Docket No. FISCR 18-01

In the

United States Foreign Intelligence Surveillance Court of Review

IN RE: CERTIFICATION OF QUESTIONS OF LAW TO THE FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW

Upon Certification for Review by the United States Foreign Intelligence Surveillance Court

REPLY BRIEF OF AMICUS CURIAE

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ARGUMENT

I. THIS CASE IS ABOUT WHETHER MOVANTS HAVE ESTABLISHED STANDING TO ARGUE A FIRST AMENDMENT RIGHT OF ACCESS TO JUDICIAL OPINIONS.

The Government fails to address the question before the Court, whether movants have standing to assert a constitutional right of access to this Court's opinions. *See* Gov't Opening Br. at 1-15. On page 16, their opening brief finally begins to turn towards the issue only to get waylaid by *Press-Enterprise II*, which recognizes a First Amendment right of access to the transcripts of preliminary hearings on the grounds that such proceedings are generally open to the public. Gov't Opening Br. at 16; *Press-Enter. Co. v. Superior Court (Press-Enterprise II),* 478 U.S. 1, 2, 8, 12-13 (1986). The Government concludes that because that case dealt with "proceedings," the Court must look at whether Foreign Intelligence Surveillance Court ("FISC") hearings have historically been open to determine whether Movants have standing. *Id.* at 17-18. But *Movants are not seeking access to proceedings*. Nor are they seeking access to transcripts of *in camera, ex parte* hearings. They are seeking access to four judicial opinions that set forth the law. These documents present an even more compelling need for disclosure than the myriad proceedings and records that run the gamut of adjudication and that *have*, in any event, been acknowledged by the Supreme Court as within the right of public access.

The Courts have time and again recognized a legally- and judicially-cognizable interest in access to legal processes and judicial records that lead up to a final resolution of the law. *See, e.g., Press-Enter. Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 505-10 (1984) (holding a First Amendment right of access to voir dire transcript); *Bond v. Utreras*, 585 F.3d 1061, 1073 (7th Cir. 2009) (acknowledging "the public has a presumptive right to access discovery materials that are filed with the court, used in a judicial proceeding, or otherwise constitute 'judicial records.'"); *Doe v. Pub. Citizen*, 749 F.3d 246, 261, 268 (4th Cir. 2014) (acknowledging "the presumptive right of access to judicial documents and materials under the First Amendment and common law" and extending it to a judicial opinion ruling on a motion for summary judgment). That the People have a right to even these venues and documents strengthens the point that there is a public right of access to their ultimate object: judicial rulings. *See, e.g., Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 & n.8 (1978) (acknowledging "the existence of a common-law right of access to judicial records" and "[t]his common-law right has been recognized in the courts of the District of Columbia since at least 1894.") For the Government, it is as though nothing existed before 1978. It disregards centuries of well-understood common law practices that the Founders carried forward and cemented into the U.S. Constitution. *See* Amicus Opening Br. at 11-24. The precedential opinions being sought contain complex Constitutional and statutory

analysis, impact every citizen's rights, and reveal government noncompliance. They are law. Right of public access to the law is foundational to our system of government. Amicus Opening Br. at 24-27.

II. THE COURT HAS JURISDICTION OVER THIS ACTION.

The Government's argument that the Court lacks inherent power and ancillary jurisdiction to adjudicate this action is a red herring. *See* Gov't Opening Br. at 22-25. It is undisputed that the FISC is an Article III court. *In re Sealed Case,* 310 F.3d 717, 731 (FISA Ct. Rev. 2002) (per curiam); *In re Kevork,* 634 F.Supp. 1002, 1014 (C.D. Cal. 1985), *aff'd,* 788 F.2d 566 (9th Cir. 1986). Congress determines the subject matter of the cases that go before it. U.S. Const., art. III, § 1; *Id.* art. I, §8, cl. 9. Congress has given the Court jurisdiction over the foreign intelligence collection at issue in the four opinions. It is obliged under common law and the Constitution to hear non-statutory claims on matters within its jurisdiction. The Freedom of Information Act ("FOIA"), which provides a right of access to *agency* records, has nothing to do with access to Article III records.

A. The FISC has subject-matter jurisdiction over the opinions being sought and a non-statutory obligation to hear common law and constitutional claims.

