Nos. 02-3376 & 02-3389 (*consolidated*)
IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FIRST DEFENSE LEGAL AID,

Plaintiff-Appellee,

vs.

CITY OF CHICAGO, et al,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 01 C 9671
The Honorable **Milton A. Shadur**, Judge Presiding

BRIEF OF PLAINTIFF-APPELLEE FIRST DEFENSE LEGAL AID

Locke E. Bowman
Jean Maclean Snyder
MacArthur Justice Center
University of Chicago Law School
1111 E. 60th Street
Chicago, Illinois 60637
(773) 753-4405

Craig B. Futterman
Edwin F. Mandel Legal Aid Clinic
University of Chicago Law School
6020 S. University Avenue
Chicago, Illinois 60637
(773) 702-9611

OF COUNSEL:

Geoffrey R. Stone
Harry Kalven, Jr., Distinguished Service Professor of Law
University of Chicago Law School
1111 E. 60th Street
Chicago, Illinois 60637
(773) 702-8810

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: **02-3376**

Short Caption: **First Defense Legal Aid v. City of Chicago, et. al.**

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The test of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

First Defense Legal Aid
Sladjana Vuckovic
Dawn Sheikh

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

MacArthur Justice Center
1111 E. 60th Street
Chicago, Illinois 60637

Mandel Legal Aid Clinic
6020 S. University Avenue
Chicago, Illinois 60637

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

_____

Attorney's Signature: _____ Date: **September 25, 2002**

Attorney's Printed Name: **Locke E. Bowman**

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes **X** No____

Address: MacArthur Justice Center, University of Chicago Law School
1111 E. 60th Street, Chicago, Illinois 60637

Phone Number: **(773) 753-4405** Fax Number: **(773) 702-0349**

E-Mail Address: **locke_bowman@uchicago.edu**

rev. 11/01 AK

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

Other Authorities:

JURISDICTIONAL STATEMENT

The jurisdictional statements of defendants-appellants City of Chicago, Superintendent Terry Hillard, and Area Commanders Frank Trigg, Walter Green, Richard Kobel and Gerald Mahnke (hereinafter, collectively, the "Police") and of defendant-appellant State's Attorney Richard A. Devine (hereinafter, the "State's Attorney") are complete and correct.

ISSUE PRESENTED FOR REVIEW

Whether the police and other law enforcement officials may constitutionally prevent an attorney from advising his client -- a *voluntarily cooperating* witness in a police investigation -- because the government wants to keep the client in the dark about his legal rights and responsibilities.

STATEMENT OF THE CASE

Plaintiff First Defense Legal Aid ("FDLA"), a non-profit legal aid organization that represents indigent persons who are questioned in police stations in the City of Chicago, instituted this litigation in the District Court (with co-plaintiffs Sladjana Vuckovic and Dawn Sheikh, two of its lawyers) to prevent the Police and the State's Attorney from interfering with contact between FDLA and its clients. R. 1-1 at 2. The complaint cited a variety of Police and State's Attorney practices that caused such interference. *See* R. 1-1 at 6-9, ¶ 23. Among

them was the practice of obstructing access to FDLA clients on the ground that the clients were witnesses, not suspects, who were voluntarily at the police station and thus had no right to their lawyer. *Id.* at 6.

The complaint had eight counts: Counts I and II alleged that the defendants' interference with contact between FDLA and its clients violated, respectively, the First Amendment and Due Process rights of FDLA and its attorneys; Counts III through VI asserted various federal and state law claims on behalf of FDLA's clients; and, finally, Counts VII and VIII raised federal and state claims, respectively, arising out of a series of instances in which police officers had physically assaulted FDLA attorneys Vuckovic and Sheikh. *Id*. at 11-17. Shortly after the complaint was filed, plaintiffs moved for a preliminary injunction on Counts I through VI. R. 16.

During the proceedings below, Counts II through VIII were dismissed, either voluntarily or by order of court. FDLA's Due Process claim (Count II) was dismissed on defendants' motions pursuant to an order entered in the District Court on July 18. App. A51.[1] Before completion of the briefing of the defendants' motions to dismiss were fully briefed, FDLA voluntarily dismissed its claims on

[1] Citations in the form "App. ___" refer to the Appendix submitted with the Brief of the Police defendants.

behalf of its clients (Counts III through VI). R. 42, 43. Late in the litigation, the assault and battery claims of plaintiffs Vuckovic and Sheikh (Counts VII and VIII) were also voluntarily dismissed. R. 67.

On June 7, 2002, prompted by a series of recent incidents in which FDLA attorneys were refused access to witnesses being questioned at one of the Chicago police area headquarters, FDLA moved for a temporary restraining order ("TRO") to direct the defendants to allow it to meet with its witness-clients. R. 47, at 9. The District Court conducted a full evidentiary hearing on this motion over the course of three days, on June 7, June 12 and June 25. *See* R. 81-1, 81-2 and 81-4.

Following that hearing, on July 18, 2002, the District Court entered a brief order denying without prejudice FDLA's motion for a TRO because "a current grant of what could equate to plaintiffs' ultimately sought relief, in the form of a mandatory injunction, would constitute an unusual step (even if fully justified)." App. A61. Simultaneously, the District Court issued its Memorandum Opinion and Order denying defendants' motions to dismiss FDLA's First Amendment claim in Count I of the complaint (while dismissing FDLA's Due Process claim). App. A43-60. In light of the rulings on the TRO motion and on the motions to

dismiss, the District Court directed the parties to appear for a status hearing, on July 23, to discuss "the subject of potential interim relief." App. A62.

At the status hearing on July 23, the defendants informed the court that, from their standpoint, the evidentiary record of the TRO proceedings was sufficient to proceed directly to final judgment on the First Amendment issue of FDLA's right to communicate with witnesses being questioned at police stations. R. 88-1, at 8-10, 16, 17. Following the announcement of the defendants' position, the Court suggested a short adjournment of the status hearing to permit plaintiff's counsel to consider their position, in light of the defendants' wish to proceed to judgment on the TRO hearing record and the Court's view (expressed at that hearing) that injunctive relief would not likely be awarded in FDLA's favor on its other claims. *See Id*. at 14-15, 18.

On July 26, the parties appeared again. R. 88-2. Plaintiff's counsel informed the court that FDLA was prepared to proceed to final judgment on the existing evidentiary record. *Id.* at 3-4. Counsel for all defendants reiterated that the record was sufficient for their purposes. *Id.* at 4-5. The parties thereupon submitted proposed findings of fact and conclusions of law. R. 71, 72 and 73.

After receiving these submissions, the District Court issued its findings and conclusions, based, by agreement, upon the record from the TRO proceedings, and issued a permanent injunction barring the defendants from further interference with FDLA's First Amendment right to communicate with witnesses it has been asked to represent.

After unsuccessfully seeking in the District Court a stay of the injunction pending appeal (R. 77, 78), the defendants sought and obtained a stay from this Court.

STATEMENT OF FACTS

The District Court made findings of fact in support of its injunction order following an evidentiary hearing on FDLA's motion for a TRO. This Statement of Facts draws primarily upon the District Court's findings, supplemented where appropriate with references to the underlying evidentiary record and the proceedings below.

FDLA's Work

FDLA was formed in 1994 for the purpose of providing free legal assistance to indigent persons undergoing questioning at Chicago police stations. App. A2. FDLA, according to its Executive Director, Darron Bowden, fills a

"critical gap" in the indigent defense system by working to "make real" the opportunity of indigent persons to consult with counsel in police stations. *Id.* at A3. FDLA's services are typically provided to those who live in low income areas of Chicago where a relatively high proportion of the population has or will have involvement with the criminal justice system. *Id.* at A4. Through its direct representation of clients as well as through public education and issues-related advocacy, FDLA works to defend the constitutional rights of its clients and its client population generally. *Id.* at A5.

FDLA operates a 24 hour hotline, with a widely publicized number that people can call when a family member or friend has been taken to a Chicago police station. *Id.* at A3. An FDLA employee interviews the caller and, where the case meets FDLA guidelines, sends an FDLA attorney to the police station to assist the person there. *Id.* at A3-4. FDLA attorneys Darron Bowden and Sladjana Vuckovic testified, both in general and with reference to specific cases, regarding the FDLA procedures for screening callers and deciding whether to accept requests for representation. R. 81-1 at 60, 61 and 98-100. Relying on decisions of the Illinois Appellate Court (*People v. McCauley*, 228 Ill. App. 3d 893, 898 (1st Dist. 1992), *rev'd in part on other grounds*, 163 Ill. 2d 414 (1994) and *People v. Smith*, 220

Ill. App. 3d 678, 685 (1st Dist. 1991)), the District Court found, as a matter of Illinois law, that FDLA's arrangements with these callers "suffice to create an attorney-client relationship between the FDLA attorney and the person" being questioned. App. A4, A28-29.

FDLA represents both persons who are in custody as suspects and, less frequently, persons who have been brought to a police station for questioning as witnesses. App. A4-5. When FDLA is retained to represent an individual, an FDLA attorney determines where the client is located and immediately goes to that location to interview the client. App. A3-4. FDLA undertakes to make one of its attorneys available to the client for advice and consultation for as long as the client is present at the police station. App. A4.

