No. SJC-12884

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

RAHIMAH RAHIM,

Plaintiff-Appellant,

v.

RACHAEL ROLLINS, in her official capacity as the District Attorney for Suffolk County,

Defendant-Appellee.

ON DIRECT APPELLATE REVIEW OF A JUDGMENT OF THE SUPERIOR COURT OF SUFFOLK COUNTY, CASE NO. 1784-CV-02312 (HON. JOSEPH F. LEIGHTON, JR.)

BRIEF OF AMICUS CURIAE THE UNITED STATES IN SUPPORT OF THE DEFENDANT-APPELLEE AND AFFIRMANCE

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INTEREST OF AMICUS CURIAE

The United States has a central interest in this case, which concerns a request to compel disclosure of sensitive federal law-enforcement records. The Federal Bureau of Investigation conducted an internal inquiry into an officer-involved shooting that occurred during the execution of a joint federal-state counterterrorism operation. The FBI loaned some of the federal records that were part of that investigation to the Suffolk County District Attorney's Office, making clear that the federal records remained the property of—and subject to exclusive control by—the FBI. See JA.II 97.

Plaintiff-appellant Rahimah Rahim is seeking those records (among others) directly from the federal government under the federal Freedom of Information Act, 5 U.S.C. § 552. See JA.III 31-34 (June 16, 2017 FOIA request to the FBI); JA.III 73-76 (June 16, 2017 FOIA request to the Department of Justice); JA.III 89-92 (June 16, 2017 FOIA request to the Department of Homeland Security). The Department of Justice has denied Ms. Rahim's request under FOIA Exemption 7(A), see Addendum 35 (June 20, 2018 Letter), which protects from disclosure federal "records or information compiled for law enforcement purposes * * * to the extent that the production of such law enforcement records or information * * * could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C. § 552(b)(7)(A).

Ms. Rahim also brought this case in state court in a duplicative effort to compel production of these federal records under the Massachusetts Public Records Law, Mass. Gen. Laws ch. 66, § 10(a) *et seq.* The Superior Court of Suffolk County declined to

order disclosure, concluding instead, *inter alia*, that "the Documents are FBI records" and thus that "federal law govern[s] the[ir] dissemination." JA.III 217. Ms. Rahim now asks this Court to reverse the judgment of the superior court, override the determination of the federal government, and compel the dissemination of federal property under the auspices of state law. Respectfully, the United States urges this Court to affirm the decision below.[1]

RULE 17(c)(5) DECLARATION

The United States and undersigned counsel declare that (a) no party or party's counsel authored this brief in whole or in part; (b) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; (c) no person or entity other than the United States contributed money that was intended to fund preparing or submitting this brief; and (d) neither the United States nor its counsel represent or have represented any of the parties to the present appeal in another proceeding involving similar issues or were a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

[1] The United States offers its views as *amicus curiae* pursuant to 28 U.S.C. § 517, which provides that "any officer of the Department of Justice[] may be sent by the Attorney General * * * to attend to the interests of the United States in a suit pending * * * in a court of a State, or to attend to any other interest of the United States." This Court routinely considers the views of the United States in cases touching upon a concrete interest of the federal government. See, *e.g.*, *Lunn* v. *Commonwealth*, 477 Mass. 517, 532 (2017); *In re Custody of Victoria*, 473 Mass. 64, 65 n.3 (2015).

STATEMENT OF THE ISSUE

Whether FBI investigative files in the temporary custody of the Suffolk County District Attorney are subject to compelled public disclosure under the Massachusetts Public Records Law notwithstanding the contrary determination of the federal government under the federal Freedom of Information Act.

STATEMENT OF THE CASE

A joint federal-state counterterrorism task force in Boston suspected that 26-year-old security guard Usaamah Rahim was planning a violent attack on behalf of ISIS. After intercepting a phone call in which Mr. Rahim discussed his intention to behead a high-profile Islamophobic activist, the agents decided to arrest Mr. Rahim and his co-conspirators. JA.I 26-27; JA.III 47-48. When a team of FBI agents and Boston police approached him outside a CVS pharmacy, Mr. Rahim pulled out a 13-inch knife and began threatening the officers. JA.I 28-29. They shot him three times in the torso, and he died shortly thereafter. *Id.*

The FBI and the Suffolk County District Attorney's Office each conducted a separate investigation into the shooting. To assist with the local investigation, the FBI loaned the DA's office a number of investigative reports and sworn statements concerning Mr. Rahim's death (collectively, "the FBI Documents"). A letter accompanying the FBI Documents made clear that the Bureau was providing them for the office's internal use only and did not authorize further release, including in response to any public-records request under state law. JA.II 97. The DA's office ultimately

concluded that officers had probable cause to arrest Mr. Rahim and that their use of force was lawful and reasonable under the circumstances. JA.I 34.

On June 16, 2017, Mr. Rahim's mother, Rahimah Rahim, sent FOIA requests to the FBI, the Department of Justice, and the Department of Homeland Security, seeking disclosure of, *inter alia*, "[a]ll records relating to the investigation of Mr. Rahim" and "[a]ll records relating to the events that took place on June 2, 2016 [the day of the shooting], with regard to Mr. Rahim." JA.III 31-34; JA.III 73-76; JA.III 89-92. Without waiting for the federal agencies to respond, Ms. Rahim simultaneously initiated a parallel process under state law, requesting that the DA's office disclose the FBI Documents pursuant to Massachusetts's PRL. JA.I 36-39. The DA's office denied her request on the ground that the FBI Documents "are the property of the FBI" and "cannot be disseminated without the permission of the FBI." JA.I 58. The federal agencies likewise denied her FOIA requests, including on the ground that the FBI Documents are protected from public disclosure by FOIA Exemption 7(A), which shields "records or information compiled for law enforcement purposes," the disclosure of which "could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C. § 552(b)(7). See Addendum 35.