The four opinions adjudicate government requests under the pen register/trap and trace ("PR/TT") and business records/tangible goods provisions of the Foreign

Intelligence Surveillance Act ("FISA").[1] The Bates and Kollar-Kotelly opinions deal with the government's applications under the PR/TT provisions. Amicus App. F 149-352. The McLaughlin and Eagan opinions focus on tangible goods. Amicus App. F 353-421. These matters are therefore squarely within the Court's jurisdiction. Indeed, in the absence of subject matter jurisdiction, the Court could not constitutionally address the very cases in which they have issued opinions.

There are three further questions bound up in the government's claim, the first of which is whether, once Congress has vested subject-matter jurisdiction in the FISC, the Court retains inherent authority over how it adjudicates cases over which it has jurisdiction. The answer here is plainly yes. The power to adjudicate a case *is* the power to decide it, and that decision may be embodied in a written decision. Whether the Court opts to issue a memorandum opinion is in FISC judges' hands. The fact that five dozen opinions and more than one hundred orders, many of which were

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[1] *See* Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801–1811 (2012)) (original FISA); Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, §§ 601-02, 112 Stat. 2396, 2404 (1998) (codified at 50 U.S.C. §§ 1841–46, 1861-63) (adding PR/TT and business records); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, §215, 115 Stat. 272, 287 (expanding the business records provision to include "the production of any tangible things (including books, records, papers, documents, and other items)" from any business or entity); USA PATRIOT Improvement and Reauthorization Act of 2005, § 106, 120 Stat. 192, 196 (codified as amended at 50 U.S.C. §1861 (2012)) (requiring that the government establish "reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation (other than a threat assessment)").

released by the Court itself, are in the public domain puts this question to rest. *See* Amicus App. A 1-30. The government goes on to make two novel arguments that fail.

1. The FISC, as an Article III court, is obliged to hear cases that arise under common law and the Constitution, as long as they relate to matters properly before the Court.

The Government attempts to argue that non-parties may seek release of opinions only in a given FISA case (even as it remains cognizant that third parties are highly unlikely to be in a position to know when the FISC is considering matters before it). Its analysis misses the centuries-old obligation that the FISC has, as an Article III court, to hear cases arising under the common law and the Constitution, as long as they relate to matters properly before it—which the four opinions are.

There is a long history of Article III engaging in non-statutory review of common law and constitutional matters. This case fits squarely in that paradigm. In *American School of Magnetic Healing v. McAnnulty*, litigants brought a First Amendment claim against actions of the Postmaster General, based on the common law understanding that non-statutory review of constitutional claims is ordinarily available. 187 U.S. 94, 108-11 (1902); *cf. Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988) ("When an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority.") *See also Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) ("courts will ordinarily presume that Congress

intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command.") (internal quotation omitted); *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1168, 1172-73 (D.C. Cir. 2003) (holding non-statutory review "is available when an agency acts *ultra vires*.") In 2015 the Supreme Court reiterated the availability of constitutional review, recognizing that it has "long held that federal courts may in some circumstances grant injunctive relief against...violations of federal law by federal officials." *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct 1378, 1384 (2015) (internal citations omitted).

The history of allowing non-statutory common law and constitutional claims extends to judicial records. In dozens of cases, third parties have been granted a non-statutory right of access to judicial records relating to a separate action.[2] In one suit

[2] *See, e.g.*, *United States v. Kravetz*, 706 F.3d 47, 56-59 (1st Cir. 2013) (holding a common law right of access for a journalist to the advocacy memoranda and sentencing letters submitted by an outside party); *In re Providence Journal Co.*, 293 F.3d 1, 9-13 (1st Cir. 2002) (holding that a district court's policy violated right of access to criminal proceedings under the First and Fourteenth Amendments and the common law right of access in civil actions); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119-124, 126 (2d Cir. 2006) (holding in response to media organizations' efforts to obtain access to documents filed under seal that they were judicial documents and that the existence of a confidentiality order did not defeat the presumption of public access); *United States v. Smith*, 776 F.2d 1104, 1107-1113 (3d Cir. 1985) (holding that a newspaper had a First Amendment and common law right of access to bills of particular that arose in the context of a federal prosecution); 749 F.3d at 265-68 (4th Cir. 2014) (holding that the First Amendment right of access extends to a judicial opinion ruling on a motion for summary judgment); *Balt. Sun Co. v. Goetz*, 886 F.2d 60, 64-65 (4th Cir. 1989) (holding that the newspaper had a

brought by a taxpayer, moving to unseal three probable cause affidavits, the Fifth Circuit held that the district court had jurisdiction to determine whether a common law qualified right of access extended to pre-indictment search materials. *United States v. Sealed Search Warrants,* 868 F.3d 385, 390 (5th Cir. 2017).

