11-3390-cv

United States Court of Appeals

for the

Second Circuit

PUERTO 80 PROJECTS, S.L.U.,

Petitioner-Appellant,

– v. –

UNITED STATES OF AMERICA AND DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT,

Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PETITIONER-APPELLANT PUERTO 80 PROJECTS, S.L.U.

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INTRODUCTION

The government's opposition to Puerto 80's First Amendment challenge hinges largely on its flawed assertion that the seizure was not a prior restraint. The government makes two errors that lead to its conclusion.

First, the government points only to cases proscribing past conduct already determined to be illegal after an adversary hearing. This reflects a fundamental misunderstanding of the difference between what courts have held constitutionally permissible and what the government did in the instant case—seize, *ex parte*, expressive material in advance of any determination (or even charge) that any law was broken.

Second, throughout its brief, the government assumes that the First Amendment does not protect any Rojadirecta content that the government claims links to infringing material. Not so. True, were the government ultimately to show at a hearing that the Rojadirecta web sites or certain content on those web sites infringed copyrights, that content would no longer be protected. But the very point of the prior restraint doctrine is that the government does not get to assume that speech is unprotected without first affording the speaker notice and an adversarial hearing on that issue. The government's failure to afford either renders its acts here unconstitutional.

Under the government's view of the Constitution, no First Amendment scrutiny is required in order for it to shut down a search engine, a website, a newspaper, or a printing press it believes is being used to violate the law—not just prior to a determination of the illegality of the content, but without *ever* having to prove that its owner violated the law. All it needs to do is assert that those sites are somehow facilitating infringement. The government's theory would have allowed it to seize the New York Times issue that published the Pentagon Papers and destroy it, on the theory that the New York Times was facilitating Daniel Ellsberg's violation of national security laws. And the Times would have had no opportunity to show that its speech was lawful. That is simply not the law. *New York Times Co. v. United States*, 403 U.S. 713 (1971) (effort to block publication of information alleged to violate the law in advance of legal hearing was an unconstitutional prior restraint).

I. WHETHER THE FIRST AMENDMENT DEPRIVATION IS A "SUBSTANTIAL HARDSHIP" WITHIN THE MEANING OF CAFRA IS IRRELEVANT

Puerto 80 is appealing the district court's rejection of its argument that the seizure constituted an unlawful prior restraint of speech. Puerto 80 has not appealed the district court's finding that the hardship it bore as a result of the seizure does not constitute the type of "substantial hardship" articulated in 18 U.S.C. § 983(f)(1)(C). The government's detailed effort to defend that ruling

accordingly misses the point. If the government's seizure of the domain names violates the First Amendment, it is irrelevant whether it also constitutes a substantial hardship within the meaning of section 983(f). Accordingly, we focus our reply on the one issue on appeal: the government's prior restraint of speech.

For the same reason, the government's suggestion that the standard of review in this case is abuse of discretion is incorrect. Abuse of discretion may be the standard for reviewing a "substantial hardship" determination under 18 U.S.C. § 983(f)(1)(C); it is not the standard for reviewing a First Amendment challenge to a prior restraint. As Puerto 80 established in its Opening Brief, and as the government did not deny, review of First Amendment challenges is *de novo*. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 n.27 (1984) ("The simple fact is that First Amendment questions of 'constitutional fact' compel this Court's de novo review.").

II. THE SEIZURE IS AN UNLAWFUL PRIOR RESTRAINT

A. The Government's *Ex Parte* Seizure of the Rojadirecta Domain Names Is a Prior Restraint on Speech.

The government's seizure was no less of a prior restraint by virtue of the fact that the suppression occurred in the context of an attempt to enforce intellectual property laws. The Supreme Court has held that "the way in which a restraint on speech is 'characterized' [under the law] is of little consequence." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 66 (1989) (noting that "[t]he fact that

respondent's motion for seizure was couched as one under the Indiana RICO law—instead of being brought under the substantive obscenity statute—is unavailing."). *See also Beal v. Stern*, 184 F.3d 117, 124 (2d Cir. 1999) ("A regulation may constitute a prior restraint even if it is not content-based.").

