UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT
Nos. 11-2511 and 12-1159

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

UNITED STATES

Petitioner - Appellee,

v.

ED MOLONEY; ANTHONY MCINTYRE,

Movants - Appellants

AND

ED MOLONEY, ANTHONY MCINTYRE,

Plaintiffs - Appellants,

v.

ERIC H. HOLDER, Attorney General; JACK W. PIROZZOLO, Commissioner

Defendants - Appellees.

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

AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING OR REHEARING *EN BANC*

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RULE 29(c)(1) DISCLOSURE STATEMENT

The American Civil Liberties Union of Massachusetts is a not for profit organizations. It has no parent corporation and no corporation owns ten percent or more of its stock.

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ACLUM a non-profit membership organization of over twenty thousand members and supporters, is the state affiliate of the American Civil Liberties Union. Its mission is to protect civil rights and civil liberties in the Commonwealth. ACLUM often participates in cases involving freedom of expression, including the right to receive information, both through direct representation and as amicus curiae, and was granted leave to file an amicus brief before the Panel.

Rule 29(c)(5) Statement

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

ARGUMENT

The issue which Amici urge the Court to rehear is narrow, but of exceptional importance: Do persons with standing to assert First Amendment objections to a subpoena have the right to be heard on those objections?

The Panel ruled that the appellants alleged an injury sufficiently "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling" to satisfy the requirements of Article III standing. *In Re Request From The United Kingdom Pursuant To The Treaty*, 11-2511 (1st Cir. July 6, 2012), slip op. at 31 (citation omitted). The Panel also acknowledged that the appellants were never permitted to submit evidence about the nature of their interests—including the risk of physical danger—in the outcome of this case. *Id.* at 17 n.11, 31 & n.19. But because there is no First Amendment evidentiary privilege (or "special rule") to refuse to appear and answer relevant questions in grand jury-type proceedings, the Panel concluded that that there was "no need . . . to consider whether the district court acted within its discretion in denying appellants' motion to intervene," and that the district court did not abuse its discretion by enforcing the subpoenas without ever seeing the evidence that appellants might have presented. *Id.* at 29-30, 32-33, 34 (citing *Branzburg v. Hayes*, 408 U.S. 665 (1972)); *see also id.* at 32-40 & n.27. The result is that the appellants were denied any meaningful right to be heard.

This holding conflicts with Supreme Court First Amendment precedent, including cases establishing First Amendment due process rights.

> "[P]rocedural safeguards often have a special bite in the First Amendment context." G. Gunther, *Cases and Materials on Constitutional Law* 1373 (10th ed. 1980). Commentators have discussed the importance of procedural safeguards in our analysis of obscenity, *Monaghan, First Amendment "Due Process,"* 83 Harv.L.Rev. 518, 520-524 (1970); overbreadth, L. Tribe, *American Constitutional Law* 734-736 (1978); vagueness, Gunther, *supra*, at 1373, n. 2, and 1185-1195;

> and public forum permits, Blasi, *Prior Restraints on Demonstrations*, 68 Mich. L. Rev. 1481, 1534-1572 (1970). The purpose of these safeguards is to insure that the government treads with sensitivity in areas freighted with First Amendment concerns. *See generally* Monaghan, *supra*, at 551 ("The first amendment due process cases have shown that first amendment rights are fragile and can be destroyed by insensitive procedures").

Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson, 475 U.S. 292, 303 (1986).

Although *Branzburg* held that the First Amendment did not establish a "virtually impenetrable constitutional shield, beyond legislative or judicial control," excusing newspersons from the obligation to appear and answer relevant questions before a grand jury, 408 U.S. at 697, the Court did not hold that such subpoenas *never* implicate First Amendment interests. To the contrary, the majority affirmed that "news gathering is not without its First Amendment protections" and that "[g]rand juries are subject to judicial control *and subpoenas to motions to quash*." *Id.* at 707, 708 (emphasis added). Those protections are meaningless without a commensurate right to be heard. *See also id.* at 710 ("if [a reporter] has some other reason to believe that his testimony implicates confidential source relationship without a legitimate need of law enforcement, *he will have access to the court on a motion to quash*") (Powell, J., concurring) (emphasis added).

The right to be heard on First Amendment objections to government efforts to compel the disclosure of confidential information is clearly established, *even in the absence of any First Amendment privilege*. For example:

There is no First Amendment "privilege" that protects the contents of a professor's lecture to a group of college students, but the professor has the right to object to a government subpoena requiring him to testify about a lecture because the "power of compulsory process [must] be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom

of speech or press, freedom of political association, and freedom of communication of ideas, particularly in the academic community." *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957).

There is no First Amendment "privilege" to withhold the membership list of a political advocacy group, but where disclosure of the list might cause members to face "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility," the First Amendment is implicated and there is a right to be heard. *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

There is no First Amendment "privilege" that applies to receiving foreign political propaganda, but requiring recipients to disclose their interest in receiving such information is "almost certain to have a deterrent effect" and "amounts . . . to an unconstitutional abridgment of the addressee's First Amendment rights." *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965).

There is no First Amendment "privilege" to distribute "unsigned documents designed to influence voters in an election," but the First Amendment permits an individual to require that government efforts to compel such disclosures satisfy an "exacting scrutiny" requiring that the law be narrowly tailored to serve an overriding state interest. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 344, 347 (1995).

Finally, there is no First Amendment "privilege" to secretly contribute to political campaigns, yet the Supreme Court repeatedly has acknowledged a right to challenge financial disclosure requirements by proving a "reasonable probability" that disclosure will subject donors to "threats, harassment, or reprisals from either Government officials or private parties." *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 198 (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976)).

These Supreme Court opinions—decided both before and after *Branzburg*—demonstrate that there is a right to be heard on First Amendment objections to

government efforts to compel confidential information, even in the absence of a First Amendment privilege. A proceeding that excludes those individuals best able to marshal the evidence needed to challenge the government's efforts violates the First Amendment, due process and fundamental fairness. To paraphrase Justice Frankfurter, using the concept of judicial discretion to validate such a procedurally flawed proceeding implies a "legal abracadabra," rather than "standards of conduct within the comprehension of the laity in whose interests they are enforced."[1]

CONCLUSION

For the foregoing reasons, and for those set forth in the appellants' petition for rehearing or for rehearing en banc, Amici request that the appellants' petition be granted.

By their attorneys,

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Dated: August 28, 2012

[1] F. Frankfurter, *The Case of Sacco and Vanzetti*, The Atlantic (March 1927).

Certificate of Service

I, Jonathan M. Albano, hereby certify that this document filed through the CM/ECF system was sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on August 28, 2012.

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Rule 32(a)(7) Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1065 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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