

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

UNITED STATES OF AMERICA :
 :
v. : CRIMINAL INDICTMENT NO.
 : 4:05-CR-27 - HLM
FALGUN PATEL and :
ANERI, Corp. :
d/b/a Tobacco and Beverage Mart :

UNITED STATES OF AMERICA :
 :
v. : CRIMINAL INDICTMENT NO.
 : 4:05-CR-33 - HLM
SUDHIRKUMAR PATEL and :
KASHIBA, Inc., :
d/b/a Deep Springs Grocery :

UNITED STATES OF AMERICA :
 :
v. : CRIMINAL INDICTMENT NO.
 : 4:05-CR-38 - HLM
SATISHKUMAR PATEL and :
JAI GOPAL, Inc. :
d/b/a Creekside Grocery :

**MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR DISCOVERY
BASED ON NEWLY DISCOVERED EVIDENCE OF SELECTIVE
ENFORCEMENT AND BRIEF IN SUPPORT THEREOF**

Defendants Falgun Patel, Sudhirkumar Patel, and Satishkumar Patel (“Defendants”) bring this motion based on newly discovered evidence and respectfully move the Court, pursuant to the United States Constitution’s Fourteenth Amendment Equal Protection Clause and Fifth Amendment Due Process Clause, for: (1) an order dismissing this action on the grounds that Defendants (along with other persons of Indian and Pakistani origin) were selectively targeted for investigation and arrest based on their South Asian ethnicity or, in the alternative, (2) an order allowing discovery and an evidentiary hearing regarding all portions of the government’s investigative files related to Operation Meth Merchant that will reveal (a) all investigative leads collected at the time government officers commenced a campaign of targeted buys against Defendants and other South Asians and (b) whether government investigators pursued those leads in a selective and discriminatory fashion, targeting South Asian businesses and store clerks rather than all suspects reported to the government (or a representative class thereof).¹ In support of this motion, Defendants show the Court as follows:

INTRODUCTION

¹ For the Court’s convenience, Defendants have attached a Proposed Order for Discovery to this Motion and Brief as Exhibit A.

Between December of 2003 and May of 2005, Georgia state and federal law enforcement officers conducted a sting operation code-named Operation Meth Merchant (“OMM”), which involved sending at least sixteen Confidential Informants (“CIs”) to dozens of retailers that were operated by South Asians.² On June 2, 2005, the Court unsealed 24 indictments,³ involving 24 businesses (23 of which were South Asian owned) and 49 individuals (44 of whom are South Asian).⁴ The indictments allege that all of the defendants sold general household ingredients that can be used for the production of methamphetamine (“meth”) with reasonable cause to believe that these ingredients would be used by others to make the drug. Given that only 19.3% of the stores in the relevant area are owned or managed by persons of South Asian descent, this ethnic class was over 95 times more likely to be targeted by OMM than other similarly situated merchants. Moreover, law enforcement officers ignored numerous active leads that they had received regarding identical sales by non-South Asian merchants and deliberately

² Although Defendants are charged under the federal statute, Defendants note that the Georgia law which requires stores to place products containing ephedrine, pseudoephedrine, and phenylpropanolamine behind the counter and to limit sales to no more than three packages did not go into effect until July 1, 2005. *See* O.C.G.A. § 16-13-30.3.

³ Crim. Indict. Nos. 4:04-CR-018 through 4:05-CR-041.

⁴ *See* Order, Docket No. 67 [4:05-CR-27-HLM]; Order, Docket No. 75 [4:05-CR-33-HLM]; Order, Docket No. 71 [4:05-CR-38-HLM] (denying Defendants’ initial Motion to Dismiss for Selective Prosecution on the basis that Defendants had not provided enough evidence to satisfy their burden.)

targeted South Asian retailers by repeatedly directing CIs to perform controlled buys almost exclusively at South Asian stores, even after being confronted by the objection of at least one CI.

This impermissibly selective investigation violated Defendants' constitutional rights to equal protection of the laws and clearly satisfies the following well-established two-part test for dismissal based on such selective enforcement of the criminal laws: (1) Defendants have "been singled out for prosecution although others similarly situated who have committed the same acts have not been prosecuted"; and (2) "the government's selective prosecution of [Defendants] has been constitutionally invidious."⁵ Defendants have provided clear evidence that (1) hundreds of other non-South Asian retailers in the same area committed identical acts but were not investigated, and (2) Defendants were selected for investigation based on their South Asian ethnicity. In light of this evidence, the Court should dismiss the government's charges against Defendants. Even if the Court finds that Defendants have not entirely satisfied both of these factors, however, the substantial evidence that Defendants have provided on both of these elements justifies an order allowing formal discovery and an evidentiary hearing to further develop evidence on these issues.

⁵ *Owen v. Wainwright*, 806 F.2d 1519, 1523 (11th Cir. 1986).

PROCEDURAL HISTORY

The government has charged Defendants with violations of 21 U.S.C. § 841(c)(2) and 21 U.S.C. § 843(a)(7) which make it unlawful to distribute certain legal products while knowing or having reason to believe they will be used to manufacture a controlled substance such as meth. In September 2005, Defendants filed motions to dismiss on the basis of the government's unconstitutionally selective prosecution.⁶ Several other defendants in related cases also submitted motions to dismiss for selective prosecution or adopted one of the previously filed motions as their own.⁷ By an Order entered on November 18, 2005, this Court denied Defendants' motions based on the lack of evidence tending to show that similarly situated individuals of a different ethnicity or national origin were not prosecuted or that a discriminatory purpose animated any difference in treatment.⁸

⁶ Docket Nos. 4:05-CR-27 [53, 57]; 4:05-CR-33 [55, 60]; 4:05-CR-38 [53, 57].

⁷ *See also* Docket Nos. 4:05-CR-024 [41]; 4:05-CR-025 [66]; 4:05-CR-026 [32]; 4:05-CR-21 [65]; 4:05-CR-22 [52]; 4:05-CR-19 [32, 33, 36]; 4:05-CR-20 [68, 69]; 4:05-CR-21 [70]; 4:05-CR-25 [77, 78, 81, 83]; 4:05-CR-29 [77, 83]; 4:05-CR-30 [46]; 4:05-CR-31 [33, 36]; 4:05-CR-34 [24]; 4:05-CR-35 [25, 46]; 4:05-CR-36 [72, 75, 73, 76]; 4:05-CR-37 [31, 34]; 4:05-CR-38 [53]; 4:05-CR-39 [42, 43, 47]; 4:05-CR-40 [40, 43, 47]; 4:05-CR-41 [32, 35]. Unless otherwise noted, numbers in brackets refer to the document number for Docket No. 4:05-CR-27.