This principle is borne out in a long line of Supreme Court jurisprudence, including *Fort Wayne*, which the government erroneously argues "turned on the nature of the seizure," and required the state to "delve into an inquiry related to the content of the books . . . ." (Brief for the United States of America ("Gov. Br.") at 21.) But the Court's determination that the seizure was a prior restraint in *Fort Wayne* did not hinge on the content of the suppressed speech. In fact, the Indiana Supreme Court below had found that the seizure was "not based on the nature or suspected obscenity of the contents of the items seized, but upon the neutral grounds that the sequestered property represented assets used and acquired in the course of racketeering activity." *Fort Wayne*, 489 U.S. at 64. The Supreme Court did "not question of the holding of the court below that adding obscenity-law violations to the list of RICO predicate crimes was not a mere ruse to sidestep the First Amendment," and further assumed that the content at issue was "forfeitable (like other property such as a bank account or a yacht) *when it is proved that these items are property actually used in, or derived from, a pattern of violations of the State's obscenity laws*." *Id*. at 65 (emphasis added). The Court held that "[e]ven

with these assumptions . . . the special rules applicable to removing First Amendment materials from circulation are relevant here," and that the seizure was an unlawful prior restraint because there was not any determination that the seized items were unprotected speech or that a RICO violation *had occurred*. *Id*. at 65-66.

The Court went on to make clear that it was only after an adversarial hearing that determined the illegality of the speech that the government could seize the books in question: "At least where the RICO violation claimed is a pattern of racketeering that can be established only by rebutting the presumption that expressive materials are protected by the First Amendment, that presumption is not rebutted until the claimed justification for seizing books or other publications *is properly established in an adversary proceeding*." *Id*. at 66 (emphasis added).

In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), the Supreme Court described the characteristics of a prior restraint. At issue in *Southeastern* was a municipal theater's denial of use of its facilities for a musical performance "in anticipation that the production would violate the law." *Id*. at 555. The Court explained that the elements of a prior restraint were "clearly present" where "approval of the [performance] depended upon the board's affirmative action. Approval was not a matter of routine; instead, it involved the

'appraisal of facts, the exercise of judgment, and the formation of an opinion' by the board." *Id*. at 554.

As in *Fort Wayne* and *Southeastern*, the government blocked Puerto 80's use of its domain names in anticipation that some of the content linked to on the site may violate the law. This is a classic prior restraint on speech.

Nor can the government point to any purported content-neutrality to save its actions. In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), a city ordinance that regulated adult-oriented businesses was deemed to be a prior restraint even where the city did "not exercise discretion by passing judgment on the content of any protected speech." *Id*. at 229. Rather, the city performed the "ministerial action" of reviewing the general qualifications of each license applicant. *Id*. Here, the government did far more: it targeted the Rojadirecta domain names precisely because of the content of Puerto 80's web sites.

B. The Government's Cases Involve Restrictions on Speech After That Speech Has Already Been Held Unprotected

The government attempts to analogize its *ex parte* seizure of the Rojadirecta domains to the post-hearing restraint on speech that occurred in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), and *Alexander v. United States*, 509 U.S. 544 (1993). *Arcara* and *Alexander* involved the incidental suppression of expressive activity as punishment for a proven violation of a law. Neither case addresses the

standard applicable to the seizure that occurred here, where there was no demonstrated violation of any law.

The challenged action in *Arcara* was an "order of abatement . . . direct[ing] the effectual closing of" any building *found* to be a public heath nuisance in a civil or criminal proceeding. *Arcara*, 478 U.S. at 699-700. The Court noted that the closure order sought "would not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited," because the "closure order has nothing to do with any expressive conduct at all." *Id*. at 706 n.2. The closure order in *Arcara* was aimed at punishing past conduct (prostitution) that had already been found to be illegal in an adversarial proceeding, and the incidental burden on speech resulting from closure of the premises had "nothing to do with books or other expressive activity." *Id*. at 707. By contrast, the government here made an advance determination that the material linked to by Rojadirecta was illegal, without affording Rojadirecta or its users advance notice, an opportunity to challenge the seizure, or a speedy determination of the seizure's legality. Unlike *Arcara*, the target of the seizure order here was the content of the material linked to on the Rojadirecta site.

Arcara is distinguishable for another reason: the closure authorized by the regulation was of physical premises used for an illegal purpose, rather than a medium of communication. The Court in *Arcara* noted that the "First Amendment

is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books." *Id*. at 707. But here, the Rojadirecta website doesn't just "happen to" host expressive material and display speech—the essence of a website is to provide a forum to communicate, and, like a printing press, to facilitate the dissemination of speech. *See Reno v. ACLU*, 521 U.S. 844, 850, 870 (1997) ("The Internet is 'a unique and wholly new medium of worldwide human communication'" through which "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox") (citation omitted); *Blumenthal v. Drudge*, 992 F. Supp. 44, 48 n.7 (D.D.C. 1998) ("It is probably safe to say that more ideas and information are shared on the Internet than in any other medium."); *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1091 (W.D. Wash. 2001) ("It has been suggested that the Internet may be the 'greatest innovation in speech since the invention of the printing press[.]'") (quoting Raymond Shih Ray Ku, *Open Internet Access and Freedom of Speech: A First Amendment Catch–22*, 75 Tul. L. Rev. 87, 88 (2000)). The Constitution applies different rules to the seizure of printing presses than it does to the seizure of drugs or houses.[1]

