

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

Case No. 07-0981-CR

YASSIN MUHIDDIN AREF and
MOHAMMED MOSHARREF HOSSAIN,

Defendants-Appellants.

**MOTION OF THE AMERICAN CIVIL LIBERTIES UNION
FOUNDATION AND THE NEW YORK CIVIL LIBERTIES UNION
FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE***

The American Civil Liberties Union Foundation (“ACLU”) and the New York Civil Liberties Union Foundation (“NYCLU”) (collectively, “*amici*”), through undersigned counsel, respectfully move to participate in this matter as *amici curiae*, for the reasons set forth below. Counsel for both Defendants-Appellants have consented to this Motion. Counsel for the government oppose this Motion.

The ACLU is a nationwide, non-profit, non-partisan public interest organization with more than 500,000 members dedicated to defending the

civil liberties guaranteed by the Constitution. The NYCLU, with more than 40,000 members, is the New York State affiliate of the ACLU. *Amici* have been leaders in protecting civil liberties in a post-9/11 national security context.

In this case, two criminal defendants appeal from the denial of a motion to suppress evidence potentially arising out of the NSA's controversial warrantless electronic surveillance program (hereinafter, "NSA Program"). Thus, the issue of the legality of the NSA Program is before this Court. *Amici* and their many thousands of members are deeply concerned that that the NSA Program may be tainting criminal prosecutions such as this one.

The ACLU is well-qualified to address the issues presented in this case. In January, 2006, the ACLU brought the first legal challenge to the NSA Program. That litigation is ongoing. The ACLU is also litigating a Freedom of Information Act lawsuit related to the NSA Program. *See ACLU v. Dep't of Justice*, No. 06-ca-0214 (D.D.C.).

In addition, *amici* have been involved in numerous other cases before this Court, both as direct counsel and as *amici curiae*, involving the lawfulness of policies and measures implemented by the government in the name of national security. For example, the NYCLU currently has a lawsuit

pending before this Court against the Department of Homeland Security on behalf of American citizens detained and interrogated at the U.S.-Canada border after attending an Islamic religious conference in Toronto. *Tabbaa v. Chertoff*, No. 06-0119-cv (2d Cir.). *Amici* are also litigating a challenge to the statute that allows the FBI to issue “national security letters.” *See Doe v. Gonzales*, 449 F.3d 415, 419 (2d Cir. 2006) (remanding to district court). Also, in 2003 the ACLU argued, as *amici*, before this Court against the designation of an American citizen as an “enemy combatant” without congressional authorization and secured an order for the release of Padilla from military detention and transfer to civilian authorities for a criminal trial. *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003).

In the proceedings below, because the defendants’ suppression motion challenged the legality of the NSA Program, the NYCLU petitioned the district court for permission to submit an *amicus curiae* brief on that issue. *See* Letter from Christopher Dunn to the Hon. Thomas J. McAvoy (Feb. 15, 2006) (I-A134).¹ The district court denied this motion as moot several days after issuing its secret, *ex parte* opinion denying the suppression motion.

¹References to “I-A” are to the Intervenor Joint Appendix filed by the NYCLU in its appeal of the district court’s denial of its motions to intervene and for public access, as distinguished from the Joint Appendix filed by defendants Aref and Hossain.

See Order (March 13, 2006) (I-A139). Subsequently, the NYCLU filed motions for limited intervention and for public access to the secret opinion and the secret government submission opposing the suppression motion. The NYCLU's appeal of the district court's denial of those motions is presently before this Court and has been consolidated with the underlying criminal appeal.

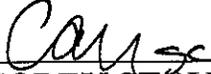
Though it is undoubtedly unusual to request *amicus* status in a case in which proposed *amicus* is also a proposed party, the unusual nature of motions for public access makes such a request logical and procedurally justified. The NYCLU's motion to intervene is a motion for *limited* intervention. Granting that motion would not give *amici* standing for any purpose other than to move for public access to judicial documents under the First Amendment. In particular, it would not give *amici* standing to address the unlawful surveillance issues presented in defendants' suppression motion. Thus, other than in this brief, *amici* have no means to assert their interest in challenging the legality of the NSA Program, the very interest that prompted their involvement in this case to begin with. Although the reasons for doing so are evident, consolidating the NYCLU's appeal from the denial of public access with the defendants' criminal appeal obscures the fact that the issues raised in the two cases – the public's right of access to judicial

documents and the various errors in the prosecution of two criminal defendants – are wholly separate.

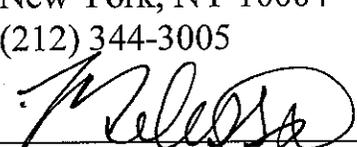
Wherefore, *amici* respectfully request that their Motion be granted, and that they be permitted to file their *amici curiae* brief with this Court on August 24, 2007.

Dated: August 24, 2007
New York, NY

Respectfully Submitted,



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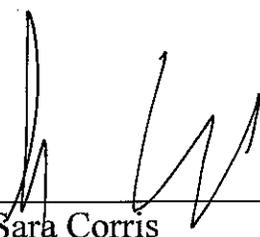
CERTIFICATE OF SERVICE

I certify that on this 24th day of August 2007, I served two copies of the foregoing motion upon the following counsel by email and FedEx next-day courier:

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