No. 13-16480

IN THE 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

BRIEF FOR DEFENDANT-APPELLANT

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BRIEF FOR DEFENDANT-APPELLANT

STATEMENT OF JURISDICTION

Plaintiff-appellee Electronic Frontier Foundation ("EFF") brought this action against the United States Department of Commerce ("Commerce" or "the Department"), invoking the jurisdiction of the district court under 5 U.S.C. § 552(a)(4)(B), the jurisdictional provision of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and 28 U.S.C. § 1331. *See* Complaint, District Court Docket Entry ("DE") 1, Appellant's Excerpts of Record ("ER") 75-79. On cross-motions for summary judgment, the district court on July 12, 2013, ordered disclosure

of material withheld under FOIA Exemption 3, 5 U.S.C. § 552(b)(3); ordered Commerce to submit a *Vaughn* index regarding its withholdings under FOIA Exemptions 4 and 5, 5 U.S.C. §§ 552(b)(4) &(5); and held that Commerce had conducted an adequate search for responsive records. Order Re Cross-Motions for Summary Judgment ("Order"), DE 39, ER 6-24; *see* also Judgment, DE 40, ER 5. Defendant filed a timely notice of appeal on July 22, 2013. DE 41, ER 25-30. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1).[1]

STATEMENT OF THE ISSUE

Whether, pursuant to FOIA Exemption 3, 5 U.S.C. § 552(b)(3), Commerce may withhold applications for licenses to export "dual use" and certain military items and technologies to foreign nations.

PERTINENT STATUTES AND REGULATIONS

FOIA Exemption 3 states that FOIA does not apply to matters that are:

> 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.

[1] It is clear that the Court has jurisdiction to review the district court's disclosure order in this FOIA case, notwithstanding the fact that the district court has not finally disposed of the Exemption 4 and 5 issues. *See, e.g. In re Steele*, 799 F.2d 461, 465 (9th Cir. 1986); *Judicial Watch v. Dep't of Justice*, 432 F.3d 366, 369 (D.C. Cir. 2005); *Green v. Dep't of Commerce*, 618 F.2d 836, 841 (D.C. Cir. 1980).

5 U.S.C. § 552(b)(3).

Section 12(c)(1) of the Export Administration Act ("EAA") states in pertinent part that:

> information obtained for the purpose of consideration of, or concerning, license applications under [the EAA] shall be withheld from public disclosure unless the release of such information is determined by the Secretary [of Commerce] to be in the national interest.

50 U.S.C. App. § 2411(c)(1).

50 U.S.C. App. § 2419 states that "[t]he authority granted by this Act terminates on August 20, 2001."

The International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701 *et seq.*, authorizes the President, upon declaration of a national emergency, to:

> regulate, . . . prevent or prohibit, . . . importation or exportation of, . . . 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.

Id. at § 1702(a)(1)(B).

The confidentiality provisions of the Export Administration Regulations ("EARs"), 15 C.F.R. pts. 730-774, provide in pertinent part as follows:

> Consistent with section 12(c) of the Export Administration Act, as amended, information obtained for the purpose of considering license applications, and other information obtained by the U.S. Department of Commerce concerning license applications, will not be made available to the public

> without the approval of the Secretary of Commerce or of the Under Secretary for Industry and Security.

Id. at § 748.1.

> Consistent with section 12(c) of the Export Administration Act of 1979, as amended, information obtained by the U.S. Department of Commerce for the purpose of consideration of or concerning license applications, as well as related information, will not be publicly disclosed without the approval of the Secretary of Commerce.

Id. at pt. 736, Supp. No. 2, Admin. Order One.

STATEMENT OF THE CASE

After exhausting its administrative remedies, EFF brought this action under the FOIA against Commerce to obtain the release of information relating to the export of certain types of technology. On cross-motions for summary judgment, and after hearing argument, the district court granted each side's motion for summary judgment in part and denied it in part. Order, DE 39, ER 6-24; Judgment, DE 40, ER 5. Briefly, the court ruled in plaintiff's favor with respect to material withheld under FOIA Exemption 3; ordered the government to supply a *Vaughn* index with respect to material withheld under FOIA Exemptions 4 and 5; and upheld the adequacy of the government's search for responsive documents. *See* Order 1, 19, ER 6, 24. The court further ordered the government by August 9, 2013, to disclose the material withheld under Exemption 3 and to submit the required *Vaughn* index regarding the Exemption 4 and 5 withholdings. *See id.* at 19, ER 24. The parties subsequently

stipulated to a stay pending appeal of the court's disclosure and *Vaughn* index orders, and by order of July 24, 2013, DE 44, ER 1-4, the court approved the stipulation.

STATEMENT OF THE FACTS

A. Statutory and Regulatory Background

The federal government has long regulated the export of goods and technology from the United States to provide a rational system for controlling exports that satisfies national security, foreign policy, and domestic supply needs without unduly impeding exports that enhance U.S. economic well-being. *See Times Publ'g Co., v. Dep't of Commerce*, 236 F.3d 1286, 1290 (11th Cir. 2001). The export control system regulates dual-use items (goods, software and technology) that have both commercial and military applications. *Wisconsin Project on Nuclear Arms Control v. Dep't. of Commerce*, 317 F.3d 275, 277 (D.C. Cir.), *reh'g denied*, 2003 U.S. App. LEXIS 11339 (D.C. Cir. 2003). In addition, as part of the ongoing Export Control Reform Initiative (*see* www.export.gov/ecr/ (last accessed on November 20, 2013)), Commerce's export control mission is expanding to include the control of certain military goods and technology being transferred from the U.S. Munitions List ("USML") to the Commerce Control List ("CCL"). *See* 78 Fed. Reg. 22,660 (Apr. 16, 2013). The transfer of the first two control categories of items, accounting for the largest dollar volume of U.S. export licenses, occurred effective October 15, 2013. A number of additional categories will be transferred from the USML to the CCL effective during 2014. It is expected that half of the export transactions that until now have been

licensed by the Department of State under the International Traffic in Arms Regulations soon will be subject to the EARs.