Ms. Rahim responded to these setbacks by suing the DA in the Superior Court of Suffolk County. She sought a declaratory judgment that the FBI Documents are public records subject to disclosure under the PRL and an injunction compelling their production. After considering the parties' cross-motions, the court allowed summary

judgment in favor of the DA, holding that the FBI Documents could not be disclosed because, *inter alia*, the Supremacy Clause of the federal Constitution requires that the records "be disseminated, if at all, pursuant to federal law, not state law." JA.III 215.

SUMMARY OF ARGUMENT

I. In order to preserve the benefits of federal-state law-enforcement cooperation and carry out the Court's "duty to construe statutes so as to avoid *** constitutional difficulties," *Commonwealth* v. *Disler*, 451 Mass. 216, 228 (2008), Massachusetts's PRL can and should be construed in harmony with FOIA and other federal statutes rather than interpreted to create an unnecessary conflict between sovereigns, cf. *Modified Motorcycle Ass'n of Mass., Inc.* v. *Commonwealth*, 60 Mass. App. Ct. 83, 86 (2003). Two exemptions in the PRL—for records "specifically or by necessary implication exempted from disclosure by statute," Mass. Gen. Laws ch. 4, § 7(26)(a), and for "investigatory materials necessarily compiled out of the public view by law enforcement *** the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest," Mass. Gen. Laws ch. 4, § 7(26)(f)—encompass federal law-enforcement records that the federal government has deemed protected from public disclosure under a FOIA exemption in 5 U.S.C. § 552(b)(7). Ms. Rahim has not asked this Court to second-guess the federal government's application of FOIA to the FBI Documents—nor, out of deference to federal-state comity, should it do so—and that federal determination forecloses her backdoor gambit to compel disclosure under state law.

II. In the event the PRL cannot be harmonized with the federal disclosure regime, it is the latter that must control dissemination of federal records. The federal government's position with respect to the FBI Documents has been clear and consistent from the outset: the Bureau notified the DA that it was loaning these records only for use in the DA's investigation into the shooting of Mr. Rahim, and it expressly warned that "the FBI cannot authorize the further release of the records to any third party for any [other] purpose," including "any request made under the Massachusetts [PRL]." JA.II 97. Those conditions reflect restrictions on disclosure embodied in the federal statutes that address the intergovernmental sharing of federal law-enforcement records. Ms. Rahim's effort to convert this temporary intergovernmental loan into a full-blown surrender of the federal government's control over its confidential law-enforcement records relies on the same flawed reasoning as other attempted end-runs around the federal disclosure regime and should meet the same fate. See *United States* v. *Napper*, 887 F.2d 1528, 1530 (11th Cir. 1989); *United States* v. *Story County*, 28 F. Supp. 3d 861, 873 (S.D. Iowa 2014); *Brady-Lunny* v. *Massey*, 185 F. Supp. 2d 928, 935 (C.D. Ill. 2002). Indeed, the doctrine of intergovernmental immunity arising from the Supremacy and Property Clauses of the federal Constitution constrains a State from interposing itself as an arbiter of federal property and using its own laws to deprive the federal government of prospective control over its property. See *Arizona* v. *Bowsher*, 935 F.2d 332, 334 (D.C. Cir. 1991). In light of the relevant statutes, analogous caselaw, and well-established principles of federal supremacy, Ms. Rahim's effort must fail.

ARGUMENT

Ms. Rahim does not contest the superior court's finding that the FBI Documents "are FBI records" and thus federal property that is merely "on loan to the [District Attorney]." JA.III 216; accord JA.III 217 ("the Documents remained FBI property" even after "the FBI loaned the Documents"); *id.* ("the Documents are FBI records, and thereby FBI property"). Likewise, there is no dispute that the federal government has already determined that the FBI Documents are exempted from public disclosure under federal law. See Addendum 35. Thus, to prevail in this litigation, Ms. Rahim must demonstrate (1) that Massachusetts law compels an outcome contrary to the commands of the federal disclosure regime, and (2) that, if the separate federal and state disclosure schemes are deemed to conflict with respect to these federal records, the State's determination controls over the federal government's. Neither contention has merit.

I. Massachusetts's PRL Can and Should Be Interpreted in Harmony with Federal Law.

Although a separate statutory scheme from FOIA and related federal provisions, Massachusetts's PRL can—and, thus, should—be interpreted in harmony with federal law rather than to create an unnecessary conflict between sovereigns. See *Modified Motorcycle Ass'n of Mass., Inc.* v. *Commonwealth*, 60 Mass. App. Ct. 83, 86 (2003) (Judicial construction that "conforms the [state] regulation to the Federal statute is therefore warranted and is consistent with the 'duty [of a court] to construe statutes so as to avoid constitutional difficulties, if reasonable principles of interpretation permit [doing so].'"

(quoting *Blixt* v. *Blixt*, 437 Mass. 649, 674 (2002)) (ellipsis omitted)). The superior court held that the FBI Documents are exempted from disclosure under the PRL's express carve-out for "investigatory materials." JA.III 214. The United States agrees with that determination[2] and proposes an analytical framework for applying the PRL consistently to future efforts to compel disclosure of similar federal law-enforcement records.

