

**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-33 - HLM
SUDHIRKUMAR PATEL and	:	
KASHIBA, Inc.,	:	
d/b/a Deep Springs Grocery	:	

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**DEFENDANTS' REPLY BRIEF**

Defendants respectfully submit this Reply Brief in further support of their Motion To Dismiss Or, In The Alternative, For Discovery Based On Newly Discovered Evidence Of Selective Enforcement<sup>1</sup> (“Motion”).

**INTRODUCTION**

The parties do not contest most of the basic facts underlying Defendants’ motion and agree on the controlling legal standards, considerably narrowing the issues before this Court:

First, the government does not dispute that Defendants’ investigation has required extraordinary resources and that it has uncovered extensive new evidence

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<sup>1</sup> Defendants’ use of the term “selective enforcement,” rather than “selective prosecution,” is intended to more accurately describe the point in time, during OMM’s initial investigatory stages, when the government’s unconstitutional decision-making occurred.

since this Court's ruling on the initial motion to dismiss. Rather, the government argues unpersuasively that this evidence should be ignored.

Second, the government does not dispute or contradict in any fashion Defendants' evidence—based on nine sworn declarations and dozens of pages of government police reports and search warrants—that proves OMM agents ignored numerous documented tips regarding local sales of meth manufacturing ingredients by Caucasian stores to known meth manufacturers while simultaneously targeting South Asian stores for which they had no tips.

Third, the government does not deny or contradict the testimony of John Edward Ross or the confirming affidavit of John Doe 2. Both describe how the leading investigative officer in OMM admitted that the investigation intentionally and invidiously targeted South Asian merchants.

Finally, the government concedes that Defendants' indictments must be dismissed where defendants have provided clear and convincing evidence<sup>2</sup> that law enforcement officers have selectively enforced the law against them, and that discovery must be granted where defendants have provided evidence that merely tends to show an equal protection violation.

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<sup>2</sup> The proper standard for evaluating claims of unconstitutional profiling by law enforcement is preponderance of the evidence. *See* Defs.' Mot. to Dismiss at 19 n.49. The government does not object to either standard.

With attention to each of these points in detail below, it is clear that Defendants have readily met the standard for discovery—that is Defendants should be permitted to examine the larger picture of all investigative tips (both those ignored and those pursued) to document precisely the extent of racial targeting, and Defendants should be able to question under oath the officers involved in the investigation. Given the government’s failure to contest the basic evidentiary foundation for this Motion, however, this Court should grant dismissal forthwith and find that the OMM investigation had both a disparate racial impact and was motivated by intentional racial or ethnic discrimination.

**I. TIMELINESS OF MOTION: The Court Has The Power To Consider Defendants’ Current Motion To Dismiss For Selective Enforcement.**

The government argues that the Court should not consider Defendants’ Motion because it is repetitive and/or untimely. However, the Court has complete discretion to consider Defendants’ Motion whether it is considered a motion for reconsideration or a new motion for selective enforcement.

If the Court considers Defendants’ Motion as a request for reconsideration of the Court’s Order, dated November 18, 2005, denying Defendants’ initial motions to dismiss on the grounds of selective prosecution,<sup>3</sup> the Court is free to consider the

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<sup>3</sup> Notably, the government admits that Defendants’ motions to dismiss on the basis of selective prosecution were timely filed. Gov’t Resp. at 2, 3, 4, 9, & 28.

Motion on its merits because the Court has complete authority to revisit its prior orders. The federal courts have long recognized that “a district court has the inherent power, and thus jurisdiction, to reconsider interlocutory orders prior to entry of judgment on such orders.”<sup>4</sup> This inherent power is consistent with Fed. R. Crim. P. 2, which states that the “rules are to be interpreted to provide for the *just determination of every criminal proceeding* [and] to secure . . . *fairness in administration*.”<sup>5</sup> As a result, the Court has complete authority to reconsider its November 18, 2005 Order in light of the additional evidence and authority presented in Defendants’ Motion now before the Court.

If the Court treats Defendants’ Motion as a new and independent motion, the Court has complete authority to consider it even though it was filed after the Court’s deadline for pretrial motions. While Defendants’ Motion must simply be made before trial pursuant to Fed. R. Crim. P. 12(b)(3)(A), Fed. R. Crim. P. 12(c) permits the trial court to set an earlier deadline. Pursuant to this Rule and various Local Rules, the Court ordered a September 12, 2005 deadline for pretrial motions.<sup>6</sup> Although Defendant’s Motion was filed after this deadline, the Court

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<sup>4</sup> *United States v. Breit*, 754 F.2d 526, 530 (4<sup>th</sup> Cir. 1985). *Accord United States v. Aguirre*, 214 F.3d 1122 (9<sup>th</sup> Cir. 2000); *United States v. LoRusso*, 695 F.2d 45, 53 (2<sup>d</sup> Cir. 1982).

<sup>5</sup> Fed. R. Crim. P. 2 (emphasis added).