The first precursor of the EAA was enacted in 1949 as the Export Control Act of 1949. *Wisconsin Project*, 317 F.3d at 278. That law was reenacted as the Export Administration Act of 1969. *Id.* The present incarnation of the law is found in the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (Sept. 29, 1979), as amended, codified at 50 U.S.C. App. §§ 2401-2420.

Recognizing that Commerce would have to rely on the cooperation and candor of exporters to obtain complete and accurate export information to effectively administer and enforce the dual-use export control system, and to prevent the release of information that could damage exporters, and, in turn the balance of trade, Congress included in the EAA a confidentiality provision to ensure that such information would not be publicly disclosed. See 50 U.S.C. App. § 2411(c); *Wisconsin Project*, 317 F.3d at 281; *Times Publ'g*, 236 F.3d at 1290. Since 1949, every version of the EAA has contained such a provision and every extension or amendment continued such a provision. *Wisconsin Project*, 317 F.3d at 281-82.

Furthermore, the EAA authorizes Commerce to promulgate regulations implementing its provisions, including its confidentiality provision. *Wisconsin Project*, 317 F.3d at 278; 50 U.S.C. App. § 2414(b). The EARs, 15 C.F.R. pts. 730-774, which set forth exporters' obligations and specify the types of products that are subject to the EAA's requirements, mirror the EAA in providing that confidential export

information will not be made available to the public without a national interest finding by the Secretary. *Wisconsin Project*, 317 F.3d at 278; *Times Publ'g*, 236 F.3d at 1289, 1291, n.3; 15 C.F.R. § 748.1; 15 C.F.R. pt. 736, Supp. No. 2, Administrative Order One. In a similar vein, Commerce assures exporters that the information provided to DOC with the application is subject to Section 12(c) and its unauthorized disclosure is prohibited. *See also* Declaration of Eileen Albanese in Support of Federal Defendant's Motion for Summary Judgment ("Albanese Decl."), DE 20-2, ER 31-69, ¶¶ 16, 27, Exh. D, ER 36, 40, ER 65-69.

Inasmuch as Congress has deemed that "such important regulatory legislation should be periodically reviewed," the EAA has, since its inception in 1949, always been enacted on a temporary basis and always been subject to frequent lapses and reenactments. *Wisconsin Project*, 317 F.3d at 278; *Times Publ'g*, 236 F.3d at 1290, both quoting H.R. Rep. No. 95-459, 95th Cong., 1st Sess. 13 (1977). Reenactment of this highly sensitive statute is frequently proposed and debated but often delayed before passage. *Times Publishing*, 236 F.3d at 1290, n.2. Accordingly, the EAA is frequently in a period of lapse. *Id.*; *Wisconsin Project*, 317 F.3d at 278-79. The current version, the EAA of 1979, has lapsed six times, with lapses ranging in length from a few days to several years. *Id.* To achieve continuity of this vital program, Congress, by statute, granted the President the authority to continue the export control system during lapses. *Times Publ'g*, 236 F.3d at 1290-91; *Wisconsin Project*, 317 F.3d at 278-79. Indeed,

pursuant to this authority, the export control system has continued to operate without a break for over sixty years. *Wisconsin Project*, 317 F.3d at 283.

As noted by the court in *Wisconsin Project*, "[e]ach time the EAA has expired, the President has promptly declared a national emergency and has extended the regulatory scheme by executive order," initially by relying on the Trading with the Enemy Act[2] ("TWEA"), 50 U.S.C. App. § 5(b), for authorization to continue the export control system during lapses in the EAA, and later, the IEEPA. 317 F.3d at 278. Like the former TWEA, the IEEPA authorizes the President, upon declaration of a national emergency, to: "regulate, . . . prevent or prohibit, . . . importation or exportation of, . . . 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). In passing the IEEPA, Congress expressly stated that "[s]hould a lapse occur . . . the authority of

[2] *See also United States v. Spawr Optical Research, Inc.*, 685 F.2d 1076, 1081 n.12 (9th Cir. 1982), *cert. denied*, 461 U.S. 905 (1983) ("One of the reasons why the Export Administration Act has been allowed to expire so many times is because there was [the TWEA]") (quoting Congressman Bingham, Emergency Controls on International Economic Transactions: Hearings on H.R. 1560 and H.R. 2382 Before the Subcommittee on International Economic Policy and Trade of the House Committee on International Relations, 95th Cong., 1st Sess. 30, 36 (1977)). Likewise, in considering the Export Administration Amendments of 1977, Congress recognized that the Export Administration Act of 1969 had expired by its own terms on September 30, 1976, but stated that "[s]ince that date, the Department of Commerce has been using primarily the authorities vested in the President under the Trading With the Enemy Act to conduct the export administration functions that are specified in the Export Administration Act." H.R. Rep. No. 95-190, 95th Cong., 1st Sess., at 1 (1977), *reprinted in* 1977 U.S.C.C.A.N. 362, 363.

title II of this bill [conferring authority on the President to exercise control on international economic transactions during national emergencies] could be used to continue the Export Administration Regulations in effect . . . ." H.R. Rep. No. 95-459 at 13; *see also Wisconsin Project*, 317 F.3d at 282.

During the life of the EAA of 1979, the President has invoked section 1702(a)(1)(B) of the IEEPA six times to issue executive orders that provided for continuous export control systems.[3] *Wisconsin Project*, 317 F.3d at 278-79.

