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

REPLY BRIEF FOR DEFENDANT-APPELLANT

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INTRODUCTION AND SUMMARY OF ARGUMENT

In its opening brief ("Govt. Br."), the government demonstrated that as both the D.C. Circuit and the Eleventh Circuit have held, the confidential applications for export licenses that plaintiff-appellee Electronic Frontier Foundation ("EFF") sought are exempt from disclosure under Exemption 3 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(3), even though plaintiff filed its FOIA request during a period when the Export Administration Act ("EAA"), 50 U.S.C. App. §§ 2401-20, had lapsed. *See 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); *Times Publ'g Co., v. Dep't of Commerce*, 236 F.3d 1286, 1290 (11th Cir. 2001). As both circuits recognized, Congress plainly mandated this result under the statutory scheme it enacted, which encompasses both the EAA and the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701 *et seq*. Thus, "'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. And as this Court has stated in another FOIA Exemption 3 case, "'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).

Like the district court, however, EFF incorrectly embraces 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. This is at odds with the Supreme Court's teaching 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), in consequence of which the Court "consistently has taken a practical

approach when it has been confronted with an issue of interpretation of the Act," *id. at* 157, and has admonished that a FOIA exemption "should not 'be construed in a nonfunctional way." *Id.* Such a "nonfunctional" interpretation is precisely what EFF advocates in the instant case. Although our opening brief fully refutes EFF's contentions, we take this opportunity to reply to certain assertions in EFF's brief ("EFF Br.").

ARGUMENT

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

1. As the D.C. Circuit and the Eleventh Circuit have correctly held, "'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 on Nuclear Arms Control v. Dep't. of Commerce*, 317 F.3d 275, 284 (D.C. Cir.), *reh'g denied*, 2003 U.S. App. LEXIS 11339 (D.C. Cir. 2003), quoting *Times Publ'g Co., v. Dep't of Commerce*, 236 F.3d 1286, 1292 (11th Cir. 2001).

Plaintiff argues that this statutory "scheme" does not constitute a "statute" for Exemption 3 purposes and accuses the government of playing fast and loose with the text of Exemption 3, "'taking a red pen to the statute'" and "'cutting out some words

and pasting in others.'" EFF Br. 13 *(quoting Milner v. Dep't of the Navy,* 562 U.S. __, 131 S. Ct. 1259, 1267 (2011)). On the contrary, this Court has already found the confidentiality provision of the EAA to meet the requirements of Exemption 3, with no "cutting and pasting" required. See *Lessner v. Dep't of Commerce,* 827 F.2d 1333, 1335-36 (9th Cir. 1987) ("[S]ection 12(c)(1) of the EAA qualifies as an Exemption 3[(A)(ii)] statute."). IEEPA (which the D.C. Circuit also held to be an Exemption 3 statute in its own right, *see Wisconsin Project*, 317 F.3d at 284), and executive orders issued pursuant to IEEPA, are merely the tools that Congress has authorized to extend the expiration date of this Exemption 3 statute. As the D.C. Circuit explained, "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." *Wisconsin Project,* 317 F.3d at 282-83 (quoting *Dep't of the Air Force v. Rose,* 425 U.S. 352, 361 (1976)).

Interpreting Section 12(c)(1) of the EAA in conjunction with IEEPA and relevant executive orders is in keeping with the Supreme Court's recognition 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 that a FOIA exemption "should not 'be construed in a nonfunctional way." *Id.* It is also consistent with this Court's observation 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.

2. Plaintiff scants all of these teachings in its brief, embracing the same "overly technical and formalistic reading of FOIA to disclose information clearly intended to be confidential," *Times Publ'g*, 236 F.3d at 1291, that the district court erroneously adopted and the D.C. and Eleventh Circuits properly eschewed.[1] EFF purports to find support for this view (*see* EFF Br. 13-15) in the Open FOIA Act of 2009 – a statute that by its own terms does not apply to this case. *See* 5 U.S.C. § 552(b)(3)(B) (Open FOIA Act of 2009 only applies to statutes "enacted after [its] date of enactment"). Thus, the provision does not advance EFF's cause.

Plaintiff argues for a mechanistic interpretation of the term "statute" in Exemption 3. *See* EFF Br. 17-23. But this approach is at odds with the Supreme Court's analysis in *John Doe*, this Court's view in *Meyerhoff*, the D.C. Circuit's ruling in *Wisconsin Project*, and the Eleventh Circuit's holding in *Times Publishing*. It therefore cannot stand.

[1] Tellingly, EFF effectively concedes that under this Court's decision in *Lessner v. Dep't of Commerce*, 827 F.2d at 1335-36, the material plaintiff seeks would be exempt from disclosure under Exemption 3, if the EAA itself were currently in effect of its own force. *See* EFF Br. 18 n.12.