<sup>6</sup> *See* Verbal Order of September 12, 2005.

has inherent authority to waive compliance with its own ordered deadlines for “good cause,”<sup>7</sup> and courts commonly hold that this “good cause” standard is satisfied if a defendant was unable to obtain or develop the evidence upon which the motion is based at a prior time.<sup>8</sup> This is particularly true when “counsel’s tardiness [in filing a motion is] due not to negligence, oversight, or laziness.”<sup>9</sup>

In this case, Defendants have introduced evidence concerning their “good cause” for filing their Motion outside the period ordered by the Court. To build a compelling factual case for selective enforcement, defendants must unearth what the government knew, when they knew it, and what motivated them to act in the manner that they did—by no means an easy task. The evidence that Defendants’ counsel have introduced in support of this Motion took months to develop.

In short, while Defendants have been diligent throughout this case, they had no practical ability to collect and analyze the wealth of evidence currently before the Court without the assistance of the American Civil Liberties Union (“ACLU”), which entered appearances on Defendants’ behalf more than a month after the

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<sup>7</sup> Fed. R. Crim. P. 12(e). *See also United States v. Smith*, 918 F.2d 1501 (11th Cir. 1990).

<sup>8</sup> *United States v. Lamela*, 942 F.2d 100 (1st Cir. 1991); *United States v. Chavez*, 902 F.2d 259 (4th Cir. 1990).

<sup>9</sup> *Chavez*, 902 F.2d at 263-64.

Court's November 18, 2005 Order.<sup>10</sup> Simply stated, this is not evidence that was available in any real sense to Defendants at the time that they filed their previous motion and Defendants have been extremely diligent in uncovering it and presenting it to the Court in a timely manner.<sup>11</sup> Thus, Defendants respectfully contend that they have shown good cause for filing this Motion after the Court's ordered deadline for pretrial motions.

**II. SIMILARLY SITUATED STORES: The Government Attempts To Justify OMM's Targeting Of South Asian Merchants By Relying On Evidence That OMM Agents Accumulated Long After They Made This Discriminatory Decision.**

**A. The Government Concedes That Investigators Ignored Credible Leads Involving Sales Of Meth Ingredients By Caucasian Merchants, And, Instead, Targeted South Asian Merchants, For Whom The Government Had No Leads.**

The government does not dispute the basic facts underlying this motion to dismiss: presented with evidence that numerous Caucasian stores sold meth-making products to known meth manufacturers, OMM law enforcement *ignored* that evidence.<sup>12</sup> Instead, they conducted controlled buys at 21 South Asian stores for which they had absolutely *no evidence* of such sales. By focusing solely on the

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<sup>10</sup> Def.'s Mot. to Dismiss at 6-7.

<sup>11</sup> Inexplicably, the government urges the application of *McAteer v. United States*, 148 F.2d 992 (5th Cir. 1945) and *United States v. Vallejo*, 297 F.3d 1154 (11th Cir. 2002), which discuss motions for *new trial* based on newly discovered evidence.

<sup>12</sup> Exs. H, I, and J of Defs.' Mot. to Dismiss.

evidence before the prosecutor at the time of the charging decisions, the government misses the point: *Law enforcement officers*—not prosecutors—unconstitutionally discriminated against defendants by selecting their stores for investigation even though officers possessed no information leading them to select those stores over the hundreds of other stores that also sold meth-making products.<sup>13</sup> When *law enforcement officers* engaged in the impermissible selection at the initiation of investigations, they had no information about any clerks' knowledge.<sup>14</sup>

Significantly, the government does not dispute that the same investigators who led OMM possessed information provided by meth manufacturing suspects<sup>15</sup> regarding a myriad of local Caucasian stores where known meth manufacturers purchased drug-making ingredients.<sup>16</sup> Even though the government had this information, none of these Caucasian stores were targeted for controlled buys.

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<sup>13</sup> Defs.' Mot. to Dismiss at 21-28. Law enforcement officers, like other government actors, are prohibited from discriminating on the basis of ethnicity and race. *See Whren v. United States*, 517 U.S. 806, 813 (1996) ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. . . . the constitutional basis for objecting to intentionally discriminatory application of the laws is the Equal Protection Clause.").

<sup>14</sup> *Cf.* Gov't Resp. at 31-32.

<sup>15</sup> Defs.' Mot. to Dismiss at 10-12 (citing Whitfield County police reports and the statement of facts in a Georgia Court of Appeals case).

<sup>16</sup> *Compare* Defs.' Mot. to Dismiss at 10-12 *with* Gov't Resp. at 33.

Rather, early during the OMM investigation, government agents chose to target *21 South Asian stores without any prior tips or other evidence*, while ignoring Caucasian stores, *even those for which they had credible tips* of potential wrongdoing. The government has provided no legitimate basis for selecting these stores over non-South Asian stores generally, much less the Caucasian stores for which the government had credible tips of sales to known meth manufacturers.<sup>17</sup> Moreover, the government has not presented the Court with any information that it possessed prior to the time that it targeted Defendant's store, Deep Springs Grocery, for the sting operation.<sup>18</sup> The same is true for virtually all of the other indicted South Asian merchants.