Courts, moreover, have repeatedly held that the common law and First Amendment right to inspect judicial records persists even after conclusion of the matter before the Court. *See, e.g., United States v. Business of Custer Battlefield Museum & Stores*, 658 F.3d 1188, 1192-96 (9th Cir. 2011) (common law right of access applied to search warrant applications and affidavits following termination of the investigation); *Chicago Tribune Co. v. Bridgestone/Firestone Inc.,* 263 F.3d 1304, 1310-1313 (11th Cir. 2001) (constitutional right of access to unseal court records after settlement of a products liability action). In *Carlson v. United States*, the Seventh Circuit recognized that scholars had a constitutional right of access to transcripts of witness testimony from a grand jury investigation of alleged Espionage Act violations some 70 years prior. 837 F.3d 753, 757-61 (7th Cir. 2016). Carlson chose the Northern District of Illinois to bring the claim "because it was the court

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common law qualified right of access to warrant papers, committed to the sound discretion of the judicial officer issuing the warrant); *In re Wash. Post Co.,* 807 F.2d 383, 390 (4th Cir. 1986) (holding that a newspaper had a First Amendment right of access to plea and sentencing hearings and to documents); *United States v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989) (holding that a publisher that moved to intervene in a criminal case to secure release of a presentence report and testimonial letters had a common law right of access to the judicial records).

that originally had supervisory jurisdiction over the grand jury in question." *Id.* at 757. He argued that the "same court has continuing common-law authority over" matters pertaining to that grand jury, including any application to unseal the grand-jury materials." *Id.* The Court agreed:

> As a member of the public, Carlson has standing to assert his claim to the grand-jury transcripts, because they are public records to which the public may seek access, even if that effort is ultimately unsuccessful (perhaps because of sealing, national security concerns, or other reasons). *Id.* at 757-758.

Carlson's injury-in-fact was "denial of access to government documents that he [had] a right to seek." *Id.* at 758. Despite the secrecy surrounding grand jury operations, the Court considered them part and parcel of the judicial process. Under *Nixon*, Carlson had a right to petition, even if access might eventually be denied:

> To hold otherwise would amount to denying standing to everyone who cannot prevail on the merits, an outcome that fundamentally misunderstands what standing is." *Id.* at 759 (citing *Booker-El v. Superintendent, Ind. State Prison*, 668 F.3d 896, 900 (7th Cir. 2012); *Bond v. Utreras*, 585 F.3d 1061, 1073 (7th Cir. 2009).

The common law right of access demands that "documents filed in court are presumptively open to the public." 585 F.3d at 1073. Courts have the inherent power to manage their own records, and to hear common law and constitutional claims related to matters properly before them, as the FISC is doing in this case.

2. FOIA in no way impacts the right of Movants to make a common law and First Amendment claim.

The Government's reliance on FOIA as a *required alternative* to Movants' Constitutional right of access is, frankly, mystifying. Gov't Opening Br. at 26-28.

See also In re Opinions & Orders of This Court Addressing Bulk Collection of Data Under FISA, No. Misc. 13-08, 2017 WL 427591, at *3 (FISA Ct. Jan. 25, 2017). FOIA does not apply to judicial records. It does not deny judicial authority to determine matters of classification, and it cannot obviate a constitutional right.

FOIA creates a presumption of transparency *for agency records*. FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538. This includes, as the Government recognizes, a process for seeking documents classified under Executive Orders. Gov't Opening Br. at 26; Exec. Order No. 13,526, 3 C.F.R. 298 (2009). But Executive Orders, by definition, are official documents that apply to executive departments and agencies—not to the other branches. Executive Order, *Black's Law Dictionary*, (10th ed. 2014). Accordingly, the act empowers individuals to obtain such records from *agencies* that possess them. *See* 5 U.S.C. §552(a)(3)(A) ("each agency, upon any request for records...shall make the records promptly available to any person."). It does not create a right to sue for access to documents held by courts.

Nothing in the statute, moreover, suggests that it displaces the right of courts in non-FOIA cases to decide whether classification is warranted. It merely provides that district courts have "jurisdiction to enjoin [agencies] from withholding agency records" and may "order the production of any agency records improperly withheld from the complainant."5 U.S.C. §552(a)(4)(B).

