NO. 13-16480

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELECTRONIC FRONTIER FOUNDATION,

PLAINTIFF-APPELLEE,

v.

U.S. DEPARTMENT OF COMMERCE

DEFENDANT-APPELLANT.

On Appeal From The United States District Court
For The Northern District of California, San Francisco
Case No. 3:12-cv-03683-TEH
Honorable Thelton E. Henderson

BRIEF FOR PLAINTIFF-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellee Electronic Frontier Foundation states that it does not have a parent corporation and that no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE ISSUE

Whether an agency may withhold records under Exemption 3 of the Freedom of Information Act, 5 U.S.C. § 552(b)(3), in the absence of an explicit withholding statute that "specifically exempt[s]" the requested records from disclosure.

PERTINENT STATUTES

The relevant provisions of the Freedom of Information Act, 5 U.S.C. § 552, and the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701, *et seq*., are attached as an addendum.

STATEMENT OF THE CASE

Governments around the world use sophisticated communications technology to engage in surveillance of their citizens for "national security" purposes. In nations with questionable records on human rights, surveillance technology is used to monitor and track activists and, ultimately, to suppress political dissent. Through this case, the Electronic Frontier Foundation ("EFF") seeks the disclosure of records describing the federal government's role in the export of American-made surveillance technology.

The surveillance technology used around the world is overwhelmingly developed by American and European companies. *See* Paul Sonne & Steve Stecklow, *U.S. Products Help Block Mideast Web*, Wall St. J. (Mar. 27, 2011) ("U.S. technology [was . . .] used in the clampdowns on uprisings across the

Middle East" including in Egypt, Syria, and Tunisia.);[1] Vernon Silver & Ben Elgin, *Torture in Bahrain Becomes Routine With Help From Nokia Siemens*, Bloomberg News (Aug. 22, 2011).[2] For example, Narus, a Silicon Valley-based company, produces equipment used to perform "deep packet inspection"—technology that tracks, targets, and intercepts digital communications as they pass through telecommunication networks. *See* Robert Poe, *The Ultimate Net Monitoring Tool*, Wired (May 17, 2006).[3] Narus products have been linked to Telecom Egypt, Egypt's largest (and state-owned) telecommunications company, a company that figured prominently in crackdowns preceding Egypt's recent revolution. *See* Trevor Lloyd-Jones, *Narus Signs Regional License with Giza Systems*, Business Intelligence Middle East (Sep. 14, 2005);[4] James Glanz & John Markoff, *Egypt Leaders Found 'Off' Switch for Internet*, N.Y. Times (Feb. 15, 2011).[5]

American surveillance technology has been linked to regimes throughout the Middle East and the world—including Syria, Libya, Yemen, and China. *See, e.g.*, Jennifer Valentino-Devries *et al*., *U.S. Firm Acknowledges Syria Uses Its Gear to*

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[1] *Available at* http://online.wsj.com/article/SB10001424052748704438104576219190417124226.html.

[2] *Available at* http://www.bloomberg.com/news/2011-08-22/torture-in-bahrain-becomes-routine-with-help-from-nokia-siemens-networking.html.

[3] *Available at* http://www.wired.com/science/discoveries/news/2006/05/70914.

[4] *Available at* http://www.bi-me.com/main.php?id=2047&t=1.

[5] *Available at* https://www.nytimes.com/2011/02/16/technology/16internet.html.

Block Web, Wall St. J. (Oct. 29, 2011);[6] Loretta Chao & Don Clark, *Cisco Poised to Help China Keep an Eye on Its Citizens*, Wall St. J. (July 5, 2011).[7]

The federal government, and the Department of Commerce in particular, are active participants in the export of this technology. In order to export some types of surveillance technology, American companies must apply for, and receive, licenses from the agency. Since 2007, the Department of Commerce has received, and granted, applications for export of communications surveillance technology to Egypt, Pakistan, Syria, Jordan, Lebanon, United Arab Emirates, Afghanistan, Iraq, and Mexico. Appellee's Supplemental Excerpts of Record ("SER") 18-20; *see also* SER 4-11 (describing export of surveillance technology to Iraq and Afghanistan and subsequent illegal re-export to Syria).

I. Regulatory Background and the Agency's Role in the Export of Surveillance Technology

Overseas exports of products and technologies with commercial and military uses (so-called "dual-use" items) have been subject to some form of federal regulation for over sixty years. Initially, Congress played a substantial role in this regulation. In 1949, Congress passed the Export Control Act of 1949, Pub. L. No. 81-11, 63 Stat. 7 (1949), which established a statutory framework for regulating

[6] *Available at* http://online.wsj.com/article/SB10001424052970203687504577001911398596328.html.

[7] *Available at* http://online.wsj.com/article/SB10001424052702304778304576377141077267316.html.

exports. The law was scheduled to sunset on June 30, 1951, but, before it did, Congress reauthorized the law until June 30, 1953. *See* Pub. L. No. 82-33, 65 Stat. 43 (1951). This pattern—of expiration and reenactment prior to lapse—occurred seven times[8] before Congress again overhauled the export control system in 1969. *See* Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841 (1969). A subsequent congressional overhaul occurred in 1979. *See* Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979).

But the history of the Export Administration Act of 1979 ("EAA") reflects Congress's growing ambivalence toward it: beginning in 1983, Congress allowed the EAA to go into periods of lapse—sometimes for a series of days, sometimes for months, sometimes for years.[9] *See, e.g.*, Pub. L. No. 98-207, 97 Stat. 1391 (reauthorizing EAA on December 5, 1983, after two-year lapse); Pub. L. No. 103-277, 108 Stat. 1407 (reauthorizing EAA on July 5, 1994, after four day lapse). Most recently, the EAA was in lapse from 1990 to 1993, and for over six years,

[8] *See* Pub. L. No. 82-33, 65 Stat. 43 (enacted May 16, 1951; expired June 30, 1953); Pub. L. No. 83-62, 67 Stat. 62 (enacted June 16, 1953; expired June 30, 1956); Pub. L. No. 84-631, 70 Stat. 407, 408 (enacted June 29, 1956; expired June 30, 1958); Pub. L. No. 85-466, 72 Stat. 220 (enacted June 25, 1958; expired June 30, 1960); Pub. L. No. 86-464, 74 Stat. 130 (enacted May 13, 1960; expired June 30, 1962); Pub. L. No. 87-515, 76 Stat. 127-28 (enacted July 1, 1962; expired June 30, 1965); Pub. L. No. 89-63, 79 Stat. 209-10 (enacted June 30, 1965; expired June 30, 1969).

[9] Congress first allowed its statutory export scheme to lapse as early as 1974, *see, e.g.*, Exec. Order No. 11796, 39 Fed. Reg. 27,891 (July 30, 1975); however, beginning in 1983, the lapses became more pronounced and prolonged.

from 1994 to 2000. *See* Pub. L. No. 103-10, 107 Stat. 40 (1993); Pub. L. No. 106-508, 114 Stat. 2360 (2000).