**B. The Government Improperly Attempts To Explain Its Unconstitutional Selection By Invoking Evidence That It Acquired Long After, And As A Result Of, Its Operative Decision To Target South Asians.**

Rather than contesting the core factual assertions established by Defendants' Motion, the government argues that selective targeting of its investigation is somehow excused by the fact that, by the end of its investigation, it had developed evidence against South Asian stores yet lacked evidence that Caucasian merchants

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<sup>17</sup> Defs.' Mot. to Dismiss at 14-15 and at Exs. H, I, J to Defs.' Mot. to Dismiss.

<sup>18</sup> See Ex. A at 160-64; see Defs.' Mot. to Dismiss at 26 n.68 (noting that the only tip about meth-making materials bought at Deep Springs came from CS#15 a full eight months after investigators targeted the store for controlled buys).

had “reason to know that [their products] would be used to manufacture methamphetamine.”<sup>19</sup> The Government effectively asks this Court to allow it to use the evidentiary fruits of its constitutional violations to avoid the consequences of those violations. Such a rule would invite law enforcement to target any disfavored racial, ethnic, or political minorities for investigation and freely use any evidence developed during such investigations to immunize subsequent prosecutions from constitutional attack on the basis that the defendants cannot identify similarly situated parties for whom the government has developed such evidence.

Specifically, the Government supports its argument that the class of similarly situated Caucasian stores offered by Defendants is distinguishable from the class of targeted South Asian stores on the grounds that the government has audio and video surveillance evidence collected *during its controlled buys* suggesting that the South Asian clerks had the requisite *mens rea* for the charged offenses.<sup>20</sup> Because the Government made no effort to collect similar evidence for the class of Caucasian stores that it chose not to investigate, it claims that the two groups are distinguishable. This is an illusory distinction. The government has conflated what was known *at the time* that its ethnicity-based unconstitutional

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<sup>19</sup> Gov’t Resp. at 33-34.

<sup>20</sup> *Id.* at 33-34.

selection took place with what was *subsequently learned* after the Government decided to target South Asian merchants and conduct the controlled buys.<sup>21</sup> The government conflates this information by asserting (citing only to the search warrant affidavits) that “[b]efore and during” OMM, law enforcement received information concerning sale of items with knowledge that they would be used to manufacture meth, and verified that information with confidential sources through controlled buys.<sup>22</sup> Examination of this evidence demonstrates that the government lacked knowledge about South Asian stores before targeting them and any evidence of guilt was acquired as a *result* of the controlled buys. The chart attached as Exhibit B pinpoints the date upon which the government first acquired evidence against the indicted stores, and in virtually every instance, the first evidence of wrongdoing came when the government conducted the first undercover controlled buy. If law enforcement agents had chosen to investigate their tips on Caucasian stores and conduct controlled buys, it is likely that they

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<sup>21</sup> See *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 534 (6th Cir. 2002) (noting that “[a] claimant can demonstrate discriminatory effect by naming a similarly situated individual *who was not investigated* or through the use of statistical or other evidence which ‘address[es] the crucial question of whether one class is being treated differently from another class that is otherwise similarly situated.’” (Citation omitted and emphasis added).

<sup>22</sup> Gov’t Resp. at 41. The government cites to the Application and Affidavit for Search Warrants, Case Nos. 4:05-MJ-63-89, without attaching the document to its response. This document is attached hereto as Exhibit A.

would have developed similar audio and video surveillance evidence. The point is that they never tried.

In this case, the unconstitutional selection occurred early in the OMM investigation, when government agents (1) ignored credible tips about Caucasian stores while simultaneously targeting South Asian stores for which they had no tips, and (2) selected among more than 600 stores that sold these products in the relevant six-county area and decided to target almost exclusively South Asian merchants for controlled buys, while ignoring the 80% of area stores not owned by South Asians.<sup>23</sup> Thus, the Court should compare what OMM agents knew about both South Asian and Caucasian merchants at the time that they targeted the South Asians for the sting operation.

### **III. DISCRIMINATORY INTENT: Multiple Forms of Evidence Demonstrate Discriminatory Intent.**

Defendants have presented significant evidence—both direct and circumstantial<sup>24</sup>—showing that law enforcement targeted South Asians for investigation with discriminatory intent. Most strikingly, one of the government's own confidential sources revealed in sworn, cross-examined testimony on June 22,

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<sup>23</sup> Defs.' Mot. to Dismiss at 15-16.

<sup>24</sup> Intent may be shown through direct evidence that law enforcement acted with an invidious and discriminatory motive or circumstantial evidence of that intent. *United States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir. 1987).

2006, that investigators were “going to close these Indian stores down because they can’t speak good English.”<sup>25</sup> Thus, it is not a coincidence that South Asian merchants were 95 times more likely to be indicted than other ethnic groups since they were intentionally targeted. In addition, Defendants present a wealth of other evidence that independently establishes discriminatory intent through police records,<sup>26</sup> testimony of police officers,<sup>27</sup> testimony of a Caucasian store owner,<sup>28</sup> testimony of meth manufacturers,<sup>29</sup> and statistical evidence.<sup>30</sup> These multiple, consistent, corroborating pieces of evidence point to a singularly simple and evident fact: police regularly learned of mostly Caucasian stores that sold products to meth manufacturers, yet they ignored that evidence and targeted South Asian

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<sup>25</sup> Tr. 12:21-23.