Both when FDLA represents a suspect who is in custody and when it represents an individual who is present in the police station as a witness, FDLA's attorney will advise the client, among other things, of his right not to provide information. *See* R. 81-1 at 73-74. But in advising clients who are witnesses whether their best interests are served by declining to participate in a police investigation, FDLA considers the *specific* circumstances facing the witness: FDLA attorney Dawn Sheikh testified that in those rare situations when she has

been allowed to counsel a witness in a police station, she has sometimes: (a) advised the witness to agree to be interviewed and to give a statement (R. 81-2 at 271; 81-4 at 384) and (b) attempted to negotiate an assurance that the witness would not be prosecuted in exchange for the witness's participation in an investigation (R. 81-2 at 279-80). The District Court found that FDLA's advice to witnesses "is a truthful message that *accurately* and *honestly* reflects [the witnesses'] legal rights[.]" App. A9 (emphasis added).[2]

FDLA instituted this litigation because its lawyers had encountered increasing difficulty at the hands of the Police and the State's Attorney in discharging their professional responsibilities to their clients. R. 1-1 at 6.

---

[2] At the hearing, under questioning from counsel for the State's Attorney, Chicago Police Lieutenant John Farrell claimed that "in a great majority of cases" and/or "on many occasions" FDLA attorneys, after having met with a *suspect* in a case, would then seek to meet with witnesses being questioned by police on the same matter. R. 81-2 at 153, 198-99. Pressed, however, he could point to only *two* specific situations in which he claimed this had happened. *Id.* at 202-203. The State's Attorney used this testimony to suggest that, once in the stationhouse, FDLA improperly attempts to take advantage of its position to find other relevant witnesses in order to advance the interest of suspects in having those other witnesses remain silent. *See* R. 56 at 6-9.

The District Court (despite the concern this allegation prompted (*see* R. 81-2 at 153-54)) ultimately found that the allegation lacked evidentiary support, finding that there was no credible evidence that FDLA engages in direct representation of witnesses in anything other than a lawful, ethical and proper manner. App. A5. Lt. Farrell conceded on cross examination that he had no personal knowledge of FDLA seeking to represent witnesses whose names it had learned from suspects. R. 81-2 at 203-204. FDLA attorney Dawn Sheikh testified that FDLA policy strictly prohibits the solicitation of any clients and, thus, barred the conduct Lt. Farrell alleged. R. 81-2 at 290, 303.

Although FDLA's complaint identified a number of tactics employed by the defendants to interfere with FDLA's work (*Id.* at 6-9), this litigation now focuses on the defendants' obstruction of FDLA's communication with clients who are voluntarily cooperating with the Police as witnesses.

The Police Policy to Obstruct Communications Between Witnesses and Their Counsel

Relying solely on admissions of the Police officials who testified at the evidentiary hearing, the District Court found that the Police have a policy of obstructing communications between witnesses being questioned in police stations and counsel who have been retained to represent them. App. A6-7. The District Court found that the Police policy consists of the following:

(1) Taking witnesses to police stations for questioning and isolating them in small, locked, windowless interrogation rooms, typically for many hours and in some cases for days, in order to "overcome [their] reluctance" to cooperate with the police.

(2) Denying access when an attorney appears at the police station and advises the police that he or she represents the witness.

(3) Refusing even to inform the witness of counsel's presence.

(4) In those cases where a witness spontaneously asks to speak with his attorney, actively discouraging the witness from doing so, falsely informing the witness either that he does not need a lawyer or that it is better if fewer people know he is at the station, or both.

(5) Permitting the witness who affirmatively asks to speak with his attorney to do so *only* if the witness "insists" on the communication.

App. A6-8.

The District Court found that, in practice, application of this policy has caused the isolation of specific FDLA clients for lengthy periods – often for many hours, sometimes overnight – despite the witness's express request to speak with his own counsel and despite the fact that the witness's FDLA attorney is actually present at the stationhouse and available to speak with him. *Id.* at A8-9, A12-13.

The Purpose of the Defendants' Policy

The District Court found that the defendants employ their policy "for the express purpose of keeping the witnesses in ignorance of the attorney's presence in the police station and, ultimately, of the information and advice that the lawyer may convey." *Id.* at A10. The defendants work to indoctrinate witnesses to the view that they should cooperate with the police investigation and that any

concern they might have for their own interest is unwarranted. *Ibid.* When a witness asks to speak with a lawyer, the police discourage the witness from taking that course, informing him (often falsely) that he does not need a lawyer. *Ibid.*

Police officials admitted at the hearing that the defendants' purpose in obstructing communication between FDLA attorneys and their clients is to keep the witnesses in ignorance of their attorneys' availability to speak with them and of the information the lawyers might convey – particularly the information that witnesses are not required to participate in an investigation and are, indeed, free to leave the police station. *Ibid.*

In contrast to the defendants' treatment of FDLA attorneys, the Police allow *other* private speakers to enter the police station to communicate with witnesses when the Police believe that these conversations will help secure the witnesses' participation in an investigation – whether or not this is in the best interests of the individuals. *Id.* at A11. Chicago Police Chief of Detectives Philip Cline testified, for example, that a "pastor, friend or brother" would be permitted to speak with witnesses if doing so "will keep them there and keep them cooperating with us." *Ibid.*

At the hearing, police officials claimed that their policy of isolating a witness from his counsel was intended to enable the police to develop "rapport" or a "personal bond" with the witness free from any and all outside distractions. *See, e.g.*, R. 81-2 at 144-45, 147-48, 194, 236-37. The District Court discounted this testimony, finding that:

> the police references to 'rapport' and 'personal bond' are nothing more than a euphemistic way of describing defendants' actual purpose in forbidding any contact by FDLA attorneys: to prevent any person from informing witnesses of their right not to cooperate in police investigations and, thereby, to keep the witnesses in ignorance of any such right.

App. A11.

Conditions Under which Witnesses are Held for Questioning

According to Police testimony, witnesses under questioning at the police station are invariably told that they are "free to leave" the station and terminate the questioning. R. 81-2 at 182-183, 261-262. The District Court found that testimony incredible. App. at A12. Two factors led to the District Court's judgment in that regard:

i) The conditions in which the witnesses characteristically remain at the police station, according to testimony from police officials themselves, are clearly inhospitable. After being searched, witnesses

are "secured" in locked interrogation rooms, which are small, usually windowless and lack toilet facilities or running water. The witnesses must knock on the door for permission to use the toilet and they may eat or drink only if their police interrogators decide to supply the food. App. A12-13; R. 81-2 at 186-88, 194.

ii) The police officials admitted that witnesses typically remain at police stations in the above-described conditions for many hours, and sometimes overnight. App. A13; R. 81-2 at 188.

Because "[n]o reasonable person would knowingly remain in a small, windowless, locked interrogation room for such extended periods of time," the District Court found that the police officials were not credible when they claimed that all witnesses are told they are free to leave and, even if some witnesses are so informed at times, they do not in fact perceive themselves to be voluntarily at the police station or believe they are at liberty to leave. App. A12-13. The District Court further found that these conditions of police interviewing are intended to and do induce fear and desperation in the witnesses – rather than, as police officials claimed, feelings of "rapport" and "personal bonding" – and thereby

increase the likelihood that these individuals will give a statement even if that is contrary to their own best interests. App. A14.

The District Court found that, in practice, no bright line exists between individuals being questioned in the police station as witnesses and those questioned for criminal wrongdoing. *Ibid.* The Police acknowledged that, on occasion, a witness may become a suspect as the investigation proceeds. App. A14; R. 81-2 at 179-80, 254-57. The proceedings included testimony about specific instances in which the status of an individual changed from "witness" to "suspect," and the reverse, from "suspect" to "witness." App. A14.

In these circumstances, the District Court found, it is of vital importance to a witness who is trying to decide whether to cooperate with police to have the type of information that FDLA can and does provide concerning the limits on police authority, including the fact that the witness is not legally required to remain at the police station or to answer police questions. App. A14-15.

Findings Regarding Access to Chicago Police Stations

The District Court found that Chicago Police area headquarters are routinely used for the investigation of crimes, the detention and interrogation of suspects and the questioning of witnesses. App. A15. This includes the

admission of many private individuals and law enforcement officials onto the premises:

i) Assistant State's Attorneys are allowed to meet with both witnesses and suspects (who are in custody) for the purpose of taking their statements;

ii) defense counsel are allowed to meet with suspects (who are in custody) whom they represent;

iii) private individuals are allowed to meet with suspects (who are in custody) for purposes of visitation; and

iv) private individuals are allowed to meet with individuals who are at the stationhouse as mere witnesses (who are *not* in custody) *only* if the police determine that the presence of such individuals will help the government persuade or induce a voluntarily cooperating citizen to participate more fully in the police investigation. (These are, in Chief Cline's words, the "pastor, friend or brother" of the witness.)

Id. at A11, 15.