The Government suggests that "Congress's assignment of such disputes to the district courts and not to the FISC flows naturally from the respective nature of the courts." Gov't. Opening Br. at 27. This statement overlooks the fact that Congress passed FOIA in 1966—long before the FISC even existed. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966). Congress's intent was to shed light on the inner workings of the administrative state, areas where "through legislative inaction, the weed of improper secrecy had been permitted to blossom and was choking out the basic right to know." H.R. Rep. No. 89-1497, at 2 (1966). The executive was widely seen as improperly denying access to public records. *Id.* at 5-6. The legislation was to be an *additional* way to ensure that the People had access to information about how the executive acted. *See.* S. Rep. No. 89-813, at 3 (1965). Although Congress has repeatedly amended FOIA, at no time has it singled out FISC-related cases to be heard in district court.[3] Nor has Congress in myriad FISA amendments said anything about limiting access to its opinions to FOIA requests in district court. To the contrary, the entire purpose of FISA is to concentrate national

[3] *See, e.g.*, Freedom of Information Act and Amendments of 1974, Pub. L. No. 93-502, 88 Stat. 1561; Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976); Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, §§ 1801-04, 100 Stat. 3207, 3207-48 to -50; Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048; Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, 116 Stat. 2383 (2002); Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735; FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538.

security cases before a specialized court with a particular expertise and procedures designed to handle national security matters. It would be contrary to this design to read into a prior statute a requirement that only district courts could be used to obtain FISC opinions. FISA clearly assigns certain foreign intelligence matters to the FISC.

In addition, just because Movants *also* have a statutory right of action via FOIA does not mean that they somehow lose their constitutional right of access. The power of judicial review gives Article III courts the power to determine whether statutes meet constitutional demands. The latter has primacy: a statute cannot invalidate an underlying constitutional right. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-78 (1803). FOIA, in the interests of transparency, may *expand* the public right of access to executive branch documents. But it *cannot diminish rights guaranteed by the Constitution*. Where, as here, common law and the First Amendment guarantee a right of access to judicial opinions, the Constitutional right stands.

III. ARTICLE II CANNOT USE CLASSIFICATION TO PREVENT ARTICLE III FROM ACTING IN ITS CORE CAPACITY.

Perhaps the most remarkable argument made by the Government—again, unrelated to the standing question—is that were the Court to engage in "an independent review of classified national security information," it would be "usurping the Executive's constitutional function." Gov't Opening Br. at 18-19. Referencing *dicta*, the Government claims that classification is "constitutionally committed to the

Executive Branch," Gov't Opening Br. at 21 (citing *Dep't of the Navy v. Eagan*, 484 U.S. 518, 527, 529 (1988)). This statement ignores Congress's classification powers,[4] as well as the fact that Executive Order 13,526 is an executive instrument.[5] *See* discussion, *infra*. The Government cannot use classification to prevent the branches from exercising their core functions. Further, Congress and the Courts *can* release classified documents.[6]

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[4] *See, e.g.,* Atomic Energy Act of 1954, Pub. L. No. 83-703, § 142, 68 Stat. 919, 941 (classification of restricted data); Exec. Order No. 8381 (1940), 3 C.F.R. 634 (1938-1943) (citing Act of Jan. 12, 1938, ch. 2, § 1, 52 Stat. 3, 3 as classification authority).

[5] Subsidiary executive instruments thus implement the order. *See* Office of the Dir. Nat'l Intelligence ("ODNI"), Intelligence Community Directive ("ICD") No. 700, *Protection of National Intelligence* (June 7, 2012); ODNI, ICD No. 701, *Security Policy Directive for Unauthorized Disclosures of Classified Information* (Mar. 14, 2007); ODNI, ICD No. 703, *Protection of Classified National Intelligence, Including Sensitive Compartmented Information* (June 21, 2013); Department of Defense Directive 5210.50, *Management of Serious Security Incidents Involving Classified Information* (Oct. 27, 2014); 3 U.S. Dep't of Def., *Manual 5200.01, DoD Information Security Program: Protection of Classified Information* 86-103 (Feb. 24, 2012) (amended by Change 2, Mar. 19, 2013); 12 U.S. Dep't of State, *Foreign Affairs Manual* pts. 500 & 600, https://fam.state.gov/FAM/FAM.aspx?ID=12FAM (last visited Mar. 2, 2018).