<sup>26</sup> Police overwhelmingly directed their investigation towards South Asian stores, while ignoring the Caucasian stores actually named by arrestees. *See* Ex. A (Search Warrant App.); Exs. H, I, and J to Defs.’ Mot. to Dismiss (Whitfield County Sheriff’s Department Incident Report for Lolley, Wasserman, and Bates).

<sup>27</sup> Police learned about Caucasian stores from arrestees, Ex. L to Defs.’ Mot. to Dismiss (Decl. of Andrew Pennington of 3/29/06), and relied on racial stereotypes in their targeting of South Asian stores, Ex. F to Defs.’ Mot. to Dismiss (Decl. of Alyse Berthenthal).

<sup>28</sup> Caucasian store owners received guidance from police about how to sell meth-making products without incurring criminal liability while South Asian convenience store owners were instead subjected to criminal investigation and prosecution. Ex. M to Defs.’ Mot. to Dismiss (Decl. of Andrew Pennington of 4/3/06).

<sup>29</sup> Meth manufacturers purchased their materials from a wide range of stores, the majority of which were not owned by South Asians. Exs. K and G to Defs.’ Mot. to Dismiss (Decls. of John Doe witnesses).

<sup>30</sup> Ex. D to Defs.’ Mot. to Dismiss.

stores for their investigation.<sup>31</sup>

**A. John Edward Ross's Testimony Is Strong Direct Evidence Of Discriminatory Intent.**

1. John Edward Ross Presented Substantial And Compelling Direct Evidence Of Discriminatory Intent.

John Edward Ross's June 22, 2006 testimony before this Court provides compelling direct evidence of discriminatory intent. Mr. Ross testified that GBI asked him in March 2004 to be the driver for his cousin during the controlled buy at Famous Market.<sup>32</sup> Mr. Ross testified that after instructing him and his cousin how to do the controlled buy, GBI Agent Del Thomasson turned to them, smiled, and said: "We're going to close these Indian stores down because they can't speak good English."<sup>33</sup> From his previous visits to Famous Market, Mr. Ross knew that the clerk's English in fact "wasn't real good"<sup>34</sup>—a fact that Agent Thomasson also knew from supervising a previous controlled buy at the same store.<sup>35</sup> Mr. Ross also testified that the agents had wanted his cousin to do two other controlled

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<sup>31</sup> Defs.' Mot. to Dismiss at 15; Ex. D to Defs.' Mot. to Dismiss at D-11.

<sup>32</sup> Tr. 9-10.

<sup>33</sup> Tr. 12:21-23.

<sup>34</sup> Tr.13:18-14:7.

<sup>35</sup> Four days before the buy involving Mr. Ross and John Doe 2, Agent Thomasson sent CS#1 into Famous Market to purchase pills and recorded the conversation that informant had with both the male and female clerks in the store. Ex. C (GBI Investigation Report of 3-26-04 Buy at Famous Market).

buys—both at stores run by Indians.<sup>36</sup>

This evidence of intentional targeting is extraordinary in its ability to look inside a law enforcement operation, far exceeding what the Eleventh Circuit has already determined sufficient to grant discovery on a claim of selective enforcement. In *United States v. Gordon*, 817 F.2d 1538 (11th Cir. 1987), defendants' only evidence of direct intent was a statement, seen only by the magistrate judge and never by the prosecutors, which the magistrate described as "a chance remark to a college student by a public relations officer in the Justice Department concerning 'arrogance' of blacks," which was "clearly not related, directly or indirectly, to these cases."<sup>37</sup> In sharp contrast, Mr. Ross's testimony, given in open court and subject to extensive cross-examination, provided direct evidence of the motivation of the lead law enforcement agent.

2. John Edward Ross's Testimony Is Inherently Credible And Extrinsicly Corroborated.

Mr. Ross testified in a credible manner and the substance of his testimony is

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<sup>36</sup> Tr. 14:11-19.

<sup>37</sup> *United States v. Gordon*, Recommendation of the Magistrate, Case No. CR 85-PT-200-W (N.D. Ala., Western Div.) (entered Aug. 19, 1985) (A copy of this decision is attached as Exhibit D) at 14. The Eleventh Circuit reversed the District Court's denial of the selective prosecution case, and ruled that this evidence, along with "other evidence suggesting a pattern of government activity in the voting fraud cases that were prosecuted," was sufficient to establish the essential elements of a selective prosecution test and ordered an evidentiary hearing. 817 F.2d at 1540.

corroborated by several other sources of evidence. His demeanor was remarkably calm and collected, his testimony internally consistent, and from the range of subtle to obvious factors that one uses to assess credibility, Mr. Ross emerges as a sincere neutral witness to the statements made by law enforcement. Mr. Ross came forward when asked to relate what he had heard, seen, and done in his limited role as a driver for an undercover buy. He freely and voluntarily spoke with both defense counsel and the prosecution about what he knew.<sup>38</sup>

The prosecution, even after interviewing him beforehand, focused most of the cross-examination on confusing and repetitive questions designed to ensnare him on largely irrelevant details.<sup>39</sup> Even in the face of aggressive and repetitive cross-examination about the timing of the conversations and the tape recorder being activated, Mr. Ross retained his poise and repeatedly explained what he remembered. The only new information that arose after the government played the

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<sup>38</sup> Tr. 16:22-18:8.

