UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 04-15736

JOHN GILMORE,

Plaintiff/Appellant,

vs.

JOHN D. ASHCROFT, et al.,

Defendants/Appellees.

On Appeal from the United States District Court
for the Northern District of California
Case No. CV 02-03444-SI
Honorable Susan Illston, United States District Court Judge

BRIEF OF MEDIA AMICI CURIAE OF LOS ANGELES TIMES COMMUNICATIONS LLC, THE ASSOCIATED PRESS, MCCLATCHY NEWSPAPERS, INC., THE COPLEY PRESS, INC., THE CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION, AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPP0RT OF PLAINTIFF'S-APPELLANT'S OPPOSITION TO DEFENDANTS'-APPELLEES' MOTION TO RECONSIDER AND MOTION TO SEAL

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INTEREST OF MEDIA AMICI CURIAE

Media amici curiae are newspaper publishers and journalists who regularly gather and disseminate news and information, including news reports about government regulations and ongoing litigation, to readers and viewers in this Circuit and elsewhere. The Motion to Reconsider the Appellate Commissioner's Denial ("Motion to Reconsider") of the Motion to File Materials and Opposing Brief Under Seal, for In Camera and Ex Parte Review ("Motion to Seal"), filed by Defendants/Appellees John D. Ashcroft, et al. ("the government"), seeks to restrict public and press access to judicial records, and potentially restrict access to this Court's oral argument and opinion, in this litigation about the government's supposedly secret rules governing domestic airline travel. The government's proposed restriction of access directly affects Media amici's ability to discharge their constitutionally recognized function of gathering and reporting the news about the federal government and judiciary. A description of the individual interests of Media amici is set forth in Addendum A hereto.

Media amici concurrently file a Motion for Leave to File this brief in support of Plaintiff/Appellant John Gilmore's Opposition to the government's Motion to Reconsider and Motion to Seal.

SUMMARY OF ARGUMENT

The government asks this Court to shield its not-so-secret airline passenger identification rule with secret judicial proceedings. The government's second bid to file its brief and other documents under seal is no different from the first and should be similarly rejected. The absurdity of the government's request for secrecy was highlighted on September 29, when the government filed its 67-page brief without a single redaction, asserting various legal arguments and admitting to the existence of its unpublished airline passenger identification rule, contradicting its previous assertion that it would be illegal to confirm the existence of the rule. The government's September 29th brief makes clear there is no need to file a shadow brief or supporting records to hide this case from public view.

The First Amendment and common law right of public access to court documents and proceedings is well-established by this Court. The public right of access to judicial proceedings cannot be overcome by the government's unprecedented argument that it can shield its own rule from public scrutiny simply by enacting a statute and regulations containing vague secrecy provisions. If this Court permits the government to file a second legal brief and records under seal based on this circular argument, the next step presumably will be a government demand for a secret oral argument and secret opinion, not only by this Court, but also by the United States Supreme Court. Secrecy by the executive branch does

not require secrecy by the judiciary. Quite the opposite is true. Where the judicial branch reviews secret rules promulgated by the executive branch, maximum openness is required to secure public confidence in the judicial decision.

Because the government cannot overcome the presumptive First Amendment and common law right of access to these court documents and proceedings, this Court should again deny the government's sealing request.

1.
THE FIRST AMENDMENT AND COMMON LAW RESTRICT THE GOVERNMENT'S ABILITY TO FILE SEALED BRIEFS IN THIS COURT

As Judge Fletcher recently observed, "[i]n this circuit, we start with a strong presumption in favor of access to court records." Foltz v. State Farm .Mut. Auto. Ins. Co., 331 F.3d 1122, 1135 (9th Cir. 2003). The Circuit has a long history of ordering court documents unsealed and courtroom doors unlocked, relying on the First Amendment to the United States Constitution and the common law right of public access, both in criminal and civil cases. See, e.g., Foltz, 331 F.3d at 1135 (extending the common law right of public access to civil court documents that are filed under seal as attachments to a dispositive motion, even though the documents are subject to a protective order; holding that sealing is permitted only for "compelling reasons;" vacating sealing order and ordering some documents unsealed or redacted); In re McClatchy Newspapers, Inc., 288 F.3d 369, 371 (9th Cir. 2002) (extending First Amendment and common law right of access to letters

