In the United States Court of Appeals
for the First Circuit

No. 11-2511

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 in the Matter of Dolours Price

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UNITED STATES OF AMERICA,
Petitioner -Appellee
v.
TRUSTEES OF BOSTON COLLEGE, Movant

ED MOLONEY; ANTHONY MCINTYRE
Applicants for Intervention-Appellants

No. 12-1159

ED MOLONEY; ANTHONY MCINTYRE
Plaintiffs - Appellants
v.
ERIC HOLDER, JR., Attorney General; JOHN T. MCNEIL, Commissioner
Defendants-Appellees

On Appeal from a Denial of a Motion to Intervene, and a Dismissal of a Civil Action Entered in the United States District Court For the District of Massachusetts

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BRIEF FOR THE UNITED STATES

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STATEMENT OF JURISDICTION

Appellants Ed Moloney and Anthony McIntyre (collectively the "appellants") invoked the district court's jurisdiction pursuant to, *inter alia*, 28 U.S.C. §1331. This Court has jurisdiction pursuant to 28 U.S.C. §1291 to review the district court's final decision denying intervention in 11-mc-91078 [D:32][1], as well as its order dismissing the complaint in 11-cv-12331. [CD:15].

STATEMENT OF ISSUES

1. The intervention issue presented in appeal No. 11-2511 is not mooted by the appeal from dismissal of the separate civil action, No. 12-1159; rather, resolution of the intervention issue is dispositive of the issues presented on appeal.

2. The district court did not abuse its discretion in denying appellants' motion to intervene in the proceeding to quash the government's subpoenas.

3. Because appellants were properly denied intervention and Boston College did not appeal the district court's rulings on the motion to quash, appellants'

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[1]The district court docket in the original case filed by the United States (MBD No. 11-91078-WGY) is cited as "[D:_]." The district court docket in the subsequent civil case filed by Moloney and McIntyre (Civ.No. 11-12331-WGY) is cited as "[CD:_]." Transcripts in the original case are cited by the date of the hearing and page number of the transcript; thus [Tr. 12/22/11 at 5] refers to page 5 of the transcript of the December 22, 2011 hearing. Transcripts in the civil case are cited similarly, *e.g.* "[C.Tr. 1/24/12 at 5]." Appellants' brief and appendix are cited respectively as"[Br:_] and "[A_]" and the amicus brief of the American Civil Liberties Union of Massachusetts is cited as "[AmBr:_]." Because appellants did not paginate their addendum, the government refers to the documents contained therein by docket number and internal page number.

challenges to those rulings are not before this Court; nonetheless, appellants and amicus fail to establish any error in the district court's ruling that the documents should be turned over.

4. The district court's conclusion that appellants were not entitled to intervention to present their claims against the Attorney General is preclusive of their separate civil action; alternatively, the civil action was properly dismissed, including because, as the district court found, the Attorney General properly discharged his obligations.

STATEMENT OF THE CASE

In May 2011, an Assistant United States Attorney ("AUSA"), acting as Commissioner to the United Kingdom ("U.K.") under the mutual legal assistance treaty between the United States and the U.K. (hereafter, the "US-UK MLAT")[2]

[2]The US-UK MLAT is formally known as the Treaty Between the Government of the United States of America and the Government of the United Kingdom and Northern Ireland on Mutual Legal Assistance in Criminal Matters, signed at Washington on January 6, 1994 (the "1994 Treaty"), S. Treaty Doc. 104-2 , and the Instrument as contemplated by Article 3(2) of the Agreement on Mutual Legal Assistance between the United States of America and the European Union signed 25 June 2003, as to the application of the Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland on Mutual Legal Assistance in Criminal Matters signed 6 January 2004, signed at London on December 16, 2004 (the "2004 Instrument"), S. Treaty Doc. No. 109-13. The Annex to the 2004 Instrument reflects the integrated text of the provisions of the 1994 Treaty and the Agreement on Mutual Legal Assistance between the United States of America and the European Union, signed June 25, 2003.

issued subpoenas to individuals and entities at Boston College. [D:1; D:32 at 4]. The subpoenas sought recordings and documents relating to a criminal investigation being undertaken in the U.K. [*Id*.]. Boston College complied in part and moved to quash in part, filing its motion in 11-mc-91078-WGY. [D:5; D:32 at 1-3]. Moloney and McIntyre sought to intervene pursuant to Fed. R. Civ. P. 24. [D:18]. The district court denied their motion to intervene and Moloney and McIntyre appealed. The appeal of the denial of intervention was assigned Appeal No. 11-2511. [D:32]. The district court later denied Boston College's motion to quash and Boston College did not appeal that ruling. [*Id*.].

On December 29, 2011, appellants filed a separate civil action in the district court in the case numbered 11-cv-12331-WGY. The government moved to dismiss that case, and after a hearing on January 24, 2012, the district court granted the government's motion to dismiss. [CD:15]. Maloney and McIntyre's appeal from the motion to dismiss was assigned Appeal No. 12-1159.

STATEMENT OF FACTS

On March 30, 2011, the United States submitted an application *ex parte* and under seal to the district court pursuant to the US-UK MLAT and 18 U.S.C. §3512 (2009) seeking appointment of an AUSA as Commissioner to collect evidence from witnesses and to take such other action as necessary to effectuate a request from law enforcement authorities in the U.K. [D:1; D:2; D:32 at 2, 42-45].[3] The application was prompted by a formal request from the U.K. for legal assistance in a criminal investigation pending in that country, involving kidnaping and murder, among other serious crimes, made pursuant to the US-UK MLAT. [*Id*.]. On March 31, 2011, the court[4] granted the government's application and entered a sealed order appointing AUSA Todd Braunstein as Commissioner to, among other things, issue subpoenas consistent with the U.K.'s request. [D:3; D:32 at 1, 3-4].

On or about May 3, 2011, AUSA Braunstein issued subpoenas to: (i) the Boston College John J. Burns Library; (ii) Robert K. O'Neill, the Director of the John J.

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[3]The government's application remains under seal as it contains sensitive confidential law enforcement information submitted by the U.K. to the United States, and the U.K. has requested that it be kept under seal. [D:2; D:32 at 2,fn3]; *see, also* US-UK MLAT Article 7, ¶1. The government will file a separate appendix, *ex parte* and under seal, which will include these and related documents.

[4]The matter was initially drawn to Judge Stearns, who subsequently recused himself, and then assigned to Judge Tauro. [D:32 at 3]. Judge Tauro then recused himself and the matter was reassigned to Judge Young. [*Id*.].

Burns Library; and (iii) Thomas E. Hachey, Professor of History and Executive Director of the Center for Irish Studies at Boston College, seeking materials related to interviews of two former members of the Irish Republican Army ("IRA"), Brendan Hughes and Dolours Price. [D:32 at 4; D:5 at 2-3; D:10]. The materials subpoenaed were recordings and related documents made between 2001 and 2006 and held at Burns Library at Boston College. [D:32 at 4-6; A036-051].

The Hughes and Price interviews were two of twenty-six conducted by McIntyre, under the supervision of Moloney, as part of a Boston College oral history project which came to be known as "The Belfast Project." [D:32 at 4-6; D:47 at 1].[5] Boston College funded the project and the interview materials, once completed, were donated by the interviewees to the Burns Library at Boston College. [D:32 at 6]. The contract between Boston College and Moloney, who served as the project director, provided that "[e]ach interviewee is to be given a contract guaranteeing *to the extent American law allows* the conditions of the interview and conditions of its deposit at the Burns Library. . . ." [A049 (emphasis added); D:32 at 6].

[5]As part of the Belfast Project, Moloney was also contracted to interviews of 14 Protestant paramilitary members and one member of law enforcement. [Tr. 12/20/11 at 5; D:51]. In total, the Belfast Project comprises 41 interviews. [*Id.*].

In some instances, including in the case of Brendan Hughes, there was a written donation agreement signed by the interviewee.[6] [A051]. The donation agreement provided that access to the interview materials would be restricted until after the death of the interviewee unless the interviewee gave prior written approval after consultation with the Burns Librarian at Boston College. [A051; D:32 at 7-8]. There were no separate written agreements between Moloney or McIntyre and the interviewees.

The existence of the Belfast Project became widely known in 2010. The interviews with Hughes were the subject of a 2010 book by Mr. Moloney entitled *Voices from the Grave, Two Men's War in Ireland* (Public Affairs 2010). [D:32 at 8, 46-47; D:7 at 4]. In addition, a documentary film bearing the same name was produced using the Belfast Project interviews, prominently featuring McIntyre's interviews of Hughes. *See Voices from the Grave* (Deer Lake Films 2010) (Ed Moloney, co-producer). Price's interviews with Boston College were revealed in news reports published in Northern Ireland in 2010, in which Price admitted her involvement in the murder and "disappearances" of at least four persons whom the IRA targeted, including Jean McConville. [D:32 at 8; D:7 at Exhibits 1 and 2]. Price

[6]In other instances, including in the case of Dolours Price, Boston College has no record of a donation agreement. [D:32 at 7; Tr. 22/22/11 at 18; Tr. 2/1/12 at 16].

also told at least one reporter that she had been interviewed by "academics at Boston University." [*Id.*; A062].

On May 26, 2011, Boston College produced much of the subpoenaed materials related to Brendan Hughes. [D:32 at 4]. On June 7, 2011, Boston College filed a motion to quash those portions of the subpoenas related to Price, relying in large part on detailed affidavits from Moloney and McIntyre. [D:32 at 3, 5-8; D:5]. On August 3, 2011, the government issued three additional subpoenas (one of the new subpoenas also named the Trustees of Boston College). [D:32 at 4; D:15]. Those subpoenas sought information related to the abduction and death of McConville. [*Id.*]. Boston College moved to quash the second set of subpoenas. [D:12].[7]

On August 31, 2011, Moloney and McIntyre filed a motion seeking leave to intervene in the proceeding to quash the subpoenas pursuant to Fed. R. Civ. P. 24, accompanied by a proposed Intervenors' Complaint for Declaratory Judgment, Writ of Mandamus and Injunctive Relief challenging the Attorney General's role in providing assistance to the U.K. in this case pursuant to the US-UK MLAT. [D:18,

[7]Shortly after issuing these subpoenas, Mr. Braunstein left the Office of the United States Attorney, and AUSA John T. McNeil was appointed Commissioner in his place. [D:32 at 1, n.1; D:20].