In 2000, Congress passed the Export Administration Modification and Clarification Act ("EAMCA"). Pub. L. No. 106-508, 114 Stat. 2360 (2000). The EAMCA, passed in response to legal challenges to the secrecy of export applications, extended the expiration of the EAA until 2001. But, on August 20, 2001, Congress again allowed the EAA to expire. As of the date of this filing, the EAA will have been in lapse—and, thus, without any lawful force—for over twelve years.

However, the end of congressional involvement in the nation's export regulation regime marked the beginning of the Executive's. During periods of lapse in the EAA, the President, through executive orders, has declared a national economic emergency under powers provided by the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §1701 *et seq*. These executive orders require that export regulations, previously authorized under the authority granted by the EAA, continue in effect under executive authority granted by IEEPA. *See, e.g.*, E.O. No. 13222, 66 Fed. Reg. 44,025 (Aug. 17, 2001). By shifting the legal basis for export regulation—from the EAA, a specific statutory framework, to IEEPA, a statute providing generalized and discretionary authority—the executive branch thereby continues the nation's export regulation program under its

emergency powers. In August 2001, after the last lapse in the EAA, President George W. Bush declared such a "national emergency," which has continued unabated to this day. Exec. Order No. 13222, 66 Fed. Reg. 44025 (August 17, 2001); *see also* Notice: Continuation of the National Emergency With Respect to Export Control Regulations, 78 Fed. Reg. 49107 (Aug. 12, 2013).

Since the EAA's latest lapse in 2001, reauthorizations of the EAA have been repeatedly introduced in various committees of Congress. *See, e.g.*, H.R. 6828 (110th Cong., 2d Sess.) (2008); H.R. 3515 (111th Cong., 1st Sess.) (2009); H.R. 2004 (112th Cong., 1st Sess.) (2011); H.R. 2122 (112th Cong., 1st Sess.) (2011). Congress has not enacted any of these reauthorizations.

II. EFF's FOIA Request and the District Court Proceedings

In May 2012, EFF filed a FOIA request with the Department of Commerce, Bureau of Industry and Security, seeking all agency records created from 2006 to the present, concerning "the export of devices, software, or technology primarily used to intercept or block communications." Complaint, District Court Docket Entry ("DE") 1, Appellant's Excerpts of Record ("ER") 77-78. The agency responded to EFF's FOIA request by releasing two pages of records and withholding all other responsive records in full under Exemption 3 of FOIA, 5 U.S.C. § 552(b)(3). Exemption 3 requires an agency identify a statute that specifically exempts the requested records from disclosure, and the agency cited

the confidentiality provision of the lapsed EAA to purportedly justify its response. Complaint, DE 1, ER 78. After exhausting administrative remedies, EFF filed suit in July 2012, Complaint, DE 1, ER 75, and the parties later cross-moved for summary judgment. DE 20 & 22, ER 81.

The district court's order on the parties' cross-motions described the case's central issue in this way: "[a]t this case's heart is a simple question: does Exemption 3 permit Commerce to withhold information that is exempted from disclosure by an expired statute?" Order Re Cross-Motions for Summary Judgment ("Order") at 1, DE 39, ER 6.[10] The agency's claims before the district court were identical to those reprised here on appeal: although the EAA has lapsed, the agency argued a 'comprehensive legislative scheme' comprised of the expired EAA, the IEEPA, and the series of executive actions taken under the authority of the IEEPA" still worked to exempt the records under Exemption 3. Order at 7, ER 12. The district court, "[m]indful that FOIA exemptions are to be construed narrowly in favor of disclosure," disagreed and rejected Commerce's invitation "to meld a lapsed statute, a statutory grant of executive authority, and a series of executive actions into an Exemption 3 statute." Order 7-8, ER 12-13.

[10] The district court also considered whether the agency had satisfied its burden to withhold records under Exemptions 4 and 5 of FOIA, as well as the adequacy of the agency's search for responsive records. *Id*. at 16-19, ER 21-24. These questions, however, are not at issue on appeal.

First, the court noted the EAA did not satisfy Exemption 3's requirements because the agency "cannot withhold information . . . based on a statute that is longer in effect." *Id*. at 7, ER 12. The court next rejected the agency's withholding claim based on an executive order, noting that "Executive Order 13222 is not a statute," as Exemption 3 requires. *Id*. at 8, ER 13. Finally, with regard to IEEPA—"the only statute currently in effect to which Commerce point[ed]," *id*.—the court similarly rejected the agency's claims: "[b]ecause IEEPA makes no reference to withholding documents from the public, it cannot be [a] statute within the scope of Exemption 3." *Id*.

Finally, the court determined that, under the circumstances present in this case, both *Times Publishing Co. v. Dep't of Commerce*, 236 F.3d 1286 (11th Cir. 2001), and *Wisconsin Project on Nuclear Arms Control v. Dep't of Commerce,* 317 F.3d 275 (D.C. Cir. 2003)—the two decisions upon which the agency again seeks to rely—were distinguishable. Indeed, the court noted that the "critical distinction between the present case and *Times Publishing* and *Wisconsin Project*" was that, in direct response to those lawsuits and during the pendency of those cases, Congress "extended the EAA's expiration date to August 30, 2001." *Id*. at 9, ER 14. Citing statements of members of Congress, the court found the legislative history of the EAA's reauthorization "demonstrates that Congress understood and intended that the bill would extend the validity of the EAA through August 30, 2001, and that

after that date, Commerce would not be able to rely on Exemption 3 to withhold information" based on authority provided by the EAA. *Id*. Accordingly, the district court distinguished both *Times Publishing* and *Wisconsin Project* on this basis.

The district court thus concluded: "[b]ecause the EAA is expired, the IEEPA is not an Exemption 3 statute, and Executive Order 13222 is not a statute, Commerce cannot rely on Exemption 3 to withhold materials responsive to EFF's request." *Id*. at 11, ER 16. That judgment should be affirmed.

SUMMARY OF THE ARGUMENT

To withhold information under Exemption 3 of FOIA, 5 U.S.C. § 552(b)(3), the government must identify a collateral withholding statute that, on its face, "specifically exempt[s]" the requested records from disclosure. There is no such statute here. Therefore, as the district court correctly determined, the agency simply cannot rely on Exemption 3 to withhold the requested records. Order at 11, ER 16.

Nevertheless, on appeal, the agency repeats the argument that its withholdings under Exemption 3 are accomplished "by statute." But their argument lacks one critical element: a statute. The government instead urges this Court to ignore the plain terms of FOIA and Exemption 3, asserting that a "statutory scheme" exists for regulating exports. This "scheme," the government suggests, satisfies Exemption 3's requirement to identify an explicit withholding "*statute*."

Setting aside the impermissibility of such a "text-light" approach to FOIA, the government's characterization is simply incorrect; the only "*statutory* scheme" for the regulation of exports—the Export Administration Act of 1979 ("EAA"), Pub. L. No. 96-72, 93 Stat. 503 (1979)—lapsed, along with its confidentiality provision, over a decade ago. The only remaining "scheme" is a non-statutory, *administrative* one: a series of executive orders and regulations issued pursuant to a broad and discretionary grant of authority under the International Emergency Economic Powers Act ("IEEPA"), Pub. L. No. 95-223, 91 Stat. 1626 (Dec. 28, 1977), 50 U.S.C. §§ 1701, *et seq*. But a "scheme"—whether statutory or administrative—is not an explicit withholding "statute." Countenancing such an approach to FOIA's Exemption 3 would run contrary to its very purpose: vesting with *Congress*, not the executive branch, the power to determine which records fall within the exemption's reach.