submitted by criminal defendant in sentence reduction proceeding; ordering letters unsealed); San Jose Mercury News v. District Court, 187 F. 3d 1096, 1102 (9th Cir. 1999) (extending common law right of public access to "materials submitted in connection with motions for summary judgment in civil cases prior to judgment"; remanding to district court to consider unsealing); United States v. Kaczynski, 154 F.3d 930, 931 (9th Cir. 1998) (extending common law right of access to pre-trial psychiatric competency report of criminal defendant Theodore Kaczynski; affirming release of redacted report); Hagestad v. Tragesser, 49 F.3d 1430, 1434 (9th Cir.1995) (extending common law right of access to pretrial court documents in civil sexual abuse case; sealing is justified only for compelling reasons"; vacating sealing order and remanding for reconsideration); Oregonian Publ'g Co. v. District Court, 920 F.2d 1462 (9th Cir. 1990) (extending First Amendment right of access to criminal plea agreements and related court documents; ordering documents unsealed); EEOC v. Erection Co., Inc., 900 F.2d 168, 169 (9th Cir.1990) (extending common law right of access to consent decree in civil employment discrimination case; vacating sealing order and remanding for reconsideration); Seattle Times v. District Court, 845 F.2d 1513, 1519 (9th Cir. 1988) (extending First Amendment right of access to criminal pretrial bail hearing and documents; ordering documents unsealed); United States v. Schlette, 842 F.2d 1574, 1583-84 (9th Cir. 1988) (extending common law right of access to

confidential presentence report in criminal case; ordering documents unsealed); Valley Broadcasting Co. v. District Court, 798 F.2d 1289, 1293-95 (9th Cir. 1986) (extending "strong" common law right of access to videotape and audiotape trial exhibits in criminal trial; ordering trial court to permit copying of exhibits during trial); CBS, Inc. v. District Court, 765 F.2d 823, 825 (9th Cir. 1985) (extending First Amendment right of access to post-trial criminal sentencing briefs; ordering briefs unsealed); Associated Press v. District Court, 705 F.2d 1143, 1145 (9th Cir. 1983) (extending First Amendment right of access to pretrial documents in high-profile criminal trial of John DeLorean; ordering documents unsealed); United States v. Brooklier, 685 F.2d 1162, 1167, 1170 (9th Cir. 1982) (extending First Amendment right of public access to criminal voir dire and suppression hearings two years before the United States Supreme Court reached the same decision in Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 505-508 (1984) ("Press-Enterprise I") and Waller v. Georgia, 467 U.S. 39, 47 (1984), respectively); but see Times Mirror Co. v. United States, 873 F.2d 1210 (9th Cir. 1989) (declining to extend First Amendment right of access to search warrants and affidavits to protect ongoing criminal investigation). Continuing in this tradition of public and media access, this Circuit is only one of two circuits to permit the public and media to videotape and record its oral arguments. See Ninth Circuit Guidelines for Photographing, Recording, and Broadcasting, http://www.ca9.uscourts.gov.

While this Circuit has held that the First Amendment right of access applies to criminal court documents, it has not reached the question of whether the same right applies to civil court documents, relying instead on the common law. But other circuits and state courts have found that that the First Amendment right of public access applies to civil court documents, and it is likely that this Circuit would agree. See, e.g., Grove Fresh Distribs. Inc v. Everfresh Juice Co., 24 F.3d 893, 897 (7th Cir. 1994) (recognizing First Amendment right of access to civil proceedings and records); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988) (finding First Amendment standard applies to documents filed in connection with a summary judgment motion in a civil case); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1066 (3d Cir. 1984) (concluding that the analysis of Richmond Newspapers v. Virginia, 448 U.S. 555 (1980), applies equally to civil cases); Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n, 710 F.2d 1165, 1181 (6th Cir. 1983) (vacating the district court's sealing of all documents filed in a civil action based on First Amendment and common law right of access); NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal.4th 1178, 1216-1218 (1999) (recognizing a broad First Amendment right of public access to civil proceedings and records); see also Detroit Free Press, 303 F.3d 681, 696-99 (6th Cir. 2002) (recognizing First Amendment right of access to federal immigration deportation proceedings); but see North Jersey Media Group v. Ashcroft, 308 F.3d