⁸ Order at 26, Docket No. 67 [4:05-CR-27-HLM]; Order at 26, Docket No. 75 [4:05-CR-33-HLM]; Order at 26, Docket No. 71 [4:05-CR-38-HLM].

On December 19, 2005, attorneys from the American Civil Liberties Union (“ACLU”) entered appearances on Defendants’ behalf. Since that time, counsel has conducted an extensive factual investigation involving five attorneys, three investigators, and numerous ACLU staff members.⁹ The ACLU has spent more than \$60,000.00 on this investigation, including more than \$35,000.00 in fees for private investigators.¹⁰ This extensive investigation includes, *inter alia*, numerous Georgia open records act requests, a detailed review of police records, interviews with persons (both in and out of custody) who have been arrested on charges involving manufacture of methamphetamine in the relevant area of northwest Georgia,¹¹ and thorough compilations of quantitative data concerning the representation of South Asians in the class of similarly situated merchants.¹² Thus far, the investigation has generated over 10,000 documents, countless interviews, and a wealth of information that was not available to Defendants or Defendants’ counsel prior to addition of the resources made available by the appearance of the

⁹ See Declaration of Christina Alvarez (“Alvarez Dec.”) ¶¶ 2-3, attached hereto as Exhibit B.

¹⁰ *Id.* ¶¶ 6, 8.

¹¹ See Declaration of Skyla Olds (“Olds Dec.”) ¶¶ 3-10, attached hereto as Exhibit C.

¹² See generally Declaration of Zachary Kerns (“Kerns Dec.”), attached hereto as Exhibit D. See Declaration of Michael E. Tate (“Tate Dec.”), attached hereto as Exhibit E.

ACLU.¹³ In the interest of justice, Defendants respectfully request that the Court consider their Motion to Dismiss Or, In The Alternative, For Discovery Based On Newly Discovered Evidence Of Selective Enforcement And Brief In Support Thereof.

STATEMENT OF FACTS AND EVIDENCE

Based on the prior motions, this Court is familiar with the basic facts of these cases, and Defendants will repeat only those facts that are necessary for this Motion.

I. OPERATION METH MERCHANT: OMM Focused On Retailers Selling Regular Household Ingredients That Could Be Mixed With Other Chemicals To Manufacture Meth.

In 2003, state and local law enforcement agents initiated OMM in six northwest Georgia counties: Catoosa, Chattooga, Dade, Floyd, Walker, and Whitfield. Georgia Bureau of Investigation Special Agent Del Thomasson and Catoosa County Detective Alan Miles played key leadership roles in the OMM investigation. OMM's stated goal was to target merchants who sold ingredients used for the manufacture of meth and who had reasonable cause to believe that these substances would be used to produce the drug.¹⁴ However, this task was

¹³ See Alvarez Dec. ¶¶ 4, 8 (noting that the ACLU has spent more than \$60,000 conducting the investigation).

¹⁴ See Declaration of Alyse Bertenthal ("Bertenthal Dec.") ¶ 5, attached hereto as Exhibit F (describing interview with Detective Alan Miles who stated that law

complicated by the fact that most of the ingredients at issue are common household products that are readily available at over 600 discount, drug, convenience, and hardware stores in these six counties. Rather than either pursuing specific investigative leads regarding the merchants who were selling these ingredients to known meth manufacturers or choosing a random sample of retailers stocking such products, OMM agents specifically targeted a small number of stores operated by South Asians.

II. SIMILARLY SITUATED DEFENDANTS: OMM Targeted Almost Exclusively South Asian Retailers And Clerks, Even Though Government Agents Had Numerous Credible Leads Concerning Non-South Asian Businesses.

The Court is well aware that OMM's investigation focused almost entirely on South Asian merchants. *Twenty-three out of the twenty-four stores charged were South Asian owned or operated*, and the vast majority of the individuals indicted are South Asian. OMM's concentration on South Asian stores is remarkable in light of the evidence of similarly situated non-South Asian stores that were never targeted. Importantly, by the time that OMM agents performed targeted buys on Defendants' stores, they had received numerous tips from several persons arrested for manufacturing meth regarding an abundance of local non-

enforcement's purpose in targeting sellers was to avoid the dangerous and time consuming work of going after meth labs).

South Asian stores where meth manufacturers were actively purchasing ingredients for the drugs. However, these government agents ignored the tips and focused their investigation almost exclusively on South Asian merchants. Moreover, while South Asians comprise less than 20% of the 629 similarly situated merchants selling these products in the six-county area in which OMM operated, over 95% of the indicted stores were South Asian. As such, South Asian stores were over 95 times more likely to be indicted than similarly situated non-South Asian stores.

A. IGNORING ACTIVE LEADS: OMM Agents and Other Law Enforcement Officials Ignored Relevant Leads Involving Meth Ingredients Sold From Non-South Asian Retailers.

Defendants have discovered evidence that Agent Thomasson and Detective Miles ignored numerous leads and tips regarding stores that (a) sold meth ingredients to meth manufacturers; (b) were located within the six-county area targeted by OMM; and (c) were owned or operated by non-South Asians.

Defendants have been able to uncover the following instances in which such tips were received, and evidently ignored, by law enforcement:

- (1) One CI who worked for the Government (referred to as “John Doe 2”¹⁵ for purposes of this motion), has sworn in a declaration that

¹⁵ This declarant has used an anonymous John Doe designation because the declarant fears harassment and retaliation if his true identity were revealed to law enforcement. Defendants have filed a Motion for Protective Order

he/she informed Agent Thomasson that he/she purchased products from stores including “*Walmarts, Target, Dollar General, Family Dollar*, convenience stores and mom & pops.”¹⁶

- (2) In October 2003, Stephanie Lolley was arrested in connection with a meth manufacturing operation. In a statement to Agent Thomasson made on October 28, 2003, Ms. Lolley admitted that “[her husband] ha[d] asked [her] to go out and get cold pills at a *Dollar Store* on Cleveland Highway and also a *Dollar Store* in front of the Winn-Dixie on Cleveland Highway,” and that she had “gone to each one of the *Dollar Stores* on two (2) different occasions.”¹⁷
- (3) Around January 2004, Terri Bates was arrested in connection with a meth manufacturing operation. Ms. Bates stated that she purchased “matches and pills from *Gerald’s Food Mart* located on Old Grade

contemporaneous with this Motion that seeks to prevent disclosure of John Doe 2’s true identity.