The Role of the State's Attorney

The State's Attorney's Felony Review Unit provides advice to the Police concerning the rights of persons being questioned at Chicago police stations. App. A16. In the course of performing that function, on at least one occasion, a supervisor in the Felony Review Unit has advised the Police that they are under no legal obligation to allow communications between an attorney and a person being questioned as a witness. *Ibid.*

In this litigation, assistants on behalf of the State's Attorney argued that FDLA has no First Amendment or other right to communicate with witnesses it represents who are being questioned in police stations and that the Police act properly when they refuse to inform the witnesses of the presence of their FDLA attorney. *See, e.g.,* R. 56 at 9-12. Based on the hearing evidence concerning the State's Attorney's advice to the Police as well as the State's Attorney's posture in this litigation, the District Court concluded that the State's Attorney was properly subject to injunctive relief as a participant in the practices that the court found unconstitutional. App. A16-17.

The Absence of a Legitimate Basis for Defendants' Practices

Police officials testified at the hearing concerning the importance of witness interviews in solving crimes. R. 81-2 at 232. The Police claimed that the involvement of attorneys interferes with efforts to convince witnesses to cooperate voluntarily in police investigations. *Id*. at 158-59, 249.

The Police testified that their ability to solve crimes had declined in recent years and speculated that this reduction might be due to the increase in violent crime between strangers, where the cooperation of "witnesses" is more important in the investigation. *Id.* at 232. However, the Police offered no evidence that the decreased clearance rate was in any way attributable to allowing attorneys access to their witness-clients. *Id.* at 231-32, 248-49. The District Court observed that the evidence of an adverse impact on law enforcement of permitting attorney communication with witnesses is purely "anecdotal" and found that the evidence did not reliably establish a legitimate basis for the defendants' practice of obstructing such communication. App. A17.

To the contrary, the District Court cited empirical research to support the inference that the defendants' policy may even have a negative impact on law enforcement because it would cause the witnesses to perceive they were being

treated unfairly, thereby *reducing* the likelihood that they would agree to cooperate. *Ibid.*

In addition, the District Court recognized that the defendants have sufficient means to secure witness cooperation, without denying FDLA access to their clients:

i) The defendants can attempt to persuade the witness that cooperation would best serve his interests and those of his friends and neighbors.

ii) The defendants can offer transactional or other immunity to the witness.

iii) The defendants can compel the witness to testify before a grand jury.

Id. at A17-18. The defendants offered no evidence that these alternatives are either unrealistic or entail significant societal costs.

The Injunction Issued by the District Court

The District Court held that the defendants' policy of preventing communications between FDLA attorneys and their witness-clients was an impermissible, viewpoint-based restriction in violation of the First Amendment. App. A22. Because the defendants' express purpose is to keep witnesses in ignorance of their legal rights and to prevent them from knowing of the presence

of their FDLA attorneys, while at the same time permitting other private individuals to speak with these witnesses in order to persuade them to waive their legal rights, the District Court held the defendants' policy is "a crass form of governmental paternalism entirely at odds with the First Amendment." *Id*. at A23.

The District Court therefore entered an injunction providing that the defendants must:

i) Take no action to interfere with the First Amendment rights of association between a witness being questioned at a police station and his attorney.

ii) Immediately inform the witness that his attorney is present and seeking to counsel him.

iii) If the witness wants to consult with his attorney, take no action to interfere with a private consultation between the witness and his counsel – whether at the police station or at some other location.

iv) Allow the attorney to be present when the information concerning the attorney's presence is communicated to the witness.

v) Take various steps to disseminate information concerning the requirements of the order within the Police department and the State's Attorney's office.

Id. at A40-41. The District Court's ruling made clear that any attorney-client communication that the defendants are required to permit "could be accomplished either by permitting the FDLA attorney to enter and confer with the witness in the police station or simply by allowing the witness to walk outside the station and confer with counsel." *Id.* at 29.

SUMMARY OF THE ARGUMENT

The First Amendment protects the right of individuals and their attorneys to speak with one another on matters of public and personal importance. The Police violate this right when they prevent FDLA attorneys from speaking with their clients – voluntarily cooperating witnesses – in order to prevent those attorneys from providing their clients with potentially critical legal advice about their rights and responsibilities. An individual who is voluntarily cooperating with the Police is free at *any* time to speak with his attorney or, indeed, to cease the interview and leave the stationhouse. For the Police to prevent an individual's attorney from speaking with him because the Police want to keep

the individual ignorant of his rights is a blatant violation of the First Amendment.

Moreover, although the Police prevent FDLA attorneys from speaking with their client-witnesses because the attorneys may inform these witnesses of their right not to participate in the interview, they permit *other* private individuals to speak with these witnesses if they will *encourage* them to cooperate – whether or not this is in the best interests of the witness. This is a textbook example of unconstitutional viewpoint discrimination.

The defendants simply misstate the issue in this case when they claim that FDLA attorneys seek to "barge in" or "trespass" upon private areas of the police station in order to convert interrogation rooms into "forums" for discussion. The District Court's order does *not* require the Police to grant FDLA access to police interrogation rooms. The injunction merely prevents the Police from interfering with FDLA attorneys' access to their client-witnesses. Because these voluntarily-cooperating witnesses are free to leave the police station at any time, FDLA's First Amendment right to communicate with its clients can be effectuated without deciding *anything* about access to the police station. The principles

regarding regulation of access to government property are therefore irrelevant to this dispute.

Even if those principles were relevant, however, they do not support the viewpoint-based exclusion of FDLA. There is no case cited by the defendants (and none of which we know) upholding a viewpoint-based restriction on access to government property. It is no answer to assert that the exclusion of FDLA is based on "speaker identity" when it is plain that FDLA attorneys are singled out for exclusion not because of their "identity," but because of what the defendants fear FDLA's attorneys may say to witnesses. The defendants' other argument – that FDLA can be excluded because its point of view is inconsistent with the "purpose" of the police station – is wrong. The government cannot simply restate the "purpose" of its property in order to make that purpose consistent with an otherwise unconstitutional viewpoint-based restriction.

The District Court's findings of fact reflect a reasonable account of the evidence and are not in any way "clearly erroneous." The defendants' remaining arguments for reversal, including the State's Attorney's abstention and separation of powers arguments, plainly lack merit, and the contention that the

injunction might undermine legitimate law enforcement activities is sheer speculation with no support in the record

ARGUMENT

It is important to be clear at the outset what this case is *not* about. This case is *not* about whether there is a right to court-appointed counsel for citizens who voluntarily cooperate with a police investigation. This case is *not* about whether there is a right to require the police to warn such voluntarily cooperating individuals of their "right to remain silent." This case is *not* about whether there is a right to prevent the police from attempting to persuade such voluntarily cooperating individuals to cooperate fully with the authorities. This case is *not* about whether there is a right to prevent the police from deceiving such voluntarily cooperating individuals in order to induce them to cooperate more fully. This case is *not* about whether FDLA (or any other) attorneys have a right to "barge into" or otherwise enter into police stations in order to solicit potential clients. This case is *not* about whether FDLA (or any other) attorneys may "barge into" or otherwise enter the non-public areas of police stations in order to speak with their clients. What this case *is* about is *whether the Police may constitutionally prevent an attorney from speaking with his client – where that client is a*

voluntarily cooperating witness – in order to prevent the attorney from providing his client with critical legal advice about his rights and responsibilities.

Although the defendants repeatedly mischaracterize the issue on this appeal, and assert that the District Court's ruling was "novel" and "breathtaking," in fact the District Court's order merely reflects the unexceptional proposition that the state cannot unreasonably "impede an individual's ability to consult with counsel on legal matters." *Denius v. Dunlap*, 209 F.3d 944, 954 (7th Cir. 2000).

A central fallacy in the Police argument to this Court is that "these witnesses" –individual citizens who have agreed voluntarily to cooperate in a police investigation "have no right to counsel under our Constitution." Police Br. at 25. This is stunningly wrong. A witness who volunteers to assist law enforcement in an investigation has every right to have his attorney present and the Police have no lawful authority to "impede" the exercise of this right. *Denius v. Dunlap*, 209 F.3d at 954. Of course, individuals who are not the subject of a criminal investigation do not enjoy – or need – the right-to-counsel protections of the Fifth and Sixth Amendments. But the existence of those rights, which are designed to protect individuals who are already formally enmeshed in the

criminal process as suspects or defendants, does not in any way derogate from the wholly separate and independent First Amendment right of individuals who are not suspects or defendants to consult with their attorneys and from the correlative First Amendment right of attorneys to advise their clients. *See, e.g., In re Primus*, 436 U.S. 412, 432 (the First Amendment requires "a measure of protection for 'advocating lawful means of vindicating legal rights'"), *quoting NAACP v. Button*, 371 U.S. 415, 437 (1963). [3]

Equally disturbing is the defendants' argument that what FDLA seeks is the right to "barge in," "interrupt" or interfere with the progress of law enforcement's investigation of serious crime. *See, e.g.,* Police Br. at 24, 38; State's Attorney's Br. at 42; DOJ Amicus Br. at 9. FDLA does not oppose the work of law enforcement. Nor does FDLA seek to "negate society's interest" (*Texas v. Cobb*, 532 U.S. 162, 171-72 (2001)) in legitimate police interviews of witnesses. To the

[3] The Police compound their confusion of the issues here when they assert that witnesses who have agreed to be interviewed by them "surrender the protections of the Fifth Amendment when they agree to submit to a police interview." Police Br. at 25. Specific Fifth Amendment protections – the right to the *Miranda* warnings – may not be *applicable* for a person who is not in custody and agrees to an interview. This is the point of *Minnesota v. Murphy*, 465 U.S. 420 (1984), which the Police cite. But it is ludicrous to claim that witnesses "surrender" their First Amendment rights. Those rights always remain available and cannot be "surrendered." Witnesses do not descend into a twilight zone where all constitutional entitlements somehow disappear simply because they agreed to talk with the Police.

contrary, this record shows that FDLA's interest is not to interfere with appropriate police work but merely to make sure that their clients – voluntarily cooperating individuals – are fully informed of their legal and constitutional rights and responsibilities. Indeed, in appropriate circumstances, and when it is consistent with the witness's own best interests, FDLA will help to facilitate a police interview of its client, as would any responsible counsel. *See, e.g.*, R. 81-2 at 271, 81-4 at 384.