A183-222].[8] The government opposed intervention, arguing, among other things, that the putative intervenors' challenges to the Attorney General were foreclosed by Article 1, §3 of the MLAT, which expressly states that it does not give rise to private rights. [A144].

On December 16, 2011, the district court issued a written Memorandum and Order denying Boston College's motions to quash, but rejecting the government's request for immediate production of the material. *See United States v. Trustees of Boston College*, – F. Supp. 2d –, 2011 WL 6287967 (D.Mass. 2011); [D:32]. The district court first analyzed the subpoenas under a series of threshold tests derived from *Branzburg v. Hayes*, 408 U.S. 665 (1972), and this Court's decision in *In re Special Proceedings*, 373 F.3d 37, 44-45 (1st Cir. 2004). It then balanced the government's interest in the production of the material against the need for a "free flow of information" from the Belfast Project and similar oral history endeavors and

[8]Under the US-UK MLAT, the Attorney General acts as the "Central Authority" for the United States. *See* Article 2, ¶2. As such, he is responsible for, among other things, either complying with the request or declining to do so under a set of limited specified circumstances. *See, e.g.*, Article 5, ¶4 (permitting the Attorney General to postpone execution or make the execution subject to conditions); Article 3, ¶1(a)(permitting the Attorney General to refuse assistance if the request impairs its sovereignty, security, or other important interests or would be contrary to important public policy); Article 3, ¶1(b)(permitting the Attorney General to refuse assistance if the request conflicts with double jeopardy concerns); Article 3, ¶1(c)(permitting the Attorney General to refuse assistance if the request relates to a political or military offense).

concluded it would review the subpoenaed material *in camera* and subsequently "enter such further orders as justice may require." [D:32 at 48]. The court denied Moloney's and McIntyre's motion to intervene, concluding that:

> Here, Moloney and McIntyre do not have a federal statutory right, and the UK-MLAT prohibits them from challenging the Attorney General's decision to pursue the MLAT request. UK-MLAT art. 1, ¶ 3. Without devoting discussion to the rule that "[a]n interest that is too contingent or speculative . . . cannot furnish a basis for intervention as of right," [*Ungar v.] Arafat*, 634 F.3d [46,] 50-51 [(1st Cir. 2011)](citations omitted), this Court concludes that Boston College adequately represents any potential interests claimed by the Intervenors. Boston College has already argued ably in favor of protecting Moloney, McIntyre and the interviewees.

[D:32 at 47].[9]

In subsequent hearings, the district court clarified the heightened scrutiny it was applying to the subpoenas and the nature of its *in camera* review. [Tr. 12/20/11; Tr.12/22/11; Tr. 2/1/12].[10] After reviewing the Price materials *in camera*, on December 27, 2011, the district court entered an Order directing Boston College, no later than December 30, 2011, to turn over to the Commissioner all materials related to Price responsive to the first set of subpoenas. [D:38 at 1-2]. Boston College did

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[9]The district court referred to the US-UK MLAT as the "UK-MLAT."

[10]The government objected to the district court's *in camera* review as beyond the scope of its authority under the US-UK MLAT. [*See, e.g.*, D:7; Tr. 12/20/11 at 17; Tr. 12/22/11 at 22; D:36].

not appeal the December 16 or December 27, 2011 Orders and produced the Price materials. [D:42].[11]

On December 29, 2011, Moloney and McIntyre filed a notice of appeal of the denial of their motion to intervene and a motion in the district court for a stay pending appeal. [D:39 and 40]. They also filed a civil action in district court, naming as defendants the Attorney General and AUSA John T. McNeil, as Commissioner, in which they asserted the same claims they sought to raise through intervention (the"civil action"). [CD:1]. On December 30, 2011, the district court denied the motion for a stay pending appeal. [D:41].

On December 30, 2011, Moloney and McIntyre filed a motion for a stay pending appeal in this Court. Several hours later, this Court (Boudin, A.J.) entered an order staying the production of the Price materials to authorities in the U.K. [12/30/11 Order]. The government did not oppose that stay, but requested entry of an expedited briefing schedule. [1/12/12 Order].

[11]Pursuant to an agreement between the parties, Boston College also reviewed Belfast Project interviews of non-IRA members – which included 14 members of the Ulster Volunteer Force and one law enforcement member – for responsiveness to the subpoenas. [Tr. 12/20/11 at 5, 20-24; D:51]. Boston College concluded the review, using search terms provided by the government, and determined that there was no responsive material in the non-IRA interviews. [D:51].

On January 5, 2011, the government filed a motion to dismiss the civil action [CD:6, 7], and Moloney and McIntyre filed a motion for a preliminary injunction. [CD:9,10]. After a hearing on January 24, 2012, the district court granted the government's motion and dismissed the civil action. [C.Tr. 1/24/12 at 11; CD:15]. The district court concluded that:

> . . . neither Mr. McIntrye nor Mr. Moloney under the Mutual Legal Assistance Treaty . . . has standing to bring this particular claim. . . Beyond that, on the merits, I am satisfied that the Attorney General as a matter of law has acted appropriately with respect to the steps he has taken under this treaty, and I can conceive of no different result applying the heightened scrutiny that I think is appropriate for these materials were this case to go forward on the merits.

[*Id*.]. Moloney and McIntrye filed a timely notice of appeal [CD:16], and this Court consolidated the matters for briefing and argument. [1/31/12 Order].

On January 20, 2012, the district court entered a third Order in the original case, addressing the 24 IRA interviews relevant to the second set of subpoenas. [D:47]. After *in camera* review of 176 transcripts from the 24 interviewees for matters related to the McConville abduction and death, the court ordered Boston College to produce to the Commissioner the full interviews of five additional interviewees and selected portions of two other interviews. [*Id.*]. The court made the production of these materials contingent on the lifting of the stay entered by this Court on December 30, 2011. [*Id*.]. The government again objected to the procedure employed by the court

and moved for partial reconsideration of the January 20, 2012 order. [D:48]. After responses by Boston College, the court denied the government's motion, finding that the government's motion had been mooted in part, and otherwise concluding that it did not have the necessary information to grant the remaining request of the government. [Tr. 2/1/12 at 2, 14, 15(sealed)].[12]

SUMMARY OF ARGUMENT

Appeal No. 11-2511 addresses the denial of Moloney's and McIntyre's motion to intervene. Although appellants appear to believe this appeal was eclipsed if not entirely mooted by their later civil action, the district court's proper resolution of the intervention issue is in fact dispositive of this consolidated appeal.

Moloney's and McIntyre's motion to intervene presented both their arguments in support of Boston College's action to quash the subpoenas and all of their claims against the Attorney General that were presented in the later civil action. Although the district court did not expressly parse its reasoning between permissive and as-of-right intervention, it is clear that appellants were not entitled to intervention under either Rule 24(a)(2) or (b). The district court acted within its discretion and properly denied intervention with respect to the claims relating to the Attorney General because

[12]Boston College filed a notice of appeal of the January 20, 2012 order. [D:57; *see also* COA No. 12-1236].

appellants had no independent jurisdictional basis to challenge, on any grounds, the Attorney General's determination to provide assistance pursuant to the request under the US-UK MLAT. The treaty itself expressly forecloses an individual action, and the Administrative Procedure Act, 5 U.S.C. §701 *et seq.* ("APA"), does not provide appellants with an independent basis for a claim or confer subject matter jurisdiction. Moreover, neither appellant presented a substantial, legally protectable interest in the requested materials that was not adequately represented by Boston College. McIntyre cannot invoke the constitution and Moloney did not allege a cognizable concrete and particularized injury under the First Amendment, and so lacked standing. Their interests were fully and forcefully advanced by Boston College.

The district court's proper denial of appellants' motion to intervene forecloses review of the merits of the court's ruling on the motion to quash, as neither Boston College nor the government appealed that ruling. Thus, this Court should not consider appellants' challenges to the standards applied by the district court in ruling on the motion to quash. Nonetheless, appellants establish no error in the district court's analysis or its balancing of interests. ACLUM's arguments that the court should have applied the discretionary factors set forth in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), should be disregarded because it was not advanced by appellants and has thus been abandoned. In any event, there is no First Amendment

privilege that Moloney and McIntyre can assert that permits Boston College to withhold evidence pertaining to criminal activity. The district court properly denied intervention and applied a rigorous balancing of interests, beyond that applicable to grand jury subpoenas, and beyond what the government urged was required under the treaty, so that ACLUM's arguments are unavailing in any event.

Because the separate civil action duplicated the claims already raised and denied in the motion to intervene, its dismissal may be upheld based on the principle that a party may not relitigate an issue already decided adversely to him. In any event, the dismissal was proper for the same reasons that intervention was properly denied. Moreover, as noted by the district court, there would be "no different result" were appellants' action to have gone forward.

ARGUMENT

I. THE INTERVENTION ISSUE PRESENTED IN APPEAL NO. 11-2511 IS NOT MOOTED BY THE APPEAL FROM DISMISSAL OF THE SEPARATE CIVIL ACTION, NO. 12-1159; RATHER, RESOLUTION OF THE INTERVENTION ISSUE IS DISPOSITIVE OF THE APPEAL.

In its Order of February 1, 2012, this Court directed that the parties' briefs "should address whether the intervention issues in Appeal No. 11-2511 have been mooted or otherwise affected by the dismissal of plaintiffs' separate action." Appellants appear to believe that the second proceeding did moot the intervention

issue, framing their arguments almost entirely as challenges to the dismissal of the civil action. This is incorrect. Resolution of the question of whether denial of intervention was proper is dispositive of this consolidated appeal.