Further, the district court correctly determined that the two cases on which the government primarily relies are inapposite here. Instead, both *Times Publishing Co. v. Dep't of Commerce*, 236 F.3d 1286 (11th Cir. 2001), and *Wisconsin Project on Nuclear Arms Control v. Dep't of Commerce*, 317 F.3d 275 (D.C. Cir. 2003), must be evaluated in light of their critically distinguishing feature: Congress's reauthorization of the EAA during the pendency of those cases. Order at 9, ER 14. In stark contrast, here, Congress has been silent for over twelve years. Judge

Randolph's dissent in *Wisconsin Project* and, indeed, the D.C. Circuit's later decision in *Micei Int'l v. Dep't of Commerce*, 613 F.3d 1147 (D.C. Cir. 2010), amply demonstrate the error in the approach advanced by the agency here.

Finally, the agency suggests the "actions" and "expectations" of "concerned entities" somehow justify the agency's withholdings under Exemption 3. But there is only one "action" that is relevant for Exemption 3 purposes: congressional action to specifically exempt, *by statute*, records from disclosure. Where, as here, Congress has not spoken, Exemption 3 simply cannot apply. The judgment of the district court should therefore be affirmed.

STANDARD OF REVIEW

The district court's legal conclusions, including whether a particular exemption applies, are reviewed *de novo*. *See Lion Raisins v. Dep't of Agriculture*, 354 F.3d 1072, 1078 (9th Cir. 2004).

ARGUMENT

The Freedom of Information Act ("FOIA") safeguards the American public's right to know "what their Government is up to." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (citation omitted). The central purpose of the statute is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire &*

Rubber Co., 437 U.S. 214, 242 (1978). As the Supreme Court has long emphasized, "disclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

The FOIA requires disclosure of all agency records when requested by the public unless the records fall within one of nine narrow exemptions. *See* 5 U.S.C. § 552(b)(1) - (9). If requested information does not fit squarely into one of these enumerated categories, the law requires federal agencies to release the information. *See Robbins Tire*, 437 U.S. at 221. The exemptions "have been consistently given a narrow compass," and requested agency records that "do not fall within one of the exemptions are improperly withheld[.]" *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) (internal quotation marks omitted); *cf. Lahr v. NTSB*, 569 F.3d 964, 973 (9th Cir. 2009).

Here, consistent with FOIA's overriding purpose, Exemption 3 must be narrowly construed, and the district court's judgment should be affirmed.

I. The District Court Properly Determined Exemption 3 Does Not Apply to the Requested Records

The district court correctly determined that Exemption 3 does not allow Commerce to withhold the records at issue in this case. Order at 5-11, ER 10-16. Exemption 3 unambiguously requires an agency to identify an explicit

nondisclosure *statute*. Because no statute exists that specifically exempts the records at issue here from disclosure, Exemption 3 simply cannot apply.

A. The Plain Text of Exemption 3 Unambiguously Requires a Collateral Withholding Statute to Exempt Records From Disclosure

Contrary to the agency's assertions, a "scheme" is not a "statute" for purposes of Exemption 3. Exemption 3's text is clear: to shield records from disclosure, the agency must identify an explicit withholding statute directed at the responsive records. Because the agency cannot do so here, Exemption 3 does not apply.

As with any statute, interpretation of Exemption 3 begins with the text. Indeed, "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *Satterfield v. Simon & Schuster, Inc*., 569 F.3d 946, 951 (9th Cir. 2009) (citations omitted); *see also Milner v. Dep't of the Navy*, 562 U.S. __, 131 S. Ct. 1259, 1267 (2011) (rejecting "text-light" approach to FOIA that amounted to "taking a red pen to the statute" and "cutting out some words and pasting in others") (quotation marks omitted).

In full, Exemption 3 provides for the withholding of records when those records are:

> (3) specifically exempted from disclosure by *statute* (other than section 552b of this title), *if that statute*—

> (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
>
> (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and
>
> (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

5 U.S.C. § 552(b)(3) (emphasis added).

The text of Exemption 3 is clear: to withhold records under the exemption, the agency must point to a specific *statute* that satisfies one of Exemption 3's criteria. 5 U.S.C. § 552(b)(3)(A)(i), (ii). Exemption 3 therefore has a "plain meaning:" it exempts from disclosure those records, and only those records, "specifically exempted from disclosure by *statute*." *Mudge Rose Guthrie Alexander & Ferdon v. U.S. Int'l Trade Comm'n*, 846 F.2d 1527, 1530 (D.C. Cir. 1988) (emphasis added). Thus, "only *explicit nondisclosure statutes* that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption." *Church of Scientology of Cal. v. USPS*, 633 F.2d 1327, 1329 (9th Cir. 1980) (emphasis added).

If any question remained about Congress's intent to allow anything less than an explicit nondisclosure statute to satisfy Exemption 3's requirements, Congress settled that question when it enacted the OPEN FOIA Act of 2009. Pub. L. No. 111-83 § 564, 123 Stat. 2142, 2184 (2009). The Act amended Exemption 3 to require that, for any statute passed after 2009 which Congress intends to serve as a

withholding statute, that statute must "specifically cite[]" Exemption 3 within its text. This amendment reinforces what the agency refuses to acknowledge: Congress intends specific statutes—and only those statutes Congress *explicitly* authorizes—to serve as a basis for withholding under Exemption 3. *See* 155 Cong. Rec. S3175 (daily ed. Mar. 17, 2009) (statement of Sen. Leahy) ("The OPEN FOIA Act simply requires that when Congress provides for a statutory exemption to FOIA in new legislation, Congress must state its intention to do so explicitly and clearly.").

The OPEN FOIA Act thus reinforces the very purpose animating Exemption 3. Congress intended the exemption to allow for withholding from disclosure when Congress—not the Executive—specifically and unambiguously determines the records should be withheld. *Church of Scientology of Cal. v. USPS*, 633 F.2d 1327, 1330 (9th Cir. 1980) (noting at Exemption 3's core is "the policy that the legislature, not the executive, should make decisions about secrecy").

The agency's reliance on a purported withholding "scheme" is therefore unavailing. While the agency labels the requirement that it identify an explicit withholding statute as "technical and formalistic," the OPEN FOIA Act made clear that is *precisely* the interpretation of Exemption 3 Congress expects. If Congress intended Exemption 3 to also cover those cases where no underlying statute was in

effect, but where congressional intent could be pieced together from other sources, it certainly knew how to draft language to state that expressly.

Instead of amending Exemption 3 to permit such a piecemeal approach, Congress chose precisely the opposite course. The formality Congress now requires is wholly inconsistent with the interpretation of Exemption 3 advanced by the agency. Put simply: a "scheme" is not a "statute;" therefore, Exemption 3 does not apply.