The issue in this appeal – the issue that is framed by the decision below – is whether the police may constitutionally obstruct communication between an attorney and *his client* in order to keep the client in the dark about his legal and constitutional rights.

I. The District Court Correctly Held That Defendants' Unwarranted Prevention Of Communications Between FDLA Attorneys and Their Clients Violates the First Amendment.

The Police and the State's Attorney claim the authority to prevent communication between a citizen who is voluntarily in a Chicago police station as a cooperating witness and that individual's retained counsel.[4] Even more

[4] The defendants also impugn the attorney-client relationship that exists under state law between FDLA and its client-witnesses, repeatedly referring, for example, to those witnesses as "putative clients." *E.g.*, Police Br. at 7. In fact, as the District Court properly found, under Illinois law the agreement that FDLA makes with its hotline callers to

boldly, the defendants claim the extraordinary authority to refuse even to *inform* the individual that his lawyer is present and available to consult with him. Astonishingly, defendants purport to justify this policy on the ground that they have a legitimate and, indeed, compelling interest in preventing such voluntarily cooperating citizens from consulting with their own attorneys and thus affirmatively keeping them ignorant of their legal and constitutional rights. The District Court properly enjoined this policy as incompatible with the First Amendment.

Not only do the Police seek to prevent individuals whom they have asked to cooperate as witnesses in a criminal investigation from receiving critical legal advice, but they implement this policy in an explicitly viewpoint-based manner. At the same time that they *bar* an attorney from speaking with his client (for fear that the attorney will inform the client of his legal right to limit his participation in the investigation), they *allow* other private individuals (the "brother, pastor or friend") to speak with the client if the Police believe that such individuals will *encourage* the client to give the Police what they want. This violates the core First

---

represent a specific individual at a Chicago police station "suffice[s] to create an attorney-client relationship between the FDLA attorney and the person [at the police station]." App. A4. The District Court's finding correctly reflects the holdings of the Illinois state courts. *Id.* at A28-29 (citing Illinois cases).

Amendment principle that the government may not interfere with First Amendment expression "because of disapproval of the ideas [to be] expressed." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

The right of FDLA lawyers and their clients "to engage in association for the advancement of beliefs and ideas" is a fundamental right under the First Amendment. *NAACP v. Button*, 371 U.S. at 429-30. *quoting NAACP v. Alabama, ex. Rel. Patterson,* 357 U.S. 449, 460 (1958). This Court has squarely held that "the state cannot impede an individual's ability to consult with counsel on legal matters." *Denius*, 209 F.3d at 954. Here, FDLA seeks to advise its witness-clients concerning the limits of police authority, the circumstances in which a citizen may appropriately decline to participate in a criminal investigation, and the application of those principles to the particular situations facing each FDLA client. Speech on matters of such public and private importance "occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection [under the First Amendment]." *Connick v. Myers*, 461 U.S. 138, 145 (1983), *quoting NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982).

More disturbing, the defendants' objective in preventing these communications is to keep citizens who are voluntarily cooperating with the

authorities in *ignorance* of their legal rights, an objective that is completely at odds with the First Amendment. As the District Court noted, even when mere commercial speech is at stake, the First Amendment prohibits the government from denying access to information because it does not want people to make the decisions they might make if they were fully informed. *See, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 769-70 (1970); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) ("The First Amendment teaches us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.") (opinion of Stevens, J.).

As the District Court correctly noted (App. A24), the information at stake here is of far greater importance than whether a consumer should buy a particular brand of toothpaste. Here, FDLA's clients – poor, often uneducated and highly vulnerable individuals who have been isolated in police stations – face critical decisions about whether and how to assist in a police investigation, decisions of obvious public importance with potentially profound personal consequences for those individuals. It is wholly inappropriate for the

government to deny such individuals access to legitimate and readily available legal advice because the Police would prefer them to act out of ignorance.

At the same time that the Police prevent FDLA attorneys from speaking with their clients, the Police affirmatively use deception to manipulate these voluntarily cooperating citizens. As a standard practice, the Police falsely inform witnesses who have asked to speak with their attorneys that they "don't need a lawyer," when, in truth, as the district court found and the record of this case showed (App. A7, A14; R. 81-2 at 179-80, 254-57), at least some of these witnesses face situations – whether they know it or not – that could result in criminal charges being filed against them or their loved ones. Such individuals could *definitely* benefit from the advice of counsel. The Police tell witnesses who have asked to speak with their attorney that "it is better if fewer people know they are in the police station." It is difficult to conceive how a witness could be harmed by *his own lawyer's* knowledge that he is with the police.

The government owes an obligation of decency and fair dealing to individuals who have decided voluntarily to cooperate in a criminal investigation. The Police and the State's Attorney claim that, after placing an individual in a locked interrogation room in the back of a police station, they are

free to ignore an individual's express request to meet with his counsel – are free even to deceive a cooperating individual not only about the potential importance of consulting an attorney but even about his counsel's presence at the police station – unless the individual "insists" on seeing his lawyer. Such abuse of an individual who is voluntarily cooperating with governmental authorities is incompatible with the most basic obligations of a free and self-governing society.

A. The District Court's Injunction Does Not Impair the Defendants' Authority to Limit Access to Police Property.

The defendants and their amici contend that the injunction entered below would permit FDLA to "barge in" to the non-public areas of Chicago police stations, to "trespass" on Police property and to gain "access" to police interview rooms upon demand. *See, e.g.,* Police Br. 24, 28; State's Attorney's Br. at 34; DOJ Amicus Br. at 9; Police Chiefs' Amicus Br. at 6. This contention mischaracterizes the District Court's order and misstates the issues in this case.

This case concerns the right of FDLA attorneys to communicate with clients who are freely cooperating with the Police and who have the unquestioned right simply to leave the stationhouse *at any time* in order to confer with their counsel. Accordingly, as the District Court made clear, any communication between FDLA and these clients "could be accomplished either

by permitting the FDLA attorney to enter and confer with the witness in the police station *or simply by allowing the witness to walk outside the station to confer with counsel.*" App. at A29 (emphasis added).

Far from "the violation's being a pretext for the remedy," (Police Br. at 45), or an abuse of discretion (Police Br. at 43) , the District Court's injunction is appropriately tailored to the defendants' unconstitutional practice in this case. *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971) (nature of violation determines scope of remedy). Nothing in the injunction entered by the District Court confers upon FDLA a right of access to police stations in order to associate with witnesses. The injunction directs the defendants immediately to inform a client-witness when his FDLA attorney is present seeking to counsel him and not to interfere if the client-witness decides to speak with his attorney – whether it takes place in the stationhouse or at some other location. App. A40. Because the Police have consistently refused even to inform the client-witness that his attorney is present and available to speak him, the injunction further orders the defendants to allow the attorney to be present when that message is conveyed. *Ibid.* But that too can take place without admitting the attorney to the interview room or, indeed, to any non-public area of the police station. Because

the clients with whom FDLA attorneys seek to communicate are free to leave the police station at any time, this case can be resolved without deciding *anything* about the issue of physical access.[5]

This disposes entirely of the defendants' contention (*see, e.g.,* Police Br. at 41) that the injunction grants FDLA attorneys physical access to its stationhouses in circumstances that are "could undermine" the "purpose" of those facilities. Nor, for the same reason, does the District Court's injunction convert police interview rooms into "forums" for discussion and debate concerning the rights and responsibilities of FDLA's witness-clients, as the defendants contend.

---

[5] This distinguishes the decisions of other courts regarding access to lawfully *detained* migrants on which the defendants erroneously rely. In each of those cases, lawyers sought access to locations – in some instances outside of the United States – where the government was lawfully detaining would-be asylum seekers. In *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1514 (11th Cir. 1992), for example, the plaintiffs sought access to Haitian migrants being detained on Guantanamo Bay and in Coast Guard ships at sea. *Cuban Am. Bar Assn., Inc. v. Christopher*, 43 F.3d 1412, 1429-30 (11thCir. 1995) also involved a claimed right of access to Cuban migrants detained at Guantanamo. In *Ukrainian Am. Bar Assn. v. Baker*, 893 F.2d 1374, 1381 (D.C. Cir. 1990) the court identified the question before it as whether the government violated First Amendment principles by refusing access to aliens who had been placed "in custody." And *American Immigration Lawyers Assn. v. Reno*, 18 F. Supp. 2d 38, 60-61 (D. D.C. 1998), aff'd, 199 F.3d 1352 (D.C. Cir. 2000) likewise involved lawyers' access to migrants who had been denied admission to the United States. Here in contrast FDLA seeks to speak with client/citizens who are not in any way being lawfully detained or in custody. Physical access to the government's property is thus unnecessary to protect the relevant First Amendment rights in this context.