In moving to quash the subpoenas, Boston College argued that release of the materials in response to the subpoena would violate the interviewees' expectations of privacy and create a risk of physical harm to participants in the Belfast Project, and in addition would have a chilling effect on future oral history projects. [D:5 at 9-15]. Relying on the standard applied to the subpoena of documents from a third party in domestic civil litigation, *see Cusumano v. Microsoft Corp.*, 162 F.3d 708, 716 (1st Cir. 1998), and raising the principle of "academic freedom," Boston College argued that the district court was required to balance the requestor's need for the information against the interest in confidentiality and the potential injury from disclosure. [D:5 at 7-8].

Appellants, in seeking leave to intervene, sought to support Boston College's motion [D:18 at 1-2], but also proposed to introduce additional claims challenging the Attorney General's actions under the US-UK MLAT. To this end, they submitted a 25-page, 58-paragraph complaint pursuant to Fed. R. Civ. P. 24(c)[13] that sought

[13] Rule 24(c) requires that a party's motion to intervene must state the grounds for intervention and "be accompanied by a pleading that sets out the claim or defense for which intervention is sought."

review of the Attorney General's actions under the APA as well as a declaratory judgment that, *inter alia*, the Attorney General had "failed to have regard for important public policy considerations," [D:18-1 at 24], and a writ of mandamus to "compel the Attorney General" to carry out a consultation with the UK, make certain findings and report back to the court. [*Id.* at 23]. The district court denied intervention, finding that the US-UK MLAT prohibited them from challenging the Attorney General's actions and that Boston College "adequately represent[ed] any potential interests" appellants might otherwise have. [D:32 at 47].

As argued in more detail below, both the district court's determinations were correct and fully resolve the issues presented in this appeal. Because appellants were properly denied intervention in support of Boston College's motion to quash, and because Boston College did not appeal from the district court's ruling denying the motion to quash, the challenges to that ruling raised in the briefs – including appellants' and amicus' arguments regarding the proper standard to be applied in deciding whether subpoenas should issue under the MLAT – are not properly before this Court and need not be addressed.

The conclusion that intervention was properly denied with respect to appellants' separate claims against Attorney General Holder is also dispositive of appellants' rights with respect to those claims. If, as the government argues, the district court did

not abuse its discretion in denying appellants' motion to intervene to assert those claims because they were barred by the US-UK MLAT, that conclusion would preclude appellants from relitigating the issue in the separate civil suit.[14] In any event, the district court's statements in dismissing the civil suit confirm that dismissal was justified for the same reason the denial of intervention was warranted with respect to the same claims, and for the additional reason that, as the district court found upon review of the record, the Attorney General properly discharged his responsibilities.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANTS' MOTION TO INTERVENE IN THE PROCEEDING TO QUASH THE GOVERNMENT'S SUBPOENAS.

A. Standard of review.

Denial of a motion for permissive intervention and denial of a motion to intervene as of right are both reviewed for abuse of discretion. *Caterino v Barry*, 922 F.2d 37, 40 (1st Cir. 1990); *Cotter v. Mass. Ass'n. Of Minority Law Enforcement Officers*, 219 F.3d 31, 34 (1st Cir. 2000). [15] This Court has observed that, in light of

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[14]The proposed complaint filed with the motion to intervene included all of the same arguments for review of the Attorney General's actions that formed the basis of their subsequent separate civil suit. [*See* D:18-1, CD:1].

[15]Appellants' citation of *Aponte v. Calderon*, 284 F.3d 184, 191 (1st Cir. 2002) for the proposition that review of denial of intervention as of right is subject to *de novo* review appears to be in error, as that case deals with review of the grant of a preliminary injunction.

the explicit standards set out in Rule 24(a)(2), a district court has less discretion to deny intervention as of right, and so abuse of discretion review of denial of intervention as of right is more stringent than that for denial of permissive intervention. *See Int'l Paper Co. v. Town of Jay, Me.*, 887 F.2d 338, 344 (1st Cir 1989) (citing additional cases); *Ungar v. Arafat*, 634 F.3d at 51. This Court will reverse a denial of intervention if the district court "fails to apply the general standard provided by the text of Rule 24(a)(2), or the court reaches a decision that so fails to comport with that standard as to indicate an abuse of discretion." *Int'l Paper Co.*, 887 F.2d at 344. Where the district court's reasons are "imprecise" or no findings are made, this Court reviews for abuse of discretion as long as the district court's findings or reasons can be reasonably inferred or are discernible from the record. *See R&G Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 584 F.3d 1, (1st Cir. 2009) (*citing Negrón-Almeda*, 528 F.3d 15, 23 (1st Cir. 2008) for proposition that court of appeals can "comb relevant parts of the record" to discern the district court's intentions). Abstract questions of law are reviewed *de novo*. *Daggett v. Comm'n on Govt'l Ethics & Election Practices*, 172 F.3d 104, 109 (1st Cir. 1999).

B. <u>The district court appropriately denied intervention</u>.

Appellants sought intervention under both Rule 24(a)(2) and (b) on two bases: to support Boston College's motion to quash and to present their own claims for

judicial review pursuant to the APA, mandamus, and/or declaratory judgment challenging the actions of Attorney General Holder with respect to the subpoenas. [D:18 at 1-2, D:18-1]. To intervene as of right, appellants needed to demonstrate that they had an interest relating to the property or transaction that underlies the ongoing action; that the disposition of the action threatened to impair or impede their ability to protect this interest; and that Boston College did not adequately represents their interest. *Ungar v Arafat*, 634 F.3d at 51. To qualify for permissive intervention under Rule 24(b), they had to show an independent ground for jurisdiction and a common question of law and fact between the would-be intervenors' claims and the main action. *Garza v. Cnty of Los Angeles*, 918 F.2d 763, 777 (9th Cir. 1990); *see Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 52, n. 5 (1st Cir. 1979).

In denying intervention, the district court found that the claims against the Attorney General were barred, concluding that "Maloney and McIntyre do not have a federal statutory right, and the UK-MLAT prohibits them from challenging the Attorney General's decisions to pursue the MLAT request." [D:32 at 47]. The court further found that "Boston College adequately represents any potential interests claimed by the Intervenors." [*Id.*]. The district court properly denied intervention under Rule 24(a)(2) and (b) with respect to both classes of claims.

1. The district court correctly found that appellants' independent claims against the Attorney General provided no basis for intervention.

Denial of intervention for appellants' claims against the Attorney General was proper because Moloney and McIntyre had no legally protectable interest in the proceedings, as required under Fed. R. Civ. P. 24(a)(2). *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 638 (1st Cir. 1989). Although the requirement of an "interest" in the proceedings "is not amenable to a surgically precise definition," it must be "direct and 'significantly protectable.'" *Ungar*, 634 F.3d at 51 (*citations omitted*). Here, appellants could not show that their claims for judicial review of the Attorney General's actions under the treaty bore "a sufficiently close relationship to the dispute between the original litigants." *Travelers Indem.*, 884 F.2d at 638 (internal quotation marks omitted).

The principal contention underlying the proposed complaint is that the Attorney General failed to properly fulfill his obligations under the US-UK MLAT and the district court should: (1) review the Attorney General's actions; (2) declare that the Attorney General failed to heed, *inter alia* "important public policy considerations" and appellants' constitutional rights; and (3) order the Attorney General to fulfill certain steps "required by" Article 3 of the Treaty and report back to the court. [A220-21]. Appellants were simply not entitled to intervention, either permissive or

as of right, to assert the claims in their proposed complaint under the US-UK MLAT, the APA, or the Constitution. The district court had no jurisdiction to entertain such claims, because appellants have no private rights under the treaty they invoke, and no other statute provides a right of action or waiver of sovereign immunity for challenges to the Attorney General's provision of assistance pursuant to the US-UK MLAT. Nor could Moloney demonstrate standing to assert his constitutional claims, and McIntyre, a non-U.S. citizen residing in Ireland, cannot invoke the Constitution at all. Appellants simply did not have an interest recognized under substantive law that furnished a basis for intervention.

a. Appellants' claims are expressly foreclosed by the US-UK MLAT.

Since treaties "do not generally create rights that are privately enforceable in the federal courts," *United States v. Li*, 206 F.3d 56, 60 (1st Cir. 2000), there is "a strong presumption against inferring individual rights from international treaties." *United States v. De La Pava*, 268 F.3d 157, 164 (2d Cir. 2001). Here, the lack of privately enforceable rights is expressly set forth in Article 1, §3 of the US-UK MLAT, which provides that it is "intended solely for mutual legal assistance between the Parties," and expressly abnegates a right "on the part of any private person to

obtain, suppress, or exclude any evidence, or to impede the execution of a request." [A144].

Courts have uniformly ruled that private persons have no legal right to enforce an MLAT. For example, in *United States v. $734,578.82 in U.S. Currency*, 286 F.3d 641, 658-659 (3d Cir. 2002), the court considered a claimant's argument that the seizure and subsequent forfeiture of his money violated the then-existing version of the US-UK MLAT because the United States was obligated to consult with the U.K.'s Home Secretary before seizing the accounts. Relying on the language of Article 1, §3 quoted above, the court ruled that "the treaty explicitly states that it is not intended to provide a private remedy," and concluded that even if it were assumed that the United States violated the MLAT, "[c]laimants have no private right to enforce its terms." 286 F.3d at 659.

