To be Argued by:
GREGORY SILBERT

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New York Supreme Court
Appellate Division – First Department

ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND
and MUSLIM ADVOCATES,

Petitioners-Appellants,

– against –

NEW YORK CITY POLICE DEPARTMENT and RAYMOND KELLY,
in his official capacity as Commissioner of the New York City Police Department,

Respondents-Respondents.

BRIEF FOR PETITIONERS-APPELLANTS

WEIL, GOTSHAL & MANGES LLP
Attorneys for Petitioners-Appellants
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
samaa.haridi@weil.com
gregory.silbert@weil.com

On the Brief:
SAMAA A. HARIDI
GREGORY SILBERT

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (continued)

Page

TABLE OF AUTHORITIES (continued)

Page

TABLE OF AUTHORITIES (continued)

Page

Statutes

TABLE OF AUTHORITIES (continued)

Page

QUESTIONS PRESENTED

The Asian American Legal Defense and Education Fund ("AALDEF") and Muslim Advocates filed a detailed request under the Freedom of Information Law ("FOIL") concerning the New York City Police Department's surveillance of Muslims in New York, New Jersey, Pennsylvania, and Connecticut. Did the Supreme Court err by holding that almost *all* responsive records were wholly exempt from disclosure under certain FOIL exemptions?

The Supreme Court's blanket exclusion raises several subsidiary issues—namely, did the Supreme Court commit reversible error when it held that:

(a) all responsive records were wholly exempt from disclosure pursuant to the FOIL exemptions concerning records "compiled for law enforcement purposes";

(b) all responsive records were wholly exempt from disclosure pursuant to the FOIL exemptions concerning "life or safety" and "privacy";

(c) certain responsive records were exempt from disclosure pursuant to the FOIL exemption for inter- or intra-agency materials;

(d) AALDEF and Muslim Advocates did not "reasonably describe" the documents requested; and

(e) certain of the records were wholly exempt from disclosure because they were specifically exempted from disclosure by state or federal statute.

PRELIMINARY STATEMENT

The Associated Press began publishing a series of Pulitzer Prize winning articles in August 2011 that revealed the New York City Policy Department ("NYPD") was engaged in extensive covert surveillance of Muslims in New York, New Jersey, Pennsylvania, and Connecticut. These articles were based on knowledge gained from sources familiar with the NYPD's surveillance program and on secret documents that the Associated Press obtained from these sources. According to these articles, the NYPD used plainclothes officers and paid informants to monitor individuals and infiltrate mosques, businesses, schools, student groups and other institutions associated with Muslim "ancestries of interest"—even if there was *no suspicion of wrongdoing*. Mosques, businesses, and other institutions could be monitored simply because they attracted a "devout [Muslim] crowd" or because the NYPD expected "groups of Middle Easterners [to be] there."

There is a vital public interest in knowing more about how the NYPD implements its domestic surveillance program. The large-scale suspicionless spying that the Associated Press documented is simply unprecedented for a police department in the United States. In addition, what has been made known about the program through the Associated Press articles suggests that some of the NYPD's methods may be illegal and unconstitutional. The

NYPD's often suspicionless surveillance may violate its targets' First Amendment rights by chilling legitimate religious expression, free speech, and assembly rights. And targeting an entire religious group based solely upon faith may violate the Equal Protection Clause. The public needs information about the policies, procedures and scope of the NYPD's surveillance program to make informed decisions about whether and to what extent the NYPD should be engaged in the activities described in the Associated Press articles.

To that end, the Asian American Legal Defense and Education Fund ("AALDEF"), Muslim Advocates, and the Brennan Center for Justice at NYU Law School ("Brennan Center") filed a detailed request under the Freedom of Information Law ("FOIL") that sought documents and other information regarding record keeping and retention, policy guidelines, statistics, and investigatory records concerning the NYPD's Muslim surveillance program.[1] The requested records are subject to disclosure under FOIL, which imposes a broad disclosure obligation on government agencies that makes all government records, including police records, presumptively open for public inspection. Recognizing that the requested records may

[1] The Brennan Center was not a party to the Supreme Court proceeding and is not a party to this appeal.

contain sensitive information, AALDEF and Muslim Advocates made clear that they did not oppose receiving records with exempt information redacted.