On November 2, 2000, Congress extended the expiration date of the EAA from 1994 to August 20, 2001. *Wisconsin Project*, 317 F.3d at 279. In signing the new date into law, the President noted that keeping export licensing information from public disclosure is critical to the export control system and necessary to protect sensitive business information and commercial interests of exports. *See* Statement by the President, 2000 WL 1693840 (Nov. 13, 2000). The President further noted that "Congress' actions have reaffirmed the view of the executive branch in this matter – that confidential treatment of export licensing information is continuous regardless of whether the EAA is in a lapse period." *Id.*

[3] During the life of the EAA of 1969, the President invoked section 5(b) of the TWEA four times to issue executive orders that provided for the continuation of the export control systems. See Exec. Order No. 11,940, 3 C.F.R. 150 (1977); Exec. Order No. 11,810, 3 C.F.R. 905 (1971-75); Exec. Order No. 11,818, 3 C.F.R. 924 (1971-75); Exec. Order No. 11,796, 3 C.F.R. 888 (1971-75); Exec. Order No. 11,798, 3 C.F.R. 890 (1971-75); Exec. Order No. 11,677, 3 C.F.R. 719 (1971-75); and Exec. Order No. 11,683, 3 C.F.R. 724 (1971-75).

On August 17, 2001, in anticipation of the upcoming expiration of the EAA, the President once again issued an Executive Order declaring a national emergency under the IEEPA, and ordering that the EAA's provisions and administration of its be carried out so as to continue in full force and effect the export control system. Executive Order 13,222 finds:

> that the unrestricted access of foreign parties to U.S. goods and technology, . . . in light of the expiration of the [EAA] constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States and [I] hereby declare a national emergency with respect to that threat[;]

and further provides that:

> To the extent permitted by law, the provisions of the [EAA] and the provisions for administration of the [EAA] shall be carried out under this order so as to continue in full force and effect and amend, as necessary, the export control system heretofore maintained by the Export Administration Regulations issued under the [EAA], as amended.

See 66 Fed. Reg. 44,025, 3 C.F.R., Comp. 2001 at p. 783.

Consistent with past practice explicitly authorized and acknowledged by Congress, the national emergency declared by the President in Executive Order 13,222 has been continued every year – covering the time period relevant to Plaintiff's FOIA request and beyond – including as recently as August 8, 2013 (through August

17, 2014). *See* Presidential Notice of Aug. 8, 2013, 78 Fed. Reg. 49,107;[4] *see also* 50 U.S.C. § 1641; 50 U.S.C. § 1703. Recently enacted legislation continues to reflect Congress' longstanding intent that the provisions and administration of the EAA continue via the IEEPA. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, Section 1242(a)(6), 126 Stat. 1632, 2005 (stating particular term has same meaning as that given in section 16 of the EAA of 1979, 50 U.S.C. App. § 2415, "as continued in effect pursuant to the International Emergency Economic Powers Act (50 U.S.C. § 1701 *et seq.*)") (Jan. 2, 2013).

Various EAA bills have been introduced to committees and Congress since EAA's last lapse. *See, e.g.*, S. 149 (107th Cong., 1st Sess.) (2001); 147 Cong. Rec. S9160 (2001); H.R. 2557 (107th Cong., 1st Sess.) (2001); H.R. 2568 (107th Cong., 1st Sess.) (2001); H.R. 2581 (107th Cong., 2d Sess.) (2001); 148 Cong. Rec. H785 (2002); H.R. 55 (108th Cong., 1st Sess.) (2003); H.R. 4572 (109th Cong., 1st Sess.) (2005); S. 2000 (110th Cong., 1st Sess.) (2007); 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). Of the more recent bills presented to committee

[4] *See also* Presidential Notices of Aug. 15, 2012, 77 Fed. Reg. 49,699; Aug. 12, 2011, 76 Fed. Reg. 50,661; Aug. 12, 2010, 75 Fed. Reg. 50,681; Aug. 13, 2009, 74 Fed. Reg. 41,325; July 23, 2008, 73 Fed. Reg. 43,603; Aug. 15, 2007, 72 Fed. Reg. 46,137; Aug. 3, 2006, 71 Fed. Reg. 44,551; Aug. 2, 2005, 70 Fed. Reg. 45,273; Aug. 6, 2004, 69 Fed. Reg. 48,763; Aug. 7, 2003, 68 Fed. Reg. 47,833 (3 C.F.R., 2003 Comp., p. 328); Aug. 14, 2002, 67 Fed. Reg. 53,721 (3 C.F.R., 2002 Comp., p. 306).

in the 112th Congress, the Export Renewal Act of 2011 (H.R. 2122, Ros-Lehtinen) would, among other things, extend the EAA through 2015.

B. Facts of this Case

In May 2012, plaintiff EFF filed a FOIA request seeking disclosure of "'all agency records, created from 2006 to the present, concerning the export of devices, software, or technology primarily used to intercept communications,'" including applications for permits to export such "dual use" technology (*i.e.*, technology having both civilian and military uses). *See* Order 2, DE 39, ER 7 (citation omitted). After exhausting its administrative remedies, plaintiff brought this action for *de novo* judicial review under the FOIA, 5 U.S.C. § 552(a)(4)(B). Although Commerce had provided aggregate data and the applicable regulation, pursuant to FOIA Exemption 3 the Department withheld the requested applications for export permits, which were filed under the EARs, promulgated pursuant to the EAA and maintained in effect by IEEPA; for some, but not all, of the information in question, Commerce also invoked FOIA Exemption 4, 5 U.S.C. § 552(b)(4), the "trade secrets" exemption, and FOIA Exemption 5, 5 U.S.C. § 552(b)(5), the "deliberative process" exemption.

On cross-motions for summary judgment, and after hearing argument, the district court granted each side's motion for summary judgment in part and denied it in part. Order, DE 39, ER 6-24; Judgment, DE 40, ER 5. With respect to Exemption 3, the district court first acknowledged that the EAA is an Exemption 3 statute, but that "the dispute in this case centers on the fact that the EAA is expired."