<sup>39</sup> For example, on direct, Mr. Ross clearly testified that he heard Agent Thomasson give instructions about what to do in the store and make the comment about shutting the Indian stores down, the recorder was then turned on, and Agent Thomasson subsequently made a comment about not using vulgar language. Tr.12-13. On cross-examination, the prosecution asked the same question about the timing of the comment about the Indians and the tape at least seven different times; asked about the timing of the warning about the dirty joke and vulgar language six different times; and asked separately about the timing of giving instructions at the store at least seven different times. Tr. 29-40. Each of these subjects were asked about four times before the prosecution played the recording of the event. Tr. 29-34.

recording was that Mr. Ross conceded that he had not remembered that Agent Thomasson repeated some of the instructions a second time after the recorder had been activated.<sup>40</sup> The inability of the prosecutor to induce Mr. Ross into changing his story and the fact that this was all she could do to attack the actual substance of his testimony further supports his credibility.

Mr. Ross had nothing to gain from his willingness to testify at this hearing. Unlike the more common situation in which the government can offer a witness leniency or pay them for their involvement (which, ironically, they did for Mr. Ross when he suited their needs and he was paid to drive for his cousin) Mr. Ross could not benefit from his testimony. In fact, by testifying against the interests of Agent Thomasson, Mr. Ross risked increased scrutiny from local law enforcement. That he has no motivation to lie—and plenty of motivation to remain silent—provides additional reason to credit his testimony.<sup>41</sup>

Furthermore, the details of his testimony are corroborated by GBI police reports, the recording of the March 30, 2004 controlled buy at Famous Market, John Doe 2's Declaration, and common police procedures. Mr. Ross has never reviewed any of these documents, nor had he previously heard the recording of the

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<sup>40</sup> Tr. 36:8-9, 37:6-15, 40:13.

<sup>41</sup> Mr. Ross testified that he did not believe that he or his cousin, John Doe 2, were mistreated by the system. Tr. 23:6, 45:2-3.

undercover buy.<sup>42</sup> Rather, he was able to testify from his own memory in a manner that is entirely consistent with these extrinsic sources of evidence. For example, Mr. Ross testified that there was a “TBI agent” present and GBI reports confirm that TBI/DEA Agent Delany was present at the meeting.<sup>43</sup> Mr. Ross testified, and the GBI report confirms, that his cousin went into Famous Market and “stayed three or four or five minutes” before coming back out.<sup>44</sup>

Mr. Ross’s recollection of details is also corroborated by the tape played by the government at the hearing.<sup>45</sup> Mr. Ross testified that “Del told my cousin to talk good to the people in the store, told him what to say and to be nice and talk good to them” and to “make sure he said something about a cook.”<sup>46</sup> The recording repeated some of that phrasing, including Agent Thomasson saying “Talk good to him, now” after telling him to say “you got to finish this cook you’re on.”<sup>47</sup>

Likewise, the tape confirmed Mr. Ross’s recollection that Agent Thomasson

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<sup>42</sup> Tr. 18:22-19:4.

<sup>43</sup> Tr. 11:19; The GBI report of the 3-30-04 buy confirms that DEA Task Force Agent Mark Delany was present (Ex. E), and a 6-2-05 investigation report (Ex. F) identifies Agent Delany as “DEA Task Force Agent (Tennessee Bureau of Investigation).”

<sup>44</sup> Tr. 15:4-5. The GBI report of the 3-30-04 buy confirms that Mr. Ross and his cousin drove into the Famous Market parking lot at 2:43 and that the cousin left the store at 2:48 – leaving the cousin in the store for up to five minutes, as Mr. Ross recalled. (Ex. E).

<sup>45</sup> The tape was submitted as Gov’t Ex. 2 at the June 22 hearing.

<sup>46</sup> Tr. 12:6-8, 12:11-12.