Despite AALDEF and Muslim Advocates' clear entitlement to the requested records, the NYPD did not give a firm response to the request for nearly six months, and its eventual belated response amounted to little more than a categorical denial of the request. AALDEF and Muslim Advocates challenged the NYPD's blanket denial pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR"). In response, the NYPD advanced a sweeping vision of unbridled police secrecy, arguing that *every* record created since its surveillance program began in 2001/2002 was wholly exempt from disclosure pursuant to one or a combination of several FOIL exemptions.

The Supreme Court erred when it endorsed the NYPD's vision of indiscriminate police secrecy and upheld the NYPD's blanket exemption. The Supreme Court committed four critical errors, each of which warrants reversal. First, the record before the Supreme Court made clear that at least some potentially responsive records did not fall within any of the FOIL exemptions, yet the Supreme Court held that *every* record was wholly exempt from disclosure under FOIL.

Second, the Supreme Court uncritically accepted an affidavit submitted by Deputy Commissioner David Cohen (the "Cohen Affidavit") even though there was contrary evidence in the record. For example, the Cohen Affidavit claimed that the vast majority of records are not organized by ethnicity, but NYPD documents disclosed by the Associated Press show that there are many records organized by ethnicity. In fact, the NYPD documents disclosed by the Associated Press established that there was a unit within the NYPD called the *Demographics* Unit whose very mission was to identify and map communities by ethnicity. To take another example, the Cohen Affidavit strongly implied that all responsive records contained highly detailed source revealing information. But the NYPD documents released by the Associated Press showed that this could not possibly be true for some records because they, for instance, only discussed the Demographics Unit's general mission and goals.

Third, given that there were disputes about the nature and types of information contained in the responsive records and that resolving these disputes was critical to determining whether the FOIL exemptions actually applied to the responsive records, the Supreme Court should have conducted an *in camera* review of the potentially responsive records. The Supreme Court's failure to do so was particularly inexplicable because AALDEF and

Muslim Advocates specifically requested that the lower court review "randomly selected responsive records" *in camera*.

Finally, the Supreme Court almost completely ignored the fact that responsive records could be produced with any except information redacted. The Court of Appeals and the Appellate Departments have consistently held that this is proper action when responsive documents contain both exempt and non-exempt information.

The Supreme Court's ruling was contrary to the facts and the controlling law and should be reversed. Specifically, this Court should reverse the Supreme Court's decision and order the Supreme Court to issue an order compelling the NYPD to produce all responsive records with any exempt information redacted. Alternatively, given the conflicting evidence about the nature of the NYPD documents, this Court should reverse the Supreme Court's decision and remand with instructions for the Supreme Court to conduct an *in camera* review to determine whether the FOIL exemptions actually apply to the responsive records. This Court should make clear that, after conducting its *in camera* review, the Supreme Court must issue an order compelling the NYPD to produce all responsive records with any exempt information redacted.

STATEMENT OF THE CASE

(a) Factual Background

After the tragic events of September 11, 2001, the NYPD embarked on a covert, blanket surveillance program that targets Muslim individuals, places of worship, businesses, schools, student groups, and other establishments located in and throughout New York, New Jersey, Pennsylvania, and Connecticut. The program frequently targets these individuals and entities based solely upon religion, rather than any indication of wrongdoing. The details of this program were first revealed in a Pulitzer Prize-winning series of investigative articles published by the Associated Press beginning in August 2011.

According to the Associated Press reports, the Central Intelligence Agency ("CIA") played a key role in developing the NYPD's domestic surveillance program. For example, David Cohen, a retired 35-year CIA veteran, became the NYPD's first civilian intelligence chief in January 2002.[2] After just a few months in his new position, Mr. Cohen hired Larry

[2] Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, Associated Press, August 23, 2011, *available at* http://ap.org/Content/AP-In-The-News/2011/With-CIA-help-NYPD-moves-covertly-in-Muslim-areas. With one exception discussed below in footnote 27, each of the public domain articles and documents cited by Appellants in this brief were cited by the Appellants in their briefs in the Supreme Court, and were reviewed and relied upon by the Supreme Court, as demonstrated by the Supreme Court's citation to those articles and documents in its Decision and Judgment.