Order 5, ER 10. The court pointed out that the Act lapsed on August 20, 2001, and that since that time, "the President has maintained the EAR in effect through a series of actions taken under the authority of the" IEEPA. *Id.* at 6, ER 11. Rejecting Commerce's entreaty to "read Exemption 3's requirement that materials be specifically exempted from disclosure 'by statute' to permit withholding based on a 'comprehensive legislative scheme' comprised of the expired EAA, the IEEPA, and the series of executive actions taken under the authority of the IEEPA," *id.* at 7, ER 12, the court agreed with plaintiff that "Commerce has not shown that there is a statute within the scope of Exemption 3." *Id.* at 8, ER 13. The court stated that "Executive Order 13222 is not a statute," and further ruled that the "IEEPA – the only statute currently in effect to which Commerce points – is not within Exemption 3's scope." *Id.*

The court also dismissed Commerce's reliance upon *Wisconsin Project v. Dep't of Commerce*, 317 F.3d 275 (D.C. Cir. 2003), and *Times Publ'g Co. v. Dep't of Commerce*, 236 F.3d 1286 (11th Cir. 2001), distinguishing those cases on the ground that "while both cases were pending, Congress enacted" a statute that "extended the EAA's expiration date to August 20, 2001." Order 8-9, ER 13-14. The court found that the "legislative history of the" EAA extension "demonstrates that Congress understood and intended that the bill would extend the validity of the EAA through August [20], 2001, and that after that date, Commerce would not be able to rely on Exemption 3 to withhold information protected from disclosure by Section 12(c)" of the EAA. *Id.* at 9, ER 14;

see also id. at 9-10, ER 14-15 (citing statements from the legislative history). The court held that both the Eleventh Circuit and the D.C. Circuit had relied heavily upon the EAA extension and the congressional intent expressed in the legislative history of that provision, to uphold Commerce's Exemption 3 claim. *Id.* at 10-11, ER 15-16. The court also expressed its agreement with Judge Randolph's observation in dissent in *Wisconsin Project* that "'[t]he [IEEPA], which does not itself exempt anything from disclosure, is not an Exemption 3 statute.'" *Id.* at 11, ER 16, citing *Wisconsin Project*, 317 F.3d at 285 (Randolph, J., dissenting). Summarizing, the court concluded that "[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.*

The court went on to require Commerce to submit a *Vaughn* index regarding its Exemption 4 and 5 claims, *id.* at 11-16, ER 16-21, and to hold that Commerce had conducted an adequate search for responsive records.[5] *Id.* at 16-19, ER 21-24. The court ordered Commerce to disclose by August 9, 2013 all material withheld solely under Exemption 3. *Id.* at 19, ER 24. The parties subsequently stipulated to a stay pending appeal of the district court's disclosure and *Vaughn* index orders, and the court approved their stipulation by order of July 24, 2013. DE 44, ER 1-4.

[5] As the instant appeal is limited to the court's Exemption 3 disclosure order, we will not discuss these other issues at greater length.

SUMMARY OF ARGUMENT

The district court erroneously held that FOIA Exemption 3 is not properly invoked during a lapse in the EAA. Every appellate court to consider a challenge to Commerce's invocation of Exemption 3 during a lapse has rejected that challenge. *See Wisconsin Project on Nuclear Arms Control v. Dep't. of Commerce*, 317 F.3d 275 (D.C. Cir.), *rehearing denied*, 2003 U.S. App. LEXIS 11339 (D.C. Cir. 2003);*Times Publ'g Co., v. Dep't of Commerce*, 236 F.3d 1286 (11th Cir. 2001). Those courts recognized the overall statutory scheme and clear congressional intent to continue – by way of the IEEPA, as implemented by executive order – the nation's vital export control system, including its critical confidentiality provision, during a lapse in the EAA. As the D.C. Circuit and the Eleventh Circuit both concluded in upholding the Department's invocation of Exemption 3 during a lapse, "'the comprehensive legislative scheme as a whole – the confidentiality provision of the EAA, the intended and foreseen periodic expiration of the EAA, and the Congressional grant of power to the President [in IEEPA] to prevent the lapse of its important provisions during such times – exempts from disclosure the export licensing information requested by Appellees.'" *Wisconsin Project*, 317 F.3d at 284, quoting *Times Publ'g*, 236 F.3d at 1292. But instead of embracing this analysis, the district court mistakenly opted for an "overly technical and formalistic reading of FOIA to disclose information clearly intended to be confidential" – a reading that would deprive Exemption 3 of "meaningful reach and application." *Times Publ'g*, 236 F.3d at 1291-92.

The district court further incorrectly ruled that the *Wisconsin Project* and *Times Publishing* decisions are inapposite, on the ground that Congress re-enacted the EAA during the pendency of those cases. However, neither *Wisconsin Project* nor *Times Publishing* attached predominant importance to the 2000 reenactment of the EAA (let alone to the reenactment's legislative history), and their reasoning makes clear that their holdings would have been no different had there been no reenactment. Indeed, the D.C. Circuit recently clarified that its *Wisconsin Project* holding was premised upon the "'unique statutory framework created by Congress to retain the confidentiality of export data"' – not upon the reenactment of the EAA. *Newport Aeronautical Sales v. Dep't of the Air Force*, 684 F.3d 160, 167 (D.C. Cir. 2012), quoting *Wisconsin Project*, 317 F.3d at 277. That is why, despite the fact that the EAA had been in a lapse period at the time of the *Wisconsin Project* FOIA request, the D.C. Circuit felt no need to address the retroactivity issue after the EAA was reenacted. *Wisconsin Project*, 317 F.2d at 284-85 ("because IEEPA qualifies as an Exemption 3 statute, there can be no retroactivity problem"); *accord, Times Pub'g*, 236 F.3d at 1292.

Finally, affirmance of the district court's misguided ruling would upset the settled, longstanding and universal expectations of export licensees and all three branches of the federal government that during periods of lapse in the EAA the Executive Orders issued pursuant to the IEEPA continue the protection of export license application information "by statute." The Court should not countenance the

serious harm to the export administration system that would flow from such a holding.