Similarly, in a case where the defendant asserted that evidence against him was improperly admitted at trial because it was gathered in violation the MLAT between the Netherlands and the United States, the Second Circuit ruled the evidence was not obtained in violation of the MLAT, but also held that the defendant could not demonstrate that he had any "judicially enforceable individual right" under the treaty. *United States v. Rommy*, 506 F.3d 108, 129 (2d Cir. 2007). The court noted that the Supreme Court had "long observed, [that] absent explicit treaty language conferring

individual enforcement rights, treaty violations are generally addressed by the signatory sovereigns through diplomatic channels." *Id.* at 129-130 (citation omitted). *See In re Grand Jury Subpoena*, 646 F.3d 159, 165 (4th Cir. 2011) (in light of express treaty language [identical to that in the US-UK MLAT], holding that company seeking to quash grand jury subpoena and thereby block production of documents it had provided in civil discovery to another company failed to show that the MLAT at issue gave rise to a private right of action "that can be used to restrict the government's conduct"); *United States v. Chitron Elect. Co. Ltd.*, 668 F. Supp. 2d 298, 306-307 (D. Mass. 2009) (rejecting claim that summons was ineffective because service failed to comply with the US-China MLAT on grounds that "the MLAT does not create a private right of enforcement of the treaty").

Appellants cite no cases to the contrary, but baldly assert that the prohibition on a private right of action is "limited" since it is "aimed" at criminal defendants. [Br:23]. Contending that "most, if not all" of the published decisions they have found "involve attempts by criminal defendants" to invoke rights that are specifically prohibited by the MLAT in question, *id.*, they argue that they may sue to challenge determinations made pursuant to the treaty, but a putative criminal defendant may not. That reasoning is flawed. First, the suggestion that somehow a third party has more rights under the treaty than a criminal defendant whose liberty interests may be at

stake makes no sense. Second, the provision does not say, as it easily could have, that it shall not give rise to a right "on the part of any criminal defendant," but instead disavows any rights "on the part of *any private person*." Article 1, §3 (emphasis added). If the provision were intended to apply only to criminal defendants, it presumably would say that. *Cf. Mullane v. Chambers*, 333 F.3d 322, 331 (1st Cir. 2003) (observing that "[i]f Congress meant to exclude a particular class of persons from the protection of [a statute], it certainly knew how and could have done so clearly and explicitly"). The task of interpreting a treaty "begin[s] with the text of the treaty and the context in which the written words are used." *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534 (1991); *accord* Vienna Convention on the Law of Treaties, May 23, 1969, Article 31(1), 1155 U.N.T.S. 331, 340 (a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose").[16] To read the term "any private person" out of the treaty, as appellants would do, would violate its plain meaning as well as long-standing rules of statutory construction.[17] *See Duncan v.*

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[16]Although the United States has not ratified the Vienna Convention on the Law of Treaties, the United States generally recognizes the Convention as an authoritative guide to treaty interpretation. *See, e.g., Fujitsu Ltd. v. Fed. Exp. Corp.*, 247 F.3d 423, 433 (2d Cir. 2001).

[17]In interpreting treaties, courts have applied principles "similar to those governing statutory construction." *Collins v. NTSB*, 351 F.3d 1246, 1251 (D.C. Cir.

Walker, 533 U.S. 167, 174 (2001) (statutes should "be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant") (internal quotations and quotation marks omitted).[18]

Appellants are also incorrect that the US-UK MLAT permits them to maintain a private right of action to "enforce" the requirements of the treaty if the alleged rights to be vindicated "arise under" some domestic law [Br:20-25], such as "implementation of the US-UK MLAT through the prism of 18 U.S.C. §3512." *Id.* at 22; *see* A190-91. First, the language on which appellants base that contention, *see* [Br:20], is not in the US-UK MLAT, but the US-EU MLAT, and applies to that agreement alone.[19] Second, as is argued below, the particular "domestic laws" on which appellants would rely do not themselves provide appellants with a right of action under the

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2003) (internal quotation and citation omitted).

[18]Appellants' citation to two cases and a law review article discussing that the provision prohibits defendants from making MLAT requests, [Br:23], does not help them. Just because the provision may have been "aimed specifically" at defendants so that they could not invoke the treaty to request documents and information does not mean that it applies *only* to them.

[19]The provision in full reads: "The provisions of *this Agreement* shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of a request, nor expand or limit rights otherwise available under domestic law" (emphasis added). US-EU MLAT, Art. 3, §5, A329.

circumstances presented here. Thus, appellants cannot rely on those laws to supply the cause of action specifically rejected by the US-UK MLAT.

In a final attempt to evade the MLAT's plain statements, appellants argue that its negation of a private right does not apply to them because they do not seek to "obtain, suppress, or exclude any evidence, or to impede the execution of a request." [Br:14-15; *see* C.Tr. 1/24/12 at 5]. Nonsense. A lawsuit challenging issuance of the subpoenas and seeking "remand" to the Attorney General and a stay of enforcement of the subpoenas until he reports back to the district court on his "consultation" with the UK by definition "impedes the execution of [the] request." Moreover, appellants plainly believe that the Attorney General failed to fulfill his obligations under the US-UK MLAT and that, if he had followed the standards, the subpoenas would not have issued. *See, e.g.*, C.Tr. 1/24/12 at 4. By their own admission, then, they are suing to obtain review that they believe will completely derail compliance with the subpoenas and the district court's orders. To permit private actions seeking such review runs counter to express provisions in the MLAT which recognize there might be sensitive investigations requiring requests for assistance to be made in confidence, Article 7, A148-49, and "urgent cases" requiring a response by "expedited means." A146. There is no legal or policy basis to simply ignore the treaty's express preclusion of private rights and permit private parties to delay, expose, or otherwise impede

execution of a request and the underlying criminal investigation.[20] The district court properly rejected appellants' motion to intervene as barred by the US-UK MLAT.

b. Appellants cannot circumvent the treaty's express preclusion of private actions by invoking the APA, the Declaratory Judgment Act, or a request for a writ of mandamus.

Appellants were not entitled to intervene because they have no cognizable claim under the APA for review of the Attorney General's determinations. Although appellants recognize that the judicial review provision of the APA is not an independent grant of subject matter jurisdiction, they contend the Federal Question statute, 28 U.S.C. §1331, conferred subject matter jurisdiction here, thus entitling them to judicial review under §702 of the APA. Where the United States is the defendant,[21] however, there is no jurisdiction without an express and unambiguous waiver of sovereign immunity. *See generally United States v. Idaho*, 501 U.S. 1, 6-7

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[20]Were more needed, it would also appear appellants could not establish prudential standing, which requires that the interest they seek to vindicate falls within the "zone of interests" protected by the law invoked, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004), in this case the US-UK MLAT. Given the clear statement set forth in the treaty itself that it is "intended solely for mutual legal assistance between the Parties," and does not create any private rights, Article I, ¶3, A144, appellants would lack prudential standing in any event.

[21]The claims against the Attorney General and the Commissioner, are in effect claims against the sovereign, *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (an official-capacity suit is "in all respects other than name, to be treated as a suit against the entity," and not against the individual).

(1993), and cases cited; *Villanueva v. United States*, 662 F.3d 124, 126 (1st Cir. 2011) ("[A]bsent a waiver, sovereign immunity (which is jurisdictional in nature) shields the United States from suit.").[22]

Appellants' invocation of the APA does not provide a way around the express limitations in the US-UK MLAT that preclude their action. To conclude otherwise would put Article 1, §3 of the US-UK MLAT and the APA at cross-purposes, in contravention of the well-established principle that treaties and acts of Congress should be construed to be consistent with one another where possible. *See Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) ("It has been a maxim of statutory construction since the decision in *Murray v. The Charming Betsy*, 2 Cranch 64, 118, 2 L.Ed. 208 (1804), that 'an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . . '"); *cf. Cook v. United States*, 288 U.S. 102, 120 (1933) (recognizing the fundamental canon of statutory interpretation that "[a] treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose . . . has been clearly expressed").

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[22]This applies both to intervention as of right under Rule 24(a)(2), and to permissive intervention under Rule 24(b), because the doctrine of sovereign immunity "recognizes no distinction between cross-bills and original bills, or between ancillary suits and original suits, but extends to suits of every class." *Illinois Cent. R. Co. v. Pub. Utils. Comm'n*, 245 U.S. 493, 504-505 (1918) *citations omitted*.

Moreover, there is no waiver of sovereign immunity in 28 U.S.C. §1331 and the APA provides only a limited waiver of sovereign immunity in §702 for claims that are not for money damages, where those claims are not expressly or impliedly barred. Section 702 states that its provision of a right to judicial review does not affect "other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. §702(1). This provision incorporates both express preclusions of judicial review, such as that in Article 1 §3 of the US-UK MLAT [A144], and also implied preclusions regarding foreign affairs matters, such as extradition surrender decisions, which are entrusted to the political branches of government. *See Saavedra Bruno v. Albright*, 197 F.3d 1153, 1158-59 (D.C. Cir. 1999) (finding consular visa decisions to be interwoven with foreign relations, and therefore largely immune from judicial review pursuant to 5 U.S.C. §702(1), and noting that the Administrative Conference of the United States, which had proposed the specific language enacted as §702(1), explained that courts would still refuse "to decide issues about foreign affairs, military policy and other subjects inappropriate for judicial action"); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985) (concluding it would be an abuse of discretion to grant relief under the APA where court would be required to intercede in sensitive foreign affairs matters).

Nor does the Declaratory Judgment Act, 28 U.S.C. §2201, provide an independent basis of jurisdiction for appellants' claims, since it does not waive sovereign immunity. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) ("[T]he 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.") (internal quotation marks and citations omitted); *Alberto San, Inc. v. Consejo De Titulares Del Condominio San Alberto*, 522 F.3d 1, 5 (1st Cir. 2008) (noting that the Act "merely 'makes available an added anodyne for disputes that come within the federal courts' jurisdiction on some other basis'") (quoting *Ernst & Young v. Depositors Econ. Prot. Corp*., 45 F.3d 530, 534 (1st Cir.1995)).

Finally, a writ of mandamus is considered extraordinary and will issue "only where the duty to be performed is ministerial and the obligation to act peremptory, and plainly defined." *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 420 (1931); *accord Heckler v. Ringer*, 466 U.S. 602, 616 (1984) ("The common law writ of mandamus, as codified in 28 U.S.C. §1361, is intended to provide a remedy for a plaintiff . . . only if the defendant owes him a clear nondiscretionary duty."). Here, the language of Article 1, §3 of the US-UK MLAT makes clear that no legal duty, let alone a nondiscretionary one, is owed to any private party under the treaty.