Sanchez, a CIA veteran, to help him build the NYPD's surveillance program, on a "temporary assignment" with the NYPD.[3] Mr. Sanchez, who had an office at the NYPD, interviewed officers for positions within the Intelligence Division, taught them how to gather information, and directed their efforts.[4] With such assistance, the NYPD's Intelligence Division became a full-fledged domestic surveillance operation.[5]

The NYPD's surveillance program targets twenty-eight "ancestries of interest."[6] These "ancestries of interest" include "American Black Muslim" and represent eighty percent of the global Muslim population: Afghanistan, Albania, Bahrain, Bangladesh, Chechnya, Egypt, Guyana, India, Indonesia, Iran, Iraq, Jordan, Lebanon, Libya, Morocco, Pakistan, Palestine, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, Turkey, the United Arab Emirates, Uzbekistan, Yemen, and Yugoslavia.[7] Almost all of these countries or

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See generally, Record on Appeal ("Record" or "R.") at 32-63 (Memorandum in Support of Verified Petition), 262-78 (Reply Memorandum in Support of Verified Petition); R. at 9 n.1 (Decision and Judgment).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] R. at 285 ("The Demographics Unit").

[7] *Id.*

regions have majority Muslim populations, and one of the few that does not—India—has eleven percent of the world's Muslim population.

The Associated Press has obtained and released redacted documents from the NYPD's surveillance program, and these documents make perfectly clear that certain "ancestries" are "of interest" only to the extent that they identify Muslims. For example, the "Egyptian Locations of Interest Report," notes that Coptic Christians represent "the majority of the Egyptian Community in New York City."[8] Tellingly, the report expressly excludes the Coptic Egyptian community from its purview, and instead provides "insight" exclusively "into the Muslim Egyptian community of New York City."[9] Similarly, the "Syrian Locations of Concern Report," states that New York City's Syrian community "is divided into two parts, a Jewish Syrian and a Muslim Syrian community with the Jewish community being the larger of the two," and that the report "will focus on the smaller Muslim community."[10]

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[8] Egyptian Locations of Interest Report, http://hosted.ap.org/specials/interactives/documents/nypd/nypd-egypt.pdf at 2.

[9] *Id.*

[10] Syrian Locations of Interest Report, http://hosted.ap.org/specials/interactives/documents/nypd/nypd-syria.pdf at 1.

The NYPD uses informants and plainclothes officers to infiltrate and monitor businesses, communities, institutions, and mosques that are associated with these Muslim "ancestries of interests." The plainclothes officers are known as "rakers" and the informants sent to spy on mosques are known as "mosque crawlers."

These informants, rakers, and mosque crawlers are not necessarily engaged in traditional criminal investigations based on a suspicion of wrongdoing or evidence of a crime. Instead, they could be dispatched to locations simply because a particular business or location attracts a "devout [Muslim] crowd" or is owned or frequented by members of one of the twenty-eight Muslim "ancestries of interest."[11] In fact, the NYPD's "Egyptian Locations of Interest Report," which was disclosed by the Associated Press, defines a location of interest as, among other things, any "[l]ocalized center of activity for a particular ethnic group," any "[l]ocation that individuals may frequent to search for ethnic companionship," or any "popular *hangout* or meeting location for a particular ethnic group that provides a forum for listening to neighborhood *gossip* or otherwise provide

[11] Matt Apuzzo & Adam Goldman, *Documents Show NY Police Watched Devout Muslims*, Associated Press, Sept. 6, 2011, *available at* http://ap.org/Content/AP-In-The-News/2011/Documents-show-NY-police-watched-devout-Muslims; Egyptian Locations of Interest Report at 8, *available at* http://hosted.ap.org/specials/interactives/documents/nypd/nypd-egypt.pdf.

an overall *feel* for the community."[12] Thus, one aim of the NYPD's suspicionless surveillance program is simply to monitor daily life in communities associated with Muslim "ancestries of interest."

Indeed, Assistant Chief Thomas Galati, then the commanding officer of the Intelligence Division, admitted in a June 2012 deposition in an unrelated litigation that the Demographics Unit (which was renamed the Zone Assessment Unit in 2010)[13] would "gather information on people *even when there is no evidence of wrongdoing*, simply because of their ethnicity and native language."[14] Assistant Chief Galati testified that "a business can be labeled a 'location of concern' whenever police can expect to find groups of Middle Easterners there."[15] Thus, although the redacted documents released by the Associated Press at times refer to monitoring "illegal

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[12]Egyptian Locations of Interest Report, http://hosted.ap.org/specials/interactives/documents/nypd/nypd-egypt.pdf at 1 (emphases in the original).