[1] The district court did state that the primary purpose of the Rojadirecta website was to link to sporting events. (SPA-4.) The district court did not cite whatever evidence it was that led it to that conclusion, with which Puerto 80 respectfully disagrees. Nor did it make any effort to distinguish links to supposedly illegal content from links to sporting events actually posted by or with the authorization of

Nor can the government take solace in *Alexander*. There, the government action found not to run afoul of the First Amendment was "a criminal penalty imposed following a conviction for conducting an enterprise engaged in racketeering activities." *Alexander*, 509 U.S. at 548-49 (quoting *Alexander v. Thornburgh*, 943 F.2d 825, 834 (8th Cir. 1991)). The penalty—forfeiture of material found to be obscene—was ordered after a "full criminal trial on the merits," at which the government "established beyond a reasonable doubt the basis for the forfeiture." *Id*. at 552. Discussing the distinction between a prior restraint and penalizing past speech, including citation to *Arcara*, the Court concluded: "Our cases . . . establish quite clearly that the First Amendment does not prohibit either stringent criminal sanctions for obscenity offenses or forfeiture of expressive materials as punishment for criminal conduct." *Id*. at 554-55. As this Court and the Supreme Court have noted, "[t]his view reflects 'a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.'" *Beal*, 184 F.3d at 123 (emphasis in original) (quoting *Southeastern*, 420 U.S. at 559).

Here, the government has not even *charged* that Puerto 80 has engaged in any criminal—or tortious—conduct, let alone proven any such violation. (*See* Motion for Request for Judicial Notice ("MJN"), ECF No. 39, Exh. D, at 17). It

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the copyright owner. In any event, the district court did not and could not deny that the Rojadirecta website also hosted expressive speech.

can take no solace in cases that find it lawful for the government to punish speech *after* it has been found criminal.

C. The Government Wrongly Presupposes That There is No Speech Interest in the Parts of the Rojadirecta Web Sites It Claims Are Infringing.

The disconnect between what the First Amendment cases require and what the government is arguing seems to be driven by the government's assumption that it is only the unquestionably noninfringing speech on the Rojadirecta forums that might trigger First Amendment concern. But that misunderstands the prior restraint doctrine. The government is (at some times, but not others) claiming that much of the content on the Rojadirecta site consists of links to other sites that show videos of sporting events, that those other sites are showing those videos without authorization, and that Puerto 80 is liable because its links help users to find that infringing content. (MJN, Exh. D at 17.)

Were the government able to prove each of those things in an adversarial hearing, it might have a case for copyright infringement, and if the court found such infringement, the material deemed infringing would not be subject to First Amendment protection.[2] But the government has not proven those things. Indeed, in the district court it is now denying it will *ever* need to prove them. (MJN, Exh.

[2] Even then, the government would not have justified shutting down a web site altogether. There is unquestionably protected material on the Rojadirecta site, and many of the links to sporting events appear to be links to legitimate copies of those events posted with the copyright owner's consent. (*See* A-48 at ¶ 10.)

D at 18.) And it is quite unlikely the government ultimately could prove them. The only two courts to have considered the legality of the Rojadirecta web sites have held that they did not infringe copyright. (A-18-A-44.) And as Puerto 80 explained in its opening brief without contradiction from the government, United States courts have overwhelmingly held that merely linking to content that turns out to infringe is not even civil, much less criminal copyright infringement.

Whether or not the government could eventually prove its case, however, it has not done so yet. And the prior restraint doctrine makes it clear that the government cannot suppress speech until a court determines in an adversary hearing that that speech is unprotected. The government can no more assume the links on the Rojadirecta.com web site are unprotected "copyright infringement" than it could assume the book seized in *Fort Wayne* was unprotected obscenity. The government is entitled to its day in court. But it is not entitled to bypass that day in court by suppressing Puerto 80's web site without having to make its case.

