commissioner's Subpoenas*, 325 F.3d 1287 (11th Cir. 2003), abrogated in part, *In re Clerici*, 481 F.3d 1324, 1333 n. 12 (11th Cir. 2007). These cases effectively surrendered judicial review of foreign requests for evidence in criminal cases to the judgment of the executive branch. Nothing in the UK-MLAT requires such a result. Indeed, it would be contrary to the discretionary language found in the later-enacted Foreign Evidence Request Efficiency Act.

In Search of Premises involved a request under Section 1782 and the U.S.-Russia Mutual Legal Assistance Treaty. In ruling that a district court's review of a proper foreign request is limited to review of whether the subpoena would offend a constitutional guarantee, the Ninth Circuit took refuge in the procedural requirements of the mutual legal assistance treaty requiring the executive branch to present the request to the district court. Thus, for the factors set out in the discussion of Section 1782 in *Intel*, 542 U.S. at 264-65, which "depend on the facts of the particular case," the Ninth Circuit concluded that "it is reasonable to conclude that the United States government effectively has weighed those factors by agreeing to the MLAT and by agreeing to the particular request at issue." 634 F.3d at 571.

This ruling is not supported by UK-MLAT. Nothing there requires the executive to be presented with all defenses to enforcement of the foreign request, nor, as this case demonstrates, are all of the reasons for non-enforcement necessarily clear from the face of the request. Moreover, to the extent the Ninth

Circuit was considering the effect of the U.S.-Russia MLAT on the judicial discretion found in Section 1782, it did not consider the effect of the still later-enacted Foreign Evidence Request Efficiency Act, which plainly recognizes the discretion a district court has with respect to a proper foreign request for evidence in a criminal case. *See* 18 U.S.C. §3512(a)(1) (district court "may" issue orders in response to a proper foreign request for evidence). Similarly, the Eleventh Circuit's 2003 decision in *Commissioner's Subpoenas* was decided well before the enactment of the Foreign Evidence Request Efficiency Act, and effectively held that a request under a mutual legal assistance treaty is not reviewable by a district court. 325 F.3d at 1306.

The Foreign Evidence Request Efficiency Act, 18 U.S.C. §3512, did not change the legal safeguards for determining whether a foreign request for evidence should be enforced. As the district court correctly recognized, Section 3512 was designed with the "principal purpose" of streamlining the prior cumbersome mechanism for handling foreign requests for evidence by permitting a single U.S. Attorney's Office to handle a request for evidence to be found in multiple jurisdictions.

The Act did make clear, however, that the district court had discretion about whether to enter an order. While Section 3512 expanded the jurisdictional reach of courts asked to issue orders in response to foreign requests, it also states that the district court "may" issue orders in response to a proper foreign request for evidence. 18 U.S.C. § 3512(a)(1). *See also* 18 U.S.C. §§ 3512(a)(2) (such order "may include . . ."), 3512(b)(1) (the court "may also issue an order appointing a person to direct the taking of testimony").

Congress did not intend the Foreign Evidence Request Efficiency Act to change the existing protections against improper foreign requests. It believed

courts would review such requests as they would in domestic cases. The legislative history could not be more clear. In writing to the Senate to urge enactment, Acting Assistant Attorney General M. Faith Burton wrote: "We note that the proposed legislation would not in any way change the existing standards that the government must meet in order to obtain evidence, nor would it alter any existing safeguards on the proper exercise of such authority." 155 Cong. Rec. S6810 (emphasis added). Sen. Whitehouse echoed the same sentiments in advocating the Act's adoption. *Id.* (emphasis added). Similarly, Rep. Adam Schiff made clear his belief, uncontradicted in the legislative history, that "[c]ourts will continue to act as gatekeepers to make sure that requests for foreign evidence meet the same standards as those required in domestic cases." 155 Cong. Rec. H10092.

Before the enactment of Section 3512, the courts did not apply a "grand jury standard" Section 1782 requests. To apply such a standard would substantially reduce the reviewing court's role from what exists in domestic cases. Under federal law, subpoenae for assistance in the prosecution of criminal offenses are reviewable under Rule 17(c). Subpoenae for assistance in forfeiture and restitution matters may be reviewable under Rule or Fed. R. Civ. P. 45(c), depending on whether related proceedings are civil or criminal. Therefore, to apply a "grand jury standard" to such a foreign request would permit far lesser judicial protections under Section 3512 than are available for domestic cases, in clear derogation of the Congressional intent.

By their attorneys,

/s/Peter B. Krupp
Peter B. Krupp, First Cir. No. 51561
LURIE & KRUPP, LLP
One McKinley Square
Boston, MA 02109
617-367-1970 ext. 101

/s/Jonathan M. Albano
Jonathan M. Albano, First Cir. No. 34321
Robert E. McDonnell, First Cir. No. 56450
BINGHAM MCCUTCHEN LLP
One Federal Street
Boston, MA 02110-1726
617-951-8000

/s/Sarah Wunsch
Sarah Wunsch, First Cir. No. 28628
ACLU OF MASSACHUSETTS
211 Congress Street, 3rd Floor
Boston, MA 02110
617-482-3170, ext. 323

Dated: February 27, 2012

Certificate of Service

I, Jonathan M. Albano, hereby certify that this document filed through the CM/ECF system was sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on February 27, 2012.

/s/Jonathan M. Albano
Jonathan M. Albano, First Cir. No. 34321

Rule 32(a)(7) Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6989 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/Jonathan M. Albano
Jonathan M. Albano, First Cir. No. 34321