¹⁶ See Declaration of John Doe 2 (“John Doe 2 Dec.”) ¶ 5, attached hereto as Exhibit G (emphasis added).

¹⁷ See Whitfield County Sheriff’s Department Incident Report – Lolley, dated October 24, 2003 at 15, attached hereto as Exhibit H (emphasis added).

Road”¹⁸ and that others “purchased bottles of HEET from the *Walmart*.”¹⁹

- (4) Around February 2004, Telina Wasserman was arrested in connection with a meth manufacturing operation. Ms. Wasserman reported to law enforcement that the following items were purchased for the meth manufacturing operation in which she had been involved: (a) matches and pills purchased from the *Jerrell’s Food Market*,²⁰ (b) acid and tubing bought from *The Warehouse Store*,²¹ (c) fuel injection cleaner found at the *Dollar Store*,²² and (d) matches purchased from *Creekside Store*.²³
- (5) Before October 2004, an apparent meth manufacturing suspect, Kathy Combs, informed Dade County detectives that an acquaintance, Rodney Lough, had purchased ephedrine from a *Dollar General* store

¹⁸ See Whitfield County Sheriff’s Department Incident Report – Bates, dated January 2, 2004 at 3, attached hereto as Exhibit J (emphasis added). “Jerrell’s” Food Market is located at 2680 Old Grade Road, Dalton, Georgia 30721, See Chart at 56 attached to Kerns Dec., Exhibit D.

¹⁹ See Whitfield County Sheriff’s Department Incident Report - Bates dated January 2, 2004 at 3 (emphasis added).

²⁰ See Whitfield County Sheriff’s Department Incident Report – Wasserman, dated February 13, 2004 at 12, attached hereto as Exhibit I.

²¹ *Id.* at 6.

²² *Id.* at 11.

²³ *Id.* at 12.

in Trenton, Georgia.²⁴ At the time of his arrest, a Dollar General store bag was found in the automobile in which he was traveling, and detectives found ephedrine pills, matches, and HEET in the bag.²⁵ When the arresting officer questioned Lough and his companion, his companion stated that “they had just been to the Dollar General store and had purchased the HEET.”²⁶

These informants’ identification of a broad spectrum of non-South Asian stores as sources for the common ingredients used to manufacture meth is by no means unusual. As one convicted meth manufacturer (referred to for purposes of this motion as “John Doe 1”)²⁷ admitted in an attached declaration, he knows of several stores, including *Hartline’s Grocery* and *Breezy Top* (neither of which are owned or operated by South Asians), where he could freely “purchase up to 20 boxes” of pseudoephedrine “if they had them in stock,”²⁸ and “[i]t is common knowledge in the meth community that during [the period in question] you could

²⁴ See *Lough v. State*, 276 Ga.App. 495, 496, 623 S.E.2d 688, 689 (2005).

²⁵ *Id.* at 496, 623 S.E.2d at 690.

²⁶ *Id.*

²⁷ This declarant has used an anonymous John Doe designation because the declarant fears harassment and retaliation if his true identity were revealed to law enforcement. Defendants have filed a Motion for Protective Order contemporaneous with this Motion that seeks to prevent disclosure of Doe 1’s true identity.

²⁸ Declaration of John Doe 1 (“John Doe 1 Dec.”) ¶ 6, attached hereto as Exhibit K.

go to any of the local stores and get the amount of chemicals you needed.”²⁹

According to John Doe 1, these stores included both small locally-owned businesses and larger operations like “*Food Lion, Dollar General, Family Dollar, Fred’s, Avaco*, [and] *Bell’s Smokeshop*.”³⁰ John Doe 1 further noted that *Citgo* on Slygo road, “back when Larry Moses and Lamar MacBor owned it,” sold such quantities that they would “sell out quick.”³¹

Moreover, as the meth problem in north Georgia worsened, it became standard procedure for law enforcement to ask anyone who was arrested or questioned for meth manufacturing where they had purchased the ingredients to make meth.³² Law enforcement received tips on stores including *Bi-Lo, Hartline’s, Sue’s Market in Rising Fawn, Tobacco and Beverage Mart, Food Lion* in Dade County and various *Walmarts* in the surrounding areas.³³ As a result, OMM agents who were familiar with the community of meth manufacturers would certainly have known (even without the numerous, specific, and documented tips identified above) that a wide variety of non-South Asian

²⁹ *Id.* ¶ 8.

³⁰ *Id.* ¶ 9 (emphasis added).

³¹ *Id.* ¶ 7.

³² *See* Declaration of Andrew Pennington (“Pennington Dec. (03/29/06)”) ¶ 10, dated March 29, 2006, attached hereto as Exhibit L (describing interview with former investigator previously employed with Dade County Sheriff’s Office during time of OMM); Bertenthal Dec., ¶ 4, Exhibit F.

³³ *Id.* ¶ 13.

merchants commonly sold these ingredients under potentially suspicious circumstances.³⁴

Out of the above identified tips, OMM targeted Creekside, Famous Market, Hartline's, Sue's Market, and Tobacco and Beverage Mart.³⁵ The primary commonality among these stores is the ethnicity of the store's owner—all except Hartline's is South Asian owned.³⁶ It appears that law enforcement completely ignored the vast majority of the tips they received regarding non-South Asian

³⁴ This conclusion is further strengthened by the fact that at least one non-South Asian merchant was visited by Detective Miles in April 2005 (16 months after OMM performed its first targeted buy on Defendant Falgun Patel's store, Tobacco and Beverage Mart) in an apparent effort to inform the store owner regarding what products the store carried that could be used to manufacture meth. *See* Declaration of Andrew Pennington ¶¶ 20-21 ("Pennington Declaration (04/03/06)"), dated April 3, 2006, attached hereto as Exhibit M. During this visit, Agent Miles identified several products in the store (including HEET, starting fluid, Drano, matches, and cold tablets with ephedrine) as potential meth ingredients. *Id.* Notably, Defendants were never put on notice by OMM agents in this manner.

³⁵ *See* Indictment, Docket No. 1 [4:05-CR-27-HLM]; Indictment, Docket No. 1 [4:05-CR-33-HLM]; Indictment, Docket No. 1 [4:05-CR-38-HLM].