A. The FBI Documents Are Exempted from Disclosure by Statute within the Meaning of PRL Exemption (a).

The PRL expressly exempts from disclosure all records "specifically or by necessary implication exempted from disclosure by statute," Mass. Gen. Laws ch. 4, § 7(26)(a), and this Court has recognized that this provision contemplates exemptions codified in federal statutes as well as state ones, *Champa* v. *Weston Pub. Sch.*, 473 Mass. 86, 92-93 (2015) (federal educational records statute exempted disclosure under the PRL). See *Brady-Lunny* v. *Massey*, 185 F. Supp. 2d 928, 931 (C.D. Ill. 2002) (construing a similar provision of the Illinois Freedom of Information Act as incorporating federal disclosure restrictions); cf. *Howlett By & Through Howlett* v. *Rose*, 496 U.S. 356, 371 (1990) ("'When Congress * * * adopted [an] act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of [the State]

[2] The DA argues (DA Br. 16-21)—and the superior court agreed, JA.III 5-6—that, even if an express exemption did not apply, loaned federal records categorically fall outside the scope of "public records" as that term is used in the PRL. Affirming on that basis would likewise "avoid constitutional difficulties," *Blixt*, 437 Mass. at 674, and the United States does not dispute the superior court's resolution of that threshold question. The discussion of applicable PRL exemptions that follows thus assumes but does not concede that the FBI Documents would otherwise qualify as "public records."

as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State.'"). FOIA exempts from disclosure a number of categories of federal records, including (as relevant here) "records or information compiled for law enforcement purposes * * * to the extent that the production of such law enforcement records or information * * * could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A).

The federal government has determined that the FBI Documents qualify as law-enforcement records whose disclosure could be expected to interfere with enforcement proceedings and, accordingly, that they are properly withheld under Exemption 7(A). Addendum 35. Ms. Rahim has not expressly asked the state courts to engage in their own interpretation of FOIA, nor would it be appropriate for this Court to second-guess a separate sovereign's interpretation and application of its own legal framework. As the First Circuit has held in the context of abstention doctrine, "[in] circumstances where a federal agency with primary jurisdiction over the controversy has already exercised said jurisdiction, it would be inconsistent with * * * principles of comity and equal respect for the interests of both the federal and state government" for a court "to give way to a state administrative action filed after the federal proceedings are underway." *Chaulk Servs., Inc.* v. *Mass. Comm'n Against Discrimination*, 70 F.3d 1361, 1369 (1st Cir. 1995); cf. *Parisi* v. *Davidson*, 405 U.S. 34, 50-51 (1972) (Douglas, J., concurring) ("Th[e] principle of comity is important in the operation of our federal system, for both the States and the Federal Government are administering programs relating to criminal justice.").

Thus, the federal government's determination that the FBI Documents are excepted from disclosure under FOIA Exemption 7(A) constitutes an "exempt[ion] from disclosure by statute" that forecloses Ms. Rahim's claim under PRL Exemption (a).

B. Disclosure of the FBI Documents Would Prejudice the Possibility of Effective Law Enforcement and Be Against the Public Interest within the Meaning of PRL Exemption (f).

The PRL also exempts from disclosure "investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest." Mass. Gen. Laws ch. 4, § 7(26)(f). Besides the compelling rationale put forward in the DA's brief (DA Br. 22-28), the FBI Documents should be deemed exempt under this provision for three additional reasons.

First, in the interest of harmonizing state and federal law with respect to the disclosure regimes applicable to federal records, the investigatory-materials carve-out in PRL Exemption (f) can and should be read consistently with the federal cognate provision for law-enforcement records withheld under FOIA Exemption 7. Exemption 7, codified at 5 U.S.C. § 552(b)(7), applies to "records or information compiled for law enforcement purposes" the public disclosure of which:

> (A) could reasonably be expected to interfere with enforcement proceedings,
>
> (B) would deprive a person of a right to a fair trial or an impartial adjudication,

(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,

(D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,

(E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or

(F) could reasonably be expected to endanger the life or physical safety of any individual.

Both the state provision and its federal cognate apply to the same general category of governmental documents: confidential law-enforcement materials. Compare Mass. Gen. Laws ch. 4, § 7(26)(f) (covering "investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials"), with 5 U.S.C. § 552(b)(7) (covering "records or information compiled for law enforcement purposes").[3] And although the language of FOIA Exemption 7 is more detailed than PRL Exemption (f), each of the concerns enumerated in the FOIA provision is oriented toward the "the possibility of effective law enforcement" and "the

[3] While FOIA Exemption 7 does not include an express textual requirement that the records have been "compiled out of the public view," the exemption is contingent on the materials being non-public, and FOIA generally does not shield from disclosure information that is "already * * * in the public domain by official disclosure." *Wolf* v. *CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007).

public interest" broadly protected by the PRL. At a minimum, FOIA Exemption 7(A)—precluding disclosures that "could reasonably be expected to interfere with enforcement proceedings"—plainly fits within the ambit of materials exempted from disclosure by PRL Exemption (f).