B. No Authority Within the Agency's Purported "Scheme" Satisfies Exemption 3's Requirement to Identify a Collateral Withholding Statute

While the agency's purported "scheme," as a whole, fails to satisfy Exemption 3, the district court correctly determined that no single ingredient in that "scheme" provides for the withholding of records either. Order at 5-11, ER at 10-16. Neither the lapsed EAA, the discretionary authority granted by IEEPA, nor executive orders or regulations provide a basis for the agency's withholdings. *Id*.

When an agency seeks to withhold records under Exemption 3, the first step in a court's analysis is to "determine whether there is a statute within the scope of Exemption 3." *Minier v. CIA*, 88 F.3d 796, 801 (9th Cir. 1996); *see also Carlson v. USPS*, 504 F.3d 1123, 1127 (9th Cir. 2007) (noting first part of the "two-part inquiry" under Exemption 3 is to "determine whether the withholding statute meets the requirements of Exemption 3."). Here, the inquiry fails at the first step: no part

of the agency's purported "scheme" satisfies Exemption 3's requirement to identify a particular withholding statute.

1. Because the EAA Lapsed Over a Decade Ago, It Is Not a Statute for Exemption 3 Purposes

The first ingredient in the agency's regulatory "scheme" is the confidentiality provision of the now-defunct EAA. *See* Pub. L. No. 96-72, 93 Stat. 503 (1979), 50 U.S.C. App. § 2411(c).[11] However, because the EAA has not carried the force of law for over a decade, the district court properly determined that the EAA cannot serve as the basis for the agency's withholdings. Order at 7, ER 12.

To "invoke Exemption 3, an agency must demonstrate that [] a statute exists and was in effect at the time of the request[.]" *Public Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1284 (D.C. Cir. 1983). Undeniably, the EAA had a

[11] Although the EAA remains in the United States Code, *see* 50 U.S.C. App. § 2401 *et seq*., its presence in the Code is not evidence of lawful force. Revisions to the Code are only periodic, and there is no requirement to cull lapsed laws. *See* 2 U.S.C. § 285(b). Thus, at any given time, the Code may contain provisions without any lawful effect.

Furthermore, the Code is generally only *prima facie* evidence of the law, unless a section of the Code has been enacted into positive law. 1 U.S.C. § 204(a). Title 50 has not been enacted into positive law. *See About the Office and the United States Code*, Office of the Law Revision Counsel, http://uscode.house.gov/about/info.shtml. Where Congress has not enacted a title of the Code, the Statutes at Large are the only legal evidence of the law. 1 U.S.C. § 112; *see also* Charles S. Zinn, *Revision of the United States Code*, 51 Law Lib. J. 388, 389-90 (1958).

confidentiality provision that specifically exempted from disclosure "information obtained for the purpose of, consideration of, or concerning, license applications under the EAA." 50 U.S.C. App. § 2411(c)(1). But critically, and as the agency concedes, the EAA lapsed over a decade ago on August 20, 2001.[12] Indeed, by the EAA's own terms, the "authority granted by this Act . . . terminate[d] on August 20, 2001." 50 U.S.C. App. § 2419. Thus, for over twelve years, the EAA has carried "no more force than . . . the Sedition Act of 1798. It simply 'no longer exists. Its life is at an end.'" *Wisconsin Project*, 317 F.3d at 285 (Randolph, J., dissenting) (internal citation omitted); *see also Burke v. Barnes*, 479 U.S. 361, 363 (1987) ("We see no reason to treat . . . the validity of a statute that has expired any differently from . . . the validity of a statute that has been repealed[.]").

Thus, because the EAA "became a dead letter" over a decade ago, *Burke*, 479 U.S. at 363, it cannot serve as an Exemption 3 statute.

2. IEEPA's Broad and Discretionary Provisions Do Not Constitute a Withholding Statute For Exemption 3 Purposes

The second ingredient in the agency's purported regulatory "scheme" is the International Emergency Economic Powers Act ("IEEPA"). *See* 50 U.S.C.

[12] EFF acknowledges that, were the EAA in force, this Circuit's decision in *Lessner v. Dep't of Commerce*, 827 F.2d 1333 (9th Cir. 1987) (finding that Section 12(c) of the EAA is a withholding statute under Exemption 3) would likely be controlling. Although, if reenacted today, the EAA's confidentiality provision would likely need to be amended to specifically reference Exemption 3, in light of the OPEN FOIA Act. *See* 5 U.S.C. § 552(b)(3)(B).

§§ 1701, *et seq*. In contrast to the EAA, IEEPA actually carries the force of law. However, as the district court properly concluded, IEEPA's sweeping grant of discretionary authority does not satisfy the specific requirements needed to qualify as an Exemption 3 statute. Order at 8, ER 13.

To withhold records under Exemption 3, the collateral withholding statute must either "leave no discretion on the issue" of withholding or establish "particular criteria for withholding or refer[] to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3)(A). A statute, therefore, "must *on its face* exempt matters from disclosure. [The Court] must find a congressional purpose [to] exempt matters from disclosure *in the actual words of the statute* . . . not in the legislative history of the claimed withholding statute, nor in an agency's interpretation of the statute." *Nat'l Assoc. of Home Builders v. Norton*, 309 F. 3d 26, 38 (D.C. Cir. 2002) (emphasis added; internal citations and quotations omitted).

The generalized and sweeping authority granted the President by IEEPA fails to satisfy these requirements. In full, IEEPA provides the President *may*, during times of "national emergency":

> investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any

> interest by any person, or with respect to any property, subject to the jurisdiction of the United States[.]

50 U.S.C. § 1702(a)(1)(B). The text of IEEPA does not "refer to particular criteria for withholding [records]," let alone refer to *any* criteria. 5 U.S.C. § 552(b)(3)(A)(ii). It does not refer to "particular types of matters to be withheld," let alone refer to withholding records at all. *Id*; *see also Nat'l Assoc. of Homebuilders*, 309 F.3d at 37 (rejecting Exemption 3 claim where "nothing in [the statute's language] refers to nondisclosure of information"); *Public Citizen*, 704 F.2d at 1285 (rejecting Exemption 3 withholding where statute did not exempt from disclosure "on its face").

Moreover, IEEPA does not leave the Executive with "no discretion on the issue" of withholding. 5 U.S.C. § 552(b)(3)(A)(i). Instead, IEEPA is the embodiment of absolute discretion: its plain terms don't require the President to do *anything*. *See* 50 U.S.C. § 1702(a)(1) (providing the "President *may*, under such regulations as he *may prescribe*" take actions during national emergencies) (emphasis added). Such discretionary authority does not qualify as an Exemption 3 statute. *See Church of Scientology of Cal. v. USPS*, 633 F.2d 1327, 1333 (9th Cir. 1980) (finding that statute providing agency with "total discretion" regarding disclosure of its investigatory files was not within Exemption 3); *see also Reporter's Comm. for Freedom of the Press v. Dep't of Justice*, 816 F.2d 730, 736 (D.C. Cir. 1987) (rejecting withholding claim where statute provided "apparently

unbounded" discretion), *modified on other grounds*, 831 F.2d 1124 (D.C. Cir. 1987), *rev'd on other grounds*, *Dep't of Justice v. Reporter's Comm. for Freedom of the Press*, 489 U.S. 749 (1989).