³⁶ Not only is Hartline's Grocery the *only* non-South Asian store indicted in OMM, but inculpatory evidence available to government investigators about Hartline's was overwhelming compared to the other stores targeted in OMM. Tonya Layman, the clerk at Hartline's, is a known meth user whose husband was incarcerated for "cooking methamphetamine." *See* Exhibit A to Search Warrant for Hartline's Grocery and Hartline's Deli, attached hereto as Exhibit N. By contrast, government records available to Defendants do not evidence any information suggesting that any of the store clerks or owners of the 23 South Asian stores was ever associated with using, selling or manufacturing meth or any other illegal substance.

retailers. Importantly, only one of the multitude of non-South Asian merchants that sold these ingredients was ever indicted in the OMM sting operation.

B. PROFOUND STATISTICAL DISPARITIES: South Asian Stores Were Over 95 Times More Likely to Be Targeted For Investigation Than Non-South Asian Stores.

Based upon Defendants' investigation, there are 629 discount, drug, convenience, and hardware stores that (1) are located in the six-county area in which OMM operated and (2) sell products that may be used to manufacture methamphetamine.³⁷ Of the 610 stores for which the identity of the owners and/or managers are known,³⁸ 80.7% (or 492) appear to be owned by non-South Asians.³⁹ Only 19.3% (or 118) are owned by South Asians.⁴⁰

Measuring from this baseline, the disparate impact of the indictments in this matter upon South Asian stores is overwhelming. Of the 118 South Asian-owned stores in the area, 23 (or 19.5%) were indicted. Of the 492 non-South Asian

³⁷ See Chart at 1 attached to Kerns Dec., Exhibit D (attaching a list of all 629 relevant retail stores, separated by county and identifying the store name, address, owner, and manager).

³⁸ *Id.* This calculation excludes 19 stores where the owners and/or managers could not be determined.

³⁹ Kerns Dec. ¶¶ 37-42; Chart at 1 attached to Kerns Dec., Exhibit D. The owners' ethnicity is based upon an analysis of surnames, a method that has been approved for similar ethnicity studies. See *Castaneda v. Partida*, 430 U.S. 482, 487 (treating all persons with Spanish surnames as Mexican-American for the purpose of assessing a claim of discrimination against Mexican-Americans in grand jury selection).

⁴⁰ Chart at 1 attached to Kerns Dec., Exhibit D.

retailers in the area, only one, Hartline's Grocery, (or 0.2%) was indicted.

Therefore, law enforcement officers were over 95 times more likely to target and indict South Asian stores than similarly situated non-South Asian stores for identical acts of selling any of an extensive list of perfectly legal household products that can be used as ingredients in meth manufacturing.

III. PURPOSEFUL TARGETING: OMM Officers Directed Their CIs To Target South Asian Stores, Even After At Least One CI Challenged Such Targeting.

Government investigators directing OMM specifically targeted South Asian merchants. This fact was even obvious to at least one CI who was used in the operation. John Doe 2, who was used by the government to make targeted buys, has sworn under penalty of perjury that he/she routinely purchased products from “all over,” but law enforcement “only sent me to Indian stores” to perform controlled buys.⁴¹

John Doe 2 stated that the officers he/she worked with, including Agent Thomasson, ordered him to make targeted buys at specific stores and directed him/her regarding what to say during the buys, including statements such as “I need it to go cook” or “Hurry up, I've got to get home and finish a cook.”⁴² When John Doe 2 expressed concern that people who manufacture meth would never

⁴¹ See John Doe 2 Dec. ¶ 8, Exhibit G.

⁴² *Id.* ¶ 9.

offer such unsolicited and incriminating statements, the officers (a) ordered him/her to make the statements subsequent to the paying for and receiving the products and (b) explained “that the Indians’ English wasn’t good, and they wouldn’t say a lot so it was important for [him/her] to make th[ose] kinds of statements”⁴³ to support the arrests.

ARGUMENT AND CITATION TO AUTHORITY

I. **DISMISSAL: These Cases Should Be Dismissed Because The Government Has Selectively Enforced The Criminal Laws Against The Defendants Because Of Their South Asian Ethnicity.**

The charges against Defendants should be dismissed because the government’s racially biased targeting of South Asian convenience stores and store employees has violated their Fifth and Fourteenth Amendment rights to due process and equal protection of the laws.⁴⁴ Because these constitutional violations are divorced from the merits of the government’s claims against Defendants, they raise issues that are proper for the Court to decide prior to trial.⁴⁵

⁴³ *Id.* ¶ 12.

⁴⁴ U.S. Const., amend. V (mandating that the federal government provide due process of law); U.S. Const., amend. XIV (mandating that states may not deny any person “the equal protection of the laws”); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that equal protection requirements are implicit in the Fifth Amendment’s due process clause and, thus, are binding on the federal government as well as the states).

⁴⁵ *See, e.g., U.S. v. Jones*, 52 F.3d 924 (11th Cir. 1995).

A. THE DISMISSAL STANDARD: The Selective Enforcement Dismissal Standard Involves Two Elements, Both Of Which Are Satisfied By Defendants.

The requirements for a selective enforcement claim draw on “ordinary equal protection standards.”⁴⁶ In *Yick Wo v. Hopkins*, the United States Supreme Court

held that:

Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.⁴⁷

To establish that their equal protection rights have been violated, Defendants must demonstrate that the government’s enforcement actions: (1) had a discriminatory effect and (2) were motivated by a discriminatory purpose.⁴⁸ Defendants have provided clear and convincing evidence⁴⁹ that satisfies these two elements. This

⁴⁶ *U.S. v. Armstrong*, 517 U.S. 456, 465 (1996) (internal quotations omitted).

⁴⁷ 118 U.S. 356, 373-74 (1886).

⁴⁸ *See, e.g., U.S. v. Smith*, 231 F.3d 800 (11th Cir. 2000).

⁴⁹ Notably, Defendants *have provided clear and convincing evidence* that law enforcement officers have selectively enforced the law against them in violation of the Equal Protection Clause. Defendants assert, however, that such a heavy burden is not required because the proper standard for evaluating claims of unconstitutional profiling by law enforcement is actually *preponderance of the evidence*. *See, e.g., Farm Labor Organizing Committee v. Ohio State Highway Patrol*, 308 F.3d 523, 536 (6th Cir. 2002) (applying the preponderance standard to selective police investigation claims); *Chavez v. Illinois State Police*, 251 F.3d 612,

Court should dismiss the indictments against Defendants because Defendants have provided clear and convincing evidence that (1) hundreds of other non-South Asian retailers in the same area committed almost identical acts and government investigators knew about these acts but did not investigate them, and (2) Defendants were purposefully selected for investigation based on their South Asian ethnicity.

B. DISCRIMINATORY EFFECT: The Government Ignored Information Uncovered During Its Investigation Regarding The Conduct Of Numerous Similarly Situated Non-South Asian Retailers.