[13] The Demographics Units, along with the Terrorist Interdiction Unit and the Special Services Unit, are three units within the Intelligence Division that are heavily involved in the NYPD's covert domestic surveillance program. The NYPD had previously denied the existence of the Demographics Unit. *See* Matt Apuzzo & Adam Goldman, *Inside the Spy Unit that NYPD Says Doesn't Exist*, Associated Press, August 31, 2011, *available at* http://ap.org/Content/AP-In-The-News/2011/Inside-the-spy-unit-that-NYPD-says-doesnt-exist.

[14] Adam Goldman & Matt Apuzzo, *NYPD: Muslim Spying Led to No Leads, Terror Cases*, Associated Press, Aug. 21, 2012, *available at* http://ap.org/Content/AP-In-The-News/2012/NYPD-Muslim-spying-led-to-no-leads-terror-cases (emphasis added).

[15] *Id.*

actions" or "illegal activities," Muslim individuals, businesses, mosques, and other institutions are spied upon without any suspicion or evidence of wrongdoing.

The redacted NYPD documents released by the Associated Press reveal some of the fruits of the NYPD's suspicionless surveillance program. These reports are often organized by nationality and have names such as the Albanian Locations of Concern Report, the Egyptian Locations of Interest Report, the Syrian Locations of Concern Report, and the Moroccan Locations.[16]

The Moroccan Locations report is representative of the type of information found in the redacted documents that the Associated Press has released. *See* R. at 330-55 (Moroccan Locations Report). One section of that report contains information on businesses owned or frequented by Moroccans. Each entry has a listing for "Location Name," "Location Type," "*Ethnicity*," "Address," "City," "State," "Telephone," "Zip Code," "Precinct," and "Information of Note." The "Information of Note" section for a cafe and restaurant called "Jour et Nuit" is typical. R. at 338 (Moroccan

[16] Even the reports that are not organized by nationality—for example, the Newark, New Jersey Demographics Report, the Suffolk County Demographics Report, and the Nassau County Demographics Report—exhaustively document the nationality or ethnicity of mosques, businesses, and schools under surveillance. *See* http://ap.org/media-center/nypd/investigation (last accessed March. 20, 2014).

Locations Report). It states that "Jour et Nuit" (i) is a "medium sized cafe that serves Hookah, hot tea and Moroccan cuisine"; (ii) is "[o]wned and operated by two males of Moroccan descent"; (iii) is "in close proximity to the Al-Iman Mosque located at 24-30 Steinway Street"; (iv) has "approximately 18 tables and can hold up to 60 customers"; and (v) has "an ATM machine located by the entrance" R. at 338 (Moroccan Locations Report). That is *all* the information the Moroccan Locations report found notable about this restaurant. The report does not indicate that any suspicious activity or evidence of wrongdoing was found at "Jour et Nuit." This is true for the seventeen other businesses discussed in that section of the Moroccan Locations report. *See* R. at 331-39 (Moroccan Locations Report).

The other redacted ancestries/locations of concern reports released by the Associated Press contain equally mundane observations about life in the communities of Muslim "ancestries of interest." For example, the "Syrian Locations of Concern Report," notes that Oriental Travel Ltd. in Brooklyn is owned by a Syrian and that "a female named 'Rasha' [was observed] working in the travel agency, she recommends the 'Royal Jordanian Airline.'"[17] Likewise, the "Egyptian Locations of Interest Report," states

[17] Syrian Locations of Interest Report, http://hosted.ap.org/specials/interactives/documents/nypd/nypd-syria.pdf at 15.

that the Arabesq Cafe and Bazaar is owned by an Egyptian, that "[t]his cafe sells Egyptian antiques," and that "[f]lyers and local newspapers are available with listings posted for apartment for rent and available jobs."[18] Many of the locations discussed in the Syrian Locations of Concern Report and the Egyptian Locations of Interest Report are filled with similarly prosaic commentary.