Second, the disclosure of federal law-enforcement materials against the expressed direction of the FBI will prejudice the possibility of effective law enforcement to the detriment of the public by jeopardizing the nature and scope of future FBI cooperation with Massachusetts agencies. While the FBI remains committed to cultivating salutary partnerships with its state and local law-enforcement counterparts, the Bureau would likely be forced to take additional steps to protect its investigatory materials from exposure under the PRL. For example, to ensure that confidential federal records do not inadvertently fall prey to compelled disclosure under state law, the FBI would consider implementing onerous but necessary procedural safeguards with respect to sensitive law-enforcement materials, such as allowing Massachusetts investigators to review FBI documents only at FBI facilities and to leave any notes based on those materials in the FBI's custody. Accord Rahim Br. 36 ("The U.S. government can, for example, allow state agencies to view, but not 'receive' and retain, documents that it desires to shield from state public records law. * * * [F]ederal agencies should not operate under the illusion that they can indefinitely share documents with Massachusetts agencies without running the risk that those agencies will be required by state law to produce them to Massachusetts residents."). Those steps could impede the

working relationship between state and federal law-enforcement agencies, as the inability of state and local officials to guarantee that they would maintain the confidentiality of federal records would inevitably create tension between federal and state agents, erect bureaucratic roadblocks in federal-state joint operations (such as the counterterrorism operation that gave rise to this litigation), and broadly inhibit cooperation in a manner that diminishes the "possibility of effective law enforcement" and prejudices the "public interest"—contrary to the express provisions of state law.

Third, the prejudice to the possibility of effective law enforcement could hardly be more pronounced than in the counterterrorism context, where investigatory materials are likely to be used to identify and retaliate against the agents involved. See JA.III 98-100. Here, Mr. Rahim was "attempting to carry out an ISIS-inspired attack on June 2, 2015," and ISIS has become infamous for targeting law-enforcement officers, including within the last few years. JA.III 99. ISIS also encourages its followers to execute such attacks by publishing "kill lists" bearing the names of law-enforcement personnel. JA.III 100. In light of its institutional expertise in the conduct of terrorist organizations, the FBI is better positioned than the state courts to reach consistent and informed determinations as to which of its own records will expose state and federal law-enforcement personnel to violent reprisal. See generally *United States* v. *Prosperi*, 573 F. Supp. 2d 436, 453-454 (D. Mass. 2008) (describing the post-9/11 "massive reorganization of the U.S. Government to cope with the threat posed by terrorists" and particularly the "shift in focus" at the DOJ and FBI).

Thus, to preserve effective federal-state law-enforcement cooperation in the public interest and to avoid the statutory and constitutional pitfalls (detailed below) that would attend a federal-state conflict, the PRL should be construed consistently with the federal disclosure regime—here, precluding Ms. Rahim's end-run around FOIA.

II. If the State and the Federal Government Are in Irreconcilable Conflict over these Federal Records, the Federal Disclosure Regime Must Prevail.

The letter accompanying the FBI Documents made clear that the FBI was loaning them to the DA's office for a narrow purpose and under a reservation of the federal government's right to control its records. Specifically, the FBI stated (1) that the DA's "office is now requesting copies" of the Bureau's Rahim-related records "in order to continue the [DA's] investigation" into the shooting; and (2) that the FBI Documents "are being released for continuing use in the same" and are not eligible for "further release of the records to any third party," including in response to a request under Massachusetts law. JA.II 97. The FBI advised that any "further dissemination" must follow the same legally mandated course that the DA's application took: a request to the Bureau for the records followed by "prior written permission of the FBI" setting out the parameters of their distribution. *Id.* The FBI thus made clear that it was complying with established mechanisms for federal-state information-sharing, not generally waiving control over its records or conferring on the DA any sort of independent publication authority not contemplated by federal law. Because those conditions track restrictions established in relevant federal statutes, upheld in analogous

caselaw, and consistent with the constitutional doctrine of intergovernmental immunity, this Court should permit the DA to comply with the express terms of this limited loan.

A. Federal Law Plainly Envisions Continuing Federal Control over Records Shared with State and Local Law-Enforcement Agencies.

The conditions in the FBI's letter reflect restrictions embodied in the comprehensive federal statutory scheme that permits limited public disclosure of federal law-enforcement documents and other federal records and authorizes federal agencies to restrict access to sensitive information.

The federal Freedom of Information Act, 5 U.S.C. § 552, generally provides that any person has a right to request access to federal agency records and establishes a limited presumption that records in the possession of Executive Branch agencies are accessible by the public. See 5 U.S.C. § 552(a). "Congress recognized, however, that public disclosure is not always in the public interest." *CIA* v. *Sims*, 471 U.S. 159, 166-167 (1985). The Supreme Court has stated that, in enacting FOIA, "Congress sought 'to reach a workable balance between the right of the public to know and the need of the Government'" to protect specific categories of information. *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989).

That balance is embodied in the nine categorical exemptions set forth in subsection (b) and three special law-enforcement record exclusions set forth in subsection (c). FOIA's enumerated exemptions reflect a recognition that "legitimate governmental and private interests could be harmed by release of certain types of

information." *John Doe Agency*, 493 U.S. at 152 (quoting *FBI* v. *Abramson*, 456 U.S. 615, 621 (1982)). As relevant here, Exemption 7(A) protects from disclosure "records or information compiled for law enforcement purposes * * * to the extent that the production of such law enforcement records or information * * * could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C. § 552(b)(7).