The Police and the State's Attorney have a legitimate interest in interviewing witnesses and in encouraging their cooperation. Police stations are certainly appropriate locations for that activity. But these facts do not in any way justify the blatant refusal of the Police to inform a voluntarily cooperating witness that his FDLA attorney is present and available to counsel him, because the police do not want the witness to hear FDLA's message. Moreover, this disregard of the rights of these individuals is compounded by the fact that the Police *allow* communications between these client/witnesses and other "outside" individuals whose viewpoint is consistent with "keep[ing] them there and keep[ing] them cooperating with us." *See* App. A11. Thus, the reason the Police refuse to permit FDLA attorneys to advise their client-witnesses is not in any way "content-neutral." It has nothing to do with the physical nature of the facility or the need to maintain order. It is grounded instead in the constitutionally impermissible concern that the attorney may inform the witness of his rights and, in appropriate circumstances, "tell the witness . . . not to further cooperate with the police" (*see Id.* at A10). The First Amendment absolutely precludes such governmental discrimination against "those speakers who express views on disfavored subjects," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390

(1992), and this is especially so when the very *purpose* of the discrimination is to keep people ignorant of their legal rights.

Here, the Police and the State's Attorney plainly engage in unconstitutional viewpoint discrimination when they *impede* communication between FDLA and its clients because of the views they fear FDLA might express but *allow* communication between those very same clients and other "outsiders" whose views are approved by the Police.

B. The Principles Governing Access to Government Property Do Not Justify the Defendants' Unconstitutional Viewpoint Discrimination.

The Police argue that the viewpoint-based exclusion of FDLA attorneys from police stations is constitutionally permissible because it is consistent with their use of that property. Police Br. at 30 and *passim*. Indeed, defendants argue that the law enforcement purposes of the police station are "incompatible with the requirement of viewpoint neutrality." *Ibid.* This argument is irrelevant to the resolution of this case. As demonstrated above, the FDLA does not insist on physical access to any of the non-public areas of the stationhouse. Moreover, even if this argument were relevant, it is wrong on the merits.

The defendants do not cite a single case – and we know of none – in which a court has upheld an expressly viewpoint-based regulation of access to government property. To the contrary, a long line of authority holds that, while the government may regulate access to non-public areas of its property, it may *not* do so on the basis of viewpoint. Among the innumerable decisions that so hold, see, for example, *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985); *Perry Educ. Assn. v. Perry Local Educators' Assn., Inc.*, 460 U.S. 37, 46 (1983); and *Arkansas Educ. Television Comm. v. Forbes*, 523 U.S. 666, 682 (1998), as well as an unbroken line of decisions from this Court, including *Chicago ACORN, SEIU Local No. 880 v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695, 700 (7th Cir. 1998); *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 63 F.3d 581, 587 (7th Cir. 1995); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 567 (7th Cir. 2001).

Even on the incorrect premise that FDLA's communications with its witness- clients would have to occur in the police station, no case cited by the Police supports their blatantly viewpoint-based exclusion of FDLA from those premises. *Arkansas Educ. Television Comm. v. Forbes*, on which the defendants rely, upheld the exclusion of a candidate from a public television debate based, not

upon the candidate's views, but upon his lack of voter support. 523 U.S. at 682-83. *Adderley v. Florida*, 385 U.S. 39, 47 (1966), upheld the State's right to exclude protestors from a jail grounds, but the court specifically noted that there was "not a shred of evidence" that the protestors were excluded because the authorities "objected to what was being . . . said." In *City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984), the Court upheld the City's no posting ordinance in part because there was "no claim that the ordinance was designed to suppress certain ideas that the City finds distasteful or that it has been applied to [Taxpayers for Vincent] because of the views that they express." And in *National Endowment for the Arts v. Finley*, 524 U.S. 569, 583 (1998), the Court upheld criteria for the funding of the arts, but went out of its way to emphasize that such criteria are permissible only to the extent that they "do not engender . . . viewpoint discrimination."

In *Perry Educ. Assn. v. Perry Local Educators' Assn., Inc.*, 460 U.S. 37, 46 (1983), which presented the question of access to a school district's internal mail system, the Court made clear that access could *not* be denied "because public officials oppose the speaker's view." In *Cornelius*, the Court upheld the exclusion of certain advocacy organizations from a charity drive sponsored by the federal

government, but emphasized that the outcome would have been different if the government had discriminated based upon the point of view of the excluded organizations. 473 U.S. at 49.

Similarly, *Jones v. North Carolina Prisoners Union*, 437 U.S. 119 (1978), which concerned the government's authority to restrict a prisoners' union from soliciting prisoners via bulk mailings, and *Greer v. Spock*, 424 U.S. 828 (1975), which involved the government's authority to exclude outside speakers from military installations, lend no support to the defendants here. Neither of those cases permitted the government to exclude a speaker because of his viewpoint. *Jones* would certainly have been decided differently if the prison had allowed bulk mailings only by prisoners' unions that supported all prison policies and *Greer* would have been decided differently if the government had admitted only pro-war outside speakers onto the military base.

Finally, the Police argue that *Ukrainian-American Bar Assn.* and *Haitian Refugee Ctr*. support their viewpoint based exclusion of FDLA lawyers. But like every other decision on which the Police rely, no viewpoint-based exclusion was involved in these cases. In both *Ukrainian-American* (893 F.2d at 1382) and *Haitian Refugee Ctr.* (953 F.2d at 1514), the opinions make clear that *all* persons seeking

access to the detained migrants were excluded and that the challenged restrictions were "not content-based because the government denies access to all organizations." *American Immigration Lawyers Assn.*, 18 F. Supp. 2d at 62 (discussing *Ukrainian-American*).

More relevant to this case is *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D. N.Y. 1993), in which the court held that the First Amendment was violated when lawyers were barred from their clients "because of the viewpoint of the message they seek to convey." 823 F. Supp. at 1041. In imposing an injunction that required the government to permit the attorneys to communicate with their clients, the court reasoned that "[s]uch Government discrimination against disfavored viewpoints strikes at the heart of the First Amendment." *Ibid.*

To avoid the unanimous weight of authority that unequivocally rejects viewpoint-based restrictions in these circumstances, the Police argue that their policy is based on "speaker identity" rather than upon FDLA's point of view. Police Br. at 37. This is pure sophistry. The Police do not exclude *all* private individuals who want to speak with these witnesses, or even *all* private individuals who want to speak with these witnesses about their cooperation with the Police. Rather, the Police *permit* private individuals to speak with these

witnesses if they hold the "favored" point of view (*i.e.*, the brother, pastor or friend of the witness who will encourage cooperation), but refuse to permit the witnesses' own attorneys to speak with them because they may hold the "disfavored" point of view. Plainly, this is a distinction based, not on the identity of the speaker, but on speaker's point of view.

Equally unavailing is the argument that FDLA's communications may be excluded because they are inconsistent with the purposes of the police station. Police Br. at 37-42. It is certainly true that a purpose of police stations is to conduct criminal investigations. But those investigations must be conducted in a manner that is consistent with the Constitution.

The district court was well within its discretion in finding "unreasonable" the Police policy of preventing FDLA attorneys from access to their clients. A27. It borders on the offensive for the Police to argue that a legitimate "purpose" of a stationhouse is to prevent a citizen who is voluntarily cooperating with the authorities from speaking with his own attorney because the Police want to keep the citizen ignorant of his legal rights. The defendants' purpose – to manipulate voluntarily cooperating citizens by holding them incommunicado and denying them information about their rights – is fundamentally at odds with the First

Amendment. As the District Court rightly observed, this "purpose" is "unconscionable." App. A24.

Under the cynical approach advocated by the Police, discriminatory and unconstitutional viewpoint-based restrictions could routinely be "justified" merely by "re-defining" the government's "purpose." In *Widmar v. Vincent*, 454 U.S. 263 (1981), for example, the Court overturned a state university regulation prohibiting student groups from using university buildings for religious activities because this constituted an unconstitutional viewpoint-based restriction. Under the approach advocated by the Police, the result in *Widmar* would be altered if the university merely declared the "purpose" of its buildings to be the promotion of non-religious expression. The same cynical game could be used to circumvent the Court's holding in *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) that a state university cannot constitutionally deny funding to religiously-oriented student groups. Similarly, to take a variation on *Perry Educ. Assn.*, a school district court could justify viewpoint-based exclusions from its mail system if it could claim, for example, that the "purpose" of its mail system is to promote only those unions that support the

policies of the school board. Obviously, such sleight of hand cannot be used to circumvent the most fundamental principles of the First Amendment.