The fact that page after page of these reports is virtually bereft of any hint of criminal wrongdoing is not surprising. For example, the mandate of the Demographics Unit, now known as the Zone Assessment Unit, extends well beyond probing suspicious activity. Its objectives include simply "[i]dentify[ing] and map[ping] residential concentrations within the Tri-State area," "[i]dentify[ing] and map[ping] ethnic hot spots," and "[m]onitor[ing] current events and investigations."[19] A redacted NYPD report released by the Associated Press boasts that the NYPD had identified 263 "ethnic hot spots," and it contains an "ethnic breakdown" of the ethnicities associated with the most "hot spots"—Pakistani, Jordanian, Bangladeshi, West Indian,

[18] Egyptian Locations of Interest Report, http://hosted.ap.org/specials/interactives/documents/nypd/nypd-egypt.pdf at 10.

[19] R. at 282 ("The Demographics Unit").

Sudanese, Syrian, and Egyptian.[20] The Demographics Unit reports attempt to identify and map locations associated with Muslim "ancestries of interest" in order to "gauge the general sentiment of [the] community" and to gain "the greatest insight into the general activity of [the] community."[21] Even the so-called "hot spots" bear no apparent relationship to wrongdoing.

Notably, the NYPD's extensive identifying and mapping of Muslim "ancestries of interest" and "ethnic hot spots" has not lead to the commencement of *any* criminal investigations or proceedings. Assistant Chief Galati testified under oath at his June 2012 deposition that, contrary to earlier statements issued by the NYPD, none of the information gathered by the Demographics Unit has led to an investigation or the commencement of criminal proceedings.[22]

(b) The Proceedings Below

(i) The FOIL Request and its Denial

AALDEF, Muslim Advocates, and the Brennan Center submitted the Request on September 21, 2011 to the FOIL Unit of the NYPD. R. at 66

[20] R. at 321 ("Strategic Posture 2006"). This report strongly suggests that the NYPD uses ethnicity and nationality interchangeably.

[21] Egyptian Locations of Interest Report, http://hosted.ap.org/specials/interactives/documents/nypd/nypd-egypt.pdf at 1.

[22] Adam Goldman & Matt Apuzzo, *NYPD: Muslim Spying Led to No Leads, Terror Cases*, Associated Press, Aug. 21, 2012, *available at* http://ap.org/Content/AP-In-The-News/2012/NYPD-Muslim-spying-led-to-no-leads-terror-cases.

(FOIL Request).[23] The NYPD acknowledged receipt of the Request—consisting of four general requests and 26 specific requests seeking information regarding record keeping and retention, policy guidelines and statistics pertaining to the NYPD's surveillance of Muslim individuals, business, and organizations throughout New York City and the surrounding areas—on September 30, 2011. R. at 128 (Letter from Michael Cappello, dated September 30, 2011). It estimated that it would provide a response on November 18, 2011. Instead of complying with this estimate, the NYPD unilaterally revised and extended its estimate in letters dated November 21, 2011, January 9, 2012, and February 17, 2012. R. at 129-131 (Letters from Michael Cappello, dated November 21, 2011, January 9, 2012, and February 17, 2012). The Brennan Center wrote to the NYPD on February 22, 2012 to alert the NYPD that FOIL did not permit these unilateral extensions of time. In its letter, the Brennan Center warned that any further extensions would be treated as a constructive denial subject to appeal.

Nearly six months after the initial Request, the NYPD denied the vast majority of the Request in a letter dated March 5, 2013 (the "Foil Denial").

[23] The FOIL Unit gave the Request File # 11-PL-105567.

R. at 77-79 (Letter from Richard Mantellino, dated March 5, 2013). The Foil Denial did not provide particularized justifications for its denial, but simply parroted the statutory provisions that purportedly exempted the requested records from disclosure. Specifically, the NYPD argued that FOIL does not require disclosure of the requested records because the Request (1) did not reasonably describe records; (2) sought records that, if disclosed, would result in an unwarranted invasion of privacy; (3) sought records that are exempt pursuant to the law enforcement, public safety, infrastructure, and information technology exemption; and (4) sought records that are exempt pursuant to the inter- and intra-agency materials exemption. R. at 78-79.