Another federal statute, the Privacy Act, 5 U.S.C. § 552a, generally *restricts* the dissemination of federal "records maintained on individuals" unless an exception applies. One such exception, codified at 5 U.S.C. § 552a(b)(7), permits the distribution of federal records "to an instrumentality of any governmental jurisdiction within * * * the United States for a civil or criminal law enforcement activity" contingent on the federal agency's receipt of "a written request * * * specifying the particular portion desired and the law enforcement activity for which the record is sought." Importantly, this statutory subsection does not permit such intergovernmental sharing of law-enforcement records for any purpose other than the receiving agency's use in a specified "law enforcement activity if the activity is authorized by law." *Id.*[4]

[4] Statutes and regulations outside the Privacy Act and FOIA also permit limited dissemination of federal law-enforcement records. For example, 28 U.S.C. § 534(a) directs the Attorney General to "acquire, collect, classify, and preserve identification, criminal identification, crime, and other records," and provides that he "shall * * * exchange such records and information with, and for the official use of, authorized officials of * * * the States." That exchange, however, "is subject to cancellation if dissemination is made outside the receiving departments or related agencies." 28 U.S.C. § 534(b). And the *Touhy* regulations, 28 C.F.R. §§ 16.21 to 16.28, make disclosure of federal law-enforcement records in litigation contingent on preapproval by the appropriate DOJ official. Ms. Rahim has not sought or received approval under *Touhy*.

Read in concert, these statutes provide that federal records are to be *withheld* from the public to the extent they contain sensitive information about individuals or, if disclosed, would compromise the effectiveness of law-enforcement operations; and are to be *shared* with state and local agencies in furtherance of their own law-enforcement prerogatives only (1) pursuant to a written arrangement, and (2) for the receiving agency's limited use in a specified law-enforcement activity. Because Ms. Rahim's request under the PRL does not overcome the express law-enforcement records exemption to FOIA or qualify under the express law-enforcement sharing provision in the Privacy Act, her attempt to obtain these federal records is precluded by federal law.

B. Analogous Caselaw Supports Continuing Federal Control over Federal Records Subject to the Federal Disclosure Regime.

Ms. Rahim is not the first plaintiff to argue that a state public-records law supersedes this federal disclosure scheme, but the experience of similarly situated litigants confirms that her claim must fail.

1. In *United States* v. *Napper*, a federal district court held, 694 F. Supp. 897 (N.D. Ga. 1988), and the Eleventh Circuit affirmed, 887 F.2d 1528 (11th Cir. 1989), that the FBI's sharing of federal law-enforcement records with a municipal police department does not strip those documents of federal control, notwithstanding the dictates of a state disclosure law. There, the FBI had loaned records to the Atlanta police to aid their investigation into a string of child murders. 694 F. Supp. at 899. When a state court ordered the records released pursuant to Georgia's public records

law against the FBI's instructions, the United States filed a federal action, and the district court ordered the City to return the documents. *Id.* at 900-902. The district court determined that "the documents in question belong to [the federal government] and if intervenors want the documents, they must file an official FOIA request"—not rely on state law to make an end-run around the federal process. *Id.* at 901.

Ms. Rahim's efforts to distinguish *Napper* are unpersuasive. She argues (Rahim Br. 35) that "*Napper* did not hold that federal law countermands a state agency's obligation to comply with an otherwise valid request to produce [federal] documents under a state public records law while they remain in the state agency's possession." But, in fact, the Eleventh Circuit expressly determined that "the City of Atlanta possesses, [but] *has no right to disseminate*" the federal law-enforcement records at issue. 887 F.2d at 1530 (emphasis added). She also points out (Rahim Br. 34-35) that the district court cited "28 U.S.C. § 534(b), which provides for the 'cancellation' of an exchange of records under Section 534(a)(4) if the receiving agency disseminates the records," and argues that, here, the FBI has not "purported to identify any federal provision in which Congress has authorized it to claw back the Records." But the district court took note of Section 534(b) only to inform its understanding of "the terms of the loan agreement" between the FBI and the City, which in that case (as here) expressly prohibited "distribut[ion] outside [the receiving] agency." 694 F. Supp. at 899, 901. Indeed, in affirming the district court, the Eleventh Circuit's decision did not rest on—or even mention—Section 534(b), instead viewing the litigation as a "suit [by the

United States] to enforce its contractual and property rights" and "simply a case in which the [federal] Government seeks to retrieve documents which it owns." 887 F.2d at 1530. The Eleventh Circuit then echoed the district court in suggesting that "these documents could be made available for disclosure to the public in a proceeding under the [federal] Freedom of Information Act" in the event that the requestors "assert [a FOIA claim] against the rightful owner of them"—the FBI. *Id.* at 1530.

2. Similarly, in *United States* v. *Story County,* 28 F. Supp. 3d 861 (S.D. Iowa 2014), a federal district court rejected an attempt to compel production, pursuant to state law, of certain federal records held in a county-government email account, notwithstanding the records' exemption from disclosure under FOIA. Story County argued, *inter alia*, that the federal government could not "reach into Story County's email system and * * * prohibit disclosure of Story County email records that are subject to the Iowa Open Records Act." *Id.* at 867. But the district court undertook a functional analysis, expressing concern that the documents' requestor was engaged in "subterfuge to obtain documents that are specifically exempt from FOIA and therefore not otherwise accessible." *Id.* at 872. It was undisputed, the court observed, "that [the requestor] would not be entitled to access" the federal documents "had they been sent and/or received via [a federal] email account." *Id.* Therefore, the court determined that the temporary transfer of the federal records into the custody of a county email account "did not transform the nature of those communications, [and] neither did that

use transform [the public's] lack of access to them." *Id.* The district court thus permitted the federal government to maintain control over these federal records.[5]