D. The Procedural Safeguards Required to Impose a Prior Restraint Were Lacking.

Because the seizure was a prior restraint, the government was required to comply with the procedural rules "applicable to removing First Amendment materials from circulation." *Fort Wayne*, 489 U.S. at 65. Although the government contends it did not have to comply with these rules, it does not attempt to show that it did comply. The government admits that the seizure was made *ex*

parte (Gov. Br. at 5) and does not dispute that it failed to provide any advance notice or an opportunity to contest the seizure. As borne out in the long line of cases cited by Puerto 80 in its Opening Brief—cases which the government does not cite, let alone address—the First Amendment requires notice and an opportunity to be heard before expressive content can be seized. *See Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 180 (1968) (*ex parte* order restraining white supremacist group from holding rallies violates First Amendment); *Astro Cinema Corp. v. Mackell*, 422 F.2d 293, 296 (2d Cir. 1970) (holding that the "seizure of a film which is to be shown to a large public audience . . . must be preceded by an adversary hearing"); *United States v. Quattrone*, 402 F.3d 304, 312 (2d Cir. 2005) ("[T]he lack of notice or opportunity to be heard normally renders a prior restraint invalid.").

Additionally, the government admits that the seizure order was based on a finding of probable cause to believe that a violation of the law had transpired. (Gov. Br. at 5-6.) This, too, is inadequate: "[M]ere probable cause to believe a legal violation has transpired is not adequate to remove" expressive content from circulation. *Fort Wayne*, 489 U.S. at 66. *Cf. Alexander*, 509 U.S. at 552. ("Here, [in] contrast [to *Fort Wayne*], the seizure was not premature, because the Government established beyond a reasonable doubt the basis for the forfeiture.").

Finally, it is worth noting that the procedure Puerto 80 invoked here—a Petition for return of seized property under 18 U.S.C. § 983(f)(1)(C)—does not alleviate the prior restraint problems identified above, for the inescapable reason that the procedure cannot be invoked *before* the seizure and restraint on speech. Nor does the section 983 procedure provide all of the safeguards required to satisfy the requirements for a prior restraint. Indeed, the government does not dispute that the district court placed the burden on Puerto 80 to show why the forfeiture was not warranted. This runs afoul of the requirement that the censor bear the burden of going to court to suppress the speech, and bear the burden of proof once in court. *Freedman v. Maryland*, 380 U.S. 51, 60 (1965).[3]

In short, the only issue this Court need resolve is whether the government's seizure of a web site is a prior restraint at all. Once that question is resolved, the government must admit that it did not comply with the procedures necessary to impose prior restraints. Because the government failed to comply with the procedural requirements necessary to protect Puerto 80 and its users' speech interests, the district court's determination that the seizure did not violate the First Amendment was in error.

[3] In *FW/PBS*, the Supreme Court did not require the city to bear the burden of going to court to effect the denial of a license application or bear the burden once in court. But in *FW/PBS*, unlike here, the license applicant was provided advance notice, and the approval process required the applicant's participation. 493 U.S. at 227.

III. ALTERNATIVELY, THE SEIZURE FAILS A TRADITIONAL FIRST AMENDMENT ANALYSIS

The government's failure to consider the speech value of the non-forum content on the Rojadirecta websites also infects its over-breadth analysis. The government acts as though it is trying to regulate something unrelated to speech, and only incidentally burdening speech in the Rojadirecta forums. Not so. The government's seizure of Puerto 80's domain names had the purpose and direct effect of shutting down speech. Indeed, because the seized items were Internet domains, it is by definition *only* speech that the government could be targeting. The government might ultimately be able to prove that some of that speech is unprotected, but it has as yet fallen far short of making a showing that so much of it is unprotected that seizing it justifies shutting down the rest.

There is, as the government concedes, content on the Rojadirecta site that is indisputably non-infringing, protected speech. (Gov. Br. at 25.) The government nonetheless begins by disputing that its actions should be subject to *any* First Amendment scrutiny. (Gov. Br. at 18-20.) The cases on which it relies make the government's error clear, for they are cases in which a statute regulated non-speech conduct and only incidentally burdened speech. For example, the government cites *Church of American Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 208 (2d Cir. 2004), which narrowly held that where a "statute banning conduct imposes a burden on the wearing of an element of an expressive uniform, which element has

no independent or incremental expressive value, the First Amendment is not implicated . . ." And in *Sorrell v. IMS Health Inc.*, _ U.S. _, 131 S. Ct. 2653 (2011), the Supreme Court invalidated a statute that prohibited pharmacies from selling or disseminating certain information collected from prescribing physicians for marketing purposes. Distinguishing those cases that seek to regulate non-expressive conduct, the Court in *Sorrell* held that the statute—both "on its face and in its practical operation"—does not "simply have an effect on speech, but it is directed at certain content and is aimed at particular speakers." *Id*. at 2665. Here, too, the government's seizure was aimed at a channel of communication and the content found on it.