Government investigators singled out Defendants for investigation while ignoring similarly situated suspects of other ethnicities who were reported to government agents for committing the same basic acts that Defendants are alleged to have committed and in substantially the same manner.⁵⁰ The first prong of a selective enforcement claim requires a defendant to establish that the investigative policy had a discriminatory effect. In order to establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different

640 (7th Cir. 2001) (rejecting the *Armstrong* standard because it “is narrowly focused on the constitutional implications of interfering with the prosecutorial function,” which is not a factor in selective investigation claims); *U.S. v. Cuevas-Ceja*, 58 F. Supp. 2d 1175, 1184 (D. Or. 1999) (“A defendant must demonstrate by a preponderance of the evidence that police initiated an investigation because of race.”).

⁵⁰ *Armstrong*, 517 U.S. 456.

race were not prosecuted.⁵¹ The Eleventh Circuit defines a similarly situated person as:

one who engaged in the same type of conduct . . . so that any prosecution of that individual would have the same deterrence value and would be related in the same way to the Government's enforcement priorities and enforcement plan- and against whom the evidence was as strong or stronger than that against the defendant.⁵²

In *United States v. Armstrong*, the defendants' sole evidence in support of their selective prosecution claim consisted of a paralegal's affidavit and a "study" that identified each of 24 defendants, the defendants' race, whether the defendants were prosecuted for dealing cocaine as well as crack, and the status of each case.⁵³ In finding that the defendants had not shown that the government failed to prosecute similarly situated individuals, the United States Supreme Court outlined the type of evidence that should have been produced in support of such a claim. First, the Court noted that the defendants could have investigated whether similarly situated persons of other races "were known to federal law enforcement officers, but were not prosecuted."⁵⁴ Moreover, in rejecting the defendants' claims, the Court emphasized that the defendant "failed to identify individuals who were not

⁵¹ *Armstrong*, 517 U.S. at 465.

⁵² *Smith*, 231 F.3d at 810.

⁵³ *Armstrong*, 517 U.S. at 459.

⁵⁴ *Id.* at 470.

[the same race as defendant] and could have been prosecuted for the offenses for which [defendants] were charged, but were not so prosecuted.”⁵⁵ Here, Defendants’ investigation has uncovered just the type of evidence the Court found lacking in *Armstrong*.

1. Similarly Situated Parties Are All Non-South Asian Stores In The Six-County Area That Sold Products That Could Be Used To Manufacture Methamphetamine.

In the Eleventh Circuit, in order to determine who is similarly situated, the Court must look to the legitimate factors that may motivate an investigator’s decision to bring a case against a particular defendant.⁵⁶ Those factors include (1) the strength of the case; (2) the general deterrence value; (3) the government’s enforcement priorities; and, (4) the case’s relationship to the government’s overall enforcement plan.⁵⁷ Importantly, since the analysis requires examination of the investigator’s motivations, it is crucial for the Court to look to the universe of information available to investigators *at the time the racially invidious selection took place*.⁵⁸

⁵⁵ *Id.*

⁵⁶ *Smith*, 231 F.3d at 810.

⁵⁷ *Id.*

⁵⁸ *See Armstrong*, 517 U.S. at 469 (noting that “selective prosecution implies that a selection has taken place”)(internal quotations and citations omitted); John Doe 2 Dec., ¶¶ 6, 8, Exhibit G (stating that OMM investigators told John Doe 2, a CI, where to perform targeted buys).

In this case, “similarly situated individuals” are all non-South Asian stores in the six-county area that sold products used to manufacture methamphetamine, such as ephedrine, HEET, and matchbooks.⁵⁹ The type of conduct at issue here is the sale of ordinary household products suitable for use in making meth. Analysis of the *Smith* factors conclusively demonstrates this class of persons is the appropriate comparator. First, based on the information available to investigators at the time the unconstitutional “selection” took place, there is no disparity as to the strength of the case as against South Asian stores and non-South Asian stores. Since law enforcement selected stores for targeted buys including stores for which they had tips and for which they did not have tips, this factor is not a sufficient basis to make a legitimate distinction among the hundreds of retailers from whom the government could have selected to target during OMM.⁶⁰

Second, the general deterrence factor likewise does not support distinguishing between South Asian stores and non-South Asian stores. At least one convicted meth manufacturer stated that these products could be purchased just about anywhere during this time period without meaningful limits as to quantities.

⁵⁹ See generally Chart attached to Kerns Dec., Exhibit D.

⁶⁰ While the record reflects that law enforcement possessed tips regarding some South Asian stores that were eventually indicted (*e.g.* Creekside) the record also reflects that law enforcement possessed tips regarding non-South Asian stores that were never investigated (*see e.g.* Jerrell’s Food Market).

John Doe 1 stated “It’s common knowledge in the meth community that during that period you could go to any of the local stores and get the amount of chemicals you needed. . .”⁶¹ At the time investigators determined which stores to target, they would have been aware that the ingredients for the manufacture of meth were commonly available at any local store.⁶² Since the vast majority of the local stores are owned by non-South Asians, the government’s targeting of South Asians has no legitimate nondiscriminatory rationale. Moreover, Defendants emphasize that the government has *not alleged a broad conspiracy* involving multiple stores.⁶³ Accordingly, investigator’s selection of South Asian stores as a group has no legitimate basis.

Finally, nothing about the selection of South Asian stores as opposed to non-South Asian stores supports the government’s enforcement priorities or overall enforcement plan. Detective Miles stated that OMM’s strategy was to target sellers to avoid the dangerous and time consuming work of going after meth labs.⁶⁴

⁶¹ John Doe 1 Dec., ¶ 8, Exhibit K.

⁶² “It is known among the law enforcement community in north Georgia, southeast Tennessee and northeast Alabama that methamphetamine manufacturers frequent Sam’s Club in Chattanooga, Tennessee, to purchase matchbooks as a source for red phosphorus.” Application and Affidavit for Search Warrant, attached hereto as Exhibit D.

⁶³ *But see Armstrong*, 517 U.S. at 458 (government investigation into suspected “crack distribution ring”).

⁶⁴ Bertenthal Dec., ¶ 5, Exhibit F.

Investigators' selection of non-South Asian stores would have accomplished this goal as least as well as the selection of South Asian stores.

At the time that government investigators made the relevant selection, there were hundreds of stores in the six-county area where OMM operated that sold ordinary household products suitable for use in making meth. These stores were similarly situated to Defendants such that the government's selection of Defendants' stores and the stores of other South Asians was not based on any legitimate investigative basis but rather on the unconstitutional basis of ethnicity.

