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STATEMENT OF INTEREST

Amicus Curiae National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation with a membership of more than 12,000 attorneys and 28,000 affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practices, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to promote the proper and constitutional administration of justice, and to that end concerns itself with the protection of individual rights and the improvement of the criminal law, practices, and procedures. In furtherance of this and its other objectives, NACDL files approximately 35 amicus curiae briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.

The parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

Although Moussaoui raises several important issues in his brief, amicus curiae is particularly troubled by the allegation that his lawyers were prohibited

from sharing material and even exculpatory information with him---even in the face of his decision to plead guilty to all the charges against him---because that information was classified. In addition to the constitutional implications, it is a fundamental principle of the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3 §§ 1-16, that the involvement of classified information in a criminal prosecution shall not place a defendant in a worse position than if the information were unclassified.

As an association of criminal defense lawyers, NACDL has two primary concerns with the use of classified evidence in cases in which the defendant is not given personal access to material information because that information is maintained in a classified form. First and foremost, NACDL is concerned with the impact on the defendant's constitutional and procedural rights. Denying a criminal defendant personal access to classified information (or an acceptable unclassified version of it) that is arguably material to the defense deprives the defendant of his Fifth and Sixth Amendment rights to confront the evidence against him, to testify on his own behalf, and to prepare and present a defense. In addition, excluding a defendant from proceedings on the admissibility of evidence deprives a defendant of his Sixth Amendment right to be present at all critical stages of the proceedings. As these issues are fully briefed in Moussaoui's opening brief, amicus curiae will not address them here.

NACDL's second concern---and the focus of this brief amicus curiae---arises from the disclosure of classified evidence to "cleared" counsel or stand-by counsel in lieu of disclosure to the defendant (or disclosure of an adequate unclassified version of the evidence to the defendant). As a preliminary matter, it is clear that disclosure to counsel is simply not an adequate substitute for personal access by the defendant, particularly to the extent that the involvement of classified information may impinge on constitutional rights that are personal to the defendant, such as the right to testify and to decide whether to plead. Further, as the present case starkly illustrates, providing counsel or stand-by counsel access to classified information in lieu of the defendant deprives the defendant of his constitutional right to the effective assistance of counsel, creates a serious strain on the attorney-client relationship and, in some cases, creates a conflict of interest for counsel. This conflict arises in cases such as this where compliance with a CIPA protective order conflicts with the attorney's constitutional and ethical duty to provide the client with all information necessary to enable to the client to make informed decisions, in this case Mr. Moussaoui's decision to plead guilty.

Since the tragic events of September 11, 2001, the government has endeavored to broaden the grounds for criminal liability under the various terrorism statutes, while at the same time seeking to restrict defendants' personal access to material evidence by maintaining that evidence in a classified form.

Because this case has garnered such tremendous media attention, has been followed by courts across the country, and raises issues that involve some of the United States Constitution's core protections, "this Court must remain vigilant in its role as a guardian of the Constitution and its protections [as it is] bound to defend the liberties of even the most despised members of society, for it is in their cases that our freedoms are most at risk." *United States v. Ivy*, 165 F.3d 397, 404 (6th Cir. 1998).

ARGUMENT

I. Providing classified discovery to cleared defense counsel (or standby counsel) under a protective order that prohibits disclosure to the defendant effectively denies the defendant the right to counsel and to effective assistance and creates an ethical conflict of interest for counsel.

In cases such as this where counsel must operate under a protective order prohibiting counsel from sharing even material and exculpatory evidence with his client, the inability of counsel to consult with his client regarding the content of classified materials effectively deprives the accused of his right to counsel and to the effective assistance of counsel. In addition, such requirements create an ethical dilemma for counsel, who must walk a fine line between complying with the protective order and fulfilling ethical obligations to the client. As this case illustrates, this balancing act strains the attorney-client relationship and, indeed, may destroy it.

A. CIPA must not be applied so as to deny a defendant the right to the effective assistance of counsel.

The Sixth Amendment guarantees to criminal defendants a right not only to counsel, but to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984) ("the right to counsel is the right to the effective assistance of counsel") (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). As the Supreme Court has repeatedly recognized, a defendant may be denied the effective assistance of counsel through no fault of counsel, but through government or court action that "interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Strickland*, 466 U.S. at 686; *see also Geders v. United States*, 425 U.S. 80 (1976) (defendant denied assistance of counsel by bar on attorney-client consultation during overnight recess).