198 (3rd Cir. 2002) (recognizing Richmond Newspapers test applies to deportation proceedings but is not satisfied).

When applying the First Amendment right of access to criminal court documents, this Circuit has rejected governmental demands for secrecy. In CBS, for example, the government argued that post-trial sentencing reduction briefs filed in the DeLorean drug prosecution case should be kept under seal to protect government investigations. Justice Kennedy, writing for the court, criticized a federal prosecutor for "trying to manufacture a secret document" by "reciting confidential material" in a sealed affidavit that was "unnecessary to consideration of [the motion for a reduced sentence] on its merits," and ordered the document "removed from the record and returned to the government." Id. at 825-26. Justice Kennedy next rejected the government's assertion that the sentencing briefs should be sealed to protect criminal investigations, finding that "most of the information that the government seeks to keep confidential concerns matters that might easily be surmised from what is already in the public record." Id. at 825. In ordering the sentencing briefs to be unsealed, Justice Kennedy warned of the danger of permitting the government to present secret arguments to the judiciary: "Confidence in the accuracy of its records is essential for a court, and the authority of its rulings and the respect due its judgments. Such confidence erodes if there is two-tier system, open and closed." Id. at 826. If the public and press cannot

compare public records with sealed ones, Justice Kennedy warned, "all of the former are put into doubt." Id.

Other circuits have denied government requests to file appellate briefs and supporting documents under seal. In Matter of Grand Jury Proceedings: Victor Krynicki, 983 F.2d 74, 78 (7th Cir. 1992) (order by Easterbrook, J.), Judge Easterbrook denied motions to seal appellate briefs in a civil case involving an inheritance dispute, and a companion case involving a motion to quash a federal grand jury subpoena. Judge Easterbrook began his analysis by observing that "[j]udicial proceedings in the United States are open to the public – in criminal cases by constitutional command, and in civil cases by force of tradition." Id. at 75 (citing Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 12-13 (1986) ("Press-Enterprise II"), and Nixon v. Warner Communications, 435 U.S. 589, 597-98 (1978). Judge Easterbrook noted that despite grave concerns about national security, the briefs in the Pentagon Papers case, New York Times Co v. United States, 403 U.S. 713 (1971), and the hydrogen bomb plans case, United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979), rehearing denied, 486 F. Supp. 5, appeal dismissed, 610 F.2d 819 (7th Cir. 1979), "were available to the press." Krynicki, 983 F.2d at 76. Judge Easterbrook also emphasized that the Supreme Court denied a motion to hold part of its oral argument in secret in the Pentagon Papers case, New York Times, 403 U.S. 944 (1971). Krynicki, 983 F.2d

at 76. Judge Easterbrook concluded that openness is essential promote public confidence in unelected judges:

> What happens in the halls of government is presumptively open to public scrutiny. Judges deliberate in private but issue public decisions after public arguments based on public records.... Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat; this requires rigorous justification.

Krynicki, 983 F.2d at 75.

In Pepsico v. Redmond, 46 F.3d 29, 30-31 (7th Cir. 1995) (order by Judge Easterbrook), a civil trade secrets matter, Judge Easterbrook also denied motions to redact the trial court's opinion that would be submitted as part of the appellate court record, and ordered district court to issue an opinion without any redactions. "Opinions are not the litigants' property," Judge Easterbrook observed. "They belong to the public, which underwrites the judicial system that produces them." Id. at 31. See also Orliac v. Berthe, 765 F.2d 30 (2d Cir. 1985) (denying motion to seal appellate briefs and related documents in civil case due to "the absence of any information as to the scope of or necessity for such an order").