<sup>47</sup> See Gov’t Resp. at 20.

warned them not to say anything vulgar.<sup>48</sup>

Finally, the critical substance of Mr. Ross's testimony is corroborated by John Doe 2's Declaration. John Doe 2 (Mr. Ross's cousin who performed the controlled buy at Famous Market) was the only other non-law enforcement witness to the statements Mr. Ross attributed to Agent Thomasson. Although not identical verbatim—and indeed more believable for the minor, non-substantive discrepancies an event two years in the past would have in two different people's recollection of it—Mr. Ross's testimony and John Doe 2's Declaration together corroborate the reliability of the underlying facts. John Doe 2's Declaration confirms, as Mr. Ross testified, that the officers told him where to go and what to say, including saying things like “finish a cook.”<sup>49</sup> It confirms, as Mr. Ross testified, that the officers wanted John Doe 2 to do buys at other stores, and that they were only Indian stores.<sup>50</sup> The Declaration confirms, as Mr. Ross testified, that John Doe 2 told the officers that he did not want to make the statements about finishing a cook as instructed by the agents.<sup>51</sup> And, most significantly, John Doe 2's Declaration confirms that “[t]he officers told me that the Indians' English

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<sup>48</sup> *Id.*

<sup>49</sup> John Doe 2 Decl. ¶¶ 6, 9; Tr. 12.

<sup>50</sup> John Doe 2 Decl. ¶ 8; Tr. 14.

<sup>51</sup> John Doe 2 Decl. ¶¶ 10, 11; Tr. 12:14-17.

wasn't good," just as Mr. Ross testified.<sup>52</sup> Mr. Ross and his cousin have had no communication since this motion has been filed, they certainly have not discussed either person's testimony, and Mr. Ross has never seen his cousin's Declaration.<sup>53</sup> The similarities of their independent recollections of the same event lead to the very strong inference that both are credible and that Agent Thomasson did indeed make the statements that each witness attributes to him and that he has not denied.

3. The Government's Attempts To Discredit John Edward Ross Are Unpersuasive.

The government presented no evidence to refute the testimony of Mr. Ross. None of the agents present for the controlled buy denied Mr. Ross's account. Instead, the Government attempts without success to create inconsistencies in the testimony of John Edward Ross.

The government contends that Mr. Ross's testimony should be discredited because he testified about instructions from Agent Thomasson that are not present on the tape recording of the controlled buy.<sup>54</sup> Mr. Ross, for his part, was clear that

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<sup>52</sup> John Doe 2 Decl. ¶ 12; Tr. 12:20-23.

<sup>53</sup> Tr 18:12-24. The government insinuates that Mr. Ross knew something by claiming that "he never testified that he was unaware" of the contents of the John Doe 2 Declaration and only answered "well-crafted questions on direct." Gov't Resp. at 38. Such insinuation is misleading given that the government fully cross-examined Mr. Ross and could have asked whatever questions they felt were left unanswered by the brief direct examination.

<sup>54</sup> Gov't Resp. at 35-37.

Agent Thomasson gave instructions about conducting the controlled buy before the recording was turned on.<sup>55</sup> Despite the government's mischaracterization of his testimony, he never said that the "only conversation" that occurred after the recorder was turned on were the instructions from Agent Thomasson.<sup>56</sup> Indeed, the brief instructions recorded on the tape would hardly be all the guidance given by law enforcement to a first-time informant with charges pending. The more detailed instructions standard in law enforcement practice are absent from the recording and must, therefore, have been provided before the tape commenced.<sup>57</sup> Additionally, defense counsel's review of other recordings of CI buys in OMM confirm that tapes **do not** routinely record all instructions and discussions between the CI and law enforcement.<sup>58</sup> In other words, Mr. Ross's recollection of receiving instructions before the tape recording began is consistent with standard police

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<sup>55</sup> Tr. 36:9, 37:6-15, 40:13.

<sup>56</sup> Gov't Resp. at 35; Tr. 31-32. Mr. Ross responded about the timing of Agent Thomasson's recorded warning with: "Well, I don't know if that's the next word he said or not. He could have said something else before he said that." Tr. 31:18-19.

<sup>57</sup> For example, the Georgia Law Enforcement Command College Manual on Managing a Multi-Agency Task Force directs officers working with CIs for Controlled Buys to do the following: "School CI in utilization of body recorder and/or transmitter . . . and test equipment. School CI to be observant for occupants, address numbers, weapons, directions in which doors open, and general details of the target area's environment. School CI in route to be driven to and from target location, obey all traffic laws, location of meeting place, and time after buy." Ex. G.

<sup>58</sup> See Ex. H (Wang Declaration).

procedures and the actual practices by OMM investigators.

The government also suggests that Mr. Ross is not credible based on his recollection of the timing of the meeting—a recollection corroborated by the GBI Investigation report and not contradicted by any evidence, including the recording. Mr. Ross testified that they arrived at the Shiloh Baptist Church at *approximately* 2:30 p.m.—the same language used by Agent Thomasson in his GBI investigation report of the event<sup>59</sup>—and that they spoke for 10-15 minutes before the recording was turned on. The recording indicates that it was commenced at 2:32 p.m.<sup>60</sup> A 10-15 minute frame is entirely consistent with the “approximately” terminology used by Mr. Ross and Agent Thomasson in his report.

**B. Profound Statistical Disparities: After Failing To Introduce Any Alternative Statistics, The Government Completely Misapprehends Defendants’ Clear Statistical Calculations.**

The government does not dispute that statistics can provide evidence of intentional discrimination or present statistical analysis of its own, but instead seeks to poke holes in Defendants’ analysis, ultimately to no avail. Specifically, the government repeatedly conflates Defendants’ current statistics with the far less developed figures that Defendants presented in their initial motion, which was filed last September prior to the investigation conducted by the ACLU. The statistics

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<sup>59</sup> Ex. E.