FDLA does not in any way question the right of the Police to maintain order and efficiency in police stations. A content-neutral policy that is reasonably designed to prevent disruption and maintain good order would certainly be consistent with the operational needs of the stationhouse. But no such policy is at issue in this case.

Nor does FDLA doubt the right of the Police and the State's Attorney to attempt to persuade witnesses to cooperate in investigations. The defendants have every right to express to witnesses the government's *own* views on the importance of cooperation. And the First Amendment does not require them to balance *their own* communications by affirmatively presenting competing viewpoints.[6] But that does not justify the defendants' actions here, where the

[6] The Department of Justice amicus brief (at 23) cites *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) for the proposition that the government may choose to provide funding for one point of view without thereby becoming obligated to fund competing viewpoints. That proposition is irrelevant to this case. Moreover, in *Legal Services Corp. v. Velasquez*, 531 U.S. 533, 541 (2001) the Court made clear that nothing in *Rust* authorizes the government to impose viewpoint-based regulations on the purely private speech of lawyers who are advising their clients. The Court noted that "the advice from the attorney and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept." *Id.* at 542-43.

record clearly shows that the Police discriminate among *private* speakers by obstructing FDLA's communications, while at the same time allowing communications by other private speakers whose point of view the Police approve. Nor does the First Amendment permit the Police intentionally to keep voluntarily cooperating citizens ignorant of their rights by denying them access to their own attorneys.

C. The Limitations upon the Rights of *Suspects* under the Fifth Amendment are Irrelevant to the First Amendment Violation in this Case.

The defendants contend that the injunction in this case is unreasonable because it grants to witnesses the opportunity to learn of the presence of their counsel even though the Fifth Amendment does not require that suspects in custody be told of their attorney's presence. *See Moran v. Burbine*, 475 U.S. 412 (1986).[7] The Department of Justice complains in its amicus brief that the injunction "overrides the equilibrium" established in Fifth and Sixth Amendment cases. DOJ Amicus Br. at 12. The State's Attorney contends that FDLA's First Amendment rights of association are merely co-extensive with the rights of

[7] As the defendants note, the Illinois Constitution *does* require that suspects be informed of their counsel's presence (*People v. McCauley*, 163 Ill. 2d 414, 645 N.E.2d 923 (1994)) and the defendants acknowledge their obligation to pass this information to persons being held in custody.

custodial suspects under the Fifth and Sixth Amendments. State's Attorney's Br. at 21. These arguments are unfounded.

The defendants again ignore the fundamental fact that the voluntarily cooperating witnesses with whom FDLA seeks to communicate are perfectly free to leave the stationhouse whenever they please. Whatever "equilibrium" has been developed under the Fifth and Sixth Amendments with respect to the rights of persons who are in *custody* has no application to the rights of individuals freely cooperating in a police investigation. The District Court correctly held that "[n]o analytical difficulty or violation of principle is involved in recognizing a broader First Amendment right of association between witnesses and their lawyers than the right to counsel that *Miranda* [*v. Arizona,* 384 U.S. 436 (1966)] and its progeny confer on suspects under the Fifth Amendment." App. A34.

The right-to-counsel principles under the Fifth Amendment were developed precisely because of the unique considerations facing individuals in custody and suspected of criminal wrongdoing. Such persons are entitled to the *Miranda* warnings and allied rights because, among other factors, they are *unable* to leave the custodial environment. Cooperating individuals, who are free to

leave, cannot expect these protections.[8] FDLA does not argue that the Police must warn such individuals of their "right to remain silent" or that the government must provide such individuals with court-appointed counsel. But, because cooperating individuals retain all the rights of free persons, they may certainly expect to be told of the presence of their *own* lawyer.

Nothing at issue in this case will in any way undermine the conceptual framework that governs the protections of the Fifth and Sixth Amendments for persons in custody.

D. The Violation of FDLA's First Amendment Rights Facilitates the Defendants' Abuse of Witnesses.

The defendants attempt to distance themselves from the District Court's findings concerning their abusive treatment of citizens who have volunteered their cooperation in criminal investigations. *See* App. A8-9, A11-15. The Police argue that the District Court's findings are inadequate to warrant the inference that the Police regularly hold witnesses against their will. Alternatively, they claim that the findings below regarding abuse of these witnesses are not

[8] *People v. DeSantis*, 319 Ill. App. 3d 795, 745 N.E.2d 1 (1st Dist. 2000), which the State's Attorney claims is somehow violated by the decision below, merely applies this unexceptional rule in a case in which the defendant's custodial status at the time of his incriminating statement was in dispute. *DeSantis* is silent concerning attorney's rights to communicate with witnesses at police stations.

sufficient alone to justify the injunction. *See* Police Br. at 43-46. This arguments miss the significance of the District Court's findings regarding the mistreatment of witnesses.

*First, t*here is no merit in the attempt (Police Br. at 44-45) to diminish the District Court's findings regarding the Police failure to inform witnesses of their freedom to leave the police station. The District Court found that witnesses either are not informed or do not perceive themselves to be free to leave based upon, not isolated instances of misconduct, but based instead upon "the totality of all the circumstances" (*Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)) surrounding the witnesses' presence at the station – circumstances that police officials themselves conceded were standard policy. *See* App. A11-15. The centerpiece of the defendants' position in this litigation is and has been that they have the right to *prevent the witnesses from being informed* that they are free to leave.

Second, the witnesses' ignorance of their basic freedoms is obviously material to the public and private importance of FDLA's association with its clients. The District Court clearly recognized that the interests of the witnesses themselves were not before it. But the District Court also properly recognized

that the defendants' unconstitutional policy facilitates the abuse of witnesses that is so evident in this record. App. A26.

The record of this case and the District Court's findings expose the reality that the Police routinely isolate indigent, vulnerable citizens in deplorable conditions in order to "sweat" information from them. The record also makes clear that the obstruction of FDLA's communications with these witnesses is intended to and does facilitate mistreatment of these individuals. Those realities bear directly on the public importance of FDLA's speech and are hardly immaterial to the First Amendment issue before this Court.

II. The District Court's Findings of Fact were not Clearly Erroneous.

The defendants also contend that certain findings made by the District Court in support of the injunction are "clearly erroneous" under Rule 52(a) of the Federal Rules of Civil Procedure. These contentions must be rejected because the defendants are unable to meet the demanding standard for setting aside the factual findings made by a District Court judge who had "the opportunity . . . to judge the credibility of the witnesses." Fed.R.Civ.P. 52(a).

Long ago, the Supreme Court made clear that a trial court's factual findings may not be set aside unless the reviewing court is "left with a definite

and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). So long as the trial court's "account of the evidence is *plausible* in light of the record viewed in its entirety," a reviewing court may not reverse even if it would have weighed the evidence differently. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985)(emphasis added).

This Court has not minced words as to the highly demanding character of the clearly erroneous standard, emphasizing that findings may not be overturned merely because the reviewing court might have reached a different result and declaring, "to be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988). "Unless a judge believes physically impossible things, or disbelieves testimony supported by unrefuted documents, the 'finding, if not inconsistent, can virtually never be clear error.'" *Reed-Union Corp. v. Turtle Wax, Inc.*, 77 F.3d 909, 911 (7th Cir. 1996) (*citing Anderson,* 470 U.S. at 575).

The defendants have not come close to showing that any findings made below in this case were clearly erroneous.

A. The District Court's Finding that the Police Exclude FDLA and Allow Other Visitors Based upon Viewpoint Concerning Witness Cooperation was not Clearly Erroneous.

There is no basis for the Police to claim that the District Court was clearly erroneous in finding that they obstruct communications between FDLA and witnesses while at the same time allowing communications between witnesses and others whom the Police believe may assist them in securing the witnesses' cooperation.

At the hearing below, the Police witnesses repeatedly and emphatically maintained that they exclude – and are justified in excluding – FDLA attorneys from communicating with witnesses *because* of their fear that FDLA may advise the witnesses not to cooperate with the Police. Lt. John Farrell testified that he stopped allowing FDLA attorneys to speak to their witness-clients after learning "that the First Defense attorney is going to tell the witness not to speak to the police, not to further cooperate with the police." R. 81-2 at 159-62. Police Chief of Detectives Philip Cline echoed the point. *See Id.* at 253-54, 259-62. Indeed, the single most pervasive theme in the defendants' presentation below (consistent with their briefs to this Court) was that witnesses in police stations must be shielded from the *viewpoint* of FDLA. The defendants also made no secret of the

efforts they undertake to discourage contact between attorneys and witnesses, by routinely seeking to dissuade witnesses who have requested counsel from contacting their lawyers. *Id.* at 194, 235-36.

The evidence was also clear that Police policy, per General Order 92-05 of the department, is to require officers to admit "visitors" to stationhouses to speak with persons being held there. R. 93 at 4-5. This General Order – like all Police directives regarding persons being held in the police stations – is expressed with reference to "arrestees." But, as the District Court's findings explain in great detail, the conditions in which witnesses are confined for interrogation are not materially different than those of suspects. *See* App. A8-9, A11-15. Recognizing these similarities, testimony provided by Police Chief Cline fully supports the inference that the policy in the General Order also governs visitors for witnesses who have been locked inside police interrogation rooms. Responding to a question from his own counsel, Chief Cline explained that the "brother, pastor or friend" of such a witness would be permitted to visit. R. 81-2 at 236-37.