Thus, because no part of IEEPA's broad grant of discretionary authority satisfies Exemption 3's exacting requirements, the district court correctly determined it cannot provide a justification for the agency's withholding.

3. An Executive Order is Not a Statute and Therefore Cannot Support Withholding Under Exemption 3

The final ingredient in the agency's "scheme" is a series of executive orders, issued pursuant to the President's broad discretionary authority under IEEPA, which continue the operation of the export regulations. But an executive order, whatever its precise legal effect, is not a statute. *See, e.g.*, *Chamber of Commerce v. Reich*, 83 F.3d 439 (D.C. Cir. 1996) (discussing differences between "statute" and "executive order"). The district court thus properly rejected the agency's attempt to withhold records on this basis. Order at 8, ER 12.

Exemption 3 requires a collateral statute, and courts have rejected agency attempts to rely on non-statutory authority as a substitute. *See, e.g., Founding Church of Scientology v. Bell*, 603 F.2d 945, 952 (D.C. Cir. 1979) (court rules do not qualify under Exemption 3); *Public Citizen v. U.S. Trade Representative*, 804 F. Supp. 385, 388 (D.D.C. 1992) (trade agreement not ratified by Senate is not a

statute for Exemption 3 purposes); *but see Fund for Constitutional Gov't v. Nat'l Archives and Records Serv.*, 656 F.2d 856, 867 (D.C. Cir. 1981) (Federal Rules of Criminal Procedure a statute because it was "positively enacted by Congress.").

An executive order that seeks to continue a lapsed statute's *effect* does not constitute a statute for Exemption 3 purposes, even if the order has the effect of law and is within the President's authority. Clearly, a "statute" is "[a] formal written enactment of a *legislative* body[.]" *Mgmt. Recruiters Int'l, Inc. v. Bloor*, 129 F.3d 851, 855 n.1 (6th Cir. 1997) (quoting Black's Law Dictionary 1410 6th ed. (1990)) (emphasis added). In contrast, an "executive order" is just that—a directive issued by the executive branch. And, even where an executive order "has the force and effect of law, it is not a statute[.]" *United States v. Trucking Mgmt., Inc.*, 662 F.2d 36, 42 (D.C. Cir. 1981) (internal citations and quotations omitted). Thus, even if, as the agency claims, the executive orders here continued in effect the regulations originally issued under the EAA, the executive order does not, thereby, become an act of Congress.

It is precisely because it is a presidential requirement and not a legislative one that the agency's reliance on the series of executive orders is unavailing: "Congress intended exemption from the FOIA to be a legislative determination and not an administrative one." *Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C. Cir. 1979) (footnote omitted). Allowing the executive branch to rely on something less

than a statute, as it attempts to do here, effectively wrests the withholding decision from Congress and places it within the Executive. This is not as Congress intended.

As shown above, and as determined by the district court, no single authority within the agency's purported "scheme" works to exempt the requested records from disclosure. The EAA has not had any legal effect for over a decade. IEEPA's broad grant of discretionary authority does not constitute an Exemption 3 statute. And an executive order plainly is not a statute enacted by Congress. Nor do the elements of the "scheme," taken in combination, satisfy Exemption 3's explicit requirements. The district court correctly rejected the agency's invitation to "meld a lapsed statute, a statutory grant of [broad and discretionary] executive authority, and a series of executive actions into an Exemption 3 statute." Order at 7, ER 12. That judgment should be affirmed.

II. Over A Decade of Congressional Inaction Distinguishes this Case from *Times Publishing* and *Wisconsin Project*

The district court properly found neither *Times Publishing* nor *Wisconsin Project* sufficiently persuasive, under the facts presented here, to guide its decision. The agency's brief recounts at length the opinions of the Eleventh and D.C. Circuits in those cases. But the agency largely fails to confront the "one critical distinction between the present case and *Times Publishing* and *Wisconsin Project*: on November, 13, 2000, while both cases were pending, Congress enacted

the Export Administration Modification and Clarification Act ("EAMCA"), which extended the EAA's authorization date." Order at 9, ER 14.

The EAMCA thus constituted a specific congressional response to those cases, indicating a clear congressional purpose to exempt *those records* from disclosure. Here, in stark contrast, Congress has taken no such action, and the EAA has been a "dead letter" for over a decade. Thus, the Eleventh and D.C. Circuit's decisions must be interpreted against this legislative background. Without similar congressional action here, the agency's attempts to withhold records under Exemption 3 should be rejected.

A. Congress Reenacted the EAA in Response to the Pending *Times Publishing* and *Wisconsin Project* Cases to Provide Commerce the Authority it Otherwise Lacked

The agency makes sweeping claims about a generalized legislative intent under IEEPA and the lapsed EAA to allow the withholding of agency records at the Executive's discretion. But review of the legislative record betrays the agency's position. In November 2000, when both the *Times Publishing* and *Wisconsin Project* cases were pending, Congress passed the EAMCA. *See* Pub. L. No. 106-508, 114 Stat. 2360 (2000). The sole effect of the EAMCA was to change the EAA's expiration date from August 20, 1994 to August 20, 2001. *Id*. In particular, Congress acted, at least in part, to protect records from disclosure in the *Times Publishing* and *Wisconsin Project* cases.

Statements made by members of Congress demonstrate that Congress believed reenactment of the EAA was necessary to provide Commerce the authority to withhold export application records under FOIA. For example, Rep. Gillman commented that reenacting the EAA was necessary to "ensure[] that the [D]epartment can maintain its ability to protect from public disclosure information concerning export license[s]." 146 Cong. Rec. H8021 (daily ed. Sept. 25, 2000) (statement of Rep. Gillman). He further noted that "the department is coming under mounting legal challenges and is currently defending against two separate lawsuits seeking public release of export licensing information[.]" *Id.* Similarly, Rep. Lee, specifically addressing the district court's decision in *Times Publishing*, stated: "[T]here has been a recent court ruling that calls into question whether or not the government can essentially hide behind emergency powers to revive an expired law. . . *We have got to pass this law to make sure that they can keep the information confidential*[.]" 146 Cong. Rec. H11575 (daily ed. Oct. 30, 2000) (statement of Rep. Lee) (emphasis added); *see also* 146 Cong. Rec. H8021 (daily ed. Sep. 25, 2000) (statement of Rep. Pomeroy) (same, commenting on an earlier version of the House bill).