STANDARD OF REVIEW

With respect to purely legal issues such as the one presented on this appeal, the Court reviews *de novo* the district court's order granting summary judgment in a FOIA case. *See, e.g., Ctr. for Biological Diversity v. USDA*, 626 F.3d 1113, 1116 (9th Cir. 2010).

ARGUMENT

FOIA EXEMPTION 3 PROTECTS CONFIDENTIAL EXPORT LICENSING INFORMATION, EVEN DURING A LAPSE OF THE EAA.

In pertinent part, FOIA Exemption 3 protects documents from disclosure when another statute "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3)(A)(ii). This Court, followed by other circuits, has determined that Section 12(c) of the EAA falls within the quoted language of Exemption 3. *See Lessner v. Dep't of Commerce*, 827 F.2d 1333, 1335-36 (9th Cir. 1987); *Times Publ'g Co., v. Dep't of Commerce*, 236 F.3d 1286, 1290 (11th Cir. 2001); *Wisconsin Project on Nuclear Arms Control v. Dep't. of Commerce*, 317 F.3d 275, 277 (D.C. Cir.), *reh'g denied*, 2003 U.S. App. LEXIS 11339 (D.C. Cir. 2003). Central to the Court's decision in *Lessner* was its finding that the legislative history

"strongly suggests that Congress intended Section 12(c)(1) to be an Exemption 3 statute." *Lessner*, 827 F.2d at 1336.[6]

The Supreme Court has "recognized that the [FOIA] statutory exemptions are intended to have meaningful reach and application," *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989), and thus has "consistently has taken a practical approach when it has been confronted with an issue of interpretation of the Act," *id. at* 157, emphasizing that a FOIA exemption "should not 'be construed in a nonfunctional way." *Id.* This Court has stated in a FOIA Exemption 3 case that "'the court's objective is to ascertain the intent of Congress and to give effect to legislative will.'" *Meyerhoff v. EPA*, 958 F.2d 1498, 1501-02 (9th Cir. 1992) (citation omitted). As the D.C. Circuit has further explained, an "unduly strict reading of Exemption 3 strangles Congress's intent and deprives the exemption of meaningful reach in the context of the export regulatory scheme." *Wisconsin Project*, 317 F.3d at 283-84. In the instant case the case law, the legislative history of the relevant statutes, and the actions of license applicants as well as Congress and Commerce during periods of lapse all lead to the conclusion that uninterrupted protection is not only the "practical approach," *John Doe, supra*, but also the congressional mandate.

[6] While the Court in *Lessner* did not address the issue, it upheld the Department's invocation of Exemption 3 even though the FOIA request was submitted during a time of lapse in the EAA. *Id.* at 1334; Exec. Order No. 12,470, 3 C.F.R. 168 (1985), and Exec. Order No. 12,525, 3 C.F.R. 377 (1986), reprinted in 50 U.S.C. § 1701 at 198-99 (1994).

A. Congress "By Statute" Made The Basic Policy Decision To Continue Uninterrupted Protection Of Confidential Licensing Information.

In two thorough opinions, both the Eleventh Circuit and the D.C. Circuit addressed the precise issue presented here and held that Exemption 3 protects confidential export licensing information even during a lapse in the EAA, because Congress "by means of statute" authorized the President to maintain the force of the EAA's provisions.[7] *Times Publ'g*, 236 F.3d at 1291.

In Times Publishing, the Eleventh Circuit reversed the district court's grant of summary judgment in favor of the appellees on their FOIA claims seeking disclosure of export license application information, which Commerce withheld on the grounds of Exemption 3. 236 F.3d at 1288. The district court in that case held that the withholding of the information was unjustified because Section 12 (c) had lapsed on August 20, 1994 (almost five years prior to their FOIA requests), and thus, even if

[7] *Accord, Armstrong v. Exec. Office of the President*, 1995 U.S. Dist. LEXIS 22216, *39-40 (D.D.C. 1995), *subsequently vacated as moot*, 97 F.3d 575 (D.C. Cir. 1996) (stating that court could not ignore the undisputed contention that "the . . .EAA of 1979 [has] lapsed several times over the years, and that each time [its] provisions were extended by Executive Order, pursuant in part to the IEEPA. [citations omitted]. In light of this history, the Court is unpersuaded by Plaintiffs' contention that the President is not authorized to do what Presidents have repeatedly done, without intervention by Congress, over the past 25 years."); *Africa Fund v. Mosbacher*, No. 92 Civ. 289, 1993 WL 183736, *9 (S.D.N.Y. 1993) (upholding Exemption 3 claim although FOIA request was submitted during time of lapse); *see also Durnan v. Dep't of Commerce*, 777 F. Supp. 965, 966 (D.D.C. 1991) (upholding invocation of Section 12(c) under Exemption 3 during a lapse, albeit not directly addressing the lapse issue). The only contrary authority (prior to the district court's misguided ruling in the instant case) was reversed by the Eleventh Circuit in *Times Publishing*.

Section 12(c) covered the information, there was no "statute" in existence at the time of the requests to protect the information. *Id.*, at 1288, 1290. In reversing, the Eleventh Circuit underscored that:

> [c]ongressional intent to maintain the confidentiality of government information is the cornerstone of Exemption 3. With respect to the export licensing information Appellees seek, Congress has acted specifically to design a statutory provision to maintain confidentiality. Although Congress has permitted the statute containing this provision to lapse on a number of occasions, Congress has authorized the President, *also by means of statute*, to maintain the force of the confidentiality provision by way of executive order and has acted in accordance with the continued confidentiality of such information during those times of lapse.