Similarly, California courts have adopted a rule restricting the sealing of appellate court briefs in the wake of California Supreme Court's unanimous decision in NBC Subsidiary, 4 Cal. 4th 1208 & n.25, recognizing the First Amendment right of access to civil and criminal court documents. California Rule

of Court 12.5 forbids litigants from submitting sealed appellate courts briefs and documents unless they satisfy a strict test constitutional test for sealing. Under these requirements, no appellate court may permit the filing of sealed appellate court records without factual support and an express finding that:

(1) There exists an overriding interest that overcomes the right of public access to the record;

(2) The overriding interest supports sealing of the record;

(3) A substantial probability exits that the overriding interest will be prejudiced if the record is not sealed;

(4) The proposed sealing is narrowly tailored; and,

(5) No less restrictive means exist to achieve the overriding interest.

Cal. R. Ct. 12.5(e)(6), Cal. R. Ct. 243.1(d)-(e). See also Huffy Corp. v. Superior Court, 112 Cal. App. 4th 97 (2003) (applying constitution-based test for sealing to exhibits submitted to appellate court).

As a leader in recognizing public access to court proceedings and records, this Court should take this opportunity to make clear that the public and press have a presumptive constitutional and common law right of access to appellate court records and proceedings, both civil and criminal, and this right cannot be overcome absent an overriding interest and specific factual support, which are not present here.

2.
THE GOVERNMENT HAS NOT DEMONSTRATED THAT SEALING OR REDACTING ITS LEGAL BRIEF AND OTHER MATERIALS IS NECESSARY

In the three years since the domestic terrorist attacks of September 11, 2001, our government has struggled to find the proper balance between preserving the liberty that is our heritage and safeguarding public safety. This case examines an important flashpoint in that struggle: a citizen's constitutional challenge to an unpublished federal rule requiring airline passengers to present identification at domestic airports.

There is no question that the public has a compelling interest in the outcome of this case. Yet the government has taken the unprecedented position that even though it has filed one brief in public, but must file a second brief and other "materials" under seal because a federal regulation mandates secrecy for this unpublished, yet well-known airline passenger identification rule. Presumably, once allowed to file a secret brief and court record, the government will next assert that this Court must conduct a secret oral argument, and issue a secret opinion.

No one disputes that the government has an interest in preventing terrorists from boarding domestic airplanes. But that cannot be the end of the matter, for

> [h]istory teaches us how easily the specter of a threat to "national security" may be used to justify a wide variety of repressive governmental actions. A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons would

> impermissibly compromise the independence of the judiciary and open the door to possible abuse.

In re The Washington Post Co., 807 F.2d 383, 391-92 (4th Cir. 1986). Accordingly, "the ready resort to suppression is for societies other than our own; an accommodation of competing values remains the commendable course." In re Application & Affidavit for a Search Warrant, 923 F.2d 324, 331 (4th Cir. 1991).

The government's request for secrecy in this case is flawed both procedurally and substantively. The government did not follow the requirements of Ninth Circuit Rule 27-13, which requires the provisional filing of its sealed or redacted brief, as well as the factual basis for sealing, to allow the Court to determine whether the sealing or redaction would be permitted. For this reason alone, the government's Motion to Reconsider should be denied.

Even if the government were to follow the correct procedure, its request fails to meet the First Amendment and common law requirements for secrecy because the gist of the airline passenger identification rule is already public. The government has not satisfied the common law test for secrecy, which requires a showing of "compelling reasons" and a "factual basis" for sealing that does not "rely[] on hypothesis or conjecture," and " the public interest in understanding the judicial process" taken into account. Foltz, 331 F.3d at 1135; accord San Jose Mercury News, 187 F.3d at 1102; Hagestad, 49 F.3d at 1434. Nor has the

government satisfied the First Amendment right of access, which requires an "overriding interest" in secrecy. Grove Fresh, 24 F.3d at 897.