In the context of deciding whether to enter a plea before trial, "an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948). In this case, although counsel may have been permitted to make "an independent examination of the facts, circumstances, pleadings, and laws involved," they were precluded under the protective order from advising

Moussaoui fully on the decision whether to plead guilty. *See* Brief of Appellant at 49-58, 67, 72-73.

In determining whether a defendant has received effective assistance of counsel, courts look to "[p]revailing norms of practice as reflected in American Bar Association standards" as guides "to determining what is reasonable." *Strickland*, 466 U.S. at 688. With respect to advising a client on whether to enter a plea to a criminal charge, the American Bar Association standards have consistently provided that a defense lawyer "has the duty to advise his client *fully* on whether a particular plea to a charge appears to be desirable." ABA Model Code of Professional Responsibility, Ethical Consideration 7-7 (1992) (emphasis added); *see also id.* at 7-8 ("A lawyer should exert his best efforts to ensure that decisions of his client are made only after the client has been informed of relevant considerations."); ABA Standards for Criminal Justice Prosecution Function and Defense Function, Standard 4-5.1(a) (3d ed. 1993) ("After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome."); *id.* at 4-5.2(a) (accused should make decision whether to enter a plea "after full consultation with counsel"). As one legal scholar observed:

> The decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in any criminal case.

> This decision must ultimately be left to the client's wishes. Counsel cannot plead a client guilty, or not guilty, against the client's will. [citation omitted] But counsel may and *must* give the client *the benefit of counsel's professional advice on this crucial decision.*

Anthony G. Amsterdam, Trial Manual 5 for the Defense of Criminal Cases § 201 at 339 (1988), as reproduced in *Boria v. Keane*, 99 F.3d 492, 496-97 (2d Cir. 1996), *decision clarified on reh'ing*, 90 F.3d 36 (2nd Cir. 1996) (emphasis in court's opinion); *see also Roccisano v. Menifee*, 293 F.3d 51, 59 (2d Cir. 2002) (recognizing as well-established the principle "that the right to effective assistance of counsel encompasses the accused's right to be informed by his attorney as to the relative merits of pleading guilty and proceeding to trial").

In this case, the protective order entered pursuant to CIPA appears to have effectively denied Moussaoui the effective assistance of his counsel in making the critical decision to plead guilty to the charges against him. This is not only a constitutional violation, but also a violation of a fundamental principle underlying CIPA, namely that the Act is not to be applied to put the defendant in a worse position than if the evidence were not classified. *See United States v. Dumeisi*, 424 F.3d 566, 578 (7th Cir. 2005), *cert. denied*, 547 U.S. 1023 (2006) (recognizing CIPA's purpose as to "protect[] and restrict[] the discovery of classified information in a way that does not impair the defendant's right to a fair trial") (quoting *United States v. O'Hara*, 301 F.3d 563, 569 (7th Cir. 2002)). Indeed, explicit in CIPA's legislative history is the admonition that "the defendant should

not stand in a worse position, because of the fact that classified information is involved, than he would without this Act." Senate Report No. 96-823, at 4302. Consequently, as this Court pointed out in *United States v. Fernandez,* 913 F.2d 148, 154 (4th Cir. 1990), "[a]lthough CIPA contemplates that the use of classified information be streamlined, courts must not be remiss in protecting a defendant's right to a full and meaningful presentation of his claim of innocence."

The entry and enforcement of a protective order prohibiting counsel from discussing with his client material evidence may render counsel ineffective in other aspects of the trial as well. For example, given that counsel is prohibited from discussing with the defendant the full range of discovery, it may well be impossible for counsel to prepare the accused adequately for *direct* testimony, much less cross-examination.

Thus, even though counsel has access to the classified information, the restriction on communications between counsel and defendant a CIPA protective order imposes could nonetheless violate a defendant's right to testify. That is, the defendant must either testify subject to deprivation of exculpatory classified materials, and without adequate preparation for cross-examination, or forego testifying because of the inability to prepare for the full scope of potential cross.

A defendant possesses a Fifth Amendment right to testify. *See United States v. Dunnigan*, 507 U.S. 87, 96 (1993) (right to testify implicit in the Fifth

Amendment); *Rock v. Arkansas*, 483 U.S. 44, 50-52 (1987) (right to testify is "one of the rights that 'are essential to due process of law in a fair adversary process,'" and is derived from the Fifth, Sixth and Fourteenth Amendments) (quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)). Denying a defendant access to the full range of discovery may effectively deny him the right to make an informed decision (as well as the right to counsel's assistance in making that decision) regarding the exercise of the right to testify because the defendant is prohibited from knowing (and counsel is prohibited from disclosing) the full scope of the government's evidence. This concern is necessarily heightened when the universe of classified information includes accused's statements, including those the government has intercepted pursuant to the Foreign Intelligence Surveillance Act, 50 U.S.C.A. § 1801 *et seq.*

In *Geders*, the Supreme Court held that precluding a defendant from consulting his lawyer overnight while in the midst of government cross-examination deprived the defendant of his right to counsel. Application of CIPA to prohibit counsel from sharing classified discovery with the defendant (or to relieve the government of its burden to provide an adequate substitution that counsel may discuss with the client) may create a far more significant deprivation in cases involving a large amount of classified information. This is because the

defendant is essentially denied counsel all together with respect to a substantial amount of discovery, which counsel cannot discuss with his client.