<sup>60</sup> See Gov’t Resp. at 20.

currently before the Court incorporate numerous crucial variables (e.g., the identities and numbers of similarly situated stores in the relevant six-county area who sold products that may be used to manufacture meth during the operative period and the ethnicity of the owners and managers of those stores) that were not available to Defendants when their initial motion was filed.

With these new statistics, Defendants have been able to draw previously unavailable and constitutionally significant conclusions, as detailed in Defendants' opening brief.<sup>61</sup> Most importantly, these new statistics specify the precise number of stores selling products that may be used to manufacture meth and specify which of these stores are owned by South Asians. Rather than comparing arrestees to the general population (as in the initial motion), Defendants are now able to say with precision that, among the pool of *similarly situated merchants*, 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 perfectly legal products that could be used to manufacture meth.<sup>62</sup>

Rather than engage the specificity of Defendants' current statistics, the government largely mischaracterizes them. For instance, the government refers to Defendants' claim that "an Indian-owned store was 95 *percent* more likely to be

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<sup>61</sup> Defs.' Mot. to Dismiss at 15-16, 30-33.

<sup>62</sup> Defs.' Mot. to Dismiss at 15-16.

investigated during OMM.”<sup>63</sup> This is simply wrong. Defendants have introduced reliable evidence showing that South Asian stores were **95 times** more likely to be targeted by OMM. Given that courts have inferred discrimination where minorities were **1.7 times**<sup>64</sup> and **6.6 times**<sup>65</sup> more likely than whites to suffer under unequal application of the laws, **95 times** is an extraordinary number. There is a shocking **1 in 15 million chance** that the indictments are random. It is nearly impossible that the targeting of South Asian stores was not the result of intentional discrimination.<sup>66</sup>

The government equally misapprehends the case law utilizing statistics to find evidence of intentional discrimination, arguing that Defendants’ reliance on *Yick Wo v. Hopkins*<sup>67</sup> to establish discriminatory intent “gets the defendants

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<sup>63</sup> Gov’t Resp. at 40 (emphasis added). The government’s rendition of the statistics (95 percent more likely) would mean that South Asian merchants were only twice as likely to be targeted as their Caucasian counterparts.

<sup>64</sup> *Hunter v. Underwood*, 471 U.S. 222, 227 (1985) (invalidating a disenfranchisement provision of the Alabama Constitution because African-Americans were 1.7 times as likely to suffer disenfranchisement under its terms than Caucasians). See Defs.’ Mot. to Dismiss at 33 n.85.

<sup>65</sup> *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) (emphasis added). See Defs.’ Mot. to Dismiss at 33 n.86.

<sup>66</sup> See also *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977).

<sup>67</sup> 118 U.S. 356 (1886).

nowhere.”<sup>68</sup> Significantly, the government recognizes that statistics alone can be sufficient to establish invidious intent, yet it misreads *Yick Wo*. The government focuses on the wrong set of data by simply comparing the percentage of Chinese-owned laundries shut down (83.3%) to the percentage of South Asian stores indicted in OMM (19.5%). These numbers merely reveal discriminatory impact and say nothing about discriminatory intent. To determine discriminatory intent, one must look at the *percentage of similarly situated stores targeted*. In *Yick Wo*, there were three times as many Chinese-owned laundries as non-Chinese owned and while they were the vast majority of stores targeted, they were only 66 times more likely to be targeted because they were a bigger percentage of the pool. Here, the numbers are reversed: South Asians own a mere one-fifth of similarly situated stores in the region and because so many were targeted (19.5% compared to .02% of non-South Asian stores), they were 95 times more likely to be targeted. Not surprisingly, the government completely ignores this astounding statistical evidence of intent.

Finally, the government offers a cursory, unsupported argument that Defendants have failed to consider numerous variables<sup>69</sup> in compiling and

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<sup>68</sup> Gov’t Resp. at 42.

<sup>69</sup> E.g., percentage of ownership in a store, store size, internal controls, and external oversight. See Gov’t Resp. at 41.

analyzing their current statistics. The government fails to explain either the relevancy of these items to OMM's decision-making or even asserted that agents relied on one or more of these purportedly neutral variables when it targeted stores that happened to be overwhelmingly owned and operated by South Asians. The reason for this is clear: OMM did not rely on these criteria. Most of the variables listed are hopelessly subjective, impossible to systematically analyze, and irrelevant to OMM's stated goal of materially undermining the ability of local meth manufacturers to obtain ingredients.