The government has undermined its position by making shifting claims about the need for secrecy. Both in the district court and in its September 2 Motion to Seal and September 20 Motion to Reconsider, the government asserted that federal regulations prohibited government lawyers from even confirming or denying whether the Transportation Security Administration ("TSA") had issued an airline passenger identification security directive. Motion to Seal at 4-5, Motion to Reconsider at 2. In these motions, the government asserted that it had to file a secret brief and supporting record because Congress enacted a statute giving the Under Secretary the authority to prescribe regulations "prohibiting the disclosure of information obtained or developed in carrying out security ... if the Under Secretary decides that disclosing the information would ... be detrimental to the security of transportation." Motion to Seal at 4-5 and Motion to Reconsider at 2, citing 49 U.S.C. § 114(s)(1)(C). The government asserted that it could not confirm or deny the existence of the airline identification rule because this information has been classified by the Under Secretary of the TSA as nondisclosable "sensitive security information" or "SSI." Motion to Seal at 4-5, Motion to Reconsider at 2, citing 49 U.S.C. §§ 40119(b), 114(s)(1)(C); 49 C.F.R. §§ 1520.3, 1520.5(b)(1)(i), (b)(2)(i); 1520.9(a)(1), 1544.103(b)(4).

But after the Appellate Commissioner denied the government's Motion to Seal, the government filed its brief in public on September 29, asserting numerous legal defenses and admitting the existence of the unpublished security directive, all without any need for secrecy. The government admitted that "the TSA has now confirmed the existence of an identification requirement – that 'as part of its security rules, TSA requires airlines to ask passengers for identification at check-in.'" Brief for Appellees at 19, citing Protection of Security Information, 69 Fed. Reg. 28066, 28070-28071 (May 18, 2004). The government also confirmed that "there is an administrative record, namely the TSA security directive alleged by plaintiff," but has not filed that record in court. Brief at 19.

Even before the government filed its September 29 brief, the TSA's own website has revealed the existence of the identification rule. The TSA's website has instructs that a "boarding pass and ID are now required to pass through the security checkpoint" at domestic airports, and that "Passengers without proper ID may be denied boarding." http://www.tsa.gov/public/interrapp/editorial_1044.xml. The TSA website also explains that states that "passengers age 18 and over must present one form of photo identification issued by a local state or federal government agency (e.g.: passport/drivers license/military ID), or two forms of non-photo identification, one of which must have been issued by a state or federal agency (e.g.: U.S. social security card)." Id.

The TSA's airline security directives, including the identification requirement and the "no fly" list, have been widely reported by the press and publicly discussed by government officials. See, e.g., Paul Majendie, Cat Stevens Calls U.S. Deportation 'Ridiculous,' Reuters, Sept. 23, 2004 (federal government confirms that former pop singer was deported because he was on government "watch list"); Ted Kennedy's Airport Adventure, AP/CBS, Aug. 19, 2004 (Sen. Kennedy's name was on a "no fly" list and had to enlist government help to remove his name from list); Who Are You?, You Have to Have the ID to Prove It Before You Get On a Plane, CNN, May 26, 1998 (reporting that the FAA requires airline passengers to present ID before boarding aircraft in US). Airlines and airport security personnel are adhering to the passenger identification directive, as any domestic airline passenger can attest. While the exact language of the rule may be secret, its gist is not.

Indeed, in at least one other civil case being litigated in the Northern District over the TSA's "no fly" list, the government has released some documents under the Freedom of Information Act ("FOIA")confirming the existence of "no fly" security directive, and has not sought to seal its briefs or hold in ex parte, in-chambers proceedings in the district court. See Gordon v. F.B.I., 2004 WL 1368858, *2 (N.D.Cal. June 15, 2004) (discussing government's legal arguments about the "no fly" list, "sensitive security information," security directives, and

regulations mandating secrecy). Moreover, in that FOIA case, U.S. District Judge Charles R. Breyer admonished the government for failing to meet its burden to justify the withholding of "sensitive security information" and for making "frivolous claims" of the necessity of secrecy. Id. at *4. In one instance, the government refused to disclose a document under FOIA that simply stated that the airline "Watch Lists include persons who pose a threat to aviation." Id. at *2. Judge Breyer held that "[w]hile this information may technically fall within the category of 'selection criteria,' it is by no means sensitive security information; rather, it is common sense and widely known." Id. Judge Breyer concluded that the government defendants "offered no justification for withholding such innocuous information" and "do not meet their burden by simply reciting that information derived from security directives is sensitive security information." Id.