For substantially identical reasons, the temporary transfer of the FBI Documents into the custody of the DA's office did not transform the nature of those communications, and neither should it transform the federal government's control over those FBI records. Like the emails at issue in *Story County*, the FBI Documents are federal records that contain sensitive information about federal programs and operations. Like the recipient in *Story County*, the DA was entrusted by the federal government with maintaining the confidentiality of these records notwithstanding their placement in the custody of a non-federal system. And like the requestor in *Story County*, Ms. Rahim has been frustrated in her efforts to obtain these records through the FOIA process and now turns to state law as a work-around. Her attempt should likewise fail.[6]

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[5] The federal government has not yet demanded the return of the FBI Documents, as it did in *Napper* and *Story County*. See *Napper*, 887 F.2d at 1530; *Story County*, 28 F. Supp. 3d at 866. Relatedly, as Ms. Rahim points out (Rahim Br. 34), "the federal government has not moved to intervene in the[se] proceedings." But that restraint should certainly not be held against the federal government, which is merely extending the same comity to Massachusetts with respect to state PRL litigation that it hopes this Court will in turn provide to the United States, precluding the need for the federal government to demand return of the FBI Documents on a litigation timetable.

[6] Notwithstanding these similarities, Ms. Rahim attempts (Rahim Br. 35 n.12) to distinguish *Story County* because there "the Sheriff received the documents in question in his capacity as a board member of a federal authority rather than as a local official." She is correct about the provenance of the emails, but her argument misapprehends the court's reasoning. In fact, the district court expressly rejected "Story County's contention that the content of the subject emails is irrelevant" and that it should instead

3. Finally, in *Brady-Lunny* v. *Massey*, 185 F. Supp. 2d 928 (C.D. Ill. 2002), a federal district court concluded that federal law governs the dissemination of records pertaining to inmates confined by the federal Bureau of Prisons, even when those inmates (and records) are in the custody of state and local authorities. The requestors argued, *inter alia*, that certain inmate information was subject to disclosure pursuant to "the Illinois FOIA, not the Federal FOIA" and that federal regulations restricting disclosure were "inapplicable here because the DeWitt County Jail is not a BOP institution." *Id.* at 930-931. The district court rejected each of these contentions: it determined "that the federal FOIA applies in this case," *id.* at 932,[7] and that, because "Section 513.34 applies to all federal inmates," its restriction on dissemination attaches to federal inmate records in the custody of DeWitt County "regardless of whether the DeWitt County Jail is a BOP institution," *id.* at 931 n.2. Like *Napper* and *Story County*,

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look to the Sheriff's individual status to determine whether the documents should be disclosed. 28 F. Supp. 3d at 872. Instead, the court emphasized that it was the content of the records—and specifically, the fact that they contained sensitive federal-government communications exempted from disclosure under FOIA—that foreclosed any state-law maneuver to compel their production. So too here.

[7] The district court also noted that the Illinois Freedom of Information Act exempts from disclosure "information * * * [that] is 'specifically prohibited from disclosure by federal or State law or rules and regulations adopted under federal or State law,'" *Brady-Lunny*, 185 F. Supp. 2d at 931 (quoting 5 Ill. Comp. Stat. 140/7(1)(a)), and thus held that the Illinois statute accommodated rather than contravened federal law. The same rationale applies to Massachusetts's PRL, which exempts from disclosure, *inter alia*, all records "specifically or by necessary implication exempted from disclosure by statute," Mass. Gen. Laws ch. 4, § 7(26)(a). Thus, as discussed in Part I, *supra*, the PRL can and should be construed in harmony with the federal disclosure regime.

Brady-Lunny reinforces that the applicability of the federal disclosure regime turns on the records' *content*, not their *custodian*.[8]

C. Information-Sharing Sanctioned by Federal Law Is Not Akin to a Non-Disclosure Agreement Between the State and a Private Party.

Ms. Rahim asserts (Rahim Br. 20-22) that a decision of this Court, *Champa*, 473 Mass. at 98, precludes the federal government from binding recipients of federal records to restrictions on dissemination of those records. But *Champa* said nothing of the sort. There, this Court held that settlement agreements between a public school district and parents of public school students were "public records" within the meaning of the PRL, notwithstanding "the inclusion of a confidentiality clause in each of the agreements." *Id.* Rejecting the argument that the PRL could not pierce "a private settlement of a dispute between the school district and one of the families living in the school district," this Court held that the school district, even standing in the shoes of a civil litigant and concluding an otherwise-"private" agreement, could not shed its governmental character or shirk its "obligation to comply with the law's requirements." *Id.*

[8] Indeed, *Brady-Lunny* contradicts one of Ms. Rahim's primary arguments: that Congress must expressly "bar" officials from disclosing records they receive from a federal agency, or at least provide a mechanism for that agency to "claw back" its records in the event of unauthorized dissemination (Rahim Br. 31-35). The regulation at issue in *Brady-Lunny* (1) did not expressly encompass non-federal custodians but was instead directed to the records themselves, see 28 C.F.R. § 513.34 ("Lists of Bureau inmates shall not be disclosed."), and (2) contained no claw-back provision or any other explicit consequence for unauthorized dissemination. Nevertheless, the court correctly concluded that the federal character of these records brought them within the federal disclosure regime, and it accordingly evaluated the request under the federal FOIA.