The NYPD disclosed only three documents, totaling 26 pages of records: pages from the Patrol Guide, Operations Order #7, and Administrative Guide Procedure 322-27. One document, which comprises 18 of the 26 pages, is publicly available on the internet.[24] The other two, relating to document retention and disposal policies, are plainly not relevant to the NYPD's program of suspicionless surveillance. More importantly, these 26 pages likely represent only a tiny fraction of the responsive records

[24] The revision to the Patrol Guide Procedure 212-72 is available at http://www.docstoc.com/doc/108070668/INTERIM-ORDER (last accessed Feb. 6, 2013).

because, according to the Associated Press, the NYPD "received daily reports on life in Muslim neighborhoods."[25] This insignificant disclosure is tantamount to a blanket withholding.

AALDEF, Muslim Advocates, and the Brennan Center timely appealed the denial of the Request on April 4, 2012, by submitting a letter to Commissioner Raymond Kelly. R. at 80-89 (Letter from Petitioners to Raymond Kelly, dated April 4, 2012). The letter demonstrated that the NYPD's denial of the Request was not supported by either facts or the governing law, and explained that FOIL required more than a bare recitation of the statutory exemptions. Notably, AALDEF, Muslim Advocates and the Brennan Center explicitly stated that they did not oppose receiving redacted records to the extent that any information in the requested records fell within a statutory exemption. R. at 82-83.

The NYPD denied the appeal in a letter dated May 8, 2012 (the "Appeals Denial") and offered nearly the same reasons as the earlier denial. R. at 90-99 (Letter from Jonathan David, dated May 18, 2012). The NYPD offered some additional explanation for why the statutory exemptions applied, arguing that FOIL provided blanket exemptions from disclosure of

[25] Matt Apuzzo & Adam Goldman, *Inside the Spy Unit that NYPD Says Doesn't Exist*, Associated Press, August 31, 2011, *available at* http://ap.org/Content/AP-In-The-News/2011/Inside-the-spy-unit-that-NYPD-says-doesn't-exist.

the requested records. However, the NYPD refused to produce any additional records—redacted or otherwise—because it argued that most of the statutory exemptions did not expressly provide for redactions.

(ii) The Article 78 proceeding with Fewer and Narrower Requests and its Rejection

Thereafter, AALDEF and Muslim Advocates commenced an Article 78 proceeding on September 8, 2012 to force the NYPD to comply with its obligations under FOIL and provide them with documents responsive to the Request. In the Article 78 proceeding, *AALDEF and Muslim Advoates narrowed the scope of documents requested*; they appealed only the denial of requests 12-13 and 16-26 in an effort to invite cooperation from the NYPD. *See* R. at 21 (Verified Petition ¶ 2). AALDEF and Muslim Advocates also offered to receive redacted documents or, in the alternative, have a group of "randomly selected responsive records" reviewed *in camera*. R. at 29 (Verified Petition). And yet, after full briefing on the issue, the Supreme Court, without reviewing any documents *in camera*, entered a decision on May 6, 2013 denying AALDEF and Muslim Advocates' FOIL request in its entirety (the "Decision"). *See* R. at 9 (Decision).

On June 21, 2013, Petitioners timely filed a Notice of Appeal and Pre-Argument Statement.

ARGUMENT

LEGAL STANDARD

The Court of Appeals has repeatedly held that FOIL "expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies." *Capital Newspapers v. Burns*, 505 N.Y.S2d 576, 578 (N.Y. 1986); *Gould v. N.Y.C. Police Dep't*, 653 N.Y.S.2d 54, 57 (N.Y. 1996) (same); *M. Farbman & Sons, Inc. v. N.Y.C. Health & Hosps. Corp.*, 476 N.Y.2d 69, 70-71 (N.Y. 1984) (same). FOIL "proceeds under the premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government." *Fink v. Lefkowitz*, 419 N.Y.S.2d 467, 470 (N.Y. 1979). To promote these principles, the Court of Appeals has made clear that "*[a]ll* government records are thus presumptively open for public inspection and copying." *Gould*, 653 N.Y.S.2d at 57 (emphasis added); *Capital Newspapers*, 505 N.Y.S.2d at 578 (same). Police records are no exception. *See, e.g.*, *Gould*, 653 N.Y.S.2d at 58 (holding that NYPD complaint follow-up reports are subject to disclosure under FOIL); *N.Y. Civil Liberties Union v. N.Y.C. Police Dep't*, Index No. 115928/09, slip op. at 11 (N.Y. Sup. Ct. Feb. 14, 2011) ("All government documents, including