This Court should reject similar government arguments about unnecessary secrecy here. The government already disclosed its legal arguments in its September 29 brief and admitted that the airline passenger security rule exists. There is no need to file a second brief or other documents under seal.

The cases cited by the government in its initial Motion to Seal are inapposite. All of the cases involved the sealing or in camera presentation of specific factual materials, such as declarations, testimony, or investigative records, to protect ongoing criminal investigations or national security. See Meridian

Internat'l Logistics, Inc. v. United States, 939 F.2d 740, 745 (9th Cir. 1991) (affirming the sealing of an FBI's agent's declaration to protect an ongoing criminal investigation); In re Grand Jury Proceedings, 867 F.2d 539, 540 (9th Cir. 1988) (protecting an ongoing criminal grand jury investigation); United States v. Sarkissian, 841 F.2d 959, 965 (9th Cir. 1988) (classified information and national security in criminal prosecution in a terrorist bombing case); Pollard v. FBI, 705 F.2d 1151, 1153 (9th Cir. 1983) (FBI national security investigation); United States v. Ott, 827 F.2d 473, 476-77 (9th Cir. 1987) (national security). These cases have no application here, where the government is not trying to protect specific factual information related to an ongoing criminal investigation, but instead seeks to seal legal briefs containing legal arguments and a federal security directive that is not even secret.

Because the government has failed to justify sealing or redacting its legal brief and other "materials," this Court should deny the government's Motion to Reconsider and Motion to Seal to ensure continued public oversight of this important case, which will determine important jurisdictional questions and the constitutional validity of the government's unpublished airplane identification rule.

CONCLUSION

As Justice Brennan noted, "[s]ecrecy of judicial action only breeds ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law...." Nebraska Press Assn v. Stuart, 427 U.S. 539, 587 (1976).

Because the government has not met its burden under the First Amendment and common law to overcome the presumptive right of access to court documents, the government's Motion to Reconsider and Motion to Seal should be denied.

RESPECTFULLY SUBMITTED this 1ST day of October, 2004.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 29(d) and 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, I certify that the foregoing Brief of Media Amici Curiae is proportionately spaced in 14-point Times New Roman typeface and contains 4,077 words (as calculated by Microsoft Word 2000), exclusive of the Table of Contents, Table of Authorities, Certificate of Service and this Certificate of Compliance.

Dated: October 1, 2004

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ADDENDUM A

The Associated Press, founded in 1848, is the world's oldest and largest newsgathering organization, providing content to more than 15,000 news outlets. Its multimedia services are distributed by satellite and the Internet to more than 120 nations.

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The McClatchy Company publishes 11 daily newspapers and 13 non-daily newspapers in California and other states including *The Sacramento Bee*, *The Fresno Bee*, and *The Modesto Bee*. The newspapers have a combined average circulation of 1,400,000 daily and 1,900,000 Sunday.

Los Angeles Times Communications LLC, dba Los Angeles Times, a wholly owned subsidiary of Tribune Company, publishes the *Los Angeles Times*, the largest metropolitan daily newspaper circulated in California. The Los Angeles Times also publishes the *Newport Beach-Costa Mesa Daily Pilot*, *Glendale News-Press*, *Burbank Leader*, *Foothill Leader*, and the *Huntington Beach Independent*. The Times also maintains the website www.latimes.com, a leading source of national and international news.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment litigation since 1970.

Proof of Service

I hereby certify that on this 1st day of October, 2004, two copies of the forgoing amici curiae brief were served on the following by First Class U.S. Mail:

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