236 F.3d at 1291 (emphasis added).

The Eleventh Circuit held that "where there is no dispute that Congress granted the President authority to extend the provisions of the EAA containing the statutory exemption and that the President has exercised this authority . . . an overly technical and formalistic reading of FOIA to disclose information clearly intended to be confidential would undermine the Supreme Court's direction that the FOIA exemptions are to be given meaningful reach and application." *Id.* at 1292. The court further noted that in light of Congress' intent to protect the confidentiality of the requested export licensing information, "it would be truly nonsensical" to protect and release such information depending on the timing of lapse. *Id.* Thus, the court concluded that "the comprehensive legislative scheme as a whole – the confidentiality

provision of the EAA, the intended and foreseen periodic expiration of the EAA, *and* the Congressional grant of power to the President [in IEEPA] to prevent the lapse of its important provisions during such times – exempts from disclosure the export licensing information sought by Appellees." *Id.* (emphasis added).

Almost two years later, the D.C. Circuit reached the same result in *Wisconsin Project*, 317 F.3d 275. In that case, the plaintiff had submitted a FOIA request seeking export license application information during a time that the EAA had lapsed. *Id.*, at 279. While the lawsuit was pending, Congress extended the EAA's expiration date to August 20, 2001, the newly-extended expiration date passed, and the President extended the export control system pursuant to the IEEPA by declaring a national emergency and issuing Executive Order 13,222. *Id.* The district court granted the Department's summary judgment motion in September 2001. *Id.*

In affirming the district court's grant of summary judgment in favor of Commerce, the D.C. Circuit noted that "the touchstone of the Exemption 3 inquiry is whether the statute 'is the product of congressional appreciation of the dangers inherent in airing particular data and incorporates a formula whereby the administrator may determine precisely whether disclosure in any instance would pose the hazard that Congress foresaw.'" *Id.*, at 281, *quoting Am. Jewish Congress v. Kreps*, 574 F.2d 624, 628-29 (D.C. Cir. 1978). Reviewing the legislative history of the EAA, the Court concluded that "Congress's actions throughout the long history of the EAA evince a clear appreciation of the dangers inherent in exposing export application data

to public view." *Id.* at 281-82. The D.C. Circuit further concluded that the EAA is not the only statute that reflects Congress's determination regarding the confidentiality of export application information: "Congress enacted IEEPA out of concern that export controls remain in place without interruption . . ." *Id.*, at 282, *citing* the Report of the House International Relations Committee, H.R. Rep. No. 95-459, 95th Cong., 1st Sess. 13 (1977).

The Court found "significant for purposes of determining legislative intent that Congress acted with knowledge that the EAA's export regulations had long provided for confidentiality and that the President's ongoing practice of extending the EAA by executive order had always included these confidentiality protections." *Id.*, at 282. And it observed, citing *Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1075 (1980), that courts should be reluctant to impute to Congress an intent to eliminate the longstanding confidentiality accorded sensitive documents absent unambiguous indications that Congress wants such a result. 317 F.2d at 283 (noting "Congress's express desire, as evidenced by its enactment of IEEPA and its knowledge of a pattern of consistent lapse-filling by executive order, to hold export application information in confidence."). Recognizing that Congress (for reasons having nothing to do with the confidentiality of export license data) chose not to make the EAA permanent legislation, *id.*, citing H.R. Rep. No. 95-459 at 13, and instead to have it continue via IEEPA as implemented by Executive Order, the D.C. Circuit concluded that:

> for purposes of determining congressional intent with respect to withholding certain export data from the public, considering the EAA in conjunction with other statutes is not inconsistent with FOIA's purpose or Exemption 3's text. Exemption 3 contemplates withholding pursuant to 'clearly delineated statutory language,' a phrase that admits of more than a single statutory source. Through the concerted operation of three congressional statutes – the EAA, the TWEA, and IEEPA – and in light of the Department's regulations and the President's executive orders pursuant to those statutes, the export control system has remained in place without interruption for over fifty years. During that time, the Department has always retained the authority to withhold export license application information from public disclosure. The Wisconsin Project points to nothing to indicate that this is not as the Congress intended.

Id. at 282-83 (citations omitted); *see also Junger v. Daley*, 8 F. Supp.2d 708, 723 (N.D. Ohio 1998), *rev'd on other grounds*, 209 F.3d 481 (6th Cir. 2000) ("The President clearly has statutory authority under the [IEEPA] to extend export controls in general. Congress has recognized and approved of this practice . . . 'Where there is no contrary indication of legislative intent and where, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President,' the President has the greatest discretion to act.") (citations omitted).[8]

[8] *Cf. In re Benny*, 812 F.2d 1133, 1141 (9th Cir. 1987) (holding Congress intended to continue existence of bankruptcy courts and judges pending enactment of Bankruptcy Amendments and Federal Judgeship Act), *cert. denied*, 510 U.S. 1029 (1993); *Local 3-689, Oil, Chem. & Atomic Int'l Union v. Martin Marietta Energy Sys., Inc.*, 77 F.3d 131, 139 (6th Cir. 1996) (although suit cannot be brought to enforce a collective bargaining agreement ("CBA") in the absence of a CBA, an expired CBA can be "preserved by statute")(citation omitted).

The courts have thus made it abundantly clear that Congress is well aware of the President's frequent invocation of the statutory authorization it gave him under the IEEPA to continue the export controls of the EAA. *Times Publ'g*, 236 F.3d 1290-92; *Wisconsin Project*, 317 F.3d at 278-84; *see also Micei Int'l v. Dep't of Commerce*, 613 F.3d 1147, 1154 (D.C. Cir. 2010) ("Congress' acquiescence in the President's use of the IEEPA to maintain the export regulations evinced sufficient Congressional intent to enable the Department to invoke Exemption 3 . . ."). As this Court pointed out in *United States v. Spawr Optical Research, Inc.*, 685 F.2d 1076 (9th Cir. 1982), *cert. denied*, 461 U.S. 905 (1983), Congress not only tolerated the practice of declaring a national emergency and issuing an executive order pursuant to TWEA, it expressed approval by reenacting section 5(b) of the TWEA for the express purpose of maintaining export controls during a lapse in the EAA. *Id.* at 1081 ("[I]t is unmistakable that Congress intended to permit the President to use the TWEA to employ the same regulatory tools during a national emergency as it had employed under the EAA.").[9]