3. Plaintiff next seeks to distinguish *Wisconsin Project* and *Times Publishing*, and then more forthrightly argues that those cases are wrongly decided. *See* EFF Br. 23-33. Neither of these arguments has merit.

With respect to the former point, EFF maintains that "over a decade of congressional inaction distinguishes this case from *Times Publishing* and *Wisconsin Project*." *Id.* at 23 (bolding and capitalization omitted). According to plaintiff, the 2000 reenactment of the EAA "constituted a specific congressional response to [*Times Publishing* and *Wisconsin Project*], indicating a clear congressional purpose to exempt *those records* from disclosure." *Id.* at 24. As we already demonstrated in our opening brief, this is an unduly narrow reading of the far broader holdings in *Times Publishing* and *Wisconsin Project* that is flatly contradicted by the sweeping language of those opinions (quoted at 3, *supra*). The *Times Publishing* and *Wisconsin Project* decisions were neither simply directed at the specific records before the appellate courts in those cases, nor based primarily upon the legislative history of the 2000 reenactment, but instead established a general principle applicable to all records of the type involved in those cases and the instant case.

Indeed, plaintiff's argument is belied not only by the language of the Eleventh Circuit and D.C. Circuit opinions, but by the snippets of legislative history EFF cites, and by the *Wisconsin Project* dissent upon which it relies. Most of the isolated, individual comments in the legislative history – a slender reed to begin with, *see, e.g., Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 686-87 (9th Cir. 2006) (rejecting

reliance upon "'snippets'" and "'stray comments by individuals'" in legislative history) (citations omitted) – stress that the 2000 reenactment was "necessary to *ensure*" the continuing applicability of Exemption 3 during the prior EAA lapse period, or "to *make sure*" of that proposition in response to the district court decision in *Times Publishing* that "call[ed] into question" that proposition. *See, e.g.*, EFF Br. 25-26 (quoting Reps. Gilman and Lee) (emphasis added). EFF's claim that "[t]he 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*," *id.* at 27, and that "[i]n both decisions, the EAA's reauthorization figured prominently," *id.* at 28, grossly understates the breadth of the appellate courts' ruling in both cases.

Contrary to plaintiff's assertion, the EAA's reenactment in 2000 was not "the central component" of the Eleventh and D.C. Circuit's analysis.[2] In reality, both decisions were far broader. Far from setting great store by the 2000 reenactment and its legislative history, the D.C. Circuit stressed in *Wisconsin Project* that "Congress's actions throughout the long history of the EAA evince a clear appreciation of the

[2] We note also that plaintiff appears to have made an error in its discussion of the chronology of *Wisconsin Project*. EFF states that "[s]hortly after the district court's decision, and while the plaintiff's appeal was pending, the EAA again went into lapse." EFF Br. 28 n14. In fact, the EAA again lapsed on August 20, 2001, whereas the district court's ruling in *Wisconsin Project* was filed on September 4, 2001.

dangers inherent in exposing export application data to public view." 317 F.3d at 281-82.

Plaintiffs' argument on this score is further belied by the very dissent from *Wisconsin Project* on which it relies. *See* EFF Br. 29-31 and n.15. Judge Randolph's dissent did not even discuss the 2000 reenactment of the EAA; instead, it squarely took aim at the majority's holding that, under the EAA-IEEPA statutory scheme, the EAA's confidentiality provision survives during lapse periods by virtue of IEEPA and the relevant executive orders thereunder. *See Wisconsin Project*, 317 F.3d at 285-86 (Randolph, J., dissenting). And had Judge Randolph read the majority opinion as EFF wishes to, he might well have issued a special concurrence relying upon the 2000 reenactment, instead of a dissent not even mentioning it.

As for EFF's alternative argument that "to the extent *Times Publishing* and *Wisconsin Project* did not rely on the reauthorization of the EAA, the cases were incorrectly decided" (EFF Br. 28; capitalization and bolding omitted), we have shown at length in our opening brief that plaintiff's position is meritless. *Times Publishing* and *Wisconsin Project* are well reasoned decisions that are faithful to the Supreme Court's guidance in *John Doe Agency* that "the [FOIA] statutory exemptions are intended to have meaningful reach and application," 493 U.S. at 152, and that a FOIA exemption "should not 'be construed in a nonfunctional way," *id.*, and further are consistent with this Court's direction in *Meyerhoff* that in a FOIA Exemption 3 case "'the court's objective is to ascertain the intent of Congress and to give effect to legislative will.'"

958 F.2d at 1501-02 (citation omitted). In contrast, rejecting the reasoning of the D.C. and Eleventh Circuits in favor of plaintiff's mechanistic approach would yield "truly nonsensical" results, allowing sensitive export license applications to be withheld one day but disclosed the next, depending on the happenstance of the date of a particular FOIA request. *Times Publ'g*, 236 F.3d at 1292.