The government goes on to argue that even if its actions were subject to First Amendment scrutiny, it "clearly satisf[ies]" the test articulated in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). (Gov. Br. at 23-24.) Under *O'Brien*, a regulation is "sufficiently justified" notwithstanding its effect on speech if it is "within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377.

The government has not shown that shutting down the entire Rojadirecta domain name was no greater a restriction than was *essential* to the furtherance of the government's interest in preventing criminal copyright infringement. *O'Brien*, 391 U.S. at 377. In attempting to defend the seizure as narrowly tailored, the government points to the fact that users may still be able to access Rojadirecta's content from other sources. (Gov. Br. at 25.) True, shutting down the Rojadirecta site does not eliminate the allegedly infringing content itself—which is not (as the government admits) hosted by Rojadirecta. This fact hardly supports the government's position, however. If anything, it speaks to the ineffectiveness of the government's use of the forfeiture statute to combat copyright infringement, making it questionable whether the seizure is in fact "furthering" the government's asserted interest.

But even if the government's use of the forfeiture statute in this manner did further the government's interest in combating criminal infringement, the government has not shown that it was the least restrictive way of furthering its interest. The First Amendment "requires that government regulation of speech 'must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.'" 1 Smolla & Nimmer on Freedom of Speech § 6:1 (2011) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940)). As one leading commentator explains, this "precision principle is reflected in rules such as the

'overbreadth' and 'vagueness' doctrines. . . . While the degree of precision required may increase in heightened scrutiny situations, the requirement of some precision is a 'First Amendment universal.'" 1 Smolla & Nimmer on Freedom of Speech § 4:25 (2011) (emphasis in original) (internal citations omitted). *See also Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 371 (1997) (noting that "'our standard time, place, and manner analysis is not sufficiently rigorous' when it comes to evaluating content-neutral *injunctions* that restrict speech") (quoting *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 765 (1994) (emphasis in original); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) ("The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.").[4]

The government had ample alternatives, each less restrictive than seizure of the Rojadirecta domain names. It could have targeted the infringing acts and parties themselves by bringing charges directly against them. To the extent the identity of the infringing parties is unknown, the government had the statutory authority to subpoena the ISPs hosting the content to obtain the identity of the

[4] Truly content-neutral time, place and manner restrictions on speech can be justified by pointing to the alternative avenues of communication open to the speaker. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). But the government's seizure of the Rojadirecta domain names is not simply a time, place, and manner restriction. It is designed (within the limits of the government's power over a foreign web site) to shut down all speech at Rojadirecta.

allegedly infringing individuals. *See* 17 U.S.C. § 512(h) (authorizing the issuance of subpoenas to identify an alleged infringer). Or the government could have brought a civil lawsuit against Puerto 80 directly, and tried to prove its theory of copyright infringement in court. Had it done so, it might have been entitled to enjoin proven acts of infringement, or perhaps even to a general injunction against infringement on the Rojadirecta sites. Instead of using these less restrictive means of achieving its goal, the government availed itself of the drastic remedy of shutting down the domain names that linked to the allegedly infringing material, and all of the non-infringing content hosted on them.[5] In doing so, the government arrogated for itself a power to silence speech that even the broadest court order could not give it. That is the most restrictive alternative, not the least restrictive.

CONCLUSION

The government's seizure of the Rojadirecta domain names impermissibly burdened speech. It did so without notice to Puerto 80 or an opportunity to contest the seizure in an adversary hearing. It is an unconstitutional prior restraint on speech. Puerto 80 requests that this Court hold that prior restraint on speech

5 The government contends that the forfeiture statute does not "present constitutional infirmities due to its purported overbreadth" because it does not "criminalize" constitutionally protected speech. (Gov. Br. at 28-29.) Overbreadth is not so limited. The government itself cites a number of cases in which the Supreme Court found unconstitutionally overbroad civil statutes that regulated speech. *See Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) (finding that a state law which imposed a 25% limit on charitable fund-raising expenses was unconstitutionally overbroad).

unlawful and order the return of the domain names to Puerto 80 pending the resolution of a lawful proceeding in the district court.

Dated: December 6, 2011

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing brief complies with Rule 32(a)(7)(B)(i) with respect to word and line limitations. The word processing equipment used to generate the foregoing brief indicates that the brief, excluding those portions exempted by Rule 32(a)(7)(B)(iii), contains 4,627 words and is in 14-point Times New Roman font.

Dated: December 6, 2011

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I, Natasha S. Johnson, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age.

On December 6, 2011

deponent served the within: **Reply Brief for Petitioner-Appellant**

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