police records, are presumptively available for public inspection and copying. . . .") ("N.Y.C. Civil Liberties Union I"); *see also Capital Newspapers v. City of Albany*, 63 A.D.3d 1336, 1339 (3d Dep't 2009) (holding that City of Albany must disclose police gun tag records); *Council of Regulated Adult Liquor Licenses v. N.Y.C. Police Dep't*, 300 A.D.2d 17, 18 (1st Dep't 2002) (holding that NYPD must disclose records concerning law enforcement history of certain nightclubs). Thus, under *Gould* and other Court of Appeals precedents, AALDEF and Muslim Advocates have a clear right under FOIL to the NYPD records sought in the Request.

Because AALDEF and Muslim Advocates are presumptively entitled to review the requested records, the NYPD has the burden to prove that a requested record "falls squarely within the ambit of one of [FOIL's] statutory exemptions" and is therefore not available for inspection. *Gould*, 653 N.Y.S.2d at 57. This is not an easy burden satisfy. The Court of Appeals has held that "[t]o ensure [FOIL's policy of] maximum access to government documents, the exemptions are to be narrowly construed." *Id.* Indeed, it is well-settled that "blanket exemptions . . . are inimical to FOIL's policy of open government." *Id.* Furthermore, it is the NYPD's burden to prove that a requested record falls squarely within an exemption "by articulating a particularized and specific justification for denying access."

Konigsberg v. Coughlin, 508 N.Y.S.2d 393, 396 (N.Y. 1986). In this case, the NYPD refused to redact any exempted information from the requested records and denied any access to them entirely; as a result, the NYPD had to prove that the entirety of every requested record fell within an exemption (or exemptions). *See Polansky v. Regan*, 81 A.D.2d 102, 104 (3d Dep't 1981) (holding that "not all of a document is necessarily exempt because a portion of it would be").

As discussed below, the Supreme Court erred when it held that the NYPD has satisfied this heavy burden. The lower court erroneously endorsed a sweeping vision of police secrecy that denies virtually all access to records of the NYPD's Muslim surveillance program, even when the records bear no relation to investigation of wrongdoing. The Supreme Court's holding was incorrect as a matter of law, not supported by the record developed in the trial court, and inimical to FOIL's policy of open government.

POINT I

The Supreme Court Erred in Holding that the Requested Records Were Wholly Exempt From Disclosure Under FOIL, Pursuant to the "Compiled for Law Enforcement Purposes" Exemption.

The Supreme Court erred in holding that *all* of the requested records are wholly exempt from disclosure because they were "compiled for law

enforcement purposes" and meet certain other enumerated conditions of the exemption. *See* R. at 10-11 (Decision). Such records are exempt from disclosure if doing so would "(i) interfere with law enforcement investigations or judicial proceedings; . . . (iii) identify a confidential source or disclose confidential information relating to a criminal investigation; or (iv) reveal criminal investigative techniques or procedures." Public Officers Law ("POL") § 87(2)(e)(i), (iii), and (iv).

As an initial matter, these exemptions do not apply to many potentially responsive records because they do not satisfy the threshold requirement of being "compiled for law enforcement purposes." The NYPD monitored communities of Muslim "ancestries of interest" outside of New York City—for example, it infiltrated student groups at Yale (Connecticut) and the University of Pennsylvania, and it spied on communities in New Jersey in an attempt to build databases of where Muslims in that state worked, shopped, and prayed.[26] As Andrew Schaffer, then the NYPD's deputy commissioner for legal matters has acknowledged, NYPD officers

[26] Chris Hawley, *NYPD monitored Muslim students all over Northeast*, Associated Press, Feb. 18, 2012, *available at* http://ap.org/Content/AP-In-The-News/2012/NYPD-monitored-Muslim-students-all-over-Northeast; Adam Goldman and Matt Apuzzo, *NYPD built secret files on mosques outside NY*, Associated Press, Feb. 22, 2012, *available at* http://ap.org/Content/AP-In-The-News/2012/NYPD-built-secret-files-on-mosques-outside-NY.

are "not acting as police officers in other jurisdictions,"[27] which makes the "law enforcement purpose" exemption unavailable for those extraterritorial activities.