2. Similarly Situated Persons Of Other Ethnicities Were Known To OMM's Lead Investigators, But Were Not Targeted.

Defendants are store owners and clerks who sold common, legal household products that may be used in the manufacture of meth. Not only have Defendants presented evidence that there are hundreds of similarly situated non-South Asian merchants in the six-county area where OMM operated, but Defendants have established that OMM's investigators impermissibly and unconstitutionally targeted Defendants based on their ethnicity at the time they selected Defendants' stores for places to conduct targeted buys.

The earliest targeted buy that took place in these cases took place in December of 2003 and involved Tobacco and Beverage Mart, a South Asian

owned store where Defendant Falgun Patel worked.⁶⁵ At the time that OMM investigators targeted Tobacco and Beverage Mart, they were already in possession of information from at least one known meth manufacturer that meth ingredients were being purchased to manufacture the drug from a myriad of non-South Asian stores. In late 2003, the Whitfield County Sheriff's Department arrested and interrogated Stephanie Lolley, who told investigators (including GBI Special Agent Thomasson) that she had purchased pseudoephedrine pills for manufacturing meth at two different non-South Asian "Dollar Stores."⁶⁶

In the cases of Defendants Sudhirkumar Patel (who worked at Deep Springs Grocery) and Satishkumar Patel (who worked at Creekside Grocery), both stores in which they worked were targeted by OMM agents beginning in July 2004.⁶⁷ By this time, government investigators had numerous additional tips implicating similarly situated non-South Asian stores, which the government completely failed

⁶⁵ *U.S. v. Mangesh Patel, et al.*, Crim. Indictment, 4:05-CR-027.

⁶⁶ *See* Whitfield County Sheriff's Department Incident Report – Lolley, dated October 24, 2003 at 15 (emphasis added), Exhibit H. Ms. Lolley admitted on October 28, 2003 that she purchased "cold pills at a Dollar Store on Cleveland Highway and also a Dollar Store in front of the Winn-Dixie on Cleveland Highway." *Id.* The only stores that match these descriptions are the Dollar General Stores at 4525 Cleveland Road and 2524 Cleveland Highway. These stores are owned and operated by non-South Asians. *See* Chart of Similarly Situated Stores at 49, attached to Kerns Dec., Exhibit D.

⁶⁷ *U.S. v. Sidhharatha Patel, et al.*, Crim. Indictment, 4:05-CR-033; *U.S. v. Satishkumar Patel, et al.*, Crim. Indictment, 4:05-CR-038.

to even investigate. By July 2004, Government investigators had arrested numerous individuals for the manufacture of meth and had received specific tips on stores including: *Avaco, Bell's Smokeshop, Breezy Top Convenient Store, Citgo, Quikmart, Home Depot,*⁶⁸ *Lowe's, Sam's Club, Walmart, Dollar General, Family Dollar, Dollar Stores, Jerrell's Food Market, The Warehouse, Creekside, Food Lion, Dollar General, Bi-Lo, Hartline's, Sue's Market, and Tobacco and Beverage Mart.*

While the government has discretion to decide against whom it will focus its resources, government agents may not exercise this discretion on the constitutionally impermissible basis of ethnicity.⁶⁹ Government agents must exercise their discretion within constitutional constraints including those imposed

⁶⁸ Notably, CS#15 (the only person who told investigators that he/she bought products used to manufacture meth at Deep Springs) was not interviewed by Agent Thomasson until April 15, 2005, a full eight months after the decision to conduct targeted buys at Deep Springs had already begun. GBI Investigation Summary at 1, attached hereto as Exhibit P. Only then did CS#15 report to Agent Thomasson that she had previously made purchases at Deep Springs in April 2004. In short, GBI and WCSO waited several months after initiating their investigation of Deep Springs before collecting evidence of potentially suspicious sales at the store, presumably to justify their previous targeted buys. Significantly, Agent Thomasson completely ignored CS#15's tip in the very same interview that Home Depot and Lowe's — two non-South Asian stores — also sold CS#15 a suspicious combination of ingredients used to manufacture meth.⁶⁸

⁶⁹ *Smith*, 231 F.3d at 807; *see Oyler v. Boles*, 368 U.S. 448, 456 (1962) (selection may not be based on an unjustifiable standard such as race, religion or other arbitrary classification).

by the Due Process Clause of the Fifth Amendment and Equal Protection Clause of the Fourteenth Amendment.⁷⁰

Here, rather than rely on tips or factual investigative leads, OMM investigators impermissibly targeted Defendants on the basis of their ethnicity. The evidence presented by Defendants shows that investigators knew of similarly situated retailers, conducting the same type of businesses, selling the same type of products, and operating in the same six-county area as Defendants. Moreover, as to many of these other retailers, the very same investigators who directed OMM knew first-hand of reports that these non-South Asian merchants had been selling the same products that Defendants are accused of selling, under materially identical circumstances, and to individuals who *actually used those products to manufacture meth*. Instead of relying to this information, investigators violated Defendants' constitutional rights by targeting them because of their South Asian ethnicity.

C. DISCRIMINATORY PURPOSE: The Government's Targeting of South Asian Merchants Was Unjustifiably Motivated By Considerations of Defendants' Ethnicity.

Defendants were targeted for investigation at least in part because of⁷¹ their South Asian ethnicity.⁷² While “[t]he question of discriminatory purpose is

⁷⁰ *Smith*, 231 F.3d at 807.

difficult to probe,”⁷³ Defendants have presented two categories of evidence to show the government’s invidious intent: (1) *direct evidence* in the form of a sworn declaration by one CI regarding (a) OMM investigators’ intentional targeting of South Asian stores and (b) directions from GBI Special Agent Thomasson concerning how John Doe 2 should entrap South Asian clerks with poor proficiency in English and (2) *compelling circumstantial evidence* in the form of overwhelming statistical evidence showing that South Asian stores were over 95 times more likely to be targeted by OMM agents than non-South Asian stores.

1. Statements By One Of The OMM’s Lead Investigators Provides Direct Evidence of Discriminatory Intent.

While direct evidence of discriminatory intent is rare,⁷⁴ Defendants have produced such evidence in this case. The sworn declaration of John Doe 2, a CI

⁷¹ *Wayte v. U.S.*, 470 U.S. 598, 610 (1985) (holding that discriminatory intent requires a showing that the decision-maker “selected or reaffirmed a particular course of action *at least in part ‘because of,’ not merely ‘in spite of,’* its adverse effects upon an identifiable group”) (emphasis added; citation omitted).