Chief Cline also volunteered a comment that the District Court viewed as revealing the viewpoint-based reason why the Police allow the "brother, pastor or friend" to visit the witness. He said that these visitors are permitted for

witnesses to serve the objective of "keep[ing] them there [at the police station] and keep[ing] them cooperating with us [the Police]" (*ibid.*) – in obvious contrast to the FDLA lawyers, whom the Police believe will disserve that objective. The other Police witness, Lt. Farrell, echoed the sentiment that the Police discriminate between FDLA and the witness's family and friends based on viewpoint. In testifying about interviewing witnesses at their homes, he observed that he would not mind if the witness stopped to answer the telephone or doorbell or talk to a spouse or relative: "I don't believe that anyone is going to tell this witness, 'Don't cooperate with the police any further, don't say anything to the police.' I believe with the First Defense that is going to occur." R. 81-2 at 195. The Police officials' testimony, combined with the defendants' aggressive opposition to all communication between FDLA and those witnesses (among other considerations), led the District Court to find that the Police engage in viewpoint discrimination.

The deconstruction of Chief Cline's testimony in the Police brief (at 49) is insufficient to undermine that finding. The Police contend that the true import of that testimony was that they afford equal treatment to FDLA and all other outsiders, blocking all communications unless the witness insists on the visitor.

The District Court did not so hear Chief Cline's testimony; the trial judge heard Chief Cline as making an unguarded admission – one fully consistent with the thrust of the defendants' presentation throughout the hearing – that those visitors who will further Police objectives do not encounter the obstruction that FDLA faces. "[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson*, 470 U.S. at 575. The District Court's understanding of the testimony – dependent as it was on nuance of inflection and tone – should not be overturned.

It is, of course, "immaterial" whether this Court believes the district judge was correct. *Cook v. City of Chicago*, 192 F.3d 693, 696 (7th Cir. 1999). The District Court's finding of viewpoint discrimination is "plausible" and thus, cannot be disturbed. *Anderson*, 470 U.S. at 573.

B. The District Court's Finding that Witnesses are not Informed or Do Not Perceive Themselves to be Free to Leave the Police Station Is Not Clearly Erroneous.

The District Court found that witnesses being interrogated in police stations are either not informed of their purported freedom to leave or, if they are

so informed, do not in fact perceive themselves to be so free. App. A12. The Police also offer no grounds upon which that finding may be overturned.

The Police incorrectly claim that this finding was based upon "only a few isolated instances" of police misconduct. Police Br. at 51. To the contrary, the District Court relied upon the testimony of the Police officials themselves, which conceded that *with regularity* witnesses remain locked in police interview rooms for "a long time," sometimes overnight, as the Police conduct their investigations. R. 81-2 at 150, 188. The District Court also took account of the uncontroverted testimony that the conditions in which the witnesses remain at the stationhouse are deplorable: they are locked in small, windowless rooms without access to food, drink or toilet facilities. *Id.* at 185-88. The District Court plausibly inferred that "[n]o reasonable person would knowingly volunteer to remain in a small, windowless, locked interrogation room for such extended periods of time." App. A13.

The testimony regarding specific instances of involuntary confinement of witnesses only served to confirm the District Court's inference: the hearing record included affidavits from two witnesses who attested they did not believe themselves free to leave during their lengthy interrogations in a Police area

headquarters. App. A8. One of those witnesses stated that his repeated requests to leave were refused. *Id.* at A12. FDLA attorney Dawn Sheikh described another instance in which she observed witnesses in an area headquarters in handcuffs shouting through windows for their attorneys. *Id.* at A13. Sheikh recounted three other specific instances in which police officials informed her that witnesses with whom she sought to speak were *not* free to leave. *Id*. at A14. The Police made no attempt below to refute any of this evidence.

The Police attack the plausibility of the District Court's inference that the witnesses are in the police stations involuntarily. The Police claim that the length of the witnesses' confinement does not support that inference: "it is just as likely that lengthy stays suggest the witness is present voluntarily, because if the conditions are onerous, he should stay only if he wants to." Police Br. at 53. And the Police assert, without explanation, that the conditions in which the witnesses are held "should not play any part in the analysis." *Id.* at 52.

Even accepting *arguendo* that the Police have presented a plausible theory of the evidence, that cannot suffice to overturn the District Court's finding. It is axiomatic that "[w]here there are two permissible views of the evidence, the

factfinder's choice between them *cannot* be clearly erroneous." *Anderson*, 470 U.S. at 573 (emphasis added).

There can be no doubt that the District Court's analysis of the evidence was a permissible one. The District Court noted that its views conformed with those in an unpublished opinion of the Illinois Appellate Court. Faced with an argument like the Police make here, that court held: "the contention that the defendant preferred to spend the evening on a steel bench in a locked interview room instead of at his grandmother's nearby home is without credence." *People v. Davis*, No. 1-00-0373, unpublished order (1st Dist. Aug. 12, 2002). *See also People v. Centeno*, 333 Ill. App. 3d 604, 640, 776 NE2d 629 (1st Dist. 2002) calling an argument similar to the one the police advance here "a proposed fiction."

In sum, there is no basis for overturning the District Court's finding that the witnesses with whom FDLA seeks to communicate either have not been told or do not perceive that they are in the police station voluntarily.

C. The District Court's Finding that there is No Law Enforcement Need for the Police Practice of Obstructing Communication Between Attorneys and Witnesses at Police Stations Is Not Clearly Erroneous.

The Police also fail in their argument for overturning the District Court's finding that there is no law enforcement need for obstructing communications

between attorneys and witnesses whom the Police are interrogating in police stations.

In the proceedings below, the District Court made very clear that the question of whether there might be some interference with law enforcement needs if FDLA were to be awarded injunctive relief was a matter of central concern to the court and one as to which the court expected the defendants to present evidence. *See* R. 81-1 at 37, 45. Despite the District Court's expectation, however, the defendants failed to make a showing that law enforcement would be impaired if the Police were required to inform witnesses in stationhouses that their counsel was present.

Police officials made generalized statements that that case clearance rates have diminished in recent years, yet they offered no proof that witnesses' access to counsel was in any way responsible for that reduction. *Id.* at 231-32, 248-49. In fact, the Police speculation might harm law enforcement objectives was altogether lacking in specifics. The District Court therefore found that the Police had failed to "reliably establish a need" for their practice of obstructing lawyer communication with those witnesses. App. A17.[9]

[9] Indeed, the District Court went further and surmised that the Police practice in issue here may actually be *counterproductive*, reducing the likelihood the witnesses will be

In addition, the District Court found that the Police could deal with recalcitrant witnesses by: (1) persuading the witnesses and their counsel to cooperate in appropriate circumstances; (2) employing offers of immunity to facilitate cooperation where appropriate; or (3) employing grand jury process. *Id.* at 18. This record is completely devoid of *evidence* that these alternatives, as the Police now contend on appeal, are "unrealistic," "entail significant costs," or would "completely tie the hands of law enforcement." Police Br. at 55-56. *See Bew v. City of Chicago,* 252 F3d 891, 896 (7th Cir. 2001).

Based on the evidence, the District Court properly found that the Police had failed to "reliably establish a need" for their practice of obstructing lawyer communication with those witnesses. App. A17.

D. The District Court's Finding that FDLA Represents its Clients in a Lawful and Ethical Manner is Not Clearly Erroneous.

The State's Attorney contests the District Court's finding (App. A5) that FDLA attorneys represent their clients in a lawful and ethical manner. He contends that the trial court should have found instead that FDLA attorneys learn the names of witnesses from suspects and then seek access to the witnesses

---

both forthcoming and honest because witnesses may perceive themselves to be treated unfairly. App. A17.

in order to advance the suspects' interest in keeping witnesses from talking. *See* State's Attorney's Br. at 26-31. This contention lacks merit.

The testimony of FDLA attorneys Darron Bowden and Sladjana Vuckovic made clear that FDLA obtains its clients, not as a result of information its attorneys learn at the police station, but rather through calls that are made to its hotline. R. 81-1 at 53-55, 80-81. Ms. Sheikh explained that it is a violation of FDLA policy for an attorney to solicit new clients at a police station. R. 81-2 at 290. This testimony refutes the allegation that FDLA attorneys engage in the unethical practice of seeking to speak with a witness whom she did not represent and whose name she learned from a suspect at a police station.

Sheikh's testimony was offered in response to Police Lt. John Farrell, who claimed that "in a great majority of cases" and/or "on many occasions" FDLA attorneys, after having met with a suspect, would then seek to meet with witnesses being questioned by police on the same matter. R. 81-2 at 153, 198-99. When pressed, however, Lt. Farrell was able to name only *two* specific situations in which he believed this had happened. *Id.* at 202-203. And on cross examination, Lt. Farrell was forced to concede that he had no personal

knowledge of FDLA attorneys seeking to represent witnesses whose names they had learned from suspects. *Id.* at 204.