Members of Congress perceived the reenactment of the EAA as providing protection for records submitted from 1994 to 2001. Congress did not, as the agency now claims, give the agency a free-standing right to withhold export

application records indefinitely into the future. For example, according to Rep. Lee, extending the EAA to August 2001 would "ensure that the Department of Commerce will be able to rely on the Export Administration Act to protect the confidentiality of the relevant documents received since 1994, as well as the documents that the Commerce Department receives between now and August 20[, 2001]." 146 Cong. Rec. H11575 (daily ed. Oct. 30, 2000) (statement of Rep. Lee); *see also* 146 Cong. Rec. S11365 (daily ed. Oct. 30, 2000) (statement of Sen. Gramm) (noting that "replacing the 1994 expiration date with a 2001 expiration date" would allow Commerce to withhold "any information regarding license applications obtained *during that time period*") (emphasis added). Similarly, Rep. Bereuter, commenting on the effect of the EAMCA, stated: "Under the provisions of this measure, the Department of Commerce will be able to protect licensing information from the date of enactment through August 20, 2001." 146 Cong. Rec. H11575 (daily ed. Oct. 30, 2000) (statement of Rep. Bereuter).

If, as the agency claims, Congress viewed the purported regulatory "scheme" sufficient to withhold records under FOIA, congressional reenactment of the EAA was unnecessary: the freestanding "intent of Congress" would suffice. However, the statements of members of Congress directly contradict the agency's claim here. Congress did not think the lapsed EAA, IEEPA, or any administrative regulations or executive orders were a self-perpetuating withholding "scheme." To

the contrary, Congress believed its action in 2000 was necessary to provide Commerce the authority to withhold export applications under FOIA. In stark contrast, Congress has not so acted here and has not so acted for over a decade.

The decisions of the Eleventh and D.C. Circuits in *Times Publishing* and *Wisconsin Project* should therefore be interpreted as a recognition of congressional purpose with respect to *those particular cases*. In *Times Publishing*, Congress passed the EAMCA after the district court ordered disclosure of the requested records and while the agency's appeal was still pending.[13] *Times Publishing*, 236 F.3d at 1291. Citing statements made by members of Congress, *see supra*, the court found sufficient evidence of congressional intent to maintain the confidentiality of export applications during the time period at issue in that case. *Times Publishing*, 236 F.3d at 1291-92.

Confronted with a slightly more complicated legislative backdrop,[14] in *Wisconsin Project*, the D.C. Circuit held similarly based on its review of the same

[13] While the EAA was in lapse, the *Times Publishing* district court soundly rejected arguments identical to those made by the agency here. *See Times Publishing*, 104 F. Supp. 2d 1361, 1364 (M.D. Fla. 2000), *rev'd*, 236 F.3d 1286 (11th Cir. 2001) ("The Department's reliance upon an expired statute and non-statutory authorities as the basis for withholding the requested export information is entirely inconsistent with the requirements of narrow construction and full disclosure of FOIA.")

[14] In *Wisconsin Project*, the EAA was in lapse when the records were created, requested, and when suit was filed, but Congress reenacted the EAA while the case was pending before the district court. *Wisconsin Project*, 317 F.3d at 279.

legislative history. *See Wisconsin Project*, 317 F.3d at 282. The court initially noted that the "legislative history indicates that Congress intended to preserve [confidentiality provisions for export applications] *when it renewed the EAA in November 2000*." *Id*. (emphasis added). In particular, the court determined that the inclusion of the EAA's confidentiality provision in Congress's reenactment of the law was the "touchstone" of its "Exemption 3 inquiry." *Id*. In both decisions, the EAA's reauthorization figured prominently.

Here, Congress has now been silent on the issue for more than a decade. It has not reenacted the EAA or its confidentiality provision. Thus, in the absence of the type of "touchstone" present in *Wisconsin Project* and *Times Publishing*, the disclosure requirements of FOIA must prevail.

B. To the Extent *Times Publishing* and *Wisconsin Project* Did Not Rely on the Reauthorization of the EAA, the Cases Were Incorrectly Decided

As described above, and as the district court concluded, both *Times Publishing* and *Wisconsin Project* can be distinguished based on Congress's express intent to exempt from disclosure the records at issue in those cases. The

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Based on the EAA's reenactment, the district court held in the agency's favor. Nevertheless, the district court rejected, in *dicta*, the agency's previous arguments, identical to those raised here. *Wisconsin Project*, 99-cv-02673, * 11-12 (D.D.C. Sept. 4, 2001) ("The plain language of Exemption 3, however, makes clear that only a statute in effect exempting the requested material will satisfy Exemption 3."), SER 32-33. Shortly after the district court's decision, and while the plaintiff's appeal was pending, the EAA again went into lapse. *Id*.

agency nevertheless suggests the EAA's reenactment was not the central component of the Eleventh and D.C. Circuit's analysis. As shown above, that contention is incorrect. Nevertheless, as the district court properly concluded, to the extent either decision rested on anything other than the EAA's reenactment, the decisions were "simply incorrect." Order at 11, ER 16. Both the dissent from the panel's decision in *Wisconsin Project* and the D.C. Circuit's later decision in *Micei Int'l v. Dep't of Commerce*, 613 F.3d 1147 (D.C. Cir. 2010), correctly recognize that, in the EAA's absence, no valid basis exists for withholding records under Exemption 3.[15]

As a threshold matter, the *Wisconsin Project* decision was not nearly so uncontroversial as the agency makes it seem: neither the panel's decision, nor the denial of rehearing *en banc*, was unanimous. 317 F.3d 275 (D.C. Cir. 2003) (Sentelle, Randolph, Js. and Ginsburg, C.J., dissenting from denial of rehearing en

[15] The agency further suggests that neither decision was based on the re-enactment of the EAA because neither court conducted a "full-fledged retroactivity analysis." Appellant's Brief at 25. In *Times Publishing*, there is no indication that the parties raised the question of the retroactive application of the EAMCA. Where the parties have not raised an issue, and the question is not related to a court's jurisdiction, the Eleventh Circuit would have no opportunity to consider the question of retroactivity. The D.C. Circuit, on the other hand, avoided the retroactivity question by holding that IEEPA "qualifies as an Exemption 3 statute." *Wisconsin Project*, 317 F.3d at 284-85. That decision, however, was incorrect. As the district court in this case held, "the IEEPA, which does not itself exempt anything from disclosure, flatly fails to qualify as an Exemption 3 'statute.'" Order at 11 (quoting *Wisconsin Project*, 317 F.3d at 285 (Randolph, J. *dissenting*) (internal quotations and alterations omitted), ER 16.

banc). Indeed, Judge Randolph, dissenting from the panel decision, characterized the majority's "most curious opinion" as akin to something from *Alice in Wonderland*. *Wisconsin Project*, 317 F.3d at 285-86 (Randolph, J., dissenting).

Judge Randolph's dissent squarely rejected the agency's contention that the congressional intent of an expired statute somehow trumps the congressional intent of FOIA, an actual statute:

> [The] reading of Exemption 3 to require a "statute," the majority explains, "strangles Congress's intent." In other words, the Export Act may be gone, but congressional intent lives on: Congress at one time wanted the Commerce Department to keep the information secret, and so it shall remain. No matter that the Freedom of Information Act—a real law—expresses Congress's intent to require a statute exempting the documents from disclosure when they are sought[.]