**IV. JOHN DOE AFFIDAVITS: The Court Should Consider Their Affidavits, The Government Made No Efforts To Obtain This Testimony, And The John Does Did Not Invoke The Fifth Amendment.**

Rather than strike the Doe affidavits, this Court should consider them in the context of the full evidentiary record. As with any pretrial proceeding, resolution of the present motion does not call for application of the Rules of Evidence,<sup>70</sup> allowing the Court to consider what evidence it deems useful. Specifically in considering a motion to dismiss for selective enforcement, the Eleventh Circuit directed the district court to consider not only an affidavit of an individual who was not brought before the district court for cross-examination, but evidence

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<sup>70</sup> Fed. R. Evid. 1101(d)(3).

submitted *under seal*—which the government had no opportunity to review.<sup>71</sup> In *Gordon*, 817 F.2d at 1540, the defendant submitted under seal one piece of direct evidence in support of his selective prosecution motion: a statement by a college student that s/he heard a government official say that “arrogance on the part of blacks” brought on the prosecutions.<sup>72</sup> The court ruled that “[t]his statement standing alone would not be enough, but assumes significance **in light of other evidence** suggesting a pattern of government activity in the voting fraud cases that were prosecuted.”<sup>73</sup> Likewise here, given the many pieces of Defendants’ evidence that corroborate the Doe affidavits, such as police reports showing the availability of meth-making products at numerous Caucasian stores and the live testimony of John Edward Ross, this Court is well-equipped to evaluate the Doe affidavits in their proper context, without taking the severe action of striking them from the record.

In any event, the government was not denied the ability to question the Doe witnesses. First, the government declined this Court’s invitation to interview John Doe 1 and John Doe 2 in order to determine the truthfulness of their affidavits and

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<sup>71</sup> Despite the government’s objections to defendants’ motion for leave to file exhibits under seal, Ex. I at 3 n.1, the magistrate judge permitted it “in order that defense strategies will not be compromised.” Ex. D at 8 n.2.

<sup>72</sup> Internal quotation marks omitted.

<sup>73</sup> *Gordon*, 817 F.2d 1540 (emphasis added).

any biases.<sup>74</sup> In the six and a half weeks prior to the June 19th hearing during which the government possessed the identities of John Doe 1 and John Doe 2,<sup>75</sup> it made no efforts to contact or interview either witness, despite the fact that both witnesses were in custody and therefore readily available.

Second, even if the witnesses had invoked their Fifth Amendment rights at the hearing, the government still had the option of seeking a court-ordered grant of immunity to compel them to testify.<sup>76</sup> The government chose not to pursue this route to obtain the testimony of John Doe 1 and John Doe 2.

Finally, the Doe witnesses did not invoke the Fifth Amendment; thus, the government's argument on this point is irrelevant. These witnesses informed the Court through their appointed counsel that they would not testify. The prospective witnesses never invoked their Fifth Amendment rights. The witnesses never took the stand, and their attorneys never referenced the Fifth Amendment. Instead, John Doe 1 and John Doe 2's attorneys merely informed the Court that their clients had "decided not to testify" and "elected not to testify,"<sup>77</sup> respectively. Neither the witnesses nor their counsel ever advised the Court that their decisions were based

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<sup>74</sup> See Order of April 25, 2006 at 4.

<sup>75</sup> Defense counsel disclosed the identities of John Doe 1 and John Doe 2 on May 3, 2006. Sealed document [128].

<sup>76</sup> See 18 U.S.C. §§ 6002, 6003, and 28 C.F.R. § 0.175; *S.E.C. v. Willis*, 142 F.R.D. 100 (S.D.N.Y. 1992).

<sup>77</sup> Tr. June 19, 2006, 21:19-22; 22:2-4.

on any constitutional protections, much less used terms (i.e., “privilege,” “the Fifth,” or reference to a question’s potential for “incrimination”) that are necessary to invoke those protections. Furthermore, because the witnesses’ Fifth Amendment rights are not self-effectuating, they must have been expressly invoked to become effective.<sup>78</sup> Thus, the Court should not strike the John Doe affidavits because: (1) the Court is capable of evaluating the affidavits “in light of other evidence”<sup>79</sup> Defendants have presented in support of selective enforcement; (2) the government failed to avail itself of its opportunities to interview the Does; (3) and the witnesses did not invoke the Fifth Amendment.<sup>80</sup>

## CONCLUSION

Defendants have demonstrated clear evidence of the government’s constitutionally invidious discrimination against them. Accordingly, Defendants respectfully request that this Court grant their Motion to Dismiss Based Upon Selective Enforcement.

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<sup>78</sup> See, e.g., *Quinn v. United States*, 349 U.S. 155, 163 (1955); *Garner v. United States*, 424 U.S. 648, 656 (1976).

<sup>79</sup> *Gordon*, 817 F.2d at 1540.

<sup>80</sup> The cases relied on by the government in their response have no bearing on this case because they: (1) concern evidence presented *at trial*, which involves stricter application of the evidentiary rules than at preliminary hearings; (2) concern invocation of the Fifth Amendment; and (3) involve balancing the concerns of the Fifth Amendment with the Sixth Amendment confrontation clause, which is not at issue in this case.

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<sup>81</sup> Counsel wish to acknowledge the contributions of Elizabeth C. Wang to this brief.

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2006, I electronically filed the foregoing DEFENDANTS' REPLY BRIEF with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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