Here, however, the governmental character of the FBI Documents cuts *against* compelled disclosure, because those documents (unlike the settlements in *Champa*) are *federal* records that are governed by *federal* law. Ms. Rahim's argument assumes that the FBI Documents are indistinguishable from any record created or transmitted solely at the state level between a state organ and a private party. But that assumption is based on the same fallacy that this Court correctly rejected in *Champa*: that an instrument slips the bonds of its governmental character—and any attendant statutory encumbrances—simply by becoming subject to some sort of consensual arrangement. Just as this Court held that the confidentiality clause in *Champa* did not eliminate the effect of applicable state law (which there mandated disclosure), so too should it hold that the transmission of the FBI Documents to the DA's temporary custody did not eliminate the effect of applicable federal statutes (which here protect against compelled disclosure).

Ms. Rahim contends (Rahim Br. 22) that, "if Massachusetts agencies could avoid complying with the PRL simply by agreeing to treat records in their possession as a loan, such agreements would surely proliferate" and "severely undermine the PRL." But that concern is not implicated here. This Court has recognized that a mine-run non-disclosure assurance from a state agency to an individual or other private entity—like the clause at issue in *Champa*—is not by itself enough to override the PRL. Such an assurance would conceal information from the public without any offsetting public benefit, especially where the state could have obtained the same information from the same source *absent* the NDA through the exercise of its police powers. But a

cooperative sharing agreement between local law-enforcement agencies and their federal counterparts, reflected in an expressly limited loan of federal records to the local agency, bears no resemblance to the kind of sweeping exception to state law that Ms. Rahim posits. Because Massachusetts has no authority to compel disclosure of any information from the federal government, the State's access to federal records is strictly contingent on its adhering to the terms of the statutorily authorized intergovernmental transfer. There is no suggestion here that the DA entered into a sham agreement for the purpose of derogating state-law obligations, nor is there any reason to believe that requiring the DA to treat federal records in accordance with federal law would permit state agencies to avoid their PRL duties through NDAs with private actors.

D. Intergovernmental Immunity Precludes the States from Depriving the Federal Government of Control over Federal Property.

Finally, the federal disclosure regime must control public access to the FBI Documents because those records remain undisputed federal property, and the federal government's control over its own property cannot be subordinated to state law. In ratifying the Constitution, the States delegated to the federal government the "power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," art. IV, § 3, cl. 2, and they agreed to bind their own courts to "the Laws of the United States" notwithstanding "any Thing in the * * * Laws of any State to the Contrary," art. VI, cl. 2. As a corollary to these provisions, the Supreme Court has long recognized "the immunity of the instruments

of the United States from state control." *Johnson* v. *Maryland*, 254 U.S. 51, 57 (1920); see also *North Dakota* v. *United States*, 495 U.S. 423, 437-38 (1990) ("[T]he States may not directly obstruct the activities of the Federal Government."). Put simply, the Constitution does not permit a State to regulate federal property in a way that obstructs the federal government's exercise of its prerogatives. See *Detroit* v. *Murray Corp. of Am.*, 355 U.S. 489, 504 (1958) (opinion of Frankfurter, J.) ("The danger of hindrance of the Federal Government in the use of its property, resulting in erosion of the fundamental command of the Supremacy Clause, is at its greatest when the State may, through regulation or taxation, move directly against the activities of the Government.").

The D.C. Circuit's decision in *Arizona* v. *Bowsher*, 935 F.2d 332 (D.C. Cir. 1991), illustrates this principle. The *Bowsher* Court addressed tension between separate federal and state schemes for disbursing unclaimed moneys to citizens holding an entitlement against the United States. Pursuant to their general unclaimed-property statutes, twenty-three States sought control over funds that the federal Treasury Department had set aside for the express purpose of paying federal debts to citizens of those States; the Treasury Department resisted, arguing that the States could not interpose themselves as distributors of federal property. The court determined that the States' plan—despite being oriented to "further the federal government's presumed purpose to return the unclaimed property to its true owners"—would impermissibly "amount to direct regulation of federal property" because it "would effectively subordinate federal property to their own laws." *Id.* at 334 (alterations omitted).

The same result should obtain in this case. Here, as in *Bowsher*, a private citizen has an asserted claim to receipt of certain federal property. Here, as there, the State and the federal government operate parallel and similar statutory schemes for disseminating government property (in this case, public records) to individual claimants. Here, as there, the State would act as a conduit for its citizen's acquisition of federal property, notwithstanding the federal government's refusal to effect the transfer by operation of federal law. Here, as there, completing that transfer would deprive the federal government of control over its property. And here, as there, such a deprivation "would effectively subordinate federal property to [the State's] own laws and appropriate that property" for disposition by Massachusetts rather than by the United States. *Bowsher*, 935 F.2d at 334. Federal supremacy cannot abide that outcome.[9]

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[9] Ms. Rahim's attempt to distinguish *Bowsher* is unpersuasive. She asserts (Rahim Br. 33) that, unlike in the federal-funds context, "Congress has [not] purported to exercise its Property Clause authority to bar the operation of state public records laws on documents created by a federal agency but received and possessed by a state agency." To the extent her argument rests on legislative inaction, she is incorrect: as described *supra* pp. 19-21, Congress *has* legislated a comprehensive scheme around the intergovernmental sharing of federal law-enforcement records—one that necessarily precludes the kind of unilateral distribution that Ms. Rahim seeks here. But even setting aside that framework, her argument misapprehends the holding of *Bowsher*: the court did not inquire whether Congress had categorically "bar[red]"—or even considered—the operation of state laws when it authorized the disbursement of federal funds; rather, the court analyzed whether "the states' claims *here*" represented "an attempt to regulate [the federal] interest." *Bowsher*, 935 F.2d at 334 (emphasis added). The Constitution's allocation of supremacy to federal law "any Thing in the * * * Laws of any State to the Contrary notwithstanding," art. VI, cl. 2, means that Congress need not conduct an exhaustive survey of every conceivable application of every state law in order to prevent impingement on federal property rights—it need only establish parameters for how the federal government will manage federal property in the conduct of federal activities.