2. Appellants identify no cognizable interest in nondisclosure that is not adequately represented by Boston College.

The district court also did not abuse its discretion in determining that, to the extent – if any – appellants presented a legally protectable interest in the materials that were the subject of the subpoena, such interest was adequately represented by Boston College. Like Boston College, appellants raised the spectre of harm to the "free flow of information," asserting that the Attorney General's actions threatened their First Amendment right to freedom of speech, "in particular their freedom to impart historically important information to the American public." [D:18-1 at ¶54]. Also like Boston College [D:5 at13-14], appellants raised apprehensions of physical harm, asserting a violation to their "constitutional right to life," in that release of the materials "could expose" them to "increased risk of physical harm." [D:18-1 at ¶55, 58(f)]. On appeal they reiterate their interest in preventing release of the materials to avoid both "personal harm" from third parties and injury to their First Amendment rights. [Br:9, 15]. Neither claim has merit.

a. McIntyre has no constitutional rights related to the harms identified.

First, there is simply no constitutional "right to life" that encompasses speculative harm to a non-U.S. citizen from non-U.S. government, third-party actors outside the United States. Second, McIntyre, who is neither a United States citizen nor resident, has no rights under the First Amendment that could be the basis for Article III standing. It is well-established that aliens outside of the U.S. do not have First Amendment rights. *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Adams v. Baker*, 909 F.2d 643, 647 & n.3 (1st Cir. 1990) (noting it was "beyond peradventure" that an unadmitted, nonresident alien had no standing to seek administrative or judicial review of decision denying him a visa, and the only issue that could be considered was possible impairment of a United States' citizens' First Amendment rights through plaintiff's exclusion); *DKT Mem'l. Fund v. AID*, 887 F.2d 275 (D.C. Cir. 1989); *see also Cuban Am. Bar Ass'n*, 43 F.3d 1412 (11th Cir. 1995).

b. Ed Moloney fails to state a constitutional claim and cannot show a concrete and particularized injury to establish his standing to pursue any such claim.

Mr. Moloney argues that he has alleged both threat to his safety [Br:17], and injury to his First Amendment rights, "namely the free-flow of information associated

with the Belfast Project" and a threat to "future oral history projects and oral historians." [Br:16]. Neither establishes a colorable constitutional claim.

First, the claim of physical harm need not detain the Court, since Moloney makes no allegations of any such concern in his affidavits. [A036-47, A223-230]. Moreover, although presumably such claim is meant as one for due process under the Fifth Amendment, as faintly suggested in appellants' brief [Br:12-13, 21], and Complaint [D 18-1:1 at ¶¶68, 96], there are but two bare references to the Fifth Amendment in their entire 48-page brief. [Br:12-13, 21]. There is also no developed argumentation relating to any personal safety concerns, just a few fleeting, conclusory references to personal harm or a "threat to their safety." [Br:9, 15,17, 29]. These arguments have been waived on appeal. *Cf. United States v. Zannino,* 895 F.2d 1, 17 (1st Cir.1990) (recognizing "settled appellate rule" of waiver where party fails to develop argument).

Moloney's principal claim under the First Amendment is that the "free-flow of information" will be harmed and future oral history projects will be chilled. [Br:9, 16-17]. The district court did not abuse its discretion in denying intervention on those claims because Moloney did not allege an actual or threatened injury to himself and so lacked standing to bring the claims, and also failed to state a claim under the First Amendment that the law recognizes.

Because Moloney provided no evidence of a concrete injury in fact to his First Amendment interests, he lacks standing to pursue such a claim. Standing is a "constitutional precondition to the jurisdiction of a federal court," *United States v. AVX Corp.*, 962 F.2d at 113 (1st Cir. 1992), and the burden to establish the requisite standing "lies with the party invoking federal jurisdiction." *Mangual v Rotger-Sabat*, 317 F.3d at 56 (1st Cir. 2003). The doctrine of standing embraces both constitutional imperatives and prudential considerations. *See Allen v. Wright,* 468 U.S. 737, 751 (1984).

Article III standing requires that "a plaintiff ... allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen,* 468 U.S. at 751. In other words, the plaintiff must show (1) "actual or threatened injury as a result of the defendant's putatively illegal conduct," (2) "that the injury may fairly be traced to the challenged action," and (3) "that a favorable decision will likely redress the injury." *Vote Choice, Inc. v. DiStefano,* 4 F.3d 26, 36 (1st Cir. 1993). *See also Becker v. Fed. Election Comm'n*, 230 F.3d 381, 384-85 (1st Cir. 2000). A "mere interest" in the case, "no matter how passionate or sincere the interest and no matter how charged with public import the event" cannot by itself meet Article III's requirement. *United States v. AVX Corp.*, 962 F.2d at 114, *citing Diamond v. Charles*, 476 U.S. 54, 62 (1986).

Here, Moloney did not demonstrate a concrete and particularized injury to himself flowing from disclosure of the documents. He was paid by Boston College to direct the Belfast Project under contract terms that required, *inter alia*, that each interviewee be given guarantee of confidentiality "to the extent American law allows." [Br:7; A034]. That agreement, Moloney's agreement with McIntyre, and the "Agreement for Donation" between the interviewees and Boston College provided that all transcripts and recordings of interviews would be transferred to Boston College. Moloney is not the custodian of the materials. He was an agent of Boston College at the time he participated in the Belfast Project, [A036, 039, 048-49], an association that ended in 2006. [A036, ¶3]. To the extent he suggests disclosure will violate a personal "duty of confidentiality" to interviewees, any such assertion lacks substance, since there is no legally-cognizable "duty of confidentiality." Moreover, disclosure of information by Boston College in compliance with the subpoena and court orders does not violate *Moloney's* duty of confidentiality. He has no independent rights or obligations under the agreements between Boston College and the interviewees, which were executed by the Burns Librarian at Boston College, and through which "absolute title" to the recordings and transcripts was assigned to the Trustees of Boston College. [A051]. Nor can he assert their rights.

Moloney argues that there will be a chilling effect on the "free flow of information to the Belfast Project and future oral history projects." [Br:9]. In his two affidavits, however, totaling twenty pages and nearly 50 paragraphs, [A036-47, 223-30], Moloney does not assert any injury to his own future inquiries or research, and makes only a single assertion in one paragraph that disclosure will adversely impact "the practice of oral history generally." [A046]. Instead, he asserts beliefs, opinions, and subjective predictions focused almost entirely on his assessment of the impacts on the peace process in Northern Ireland should the materials sought by the subpoena be provided to the requesting authority. [A036-47, 223-230]. This falls well short of demonstrating the "concrete and particularized injury," required for Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 & n.1 (1992) ("By 'particularized' we mean that the injury must affect the plaintiff in a personal and individual way.").

Nor may Moloney rest his own standing on the constitutional interests of others not before the court. He is not making a facial First Amendment "overbreadth" challenge to the constitutionality of a statute. *See generally Los Angeles Police Dept. v. United Reporting Pub. Corp.*, 528 U.S. 32, 37-42 (1999) (discussing facial challenges and the First Amendment overbreadth doctrine). In general, "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present

objective harm or a threat of specific future harm. *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). Even were an action based on a threatened "chilling effect" permitted outside of the context of a facial challenge to the vagueness or overbreadth of a statue, Moloney would still need to demonstrate a threat of specific present or future harm to himself -- that is, that he is within the class of persons who might be "chilled." *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 47 (1st Cir. 2011), *citing Osiediacz v. City of Cranston*, 414 F.3d 136, 142 (1st Cir. 2005). There is no such specific record evidence here and no other basis for relaxing the constitutional standing requirements.

c. There is no academic or other First Amendment privilege to shield evidence of crime.

Although barely mentioned in Moloney's affidavits, both appellants' and *amicus* ACLUM's briefs argue that enforcement of the subpoena will have a chilling effect on oral history projects generally and suggest the interview materials should be protected by some kind of academic privilege grounded in a First Amendment principle of "academic freedom." [Br:55, AmBr:18]. Essentially they argue that the First Amendment prevents the government from obtaining evidence of criminal activity gathered by reporters or researchers because criminals could be discouraged

from discussing their crimes with journalists and historians if they thought their communications would not be shielded. That is simply not the law.

There is no recognized privilege for reporters to shield their sources or refuse to testify in a criminal grand jury investigation, let alone a recognized "academic privilege" that may be invoked to withhold evidence. *Branzburg*, 408 U.S. at 692 (rejecting notion that the First Amendment protects an "agreement to conceal the criminal conduct of [a] source, or evidence thereof, on the theory that it is better to write about crime than to do something about it."). Simply put, the obligation to provide evidence applies to journalists and their sources. *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1147 (D.C. Cir. 2006) ("Unquestionably, the Supreme Court decided in *Branzburg* that there is no First Amendment privilege protecting journalists from . . . providing evidence to a grand jury regardless of any confidence promised by the reporter to any source. The Highest Court has spoken and never revisited the question. Without doubt, that is the end of the matter."). Academic researchers have no greater rights than reporters.

d. Appellants' interests were adequately represented.

The district court did not abuse its discretion in determining that appellants' asserted interests under the First Amendment were adequately represented. Boston

College argued forcefully for preserving the promise of confidentiality to interviewees and for the interests of protecting academic research materials. [D:5 at 9-15]. At bottom, both Boston College and Moloney sought to block disclosure of the subpoenaed materials. "Adequate representation is presumed where the goals of the applicants are the same as those" of the party on whose side they wish to intervene. *See Daggett*, 172 F.3d at 111, *citing Kneelant v. NCAA*, 806 F.2d 1285, 1288 (5th Cir. 1987) and *Moosehead Sanitary Dist.* 610 F.2d at 54.