As the Supreme Court declared in *Chandler v. Fretag*, 348 U.S. 3, 10 (1954), "a defendant must be given a reasonable opportunity to . . . consult with counsel; otherwise the right to be heard by counsel would be of little worth." *See also Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). Without access to all material information, a defendant cannot consult adequately with counsel to assist in the determination of what portions of the classified discovery are relevant and exculpatory, or which might lead to such evidence. Thus, without the ability to confer with the defendant regarding these important issues, counsel may be rendered ineffective.

B. CIPA must not be applied to create a conflict between an attorney's ethical duties to fully inform and zealously represent his client on the one hand, and compliance with secrecy and security regulations on the other.

In this case, although defense/standby counsel identified information that they believed Moussaoui must know before being allowed to plead guilty to the charges, they were prohibited from discussing that information with him pursuant to the protective order. This put counsel's ethical obligations to Moussaoui in direct conflict with their obligations to maintain the secrecy of classified information. This is simply an untenable position for counsel.

Where counsel cannot disclose broad categories of evidence to a defendant, the attorney-client relationship will suffer as it clearly did in this case. *See* Brief of Appellant at 83. There are two reasons for this. First, as this Court has recognized, "a critical component of the Sixth Amendment's guarantee of effective assistance is the ability of counsel to maintain uninhibited communication with his client and to build a 'relationship characterized by trust and confidence.'" *United States v. Chavez*, 902 F.2d 259, 266 (4th Cir. 1990) (quoting *Morris v. Slappy*, 461 U.S. 1, 21 (1983) (Brennan, J., concurring)). That trust and confidence is necessarily undermined when counsel must repeatedly tell his own client there are categories of evidence or aspects to the case that counsel cannot discuss with him.

While courts have approved the withholding of limited information from the defendant (for example, the timing of a particular witness's testimony due to concerns about witness tampering), *see Morgan v. Bennett*, 204 F.3d 360 (2d Cir. 2000), such "carefully tailored, limited restriction[s] on the defendant's right to consult counsel" have far less impact on the attorney-client relationship than a ban on disclosure of material and exculpatory evidence. The restrictions at issue in those other cases do not impede the development of the defense or the realization of the defendant's other constitutional rights. For example, in *Morgan*, the court prohibited defense counsel from disclosing to his client the fact that a particular witness would be testifying the next day. 204 F.3d at 363. However, the

defendant was present when the witness actually testified and no further restrictions were placed on counsel's communications with the client. *Id.* at 368. In terrorism cases like this one, however, CIPA protective orders are being applied to prevent defense counsel from discussing substantial portions of discovery, including critical information such as exculpatory evidence or the defendant's own prior statements. *See, e.g.*, *United States v. Holy Land Foundation for Relief and Development*, 2007 WL 628059 (N.D. Tex. Feb. 27, 2007) (unpublished decision) (while recognizing inaccuracies in unclassified summaries of classified statements by the defendants, nonetheless holding CIPA constitutional as applied to deny defendants personal access to their own statements).

Second, the government's exclusive control over the timing and scope of the declassification process means that, as in this case, a defendant may learn of critical information for the first time from sources other than his counsel under circumstances that make it apparent counsel had been aware of the information for some time. *See* Brief of Appellant at 58. It has been noted that "the Federal Government exhibits a proclivity for over-classification of information." *Ray v. Turner*, 587 F.2d 1187, 1209 (D.C. Cir. 1978) (Wright, J., concurring) (quoting former Sen. Baker); *cf. United States v. Morison*, 844 F.2d 1057, 1081 (4th Cir. 1988) (Wilkinson, J., concurring) ("There exists the tendency, even in a constitutional democracy, for government to withhold reports of disquieting

developments and to manage news in a fashion most favorable to itself."). At the same time, the defense "cannot challenge [the government's] classification. A court cannot question it." *United States v. Smith*, 750 F.2d 1215, 1217 (4th Cir. 1984), *on reh'g*, 780 F.2d 1102 (4th Cir. 1985) (en banc). Under these circumstances, the client could conclude that his own lawyer has intentionally withheld more than the protective order requires, when, in fact, the government had classified the information.