4. EFF next tries to draw sustenance from the D.C. Circuit's decision in *Micei Int'l v. Dep't of Commerce*, 613 F.3d 1147 (D.C. Cir. 2010) (*see* Pl. Br. 31-32), but as we showed in our opening brief (Gov't Br. 24, 25), *Micei* actually supports the government's position here. *See Micei*, 613 F.3d at 1154 (stating that "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 . . ."); *accord, Newport Aeronautical Sale v. Dep't of the Air Force*, 684 F.3d 160, 168 (D.C.Cir. 2012) (clarifying that *Wisconsin Project* was premised upon the "unique statutory framework created by Congress to retain the confidentiality of export data," citing *Wisconsin Project*, 317 F.3d at 277).[3] To the extent that plaintiff relies on *Micei*'s holding that the D.C. Circuit lacked subject matter jurisdiction over the request for direct appellate review of the agency action in that case, EFF downplays the key fact *Micei* relies upon bedrock principles of Article III jurisdiction, which require an Act of Congress to confer jurisdiction on a federal court, and

[3] Notably, EFF does not even mention *Newport Aeronautical Sales* in its brief.

preclude the President from doing so unilaterally. *See Micei*, 613 F.3d at 1153-54. But plaintiff ultimately gives away the game in any event, stating that "[t]he *Micei* court distinguished *Wisconsin Project* only on the grounds that the *Wisconsin Project* decision 'did not speak to the question of Article III jurisdiction.'" EFF Br. 32 n.17, quoting *Micei*, 613 F.3d at 1154; *see also id.* at 31, citing *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.") (plaintiff's emphasis, internal citations and quotations omitted).

It is axiomatic that the "Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Bender v.Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986); *see also Finley v. United States*, 490 U.S. 545, 547 (1989) ("'courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction'"), quoting *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807). It follows from this incontestable proposition that "[s]uch jurisdiction as the [court of appeals] has, to review directly the action of administrative agencies, is *specifically* conferred by legislation relating *specifically* to the determinations of such agencies made subject to review, and prescribing the manner and extent of the review." *Am. Fed. of Labor v. NLRB*, 308 U.S. 401, 404 (1940) (emphasis added). That is all that *Micei* holds, in line with such unexceptionable authority. By contrast, it is clear that the Court should take a "practical approach" in determining whether FOIA

Exemption 3 (which is not a jurisdictional provision) applies to the records at issue in this case. *See John Doe Agency*, 493 U.S. at 157.

5. Finally, EFF argues that "the actions and expectations of 'concerned entities' are not evidence of an Exemption 3 statute." EFF. Br. 33 (capitalization and bolding omitted). But under the approach to interpretation of the FOIA exemptions mandated by the Supreme Court in *John Doe Agency* and this Court in *Meyerhoff*, it is entirely appropriate for the Court to take into account the "actions and expectations" of all three branches of the federal government as well as entities regulated under the EAA and the IEEPA. We have shown that those actions and expectations are wholly consistent with a general assumption of the confidentiality of the records of export license applications covered by the EAA and IEEPA – an assumption that to our knowledge has never been breached in the long history of these Acts, even during EAA lapse periods. Indeed, plaintiff does not respond to our showing that Congress has repeatedly amended the EAA during lapse periods, and that even in current legislation Congress refers to the EAA as "continued in effect pursuant to the [IEEPA]." *See* Govt. Br. 28 n.11 (citations omitted). Plaintiff is equally silent with respect to the *Times Publishing* court's observation that "Congress . . . has acted in accordance with the continued confidentiality of such information during times of lapse." *Times Publ'g*, 236 F.3d at 1291. It is thus fitting that these "actions and

expectations" should inform the Court's determination concerning the applicability of FOIA Exemption 3 to the records in this case.[4]

[4] EFF also cursorily dismisses (EFF Br. 35 n.19) as inapposite the numerous cases we cited in our opening brief – including this Court's decision in *United States v. Spawr Optical Research, Inc.*, 685 F.2d 1076 (9th Cir. 1982), and the Fifth Circuit's decision in *United States v. Mechanic*, 809 F.2d 1111 (5th Cir. 1987), both relied upon by the Eleventh Circuit in *Times Publishing* – in which courts upheld criminal penalties for violations that occurred during EAA lapse periods. *See also United States v. Guo*, 634 F.3d 1119, 1121-22 (9th Cir.), *cert. denied*, 131 S. Ct. 3041 (2011). Suffice it to say that those decisions also buttress the government's position here, for the reasons we have previously advanced. *See* Gov't Br. 24, 26, 29 n.12.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the government's opening brief, 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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FEBRUARY 2014

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 2,918 words, excluding exempt material, according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2014, 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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