Boston College also expressly stated that it was not speaking only for itself, asserting that in seeking to quash the subpoenas it was not acting "as a typical advocate seeking to protect its own parochial concerns, but as an institution of higher education seeking appropriate resolution of conflicting interests of fundamental importance to academia and to society as a whole." [D:5 at 2]. Moreover, its arguments as to the importance of the confidentiality of the Belfast Project interviews and materials relied in large measure on the affidavits of Moloney and McIntyre. [*Id.* at 5-7, 12-15]. The adequacy of these arguments is demonstrated by their effectiveness – responding to Boston College's arguments, the district court gave careful consideration to the First Amendment issues presented, applying heightened scrutiny and a balancing analysis [D:32 at 34-46] that the government objected to as going beyond what was called for under 18 U.S.C. §3512 and the US-UK MLAT. On

this record, it was within the court's sound discretion to deny intervention based on representation of Moloney's asserted constitutional interests. Appellants demonstrate no error in that conclusion.

Nor does the fact that Boston College declined to appeal the Court's Orders on the first subpoena, as suggested by amicus ACLUM, [Am.Br:21], mean that Boston College's representation of his interests was inadequate. *See Little Rock Sch. v. North Little Rock Sch.*, 378 F. 3d 774, 780 (8th Cir. 2004) ("[t]hat the [proposed intervenor] has asserted its interest with arguably greater fervor than has the [existing party] and would have made different procedural choices," including a decision to appeal, does not make its interest distinct); *Acuff v. United Papermakers & Paperworkers, AFL-CIO*, 404 F.2d 169 (5th Cir. 1968) (where union compelled arbitration and defended the rights of its employees with zeal, but did not contest the arbitrator's holding against some of those employees, the employees were not entitled to intervene as of right); *Alleghany Corp. v. Kirby*, 344 F.2d 571 (2d Cir. 1965) (decision of directors of a corporation not to apply for certiorari to the United States Supreme Court did not result in inadequate representation). *Cf. United States v. American Tel. and Tel. Co.*, 642 F.2d 1285, 1293 (D.C. Cir. 1980) (inadequate representation found where a "serious difference in interests emerged . . . when an appeal … came into consideration").

III. BECAUSE THE APPELLANTS WERE PROPERLY DENIED INTERVENTION AND BOSTON COLLEGE DID NOT APPEAL, THEIR CHALLENGES TO THE DISTRICT COURT'S RULING ON THE MOTION TO QUASH ARE NOT PROPERLY BEFORE THIS COURT; NONETHELESS, THE APPELLANTS AND AMICUS FAIL TO ESTABLISH ANY ERROR IN THE DISTRICT COURT'S RULING THAT THE DOCUMENTS SHOULD BE TURNED OVER.

For the above reasons, the district court did not abuse its discretion in denying Moloney's and McIntyre's motion to intervene and thus they were not a party to the motion to quash. As neither Boston College nor the government appealed the district court's ruling on that motion, the merits of that ruling are not properly before this Court. Nonetheless, in the unlikely event that this Court were to conclude that the district court erred in denying intervention, and that the intervenors have standing to appeal the merits of the district court's ruling,[23] the government responds to the arguments raised by appellants and amicus challenging the district court's ruling.

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[23]That the district court erred in denying appellants intervention does not automatically mean that they may appeal. Moloney and McIntyre would still bear the burden of demonstrating that they independently meet Article III standing requirements. *United States v. AVX Corp.*, 962 F.2d at 112-13 (holding that since the intervenor was the sole appellant, it could no longer "piggyback" on the underlying controversy because the interests of the named plaintiffs on whose side intervention was permitted ceased to be adverse to defendants after entry of Consent Decree); *Mangual v Rotger-Sabat*, 317 F.3d at 61 ("It is clear that an intervenor, whether permissive or as of right, must have Article III standing in order to continue litigating if the original parties do not do so."), *citing Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997); *Diamond v. Charles*, 476 U.S. 54, 68 (1986).

A. Appellants' challenges to the district court's analysis of its discretionary authority are unfounded.

Appellants argue that the district court "failed to set forth a test for the application of a court's discretionary authority under 18 U.S.C. §3512," should have applied to the subpoenas the discretionary factors set forth in *Intel Corp. v. Advanced Micro Devices, Inc.* 542 U.S. 241 (2004)[24], and should have assessed "affidavits and other documents" to be submitted by appellants in making its assessment under the *Intel* factors. [Br: 41-45]. All three arguments are readily dispatched.

The district court issued a lengthy Memorandum and Order making specific findings with respect to its discretion to evaluate MLAT subpoenas under 18 U.S.C. §3512. [*See* D:32]. Relying largely on §3512's use of the word "may," as well as the text of the US-UK MLAT, the district court concluded that it had discretion – "analogous to that used in reviewing grand jury subpoenae" – to evaluate the subpoenas issued in this case. [D:32 at 22-26, 33]. The court then evaluated Boston

[24]In *Intel* the Supreme Court concluded that a district court has discretion to review requests from foreign tribunals under 27 U.S.C. §1782, for whether, "the person from whom discovery is sought is a participant in the foreign proceeding"; "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance"; whether the request "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"; and whether the request is "unduly intrusive or burdensome." *Intel*, 542 U.S. at 264-65; *see also In re Premises Located at 840 140th Avenue NE, Bellevue, Washington*, 634 F.3d 557, 563 (9th Cir. 2011).

College's motion to quash under a hybrid standard crafted from cases addressing subpoenas in domestic civil and criminal cases. [*Id*. at 9-47, employing standards outlined in *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998) (civil subpoena under Fed. R. Civ. P. 45 for academic materials in an antitrust suit); *United States v. LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988) (third party subpoena under Fed.R.Crim.P. 17(c) for television network material which was never broadcast); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980) (assertion of a privilege in a civil deposition under Fed. R. Civ. P. 26)].

The district court engaged in a three-step process. First, it asked: (1) was the evidence sought "directly relevant to a nonfrivolous claim or inquiry undertaken in good faith"; (2) was the evidence sought "readily available from a less sensitive source"; and (3) evaluating the "totality of the circumstances," was the evidence sought so confidential that it merited special protection under the standard articulated in *Cusumano v. Microsoft Corp.*, 162 F.3d 708. [D.32 at 41-42]. The court then balanced "the government's need for the requested information against the potential harm to the free flow of information." [*Id*.]. Since the court concluded that such a balancing depended, "heavily on the particular circumstances of the case," it weighed the government's duty to the U.K. to promptly comply with MLAT requests, as well as the specific facts about the investigation presented by the government *ex parte*,

against the harm to the free flow of information. [*Id*. at 42-47]. In that assessment, the district court took account of the impact of producing the subpoenaed material on Boston College's Belfast Project as well as the consequences for future oral history endeavors. [*Id*. at 45-47]. Finally, before entering orders to produce the subpoenaed material, the court made an *in camera* assessment of thousands of pages of interview transcripts and recordings to refine and apply its balancing analysis. [*Id*. at 48; D:47 at 1; Tr.2/1/12 at 2-3]. In light of the foregoing, appellants' claim that the district court "failed to set forth a test" for the exercise of its discretion is belied by the record.[25]

[25]The government notes that the district court fashioned this standard and engaged in an *in camera* review over the government's objection. While the issue is not squarely before the Court in this appeal, it is the government's view that neither the US-UK MLAT nor 18 U.S.C. §3512 provides the degree of discretion employed by the district court. Rather, as argued in the district court, in keeping with *In re Premises Located at 840 140th Avenue NE, Bellevue, Washington*, 634 F.3d 557 and the technical analysis of the US-UK MLAT, the district court only had authority to review the Commissioner's subpoenas for constitutional infirmities and for violations of well-established privilege. [D:7 at 5-9]. In this case, the court found there were no applicable privileges. [D:32 at 45]. While First Amendment issues were implicated, the district court should only have applied the test set out in *Branzburg*, 408 U.S. at 710 (evaluating whether the subpoenas were simply meant to harass the subject or where there are otherwise no legitimate law enforcement needs for the information). Because the district court ordered the disclosure of the subpoenaed material, the government has not appealed. However, the government requests that the Court not endorse the standard developed and applied by the district court in this case.

Appellants' argument that the district court should have employed the discretionary factors outlined in *Intel* is also without force. First, appellants' single-sentence argument [Br:42] is undeveloped and unsupported and should be rejected as waived. *Colon-Fontanez v. Municipality of San Juan*, 660 F.3d 17, 45-46 (1st Cir. 2011); *Zannino*, 895 F.2d at 17. The argument is also unavailing. The discretionary standards set forth in *Intel* govern letters rogatory and other applications submitted to a federal court pursuant to 28 U.S.C. §1782, a statute which covers requests for discovery in civil and criminal matters in foreign and international tribunals. *Intel*, 542 U.S. at 246-50. Section 1782 has no application here, where the subpoenas were issued pursuant to the US-UK MLAT and 18 U.S.C. §3512, a treaty and statute narrowly addressed to requests from a foreign sovereign for assistance in a criminal matter. [D:32 at 1-4]. Appellants articulate no reason or explanation for why a court should graft all of the substantive standards developed under 28 U.S.C. §1782 onto 18 U.S.C. §3512.

Moreover, the notion that §3512 was intended to grant district courts the broad discretion of *Intel*, is directly contrary to the stated purpose of the statute, which was enacted in 2009 for the express purpose of making the MLAT process more efficient and expeditious. *See* 155 CONG. REC. S6807-01, S6809-S6810 (2009) (explaining that "the proposed legislation would not alter U.S. obligations or authorities under

existing bilateral and multilateral law enforcement treaties" and was designed to make it "easier for the United States to respond to these requests by allowing them to be centralized and by putting the process for handling them within a clear statutory system.") (Statement of Sen. Whitehouse). It enabled the United States to respond "more quickly . . . to foreign evidence requests. These efforts will assist [the United States] with [its] investigations as foreign authorities will be urged to respond in kind to [the United States'] evidence requests in a speedy manner." 155 CONG. REC. H10092-01, H10094 (2009) (Statement of Rep. Schiff).[26] To apply such discretionary standards where they had never been applied to MLATs before runs directly counter to a statute which was designed to speed compliance with such requests. [*Id*.].