Clearly the government may have a legitimate and important interest in maintaining the secrecy of some classified information, particularly in cases involving allegations related to terrorism. However, as this Court has recognized, "[t]here is no question that the Government cannot invoke national security concerns as a means of depriving Moussaoui of a fair trial" or of his other constitutional rights. *United States v. Moussaoui*, 382 F.3d 453, 466 n.18 (4th Cir. 2004). If national security can be invoked to deny or abridge a defendant's Sixth Amendment right to counsel (or his other constitutional rights for that matter), a dangerous precedent is set.

> That is not a result that can be tolerated in a civilized society founded on the rule of law. It is precisely when the lowest or most despised members of society are subjected to the investigatory and penal power of the State, when the charged crimes are most heinous … or the defendant's guilt supposedly most obvious, that courts must be most vigilant to protect defendants' constitutional rights for the sake of all members of society, the favored as well as the despised. History shows that the tables can turn with shocking rapidity, such that

> everyone has a vested interest in protection of constitutional rights from erosion, even if that erosion seems justified in a particular case by "legitimate reasons."

United States v. Johnson, 196 F. Supp. 2d 795, 885 (N.D. Iowa 2002), *rev'd on other grounds*, 338 F.3d 918 (8th Cir. 2003).

II. Cases involving classified evidence are proliferating and the legal principles and law enforcement techniques used in such cases are seeping into the prosecutions of ordinary criminal cases.

Since the attacks of September 11, 2001, the United States Government has endeavored to broaden the grounds for criminal liability under the various terrorism statutes, while at the same time seeking greater restrictions on defendants' discovery rights. In prosecutions for charges related to terrorism, CIPA is applied in courtrooms throughout America in ways that ultimately prejudice criminal defendants. Because the number of cases involving classified evidence has increased significantly in the past few years, it is essential that this Court consider the potential constitutional implications to other criminal defendants of its resolution of the CIPA issues Moussaoui has raised.

As Moussaoui notes in his brief, protective orders such as the one entered in this case have been and continue to be entered in cases across the country. *See, e.g., United States v. Hayat*, No. 05-cr-00240-GEB, Dkt. No. 184 at 4-5, 8-9 (E.D. Cal. Feb. 3, 2006) (prohibiting disclosure of classified evidence to any person (including the defendant) who has not been approved by the court or has not

received appropriate security clearances); *United States v. Hassoun*, No. 04-cr-60001-MGC, Dkt. No. 315 (S.D. Fla. Mar. 29, 2006) (same); *United States v. Damrah*, No. 03-cr-00484-JG, Dkt. No. 53 (N.D. Ohio Apr. 6, 2004) (same); *United States v. Holy Land Foundation*, No. 04-cr-240-G, Dkt. No. 146 (Apr. 5, 2005) (same).

Furthermore, the government has endeavored to extend procedures developed to address national security concerns in the context of terrorism cases to more run-of-the mill criminal cases. For example, in two cases involving allegations of material support to the Palestinian terrorist group, Hamas, federal district courts permitted Israeli agents---including at least one agent appearing as a purported expert---to testify using pseudonyms on the basis that their true identity was classified. *See United States v. Marzook*, 412 F.Supp.2d 913, 923 (N.D. Ill. 2006); *United States v. Holy Land Foundation*, No. 04-cr-240-G, Dkt. No. 628 (May 4, 2007). In a prosecution for narcotics distribution, the government relied on the *Marzook* case to argue that the court should allow six Israeli surveillance agents to testify under their "officer number" rather than their actual names. The district court denied the request, but did grant the government's request to have the agents testify in light disguise. *United States v. Rosenstein*, No. 04-cr-21002, Dkt. No. 91 (S.D. Fla. Nov. 22, 2006). These cases remind us of the significance and far-reaching impact of this Court's resolution of the present case.

CONCLUSION

Cases involving classified information have proliferated since September 11, 2001. Although the majority of cases involve allegations of terrorism, the government increasingly is using classified information in common criminal cases, such as narcotic distribution cases. Because the use of classified information and the application of CIPA raise serious constitutional questions, amicus curiae NACDL asks the Court to exercise great caution when resolving this important and closely-watched case, which tests our nation's commitment to guaranteeing critical constitutional protections to those accused of all types of crimes.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because it contains 3,687 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 a proportionally spaced typeface using Microsoft Office Word 2003 in Times New Roman, fourteen point font.

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