Although the district court in the case at bar purported to distinguish *Times Publishing* and *Wisconsin Project* on the basis of the enactment of the EAA extension after the district court's ruling in *Times Publishing*, examination of the appellate rulings

[9] The Executive Order is an action affirmatively authorized by one statute (IEEPA) to continue the force and effect of the export control system established by another statute (the EAA). Indeed, absent the EAA and IEEPA, there could be no executive order. For additional evidence of Congress' acquiescence in the role of Executive Orders to continue the EAA during lapse periods, *see* nn.2-4 *supra*.

reveals that they are not so narrowly crafted, but instead stand for the broader proposition that the entire EAA-IEEPA statutory scheme, coupled with the repeatedly-extended Executive Order 13,222, effectively constitutes an Exemption 3 statute. *See Times Publ'g*, 236 F.3d at 1291-92; *Wisconsin Project*, 317 F.3d at 282-85. Indeed, if they did not rest upon that more expansive principle, both circuits would have been remiss in not conducting a full-fledged retroactivity analysis regarding the EAA extension. *See Wisconsin Project*, 317 F.3d at 284-85 (stating that the EAA extension "confirmed, with respect to confidentiality, what has been the case all along," because "the IEEPA qualifies as an Exemption 3 statute"; further stating that "the Department of Commerce properly invoked Exemption 3 in withholding specific export application data in response to Wisconsin Project's request," filed during the EAA lapse period); *Times Publ'g*, 236 F.3d at 1291-92 (rejecting an "overly technical and formalistic reading of FOIA to disclose information clearly intended to be confidential," that would deprive Exemption 3 of "meaningful reach and application"). Accordingly, the D.C. Circuit recently clarified that its *Wisconsin Project* holding was premised upon the "unique statutory framework created by Congress to retain the confidentiality of export data" – not upon the re-enactment of the EAA. *Newport Aeronautical Sales v. Dep't of the Air Force*, 684 F.3d 160, 168 (D.C. Cir. 2012), *citing Wisconsin Project*, 317 F.3d at 277; *see also Micei*, 613 F.3d at 1154 (recognizing "sufficient congressional intent" to maintain Exemption 3 during EAA lapse).

In short, as the D.C. Circuit and the Eleventh Circuit have held, Congress did not intend that the confidential licensing information it took pains to protect through an export control system that has always contained a confidentiality provision be publicly disclosed every time the EAA lapses – even while the system itself continues to operate virtually intact. *Times Publ'g*, 236 F.3d 1292; *Wisconsin Project*, 317 F.3d at 281-84; *see also Spawr*, 685 F.2d at 1081. Rather, Congress devised a comprehensive statutory scheme to keep the nation's vital export control system, including its confidentiality provisions, in place without interruption.

B. The Actions Of Concerned Entities Underscore The Longstanding Expectation That The IEEPA Would Continue "By Statute" The Uninterrupted Protection Of Confidential Export Licensing Information.

The actions of export licensees and all three branches of the federal government during periods of lapse in the EAA underscore the universal and longstanding expectation that the Executive Orders issued pursuant to the IEEPA continue the protection of export license application information "by statute." All of these entities recognize, and their actions demonstrate, that given the nature of dual-use items, the unchecked release of export information not only could "damage exporters, and in turn, the country's balance of trade," *Lessner*, 827 F.2d at 1339, but could have repercussions for the nation's security interests. *See e.g., Gould v. Mitsui Mining & Smelting Co.*, 139 F.R.D. 244, 246 (D.D.C. 1991).

Thus, exporters apply for licenses – and submit the identical confidential information in support of their applications – during lapse periods as during non-lapse periods based on the same expectation of confidentiality codified in the EAA. *See* Albanese Decl. ¶¶ 11, 16, 25, 27, 38, ER 35, 36, 39-40, 44; *see also* Declaration of Dr. Paul Freedenberg, DE 20-3, ER 70-74, ¶ 9, ER 73 ("These companies rely on [Commerce] to maintain the confidentiality of their information based on the assurances of confidentiality contained in the applicable statutes and the EAR[s]."). The President and Commerce have continued to provide Congress with semi-annual reports on EAA activity during lapse periods. *See, e.g.*, various Periodic Reports on the National Emergency Caused by the Lapse of the Export Administration Act of 1979, available at the Government Printing Office, H.R. Doc. No. 106-256; H.R. Doc. No. 107-235; H.R. Doc. No. 108-7; H.R. Doc. No. 108-79. And the Department continues, during lapse periods, to withhold information subject to Section 12(c) in response to FOIA requests. Albanese Decl. ¶ 27, ER 39-40.

Indeed, Commerce routinely denies congressional requests during lapse periods that do not comply with Section 12(c) and, when approving a request, informs Congress that the information is protected by Section 12(c). Albanese Decl. ¶ 30, ER 41. Further, in testifying before Congress, Department representatives decline to discuss specific license applications on the basis of 12(c) confidentiality, a position Congress routinely accepts. *Id.*

Moreover, Commerce provides – and Congress expects – EAA Section 6(f) reports for annual extensions of particular foreign policy export controls, regardless of whether the EAA is in lapse. Albanese Decl. ¶ 31, ER 41-42. When the EAA is in lapse, the Department notifies Congress that it is acting under the authority conferred by Executive Order 13,222 of August 17, 2001, as authorized by the IEEPA and as extended by Presidential Notices. *Id.*

Congress, too, honors the EAA during lapse periods: pertinent here, defendant is unaware of any release by Congress of confidential export information based upon a determination that the EAA had lapsed. Albanese Decl. ¶ 29, ER 41; *see also Times Publ'g*, 236 F.3d at 1291 ("Congress . . . has acted in accordance with the continued confidentiality of such information during those times of lapse."). In fact, congressional committees requesting such information from Commerce during a lapse expressly assure the Department that all information submitted on a classified basis will be handled by the Subcommittee consistent with Section 12(c). Albanese Decl. ¶ 29, ER 41.[10] Congress has even amended the EAA during lapse periods.[11] Congress could not amend the EAA were there nothing to amend.