⁷² *See, e.g., U.S. v. Hsia*, 24 F.Supp. 2d. 33, 48 (D.D.C. 1998) (“A showing of discriminatory effect requires the defendant to demonstrate that similarly situated persons of other races, religions, national origin or *ethnicity* have not been prosecuted.”) (emphasis added) *rev’d on other grounds*, 176 F.3d 517 (D.C. Cir. 1999).

⁷³ *U.S. v. Correa-Gomez*, 160 F.Supp.2d 748, 753 (E.D.Ky. 2001), *aff’d*, 328 F.3d 297 (6th Cir. 2003).

⁷⁴ *See Scales v. Slater*, 181 F.3d 703 (5th Cir. 1999) (recognizing that “[d]irect evidence of . . . discriminatory intent is rare”); *Cartagena v. Ogden Servs. Corp.*,

who performed controlled buys at the direction of OMM investigators, reveals that the government purposely targeted South Asian merchants in their stings on the basis of their ethnicity. John Doe 2's declaration explains that GBI Special Agent Thomasson (a) only directed him/her to perform targeted buys at South Asian stores, (b) ordered John Doe 2 to make unsolicited and incriminating colloquial statements about "finish[ing] a cook" after paying for the products "because the Indians' English wasn't good," and (c) offered no response to John Doe 2's direct questioning regarding why South Asians were being targeted by the stings. As such, Agent Thomasson admitted that South Asian merchants were intentionally and invidiously targeted because they had poor proficiency in English and were thus, unlikely to understand colloquial expressions that may be used in the drug trade (*e.g.*, using the word "cook" to mean manufacture meth in a drug lab). Consequently, investigators apparently believed that South Asians would be less likely to orally object when CIs made similar incriminating statements to support an arrest. In addition, Agent Thomasson's complete failure to respond to John Doe 2's questioning regarding "why [OMM agents] were going after Indians"⁷⁵ raises

995 F. Supp. 459, 461 (S.D.N.Y. 1998) (noting that "direct evidence of . . . discriminatory intent will rarely be found").

⁷⁵ John Doe Dec., ¶ 13, Exhibit G.

an adverse inference that Thomasson had no innocent explanation for the government's discriminatory tactics.⁷⁶

2. Ninety-Five Times More Likely To Be Targeted Is Overwhelming Statistical Evidence.

While Defendants have provided direct evidence of discriminatory intent, statistical proof may also be relied upon as circumstantial proof of purposeful discrimination,⁷⁷ including racial profiling in law enforcement.⁷⁸ Where one class of persons are several times more likely to suffer the alleged harm than similarly situated individuals who are not class members, the disparate impact of the government action is uncontroversial.⁷⁹

⁷⁶ See generally *Interstate Circuit v. U.S.*, 306 U.S. 208, 226 (1939) (holding that failure to explain suspect behavior when confronted raises an adverse inference and “[s]ilence then becomes evidence of the most convincing character”).

⁷⁷ See *Batson v. Kentucky*, 476 U.S. 79, 93 (1986) (“Circumstantial evidence of invidious intent may include proof of disproportionate impact.”); *Int’l Bhd of Teamsters v. U.S.*, 431 U.S. 324, 339 (1977) (noting the importance of statistical analysis “in cases in which the existence of discrimination is a disputed issue”); *Washington v. Davis*, 426 U.S. 229, 242 (1976).

⁷⁸ See *Chavez v. Illinois State Police*, 251 F.3d 612 (7th Cir. 2001); *State v. Cochran*, 812 P.2d 1338, 1340 (N.M. App. 1991) (“Discriminatory purpose may be proved from all of the relevant facts, including statistical evidence used to establish the initial determination that a defendant was singled out for prosecution.”).

⁷⁹ For example, in *Hunter v. Underwood*, the Supreme Court found that a facially-neutral state constitutional amendment had a discriminatory effect where blacks were 1.7 times more likely than whites to suffer disenfranchisement under the amendment. 471 U.S. 222, 227 (1985).

The statistical evidence in this case is so extreme that, standing alone, it constitutes sufficient evidence of the government's intent to discriminate on the impermissible basis of ethnicity.⁸⁰ For an equal protection claim, intent can be inferred from circumstantial evidence, including a stark statistical pattern.⁸¹ That the officers directing OMM were over 95 times more likely to target South Asian stores for controlled buys constitutes such circumstantial evidence of racial motivation.

A comparison to *Yick Wo v. Hopkins*,⁸² the seminal case in equal protection jurisprudence, is instructive in understanding the gravity of the statistical disparity at issue in this case. Like Defendants' cases, *Yick Wo* involved a group of immigrant (*i.e.*, Chinese) small businesspersons who were subject to a grossly discriminatory application of a facially neutral law. In *Yick Wo*, the petitioners were denied permits to operate laundries in wooden buildings and produced evidence that Chinese-owned laundries were 66 times more likely to be shut down

⁸⁰ See *Armstrong*, 517 U.S. at 464-65 ("A defendant may demonstrate that the administration of a criminal law is 'directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive' that the system of [investigation] amounts to 'a practical denial' of equal protection of the law," citing *Yick Wo*, 118 U.S. at 373).

⁸¹ Discriminatory purpose can be inferred by a stark pattern. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); See generally, *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064 (1886).

⁸² *Yick Wo*, 118 U.S. 356, 6 S.Ct. 1064 (1886).

under the ordinance than non-Chinese laundries.⁸³ From this disparity, the *Yick Wo* Court's conclusion --- that the enforcement of the ordinance was racially motivated --- was not affected by the fact that one white store was also shut down under the ordinance. Further, the *Yick Wo* Court found a clear violation of the Equal Protection Clause without reference to any direct evidence of discriminatory intent.⁸⁴

Remarkably, Defendants statistical evidence in this case is even more compelling than the evidence in *Yick Wo*. While the Chinese laundries in *Yick Wo* were 66 times more likely to be adversely affected by the government's discretionary enforcement of the ordinance than non-Chinese laundries, the South Asian stores in this case were over 95 times more likely to be indicted as a result of OMM's sting operation than their non-South Asian counterparts. While far lower statistical disparities are sufficient to support a finding that the Equal Protection

⁸³ 6 S.Ct. at 1066, 1073 (explaining that: (1) there were 320 laundries in San Francisco, 240 Chinese owned laundries and 80 non-Chinese owned laundries; (2) over 200 Chinese laundry owners had been denied permission to operate under the ordinance by the county supervisors; and (3) only one non-Chinese owned laundry was denied permission to operate under the ordinance at issue).