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[26]Prior to the negotiation of MLATs and the passage of 18 U.S.C. §3512, Courts relied on 28 U.S.C. §1782 to enforce both civil and criminal letters rogatory. Section 1782 not only provided a procedural mechanism to obtain evidence for foreign requestors, but also vested courts with the discretion to narrow or decline to issue legal process to obtain evidence. *See In re: Comm'r's Subpoenas* 325 F.3d at 1290 (noting the "wide discretion in the district court to refuse the request" and explaining that MLATs streamlined the process and limited the court's discretion). Curtailing the discretionary aspect of 28 U.S.C. §1782 was one of the purposes of modern mutual legal assistance treaties, which have now been negotiated and ratified with more than 60 nations. *Id*. *See also*, 3 *Nanda and Pansius, Litigation of International Disputes in U.S. Courts*, §17:52 (2008). "Mutual Legal Assistance Treaties are often the preferred method of obtaining legal assistance. [MLATs] provide at least three advantages: reciprocity; the reduction (if not elimination) of the court's discretion under §1782; and the streamlining of evidence procurement processes." *Id. See also In re Request from Canada Pursuant to the Treaty Between the United States and Canada On Mutual Legal Assistance in Criminal Matters*, 155 F. Supp. 2d 515, 517-20 (M.D.N.C. 2001).

Notably, the two circuit courts which have addressed a closely related issue – the scope of a district court's discretion under 28 U.S.C. §1782 to review MLAT subpoenas – rejected the argument that a district court had broad discretion to evaluate such subpoenas. The Ninth Circuit, in *In re Premises*, 634 F.3d 557, expressly rejected the argument that a district court had the authority to apply *Intel* factors in evaluating an MLAT subpoena. *Id.* at 572. In that case, documents were subpoenaed upon a request from the Russian Federation under an MLAT with similar language to the US-UK MLAT; however, the government relied on the procedural mechanisms of 28 U.S.C. §1782 rather than §3512, which had yet to be enacted. *Id*. After reviewing the text and purpose of the Russian MLAT, the Ninth Circuit concluded that even though the government had invoked 28 U.S.C. §1782, it was only the procedural mechanisms of that statute, and not the substantive discretionary factors outlined in *Intel*, which applied. *Id*. at 571. Among other things, the court concluded that the *Intel* discretionary factors were antithetical to the language and purpose of the Russian MLAT, a treaty aimed at expediting the more cumbersome process already available to the Russian Federation under 28 U.S.C. §1782, and ensuring reciprocity of assistance in criminal cases. *Id*. at 564-65 (modern MLATs, like the one with the Russian Federation, were "yet another step toward the goal of greater legal assistance, by, and for, other nations . . . [in] criminal investigations and proceedings."). As the

district court recognized here, the language, technical analysis, and purposes of the US-UK MLAT are substantially similar to that of the Russian MLAT, and *In re Premises* provides persuasive support for the conclusion that the *Intel* discretionary factors should not be employed when the government invokes §3512. [D:32 at 11-15].

Likewise, in a case decided before *Intel*, the Eleventh Circuit vacated a decision quashing subpoenas for testimony issued pursuant to the MLAT between the US and Canada. *In re: Comm'r's Subpoenas*, 325 F.3d 1287, 1291 (11th Cir. 2003). The court rejected the claim that the US-Canadian MLAT – which contains language similar to the US-UK MLAT – only permitted enforcement of requests when "consistent with the entire substantive law of the Requested State." *Id.* at 1295. Among other things, the court reasoned that the MLAT's specified narrow limits on refusing assistance would be rendered meaningless if courts had discretion to apply all of the substantive law in the United States to reject requests made under the treaty. *Id*. at 1295-97. The Eleventh Circuit concluded that district courts should not evaluate MLAT subpoenas under the standards applicable to domestic subpoenas or under the law pertaining to civil requests under 28 U.S.C. §1782. *Id.* [27]

[27]In a similar vein, if modern MLATs incorporated by reference all of the substantive discretion available to review subpoenas under 28 U.S.C. §1782, and required a district court to test a subpoena under the standards set forth in *Intel*, it

Appellants' additional claim that the district court should have considered their affidavits and other documents in evaluating the subpoenas should also be rejected. As noted, because the *Intel* discretionary factors do not apply to §3512, the US-UK MLAT, or the subpoenas issued thereunder, appellants' factual assertions are irrelevant. For instance, nowhere in the US-UK MLAT or §3512 does it authorize the court to assess whether the authorities in the U.K. sought interviews of Ms. Price from news reporting sources in that country. Moreover, even if U.K. authorities had made such an inquiry, it is clear from appellants' own affidavits that the Belfast Project interviews were singular, were possessed only by Boston College, and could not have been obtained from news reporting sources in the U.K. [A039-40, 047]. Likewise, whether Price is subject to personal jurisdiction in the U.K., is subject to extradition to that country, or is criminally liable in the Republic of Ireland, involve complex assessments of U.K. and Irish law which §3512 eschews; those questions are fundamentally matters for law enforcement authorities in the U.K. and the Republic of Ireland, not for third parties to litigate in an American court, further delaying a prompt response to an MLAT request.

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would defeat the very purpose of the MLAT. As noted above, the primary aim of these treaties was to *limit* judicial discretion and related litigation, and to speed compliance with foreign requests in criminal cases.

Appellants make two final related arguments. First, they claim that the Attorney General's alleged noncompliance with the MLAT would be a significant factor under the *Intel* discretionary factors, and the district court failed to properly consider it. [Br:44]. Second, they claim that in the absence of information regarding the Attorney General's compliance with his obligations under the US-UK MLAT, the district court could not have adequately performed a balancing analysis under applicable First Amendment standards. [Br:44-45]. Both arguments fail.

As noted, the *Intel* factors do not apply to subpoenas issued pursuant to MLATs and §3512, and so the Attorney General's discretionary decisions under the US-UK MLAT are not subject to judicial review under such a standard. With respect to the First Amendment "balancing analysis," nowhere do appellants explain why the Attorney General's discretionary decisions play any role in such an analysis and the government disputes that the district court had any authority to make such an assessment. Nonetheless, in this case the district court reviewed materials properly submitted by the government *ex parte* in connection with the motion to quash, [D:32 at 2,fn.1], *see also* US-UK MLAT at Art. 7, ¶1, and concluded that the subpoenas were issued, "in good faith, and relevant to a nonfrivolous criminal inquiry" [D:32 at 41], that the Attorney General found no reason to deny the United Kingdom's request [*Id.* at 43], and that "the Attorney General as a matter of law acted appropriately with

respect to the steps he has taken under [the US-UK MLAT], and I can conceive of no different result applying the heightened scrutiny that I think appropriate [under the First Amendment] . . . ." [Tr.1/24/12 at 11]. While appellants are dissatisfied with the outcome of the district court's assessment, and have not have had access to the sensitive law enforcement materials submitted to the district court, their argument that the district court did not engage in an assessment as part of the First Amendment balancing analysis is belied by the record. [*Id*.].

B. ACLUM'S arguments go to issues not properly before the Court, but fail in any event.

In the first sections of its amicus curiae brief [AmBr:3-8, 12-19], ACLUM contends that the district court incorrectly applied the standards for intervention under Rule 24(a), that various First Amendment rights will be impaired absent intervention, and that the putative intervenors' interests are not be adequately represented by Boston College. These arguments are unavailing.

Contrary to ACLUM's assertion that this is a "textbook case" for intervention, [AmBr:3], ACLUM does not show an abuse of discretion in the court's denial of intervention, or explain how the district court's application of the standards was incorrect. ACLUM's reliance on *In re Grand Jury Subpoena*, 274 F.3d 563, 570 (1st Cir. 2001), which affirmed the intervention of a company's former attorney in a

proceeding to quash a subpoena served on the company to assert claims of attorney-client and work-product privilege, is misplaced. [AmBr.3-4]. First, as discussed above, there is simply no support for the conclusion that appellants possess a privacy interest in the interviews comparable to that of an attorney in his client communications and work product. Second, ACLUM's claim ignores the vital difference that, in *In re Grand Jury Subpoena*, the company waived the privilege claims, *see id.* (noting that the company in that case had "no incentive to protect the intervenors' interests") while, in this case, Boston College forcefully asserted the same confidentiality interests Moloney and McIntyre claim.

ACLUM also contends in its brief that there is only a "minimal" burden to show that an intervenor's interest will not be adequately represented, citing *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). [AmBr:12]. ACLUM's citation of *Trbovich* is inapt. There, the union member whose initial complaint had led the Secretary of Labor to institute suit to set aside the election of officers of the United Mine Workers of America was permitted to intervene only on the claims brought by the Secretary of Labor and on grounds that union members were given rights under the Labor Management Reporting and Disclosure Act and since Secretary was obliged also to protect the public interest in free and fair union elections, the two functions might not "always dictate the same approach" to conduct of the litigation.

Here, the US-UK MLAT expressly disavowed any private rights, the interests of Boston College and appellants in blocking disclosure were identical, and in addition appellants sought to significantly broaden the court's inquiry.[28]

In predicting an "alarming and unprecedented" infringement of rights that will ensue from a decision that Moloney and McIntyre as academics are "prohibited form defending their pledges of confidentiality" [AmBr:2], ACLUM ignores two critical facts. First, Boston College was party to the principal agreement with Moloney that included the terms of confidentiality that applied to the interviews, and Boston College, through the Burns Librarian, not appellants, signed the donation agreements with the interviewees. It was Boston College, not appellants, that had custody of and title to the subpoenaed materials. And Boston College, an academic institution, brought its institutional resources and stature to bear in a vigorous effort to quash the subpoenas and protect the same First Amendment and confidentiality rights invoked by appellants.