[10] Section 12(c)(2) requires Commerce to provide confidential export information "to any committee or subcommittee of Congress of appropriate jurisdiction upon request of the chairman or ranking member of such committee or subcommittee," but prohibits Congress from disclosing such information unless the full Committee determines that "withholding of that information is contrary to the national interest." 50 U.S.C. App. § 2411(c)(2).

Finally, as *Times Publishing* and *Wisconsin Project* establish, courts also honor the confidentiality provisions of the EAA during lapse periods.[12] Thus, there is unanimity on this score among all concerned.

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[11] For example, on October 26, 1990, Congress amended a lapsed EAA to add missile technology controls and sanctions to the export control system. *See* Pub. L. No. 101-510, 1990 U.S.C.C.A.N. (104 Stat.) 1738 (codified at 50 U.S.C. App. §§ 2405(1) and 2410b). Approximately one year later, during the same lapse, Congress again amended the EAA to add sanctions for violation of the export control system concerning chemical biological weapons proliferation. *See* Pub. L. No. 102-138, § 505, 1991 U.S.C.C.A.N. (105 Stat.) 647, 724 (codified at 50 U.S.C. App. § 2410c).

Since the lapse in August 2001, Congress has continued to amend the EAA. For example, on December 17, 2004, Congress amended the EAA to extend restrictions on certain export to countries whose territories are being used as sanctuaries for terrorists or terrorist organizations. Pub. L. No. 108-458, codified at 50 U.S.C. App. § 2405(j). Notably, the amendments were to be implemented via the President's authority under the IEEPA. *See* 50 U.S.C. App. § 2405(j), implementation note; Pub. L. 108-458, Title VII, Subtitle A, § 7102(c)(3), 118 Stat. 3777. Recent congressional acts further evince Congress' intent that the EAA's provisions and administration are "continued in effect pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.)". *See e.g.*, National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, Section 1242(a)(6), 126 Stat. 1632, 2005 (Jan. 2, 2013).

[12] Some courts have even imposed *criminal penalties* for violations that occur during a lapse. *See Spawr*, 685 F.2d at 1081 (rejecting argument that regulations terminated upon lapse in statute and recognizing validity of continuance via the TWEA); *United States v. Mechanic*, 809 F.2d 1111, 1113 (5th Cir. 1987) (upholding criminal convictions under regulations adopted pursuant to the EAA when the acts alleged in the indictment were committed during a period in which the EAA lapsed); *United States v. Groos*, 616 F. Supp.2d 777, 785-89 (N.D. Ill. 2008) (relying on *Spawr*, *Times Publishing* and *Wisconsin Project*, rejecting challenge to indictment on ground that IEEPA was impermissible extension of the EAA and EARs, and concluding that "Congress tacitly approved the presidential continuation of the EAA and EAR[s] during times of lapse."); *see also United States v. Lachman*, 387 F.3d 42, 44, n.1 (1st Cir. 2004) (in criminal case, discussing violation of the EAA and noting lapse: "[The EAA's] provisions have been carried forward by executive order under the authority of the [IEEPA]"); *United States v. Guo*, 634 F.3d 1119, 1121-22 (9th Cir.), *cert. denied*,

Continued on next page.

In sum, the district court's ruling wreaks havoc upon the settled expectations of the persons and businesses that submitted applications during the current lapse period – entities that justifiably relied on the assurances of confidentiality intended by Congress, in effect since the first precursor of the EAA was first enacted in 1949, and sanctioned by numerous courts. Affirmance would also upset the settled expectation of Congress, which has relied on the various court decisions holding that its intent with respect to confidentiality would be followed during a lapse period. And it would pull the rug out from under the Executive Branch as well, which has consistently operated under the same premise. Overturning these longstanding expectations at this late date thus would result in unprecedented disruptions that would have substantial negative consequences for the dual-use export control system. Albanese Decl. ¶¶ 25-49, ER 39-48. The Court should not countenance this egregious result.

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131 S. Ct. 3041 (2011) (without addressing lapse, holding that Executive Order 13,222, together with authority allocated to the President pursuant to the IEEPA, "authorized the continued enforcement of [the EARs]," and thus upholding conviction under 50 U.S.C. § 1705 for attempting to export dual-use item without required license); *compare with United States v. Quinn*, 401 F. Supp.2d 80, 95-96 (D.D.C. 2005) (dismissing conspiracy count from indictment on grounds that IEEPA and EAA did not include conspiracy charges at time of enactment). Although plaintiff has dismissed the criminal cases as resting upon the EARs rather than upon a statute, a fair reading of these decisions admits of no such hard-and-fast statutory/regulatory distinction; plaintiff's view is further belied by the fact that all of these rulings start from the fundamental premise that criminal penalties in a regulation must have a statutory basis, and they find that basis in the EAA, the TWEA, and/or the IEEPA, as appropriate. *See also Times Publ'g*, 236 F.3d at 1290-92 (extensively relying on both *Spawr* and *Mechanic*).

CONCLUSION

For the foregoing reasons, the district court's Order of July 12, 2013, and its Judgment of July 22, 2013, should be reversed to the extent that they mandate disclosure of applications for export licenses withheld pursuant to FOIA Exemption 3.

Respectfully submitted,

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NOVEMBER 2013

STATEMENT OF RELATED CASES

Defendant-appellant is not aware of any related cases within the meaning of Ninth Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B) because it contains 8,075 words, excluding exempt material, according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2013, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, and that I served counsel for plaintiff-appellee by the same means.

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