⁸⁴ *Id.* at 1073 (The Court held that “[n]o reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified.”).

Clause has been violated,⁸⁵ the overwhelming disparities in this case provide compelling, and virtually irrefutable, evidence of discriminatory intent.⁸⁶

III. DISCOVERY: At a Minimum, Defendants Are Entitled To Discovery Regarding The Government's Selective Enforcement Of The Criminal Laws Against South Asian Store Owners And Employees.

Defendants have produced evidence sufficient to show that the government's racially targeted investigation violated their constitutional rights and, thus, that the charges that resulted from this investigation must be dismissed. Even if the Court finds that the evidence produced does not completely satisfy the standard for dismissal, at a minimum Defendants have satisfied the far lower standard required to justify discovery and an evidentiary hearing on these issues.

A. THE DISCOVERY STANDARD: The Selective Enforcement Discovery Standard Requires Defendants To Provide Evidence That Merely *Tends To Show* The Two Elements Of Selective Enforcement.

Defendants are entitled to discovery and an evidentiary hearing regarding selective investigation when they present "*some evidence tending to show the*

⁸⁵ See *Hunter v. Underwood*, 471 U.S. 222, 227 (1985) (invalidating a criminal disenfranchisement provision of the Alabama Constitution because African Americans were *1.7* times as likely to suffer disenfranchisement under its terms than caucasians).

⁸⁶ Notably, the statistical disparities in this case are more extreme than many other cases in which discriminatory intent has been assumed. See, e.g., *Commonwealth v. Lora*, 16 Mass.L.Rptr. 715 (Mass. Sup. 2003) (finding an inference of purposeful discrimination from a showing that the two officers involved in the traffic stop at issue were each 6.6 times and 36.6 times more likely to conduct searches of minority motorists, respectively).

existence of the essential elements of the defense.”⁸⁷ Specifically, Defendants are required to prove only that “a credible showing of different treatment of similarly situated persons.”⁸⁸ Discovery and an evidentiary hearing are warranted where Defendants show a “colorable entitlement”⁸⁹ to a selective enforcement claim or, in other words, “ ‘sufficient facts to take the question past the frivolous state.’ ”⁹⁰

B. DISCOVERY STANDARD SATISFIED: Defendants Have Made A Credible Showing Of Different Treatment Of Similarly Situated Parties.

In this case, even if the Court finds that Defendants are not entitled to dismissal, they are entitled to discovery and an evidentiary hearing regarding their claims for selective enforcement. The evidence demonstrates (1) OMM lead investigators Agent Thomasson and Detective Miles had specific information identifying non-South Asian stores as places where admitted meth manufacturers actually purchased items used to make meth;⁹¹ and, (2) that these non-South Asian

⁸⁷ *U.S. v. Quinn*, 123 F.3d 1415, 1425-26 (11th Cir. 1997) (internal quotation marks omitted; emphasis added).

⁸⁸ *Armstrong*, 517 U.S. at 470.

⁸⁹ *U.S. v. Gordon*, 817 F.2d 1538, 1540 (11th Cir. 1987) (holding that a defendant is entitled to discovery for showing a “*colorable entitlement* for a selective prosecution claim, or as one court has held, *sufficient facts to take the question past the frivolous state* and raise[s] a reasonable doubt as to the prosecutor's purpose”) *rev'd on other grounds*, 836 F.2d 1312 (11th Cir. 1988) (emphasis added; internal quotations and citation omitted).

⁹⁰ *Id.*

⁹¹ *See infra* Statement of Facts § II.A.

stores were similarly situated to Defendants.⁹² Moreover, Defendants have presented evidence that investigators specifically targeted South Asians in an effort to exploit their lack of proficiency in English.⁹³ When a government agent has made statements that suggest a prosecution was motivated by a potentially unconstitutional bias, a defendant is entitled to at least a hearing on a claim of selective prosecution.⁹⁴

C. EVIDENCE SOUGHT: Defendants Seek Information On What OMM Investigators Knew, When They Knew It, And How They Decided Which Stores To Target.

Having demonstrated that the government selected Defendants and other South Asians based on their ethnicity while at the same time ignoring reports of similarly situated non-South Asians, Defendants are entitled to formal discovery and an evidentiary hearing. Defendants have attempted to conduct as extensive an investigation as is possible without access to the government's documents. In order for the Court to more fully examine Defendants' claims for selective enforcement, however, the Court should permit Defendants to *examine the*

⁹² See *infra* Argument and Citation of Authority § I.B.1

⁹³ John Doe 2 Dec. ¶ 8, 12, Exhibit G.

⁹⁴ See *U.S. v. Faulk*, 479 F.2d 616 (7th Cir. 1973) (involving veiled comments that the prosecutor had made reflecting improper selection of the defendant for his First Amendment activity made by the prosecutor).

complete universe of information available to the government at the time they made the unconstitutional “selections.”

To that end, Defendants seek documents that encompass the time period of OMM, from August 1, 2003 to May 10, 2005. Specifically, Defendants seek information regarding what OMM investigators knew, when they knew it, and the process investigators used to determine which of the over 600 local stores in the six-county area they would target. Defendants seek all investigative reports, drug task force reports, GBI investigative reports, and all notes and interviews concerning OMM, or the manufacturing of methamphetamine. Defendants also seek communications among law enforcement officers, or between law enforcement officers and local businesses and individuals, concerning OMM or the manufacturing of methamphetamine.⁹⁵

Defendants are entitled to this discovery based on the evidentiary showing made in this motion. Moreover, it is essential for Defendants to be able to access the *entire set of government documents* in order to understand what government investigators knew when they selected Defendants’ stores for investigation. The government should not be permitted to cherry-pick certain documents to support their post hoc explanation for how the stores were selected. Without a complete

⁹⁵ Defendants’ specific document requests are attached at Exhibit A in the Proposed Order for Discovery.

examination of what investigators knew, when they knew it, and how they made their selection, Defendants and this Court cannot determine whether the government relied on legitimate factors or engaged in naked and constitutionally invidious discrimination.

CONCLUSION

This spectre of discrimination raised by the government's action in this case undermines the public's confidence in law enforcement and the system of justice as whole. Defendants have demonstrated clear evidence of the government investigators' constitutionally invidious discrimination against South Asians in Operation Meth Merchant. Accordingly, Defendants respectfully request that this Court grant their Motion to Dismiss Based on Selective Enforcement based on Newly Discovered Evidence or, in the alternative, grant Defendants' discovery and an evidentiary hearing on the matter.

Respectfully submitted this 5th day of April, 2006

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