Second, both Moloney and McIntyre in fact did have a voice in the district court proceedings; their views were filed in the district court in their own words. [A027-

[28] *Conservation Law Found. of New England v. Mosbacher*, 966 F2d 39, 44 (1st Cir. 1992) is similarly inapt, because there the Secretary likewise had an obligation to consider the public welfare that might not align in all respects with the fishing groups who sought intervention and were "the real targets of the suit and []the subjects of the regulatory plan."

031; A036-47]. Moloney, as Boston College's contractor, and McIntyre, as a subcontractor whose contract with Moloney was expressly governed by the terms of Moloney's agreement with Boston College, each provided Boston College with an affidavit that was submitted in connection with the motion to quash the subpoenas. *Id.* It is simply incorrect to assert their perspective was not before the district court. Given that record, ACLUM fails to show how Moloney and McIntyre made any showing that Boston College's representation of their interests was inadequate.[29]

That Boston College did not oppose appellants' motion to intervene, [AmBr:13], proves nothing, since appellants proposed to add their voices to the positions Boston College was advancing. Nor, as noted above, is there an inadequacy of representation shown in the fact that Boston College chose not to appeal the two orders. In sum, ACLUM has not advanced any convincing reason to reverse the district court's denial of intervention.[30]

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[29]Indeed, the affidavits attached to the motion to intervene [D:18-2, 18-3] were identical to those provided to Boston College and filed with its motion to quash.

[30]ACLUM also asserts arguments about appellants' personal safety – based in large measure on press reports that are not in the record and so not properly before this Court. [AmBr:8-12].

C. ACLUM's arguments concerning the standard to be applied by the district court miss the mark.

ACLUM also contends that the district court incorrectly used the "unduly deferential" standard applicable to a grand jury subpoena to assess the reasonableness of the UK MLAT request. [AmBr:19-23]. Enlarging on what was merely a suggestion in appellants' brief, ACLUM argues that, notwithstanding that 28 U.S.C. §1782 was not relied upon or otherwise invoked in this case, the district court should have applied the discretionary factors outlined in *Intel* to the subpoenas. Among other things, the ACLUM argues that the district court should have evaluated "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.'" [*Id*.].

Assuming *arguendo* that the Court may consider such an argument where it was waived by appellants for failure to develop it in their brief, this Court should reject the argument. ACLUM's argument fails because the district court did not employ in this case the standard of review applicable to a federal grand jury subpoena. While the district court decided that the appropriate standard of review was "analogous to that used in reviewing grand jury subpoenae," as outlined above, it applied a heightened hybrid standard developed from a set of civil and criminal subpoena cases. [D:32 at

9-47]. This review was appreciably more protective than that available in the context of a grand jury subpoena and, in the government's view, went substantially beyond that authorized by the US-UK MLAT or 18 U.S.C. §3512. ACLUM's further claim that the district court should have applied the *Intel* factors on top of its already heightened scrutiny, has largely been addressed above and should be rejected for the reasons stated.[31] ACLUM's suggestion that enactment of 18 U.S.C. §3512, after the ratification of the US-UK MLAT, somehow injected *Intel's* discretionary standards into a court's consideration of MLAT subpoenas is without support in the text or legislative history of §3512.[32] If Congress's intent in passing 18 U.S.C. §3512 had

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[31]The government notes, however, that the Ninth Circuit expressly rejected the notion that district courts should evaluate the two tests cited by the ACLUM, noting that, "[i]n the context of a request under the MLAT . . . almost all of [the *Intel*] factors *already were resolved* by the executive branch of the government when it signed the treaty and by the Senate when it ratified the treaty." *In re Premises*, 634 F.3d at 571 (emphasis in original).

[32]A review of the entire legislative history of the §3512 makes patently clear that the "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," and was only aimed at making the execution of MLAT requests more expeditious. 155 CONG. REC. S6807-01, S6809 -S6810 (2009)(Letter from M. Faith Burton, Acting Assistant Attorney General); *see also*, 155 CONG. REC. H10092-01, H10094 (2009). ACLUM's reliance on a single statement by Rep. Adam Schiff that courts "will continue to act as gatekeepers to make sure that requests for foreign evidence meet the same standards as those required in domestic cases" [AmBr:23], mischaracterizes the thrust of the legislative history and is unavailing. Notably, there is nothing in the legislative history which reflects a Congressional intent to reverse the Eleventh Circuit's decision in *In re:*

been to impose the *Intel* standards on all MLAT requests – something which had never before been done – it would not have titled the legislation the "Foreign Evidence Request *Efficiency* Act." (emphasis added). ACLUM ultimately admits, as it must, that Congress did not intend 18 U.S.C. §3512 to alter the standards under which MLAT subpoenas were issued. [AmBr:22-23].

Finally, nowhere in ACLUM's argument is there a recognition that a request by a foreign sovereign under a treaty regarding a sensitive and confidential criminal matter is any different than a civil request by a private party in a mundane business matter. ACLUM's argument, if taken to its logical conclusion, would subject even the most sensitive and urgent law enforcement requests to litigation and delay by persons with a deeply felt, but tangential interest in such a criminal investigation. Under ACLUM's reading of §3512, criminal defendants in foreign countries, and others who disagree with the foreign policies of the United States, could tie sensitive and urgent international criminal investigations in legal knots. This would defeat the purpose of the §3512. As noted by Senator Leahy in introducing 18 U.S.C. §3512:

> As the world grows more interconnected and crime becomes increasingly global, it becomes all the more important for law enforcement agencies in the United States and around the world to work together to bring

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Commissioner's Subpoenas, 325 F.3d 1287, or to graft the wide discretion (and resulting inefficiencies) outlined in *Intel*, which had not previously been applied to MLAT requests.

> criminals to justice ... [B]y making it easier for U.S. Attorneys to collect evidence, the United States can respond more quickly to foreign requests for evidence. Setting a high standard of responsiveness will allow the United States to urge that foreign authorities respond to our requests for evidence with comparable speed. The United States will benefit if foreign governments cannot use our own delay to justify responding slowly to our requests.

155 CONG. REC. S6807-01, S6809 -S6810 (2009)(Comments of Sen. Leahy).

IV. THE DISTRICT COURT'S CONCLUSION THAT APPELLANTS WERE NOT ENTITLED TO INTERVENTION TO PRESENT THEIR CLAIMS AGAINST THE ATTORNEY GENERAL IS PRECLUSIVE OF THEIR SEPARATE CIVIL ACTION; ALTERNATIVELY, THE CIVIL ACTION WAS PROPERLY DISMISSED, INCLUDING BECAUSE, AS THE DISTRICT COURT FOUND, THE ATTORNEY GENERAL PROPERLY DISCHARGED HIS OBLIGATIONS.

A. Standard of review.

Determinations on a motion to dismiss based on the questions of subject matter jurisdiction, a cause of action, and/or standing are questions of law subject to *de novo* review. *Miller v. Nichols*, 586 F.3d 53, 58-59 (1st Cir. 2009); *N.H. Right to Life PAC v. Gardner*, 99 F.3d 8, 12 (1st Cir. 2001). In considering dismissal of a complaint under both Rule 12(b)(1) and (6), the court accepts "all well-pleaded factual averments" of the complaint as true and "indulge[s] all reasonable inferences" in plaintiffs' favor. *Katz v. Pershing, LLC*, --- F.3d ----, 2012 WL 612793 (1st Cir. 2012) at *2 (citations and internal quotations omitted); *Fothergill v. U.S.*, 566 F.3d

248, 251 (1st Cir 2009). The Court may affirm dismissal "on any ground made manifest by the record," and is not limited to the district court's rationale. *Id.*

B. Dismissal was proper where appellants had no independent right of action to challenge compliance with the MLAT request.

The claims and factual allegations asserted in the proposed Complaint in Intervention [D:18-1], are essentially identical to those in the civil Complaint [CD:1, A183-222], as is the relief sought [D:18-1 at 23 - 25; A220-22]. Given this, this Court could uphold dismissal of the civil complaint on the ground appellants were not entitled to relitigate the issue of whether they had a cognizable claim against the Attorney General after that issue had been decided adversely to them in the motion to intervene.

If not precluded, however, the civil complaint was properly dismissed for all of the same reasons intervention was properly denied: The treaty whose terms appellants invoked expressly disavowed that it created any rights for any private party. [A144]. Review under the APA was not available. As a nonresident alien, McIntyre cannot invoke the constitution. The district court had no jurisdiction to entertain their claims, because appellants have no private rights under the treaty they invoke, and no other statute provides a right of action or waiver of sovereign immunity for challenges to the Attorney General's provision of assistance pursuant to the US-UK MLAT. Nor

could Moloney demonstrate standing to assert his First Amendment claims. the First Amendment interest put forth by Moloney was "too contingent or speculative" to provide "a basis for intervention as of right." *Ungar v. Arafat*, 634 F.3d 46, 51-52 (1st Cir. 2011).

C. The district court did not err in finding that the Attorney General properly discharged his obligations.

Finally, the district court found, based on his review of materials submitted by the government, that appellants' claims failed on the merits because the Attorney General had properly discharged his obligations under the US-UK MLAT. While the government submits that appellants' claims were properly dismissed as a matter of law, this conclusion is supported the record and provides an additional basis for denying appellants' claims.

CONCLUSION

For these reasons, the government respectfully requests that the Court affirm the district court's denial of Messrs Moloney's and McIntyre's motion to intervene, and affirm the district court's dismissal of their separate civil action.

Respectfully submitted,
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Dated: 12 March 2012

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 14,806 words (an opening or answering brief may not exceed 14,000 words, a reply brief may not exceed 7,000 words), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) (*i.e.*, the corporate disclosure statement, table of contents, table of citations, addendum, and certificates of counsel).[33]

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Times New Roman 14 point, in Word Perfect 14.

/s/ Barbara Healy Smith
Barbara Healy Smith
Assistant U.S. Attorney
Dated: 12 March 2012

[33]On March 9, 2012, the Court granted the government's motion to file an oversized brief not to exceed 15,000 words.

CERTIFICATE OF SERVICE

I, Barbara Healy Smith, Assistant U.S. Attorney, 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 on March 12, 2012.

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