[6] The Senate and House of Representatives retain the right to declassify material, even over Presidential objection. S. Res. 400, 94th Cong. § 8(a), (b)(1)-(5) (1976); Rules of House of Representatives, 115th Cong., Rule X(g)(1) (2017). The Senate Select Committee on Intelligence ("SSCI") controls information in its own records. S. Res. 400 §10. Members may declassify witness names and make classified material available to Senators and to the public. SSCI R.P., 115th Cong., Rules 8.10, 9.5, 9.7; S. Res. 400, § 8(a). The House Permanent Select Committee on Intelligence ("HPSCI") safeguards sensitive national security information. HPSCI R.P., 115th Cong., Rules 12(a)-(b), 14. Once the executive branch provides classified information, it becomes committee material. *Id.* at Rule 13 (labelling it "executive session material"). HPSCI imposes an oath on Committee members and determines which members of the House gain access to the material. *Id.* at Rule 14(d), (f), (g),

FOIA, as recognized by the Government, permits a court to determine whether materials "are in fact properly classified pursuant to such Executive order." 5 USC §552(b)(1). It is not an isolated authority. In *New York Times Co. v. United States*, the Court had no trouble inquiring into classified material. 403 U.S. 713, 714 (1971) (per curiam). Justice Black explained:

> The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. *Id.* at 719 (Black, J., concurring)

In *Horn v. Huddle*, FISC Presiding Judge Royce Lamberth determined that state secrets deprived the defendants of "information required in their defense." Mem. Op., *Horn v. Huddle*, No. 94-1756, at 8 (D.D.C. July 28, 2004), https://www.fjc.gov/sites/default/files/2014/TRDCX004.pdf. When the Court discovered that the executive had been lying, (then) Chief Judge Lamberth ordered the government "to provide the Court with justifications for all of the redactions to the documents and Inspector General reports" so that the court could "undertake a meaningful in camera review of the purportedly privileged information." *Horn v. Huddle*, 636 F. Supp. 2d 10, 20 (D.D.C. July 16, 2009), *vacated*, 699 F. Supp. 2d

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(i). It can release classified information to the entire House or to the public. *Id.* at Rule 14(*l*); House Rule X(11)(g). The committee takes into account national defense and "[s]uch other concerns, constitutional or otherwise, as may affect the public interest of the United States." HPSCI R.P., Rule 14(f)(2)(A), (D).

236 (2010) (vacated for settlement). Efforts to convince the judge to reconsider fell on fallow ground and led to an order directing the government to justify *every single redaction. Horn v. Huddle*, 647 F. Supp. 2d 55, 66 (D.D.C. Aug. 26, 2009), *vacated*, 699 F. Supp. 2d 236 (2010) (vacated for settlement).

The FISC's own rules underscore that the Court retains control over its records and can declassify material: the judge authoring an opinion or order can *sua sponte* request its publication. FISC R. of P. 62(a). Following consultation with other FISC judges, the Presiding Judge may direct publication and *may* (or may not) "direct the Executive Branch to review the order, opinion, or other decision and redact it as necessary to ensure that properly classified information is appropriately protected." *Id. See also* FISC Ct. Rev. R. of P. 20. This explicit grant of authority contradicts the claim that the power to declassify opinions lies in the Executive Branch, or that access to those opinions is available under FOIA or not at all.

CONCLUSION

It may well be that Movants' claim to certain, factual information ultimately proves non-colorable. National security is a realm in which certain information cannot be made public without great risk. But in a democracy built upon transparency and accountability, such circumstances are the exception and not the rule. The precise scope of the First Amendment right of access, moreover, is not the question before

the court. Insofar as the information being sought *is a matter of law*, Movants have the right to argue their common law and First Amendment right of access.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to FISC Ct. Rev. R. P. 15(d)(1)-(2), undersigned certifies that this brief complies with (A) the content requirements of FISC Ct. Rev. R. P. 14(a)(2)-(8) and (10), with the exceptions noted in FISC Ct. Rev. R. P. 15(b)(A)-(C); and (B) the type-volume limitations referenced in FISC Ct. Rev. R. P. 9(c) and Fed. R. App. P. 29(d) and 32(a).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B)(iii), this brief includes 3,931 words.
2. This brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count of this word-processing system in preparing this certificate.

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Dated: Mar. 5, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March 2018, I provided one original and five copies of the amicus brief to Ms. LeeAnn Hall, Clerk of Court, Foreign Intelligence Surveillance Court of Review, who has informed me that the Litigation Security Group will deliver a copy of the brief to:

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I also sent one copy of the amicus brief via Federal Express to each of the following parties:

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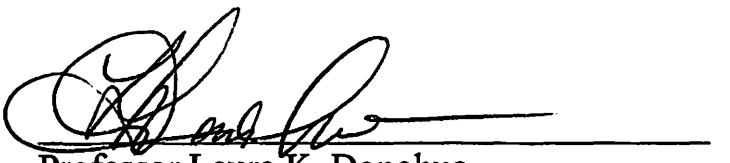

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