The District Court believed Sheikh and rejected Farrell's speculative and shifting accusations, finding that there was no credible evidence that FDLA attorneys represent their clients in anything other than a lawful and ethical manner. That finding should not be overturned. When, as in this instance, findings of fact are based on determinations regarding the credibility of witnesses, the reviewing court should be particularly hesitant to overturn them. *Coolsaet Constr. Co. v. Local 150 Int'l Union of Operating Engineers*, 177 F.3d 648, 656 (7th Cir. 1999). The State's Attorney has failed to show that the District Court's credibility determination lacked a legitimate basis.[10]

The State's Attorney also alleges that FDLA improperly represents multiple clients in the same investigation. There was evidence that on one

[10] The State's Attorney contends that the District Court's findings should be reviewed "especially critically" because the trial court adopted many of the plaintiff's proposed findings. *See* State's Attorney's Br. at 30. This contention cannot be accepted. *First*¸ the District Court did not uncritically accept any proposed findings. Although the court used plaintiff's proposed findings as a starting point for preparing its own findings, the court carefully reviewed plaintiff's proposals, subtracted from them, added to them, and created its own findings. *Compare* R. 73 *with* App. A1-41. And, *second*, this court has clearly held, in the wake of *Anderson*, that, regardless of the method of preparation, a District Court's findings of fact "are nonetheless those of the district court and entitled to the usual deference." *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1429 (7th Cir. 1985).

occasion, FDLA agreed to represent several witnesses being held in a Police area headquarters in connection with the same investigation. Clearly, multiple representation is not precluded under Rule 1.7 of the Illinois Rules of Professional Conduct unless such representation results in conflicts of interest. *See*, *e.g.*, *Guillen v. City of Chicago*, 956 F. Supp. 1416, 1426 (N.D. Ill. 1997). And there was absolutely no evidence that, in that instance or any other, FDLA had failed to adhere to its established practice of determining whether an actual conflict of interest precluded the representation and withdrawing from multiple representation that presented such conflicts. *See* R. 81-2 at 288-289.

Thus, with respect to the issue of multiple representation, the District Court was also fully justified in finding that there was no credible evidence that FDLA represents its clients in anything other than a lawful and ethical manner.

III. The Remaining Arguments For Reversal Lack Merit.

There are four remaining arguments for reversal raised by the State's Attorney and the defendants' amici. All of them plainly lack merit and should be summarily rejected.

A. The State's Attorney Was Properly Enjoined.

The State's Attorney argues that he should not have been subject to the injunction because he does not make policy for the Police and the assistant in charge of his Felony Review Unit was merely accurately reciting the defendants' claimed legal basis for refusing communication between FDLA and its witness-clients. *See* State's Attorney's Br. at 23-26. This argument is baseless.

The State's Attorney does not contest the District Court's finding that the responsibilities of his Felony Review Unit include providing advice to the Chicago Police concerning the rights of persons being questioned at police stations. App. A16. The District Court further found that on at least one occasion, the supervisor of that Unit advised Police officers that they were not required to allow communications between an FDLA attorney and a witness being questioned within the police station. *Ibid.* The Police relied upon this advice in denying the FDLA attorney her First Amendment right to communicate with her client on this particular occasion. *See Ibid.* District Court also found that the State's Attorney's position in this litigation plainly reflects an office policy consistent with the advice provided by the supervisor on that one occasion. *Ibid.*

The State's Attorney was properly enjoined. Rule 65 of the Federal Rules of Civil Procedure contemplates that those who are "in active concert or participation with" the wrongdoers may be subjected to injunctive relief. *See* Fed.R.Civ.P. 65(d). The State's Attorney continues to offer no basis to doubt, as the District Court found, that, if he is not subjected to injunctive relief, he will continue to advise the Police, consistent with his own office policy, that the Police may obstruct communications between FDLA attorneys and their witness-clients.

It is ludicrous for the State's Attorney to contend that the injunction inhibits his First Amendment freedom. The State's Attorney is free to express disagreement with the requirements of the United States Constitution. What he cannot do is to participate with the Police in denying FDLA's right to associate with its clients.

B. *Younger* Abstention is not Appropriate in this Case.

Relying primarily on *Palmer v. City of Chicago*, 755 F.2d 560 (7th Cir. 1985), the State's Attorney contends that the District Court should have abstained pursuant to *Younger v. Harris*, 401 U.S. 37 (1971) from deciding FDLA's First

Amendment claim. The District Court properly rejected this specious argument. *See* App. A20-21.

At the outset, this contention completely misses what is in issue here. This case absolutely does *not* seek to create a novel constitutional right of witnesses to be informed of some "right to remain silent" that could then somehow be enforced via a motion to suppress in a state criminal proceeding. To the contrary, this case *only* concerns the right of FDLA attorneys not to be obstructed from providing legal advice to those clients who are voluntarily cooperating as *witnesses* in police investigations. Since the injunction in this case does not afford FDLA or any witness later charged with an offense with a basis to challenge a statement in state court proceedings, the premise of the State's Attorney's abstention argument evaporates.

Younger abstention is appropriate only where all of the following three factors are present: (1) there are pending, ongoing state judicial proceedings; (2) the state proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to raise constitutional challenges. *Trust & Investment Advisors, Inc. v. Hogsett*, 43 F.3d 290, 295 (7th Cir. 1994). As the District Court properly held, the absence of the first factor squarely bars the door

to *Younger* abstention in this case: there are no state proceedings available to FDLA attorneys to vindicate *their* First Amendment to communicate with their clients. *Cf., e.g., Gerstein v. Pugh*, 420 U.S. 103, 108 n. 9 (1975) (holding that *Younger* abstention does not apply where the relief plaintiff requests is "not directed at the state prosecutions as such, but only at . . . an issue that could not be raised in defense of the criminal prosecution.").

Therefore, this Court should summarily reject the State's Attorney's argument that the District Court should have abstained.

C. The State's Attorney's Separation of Powers Argument is Frivolous.

The State's Attorney's contention that the injunction violates "separation of powers" is patently frivolous. The State's Attorney (as his title makes clear) is a state, not a federal officer. Federal separation of powers principles are therefore obviously irrelevant.

In any event, the injunction does no more than require the State's Attorney to inform the immediately responsible individuals within his office of the requirements of the order. This is hardly unusual and clearly is not an improper invasion of the operations of the State's Attorney's office.

D. The Balance of Equities And the Public Interest Favor the Injunction.

The State's Attorney and the defendants' amici seek to distract from the First Amendment issue by raising the specter of ominous consequences for law enforcement if the injunction is affirmed. The State's Attorney claims that "gangs" will somehow manage to use the injunction to enforce silence by witnesses. State's Attorney's Br. at 33-34. The Department of Justice warns that "potential covert investigations" may be "stop[ped] . . . dead in [their] tracks." DOJ Amicus Br. at 28. And the Illinois Association of Chiefs of Police, with their co-amici, hypothesize that domestic abusers might somehow use the injunction to intimidate partners whom they have victimized. Police Chiefs' Amicus Br. at 12-13.

These dire predictions are notably short on specifics. They have not one iota of support in the record of this case. FDLA is a non-profit, public interest agency staffed primarily by attorneys who *volunteer* their time to assist indigent Chicago citizens. R. 81-1 at 52-54. The District Court properly found that "[t]here is no basis for the suggestion that FDLA has engaged, or ever would engage, in improper intimidation tactics on behalf of a wrongdoer. Nor is there a shred of evidence that FDLA has ever unwittingly filled such a role." App. A33.

The defendants completely failed to make a record below that the injunction would result in any of the purely speculative, untoward consequences that they and their amici now hypothesize in their briefs on appeal. With no evidentiary support, these generalized claims provide no basis to overturn the injunction. Moreover, these arguments hypothesize unethical counsel who would use their First Amendment freedoms to engage in witness intimidation or obstruction of justice. The District Court was entitled to presume that counsel who might benefit from the injunction will conduct themselves honorably and in accordance with their professional responsibilities. This Court should presume no less.

First Amendment freedoms are precious. Their loss "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). With nothing other than speculation and innuendo to weigh in the balance against FDLA's First Amendment rights, it is evident that the balance of harms and the public interest decisively favor the injunction in this case.

CONCLUSION

For the foregoing reasons, this final judgment entered by the District Court should be affirmed.

Respectfully submitted,

FIRST DEFENSE LEGAL AID

By: _____
One of its attorneys

Locke E. Bowman
Jean Maclean Snyder
MacArthur Justice Center
University of Chicago Law School
1111 E. 60th Street
Chicago, Illinois 60637
(773) 753-4405

Craig B. Futterman
Edwin F. Mandel Legal Aid Clinic
University of Chicago Law School
6020 S. University Avenue
Chicago, Illinois 60637
(773) 702-9611

OF COUNSEL:
Geoffrey R. Stone
Harry Kalven Jr., Distinguished Service Professor of Law
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
(773) 702-8810

Edgar Chen, Jennifer Escalante, Richard Snyder, Tracy Thomas, Lissa J. Wolfendale and Richard Schwartz, students at the University of Chicago Law School, assisted in the preparation of this document.