Here, Congress has established a federal process for disclosure of federal records to private individuals; Ms. Rahim has availed herself of that process; and the federal government has, pursuant to a federal statutory exemption, rejected her request. Her attempt to upend that process by interposing the state courts as arbiters of federal property violates the intergovernmental-immunity principles embodied in the Property and Supremacy Clauses of the federal Constitution and should be rejected.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted,

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April 14, 2020

CERTIFICATE OF SERVICE

Pursuant to Massachusetts Rule of Appellate Procedure 13(e), I hereby certify under penalty of perjury that on April 14, 2020, I have effected service of this Brief of *Amicus Curiae* the United States in the matter entitled *Rahimah Rahim* v. *Rachael Rollins*, No. SJC-12884, via email to the following counsel:

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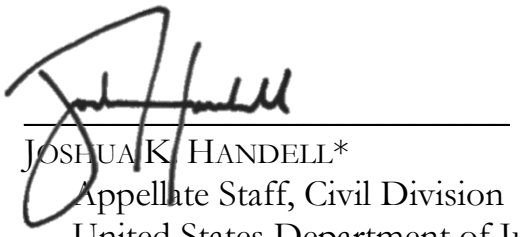
CERTIFICATE OF COMPLIANCE

1. This brief complies with Massachusetts Rule of Appellate Procedure 17(a) because it is being filed simultaneously and conditionally alongside a motion for leave.

2. This brief complies with the type-volume limitations of Massachusetts Rule of Appellate Procedure 20(a)(2)(C) because it has been prepared in 14-point Garamond font and contains 6,825 non-excludable words, as verified by the word-count feature of Microsoft Word 2019.

3. This brief complies with the privacy redaction requirement of Massachusetts Rule of Appellate Procedure 21 because it contains no personal identifying information.

4. This brief has been scanned for viruses with the most recent version of McAfee Endpoint Security, version 10.50, which is continuously updated, and according to that program, is free of viruses.



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No. SJC-12884

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

RAHIMAH RAHIM,

Plaintiff-Appellant,

v.

RACHAEL ROLLINS, in her official capacity as the District Attorney for Suffolk County,

Defendant-Appellee.

ON DIRECT APPELLATE REVIEW OF A JUDGMENT OF THE SUPERIOR COURT OF SUFFOLK COUNTY, CASE NO. 1784-CV-02312 (HON. JOSEPH F. LEIGHTON, JR.)

ADDENDUM TO BRIEF OF AMICUS CURIAE THE UNITED STATES

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Re: Appeal No. DOJ-AP-2018-003021
Request No. EOUSA-2017-002125
CDT:ADF

VIA: Email

Dear Ms. Cook:

You appealed from the action of the Executive Office for United States Attorneys (EOUSA) on your Freedom of Information Act request for access to records located in the United States Attorney's Office for the District of Massachusetts concerning Usaamah Abdullah Rahim. I note that your appeal concerns EOUSA's determination on items one and two of your request.

After carefully considering your appeal, I am affirming, on partly modified grounds, EOUSA's action on your request. The FOIA provides for disclosure of many agency records. At the same time, Congress included in the FOIA nine exemptions from disclosure that provide protection for important interests such as personal privacy, privileged communications, and certain law enforcement activities. EOUSA properly withheld this information in full because it is protected from disclosure under the FOIA pursuant to 5 U.S.C. § 552(b)(7)(A) and it is reasonably foreseeable that disclosure of this information would harm the interests protected by this provision. This provision concerns records or information compiled for law enforcement purposes the release of which could reasonably be expected to interfere with enforcement proceedings.

Furthermore, I am denying your request that we itemize and justify each item of the information withheld. You are not entitled to such a listing at the administrative stage of processing FOIA requests and appeals. See, e.g., Citizens for Responsibility & Ethics in Wash. v. FEC, 711 F.3d 180, 187 n.5 (D.C. Cir. 2013).

Please be advised that this Office's decision was made only after a full review of this matter. Your appeal was assigned to an attorney with this Office who thoroughly reviewed and analyzed your appeal, your underlying request, and the action of EOUSA in response to your request.

If you are dissatisfied with my action on your appeal, the FOIA permits you to file a lawsuit in federal district court in accordance with 5 U.S.C. § 552(a)(4)(B).

For your information, the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; email at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769. If you have any questions regarding the action this Office has taken on your appeal, you may contact this Office's FOIA Public Liaison for your appeal. Specifically, you may speak with the undersigned agency official by calling (202) 514-3642.

Sincerely,

6/20/2018

X 

Christina D. Troiani, Associate Chief, for
Sean O'Neill, Chief, Administrative Appeals Staff
Signed by: OIP