Id. at 285. And IEEPA, Judge Randolph noted, cannot "breathe[] life into the expired confidentiality provision" of the EAA because IEEPA neither "explicitly refer[s] to the Export Act" nor "its confidentiality provision." *Id*. In rejecting Commerce's contention that the continuation of a lapsed statute's terms via executive order or regulation could constitute a statute, Judge Randolph noted "[i]t never occurred to me, or to the Framers of the Constitution, that the Executive could by the stroke of a pen convert expired legislation into an existing statute." *Id*. at 286. Judge Randolph thus succinctly concluded: "Congress amended Exemption 3 . . . to restrict the Executive's discretion to withhold information; it required, as a

condition of nondisclosure, an explicit nondisclosure statute. There is no such statute here." *Id*. (internal citations omitted).

Indeed, the D.C. Circuit's later decision in *Micei Int'l v. Dep't of Commerce*, 613 F.3d 1147 (D.C. Cir. 2010), reinforces the propriety of the approach taken by Judge Randolph. Although not a FOIA case, *Micei* addressed whether IEEPA's broad grant of authority included the power to vest initial review of export sanctions with the D.C. Circuit—a power that, like the authority to withhold records under Exemption 3, requires a statutory basis. *Micei*, 613 F.3d at 1151 ("[O]nly when a direct-review *statute* specifically gives the court of appeals subject-matter jurisdiction to directly review agency action may a party seek initial review in an appellate court.") (emphasis added; internal citations and quotations omitted).[16] The question in *Micei*, then, was whether the same "scheme" the agency relies upon here provided a statutory basis for direct appellate jurisdiction. *Id*.

The D.C. Circuit first found that, because the EAA had lapsed, it could not serve as the basis for direct appellate review. *Id*. at 1152 (noting the direct appellate review "provision expired with the rest of the EAA"), 1154. The only remaining question, then, was whether IEEPA (or the executive orders or

[16] Similar to the lapsed confidentiality provision, a provision of the expired EAA authorized direct appellate review of sanctions for violation of the export regulations. *Id*. at 1151 (citing 50 U.S.C. App. § 2412(c)(3)).

regulations issued pursuant to IEEPA) provided the requisite statutory authority. The D.C. Circuit held they did not:

> Nothing in the text of IEEPA delegates to the President the authority to grant jurisdiction to any federal court. Nowhere does the statute even refer to the jurisdiction of federal courts. It never mentions the direct-review provision of the expired EAA or, for that matter, the EAA itself. To be sure, "IEEPA delegates broad authority to the President." That authority includes the power to "investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit" a wide array of transactions, 50 U.S.C. § 1702(a)(1)(B), authority that might very well permit the President to maintain many of the substantive provisions of the export regulations and the EAA. But these powers do not include the power to vest jurisdiction in the federal courts.

Micei, 613 F.3d at 1153-54 (internal citations omitted); *cf*. *supra* at 18-21.

Just as IEEPA fails to provide a statutory basis for direct appellate review, so too does it fail to provide a statutory basis for withholding under Exemption 3. While the authority granted under IEEPA "might very well permit the President to maintain many of the substantive provisions of the export regulations," the power to withhold records under Exemption 3, like vesting direct appellate review, requires a statutory basis. *Id.* at 1154.[17]

Thus, to the extent the decisions in *Times Publishing* or *Wisconsin Project* were not wholly based on the reenactment of the EAA, the decisions were "simply

[17] The *Micei* court distinguished *Wisconsin Project* only on the grounds that the *Wisconsin Project* decision "did not speak to the question of Article III jurisdiction." *Micei*, 613 F.3d at 1154.

incorrect." Order at 11, ER 16. No freestanding legislative intent to exempt records from FOIA exists, and both Judge Randolph's dissent, and the D.C. Circuit's later decision in *Micei*, amply demonstrate the error in such an approach.

III. The Actions and Expectations of "Concerned Entities" Are Not Evidence of an Exemption 3 Statute

The district court, correctly, gave no credence to the agency's suggestion that the actions of Congress, the Executive, or exporters themselves somehow provide evidence that Congress, by statute, has exempted records from disclosure. On appeal, the agency reprises its argument that these actions somehow demonstrate the propriety of the agency's withholdings. For purposes of this case, however, the only relevant inquiry is whether an explicit withholding statute within the meaning of Exemption 3 exists. Ultimately, the actions of "concerned entities" are wholly beside the point.

The agency first suggests Congress's actions during times of lapse in the EAA somehow demonstrate the legitimacy of the agency's Exemption 3 claims. But Congress's actions and inactions are immaterial when untethered to a statute. "[A]s far as the courts are concerned," the *only* relevant consideration is what Congress required through the only means that it can "require anything—the enactment of legislation." *Int'l Union, United Automobile, Aerospace & Agric. Implement Workers of America v. Donovan*, 746 F.2d 855, 860-61 (D.C. Cir.

1984); *see also Sullivan v. Finklestein*, 496 U.S. 617, 631 (1990) (Scalia, J., concurring in part) (noting that "'[s]ubsequent legislative history'—which presumably means the post-enactment history of a statute's consideration and enactment—is a contradiction in terms"). It is impossible to determine whether congressional action or inaction, untethered to a statute, "represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice." *Johnson v. Transportation Agency*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting). It does not, as the agency suggests, mean that Congress approves of the agency's refusal to disclose export applications under FOIA.[18]

The agency next argues that the expectations and practices of the executive branch are inconsistent with disclosure. Setting aside that FOIA was specifically designed to combat administrative expectations of confidentiality, *see Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976), the fact that the agency acts in accordance with what it *believes the law to be* says nothing about what the law

[18] The agency's suggestion that this Court should give great weight to the interpretative value of the *implications* of congressional action is particularly suspect, especially where, as here, clear statements of Congressional intent are available. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980) ("[S]ubsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment."); *see supra* at 24-26 (discussing legislative history of EAA's reauthorization).

actually *is*. It is also entirely beside the point. The agency may indeed be bound by the regulations issued under IEEPA. But it is also bound by FOIA and, as the district court found, the clear statutory disclosure requirements of FOIA trump whatever executive determination has been made to the contrary.

Finally, the agency suggests that the actions and expectations of exporters concerning confidentiality somehow provide evidence that the records are properly withheld. However, even if the lapsed confidentiality provision of the EAA was in force, it never afforded exporters with absolute expectations of confidentiality. *See* 50 U.S.C. App. § 2411(c)(1). Instead, export applications could be disclosed whenever it was determined to be "in the national interest." *Id*. Thus, even under the lapsed EAA, exporters had no ironclad assurance of confidentiality.[19] But, in

[19] Relying on *Wisconsin Project* and *Times Publishing*, the agency also suggests that Courts "honor the confidentiality provisions of the EAA during times of lapse." Appellant's Brief at 29. As described above, the agency's reliance on *Wisconsin Project* and *Times Publishing* here is misplaced. See *supra* 23-33. The agency further approvingly notes, in a footnote, that courts "have even imposed *criminal penalties* for violations [of export regulations] that occur during a lapse" in the EAA. Appellant's Brief at 29 n. 12 (emphasis in original). Contrary to the agency's assertions, imposition of criminal penalties says nothing about whether courts honor the EAA, let alone its confidentiality provision, during lapse. Instead, the decisions cited by the agency hold that criminal penalties for violation of export regulations are valid exercises of authority delegated under IEEPA, *see, e.g*., *United States v. Spawr Optical Research, Inc*., 685 F.2d 1076, 1079-81 (9th Cir. 1982) (upholding conviction under export regulations); *United States v. Mechanic*, 809 F.2d 1111, 1112-1415 (5th Cir. 1987) (same); or, that the export restrictions were not unconstitutionally vague. *See United States v. Guo*, 634 F.3d 1119, 1121-1123 (9th Cir. 2011), *cert. denied*, 131 S.Ct. 3041 (2011). Given that

the final analysis, those expectations are immaterial: the only relevant question is whether a valid withholding statute exists.

Importantly, disclosure of the records requested here will neither result in the release of information that threatens national security, nor will it result in the disclosure of trade secrets or confidential business information. Two separate FOIA exemptions, Exemptions 1 and 4, specifically protect that information. *See* 5 U.S.C. § 552(b)(1), (4).[20] Nevertheless, the agency suggests that by properly construing Exemption 3 of FOIA, the district court's decision "wreaks havoc" on the export control system. Appellant's Brief at 30. However, if the expectations of the "persons and businesses" that submitted export applications are altered, it is Congress—not the courts—that bears responsibility. Ultimately, the remedy the agency seeks rests with Congress, not this Court. The agency no doubt has ample resources at its disposal to solicit from Congress the statutory exemption it now lacks. However, it is not the judiciary's obligation to fashion the laws Congress has not passed.

IEEPA, itself, provides a statutory basis for imposition of criminal penalties for violation of regulations issued under IEEPA, s*ee* 50 U.S.C. § 1705(c), these decisions are wholly unsurprising—and entirely beside the point.

[20] Indeed, the agency asserted Exemption 4 to withhold information at the district court. *See* Order at 13-14, ER 18-19. And, although the government vaguely suggests that disclosure "could have repercussions for the nation's security interests," Appellant's Brief at 26, the government has not claimed Exemption 1 at any point in this litigation.

CONCLUSION

Consistent with the plain language of the statute and Congress's unambiguous intent, to withhold records under Exemption 3, the agency must rely on an explicit withholding statute satisfying Exemption 3's criteria. There is no such statute here and the requested records are thus improperly withheld. As such, the judgment of the district court should be affirmed.

Dated: January 13, 2014

Respectfully Submitted,

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CASE NO. 3:12-CV-03683-TEH

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELECTRONIC FRONTIER FOUNDATION,

PLAINTIFF-APPELLEE,

v.

U.S. DEPARTMENT OF COMMERCE,

DEFENDANT-APPELLANT

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28.2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, Appellee state that they are unaware of any related cases.

Dated: January 13, 2014

Respectfully Submitted

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS PURSUANT TO FED. R. APP. P. 32(A)(7)(C)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. Appellee's Opening Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,892 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

Dated: January 13, 2014

By: */s/ Mark Rumold*
Mark Rumold

Counsel for Appellee

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STATUTORY ADDENDUM

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Statutes

5 U.S.C. § 552(a)(3)(A)

§ 552 Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:
(3)
(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon request for records which
(i) reasonably describes such records and
(ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

5 U.S.C. § 552(b)

§ 552 Public information; agency rules, opinions, orders, records, and proceedings

(b) This section does not apply to matters that are--
(1)
(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and
(B) are in fact properly classified pursuant to such Executive order;
(2) related solely to the internal personnel rules and practices of an agency;
(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—
(A)
(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and
(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.
(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information

(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;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

50 U.S.C. § 1701: Unusual and extraordinary threat; declaration of national emergency; exercise of Presidential authorities

(a) Any authority granted to the President by section 1702 of this title may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.
(b) The authorities granted to the President by section 1702 of this title may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this chapter and may not be exercised for any other purpose. Any exercise of such authorities to deal with any new threat shall be based on a new declaration of national emergency which must be with respect to such threat.

50 U.S.C § 1702: Presidential authorities

(a) In general
(1) At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—
(A) investigate, regulate, or prohibit—
(i) any transactions in foreign exchange,
(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,
(iii) the importing or exporting of currency or securities,
by any person, or with respect to any property, subject to the jurisdiction of the United States;
(B) investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States; and.
(C) when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, confiscate any property, subject to the jurisdiction of the United States, of any foreign

person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States; and all right, title, and interest in any property so confiscated shall vest, when, as, and upon the terms directed by the President, in such agency or person as the President may designate from time to time, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes.

(2) In exercising the authorities granted by paragraph (1), the President may require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in paragraph (1) either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of such paragraph. In any case in which a report by a person could be required under this paragraph, the President may require the production of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person.

(3) Compliance with any regulation, instruction, or direction issued under this chapter shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, this chapter, or any regulation, instruction, or direction issued under this chapter.

(b) Exceptions to Grant of Authority

The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly—

(1) any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value;

(2) donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering, except to the extent that the President determines that such donations

(A) would seriously impair his ability to deal with any national emergency declared under section 1701 of this title,

(B) are in response to coercion against the proposed recipient or donor, or
(C) would endanger Armed Forces of the United States which are engaged in hostilities or are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances; or

(3) the importation from any country, or the exportation to any country, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials, including but not limited to, publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds. The exports exempted from regulation or prohibition by this paragraph do not include those which are otherwise controlled for export under section 2404 of the Appendix to this title, or under section 2405 of the Appendix to this title to the extent that such controls promote the nonproliferation or antiterrorism policies of the United States, or with respect to which acts are prohibited by chapter 37 of title 18; or

(4) any transactions ordinarily incident to travel to or from any country, including importation of accompanied baggage for personal use, maintenance within any country including payment of living expenses and acquisition of goods or services for personal use, and arrangement or facilitation of such travel including nonscheduled air, sea, or land voyages.

(c) Classified information

In any judicial review of a determination made under this section, if the determination was based on classified information (as defined in section 1(a) of the Classified Information Procedures Act) such information may be submitted to the reviewing court ex parte and in camera. This subsection does not confer or imply any right to judicial review.

50 U.S.C § 1705: Penalties

(a) Unlawful acts

It shall be unlawful for a person to violate, attempt to violate, conspire to violate, or cause a violation of any license, order, regulation, or prohibition issued under this chapter.

(b) Civil penalty

A civil penalty may be imposed on any person who commits an unlawful act described in subsection (a) in an amount not to exceed the greater of--

(1) $250,000; or

(2) an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed.

(c) Criminal penalty

A person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of, an unlawful act described in subsection (a) shall, upon conviction, be fined not more than $1,000,000, or if a natural person, may be imprisoned for not more than 20 years, or both.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 13, 2014.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that one of the participants in the case is not a registered CM/ECF user. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participant:

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Dated: January 13, 2014

By: */s/ Mark Rumold*
Mark Rumold

Counsel for Appellee