As discussed below, even as to locations in which the NYPD did have jurisdiction, the NYPD did not satisfy its burden to show that *every* record created during the entire history of the NYPD's Muslim surveillance program was completely exempt from disclosure under these exemptions.

(a) The Supreme Court erred in holding that the requested records were wholly exempt from disclosure pursuant to the exemption concerning ongoing "law enforcement investigations or judicial proceedings."

FOIL exempts from disclosure documents "compiled for law enforcement purposes" if disclosure would "interfere with law enforcement investigations or judicial proceedings." POL § 87(2)(e)(i). New York courts interpreting this provision have made clear that this exemption applies only to records that would interfere with ongoing criminal investigations. *See, e.g., Legal Aid Soc'y v. N.Y.C. Police Dep't*, 274 A.D.2d 207, 214 (1st

[27] Matt Apuzzo and Adam Goldman, *See Something, Say Something, Uncover Nypd Spying*, Associated Press, Jul. 25, 2012, available at http://bigstory.ap.org/article/what-confused-911-caller-outs-nypd-spying-nj. This article was published after the Supreme Court issued its Decision. Nevertheless, the Court may take judicial notice of this article because it is in the public domain. *See Pershing v. Coughlin*, 214 A.D.2d 145, 149 (4th Dep't 1995) ("an appellate court may, in its discretion, take judicial notice for the first time on appeal of a fact which was not brought to the attention of the trial court, and may do so even for the purpose of reversing the judgment").

Dep't 2000) (holding that disclosure of records "to a defendant in a pending criminal prosecution would interfere with that proceeding"). By its plain language, section 87(2)(e)(i) does not apply to information collected about Muslim individuals and entities that bears no relationship to a criminal investigation, which describes virtually all of the volumes of reports released by the Associated Press and described above. As those reports, as well as the description of then Deputy Chief Galati make clear, a primary function of the Demographics Unit/Zone Assessment Unit is to collect information about "ancestries of interest" that is unrelated to any criminal investigation. *See* Statement of Facts at 12-13, 15.

In addition, § 87(2)(e)(i) does not apply to completed investigations in which no further action is contemplated. *See, e.g.*, *Council of Regulated Adult Liquor Licensees*, 300 A.D.2d at 18 (section 82(2)(e)(i) did not prevent disclosure because "the information at issue is now almost two years old and is for the most part not relevant to any current or future investigation or prosecution of one of the named nightclubs"); *Church of Scientology of N.Y v. State of N.Y.*, 403 N.Y.S.2d 224, 226 (1st Dep't 1978) (disclosure would not interfere with law enforcement investigations because "it is apparent from the facts submitted that the letters of complaint have already been responded to, have been the subject of inquiry, have resulted in no

further action, and that there presently exists no intention to commence any further action with regard to them"). Thus, the NYPD was required to produce surveillance documents that (i) never resulted in a criminal investigation or judicial proceeding or (ii) resulted in a criminal investigation or judicial proceeding that has been fully resolved.

The trial court record makes clear that some of the NYPD's surveillance documents undoubtedly fall into these categories. Assistant Chief Galati, the commanding officer of the Intelligence Division, testified under oath in June 2012 that the Demographics Unit's monitoring and mapping of Muslim "ancestries of interest" had not resulted in the commencement of any criminal investigations or proceedings. *See* Statement of Facts at 16. Furthermore, even without the NYPD's admissions, it stands to reason that at least some of the thousands of surveillance documents generated over the past decade are unrelated to, and therefore would not interfere with, pending criminal investigations or judicial proceedings.

Although the Supreme Court in this case recognized that the NYPD's suspicionless surveillance program "do[es] not culminate in prosecutions," it nevertheless held that the requested records were wholly exempt under section 87(2)(e)(i) because "disclosure might compromise a related case" or

interfere with "prospective activity" because the documents "may provide a basis for further investigation along lines of inquiry not heretofore pursued." R. at 11 (Decision) (citing *Lesher v. Hynes*, 19 N.Y.3d 57 (N.Y. 2012), *Council of Regulated Adult Liq. Licensees*, 300 A.D.2d at 18, and *DeLuca v. New York City Police Dep't*, 689 N.Y.S.2d 487 (1st Dep't 1999)). In other words, the Supreme Court held that every record created since the inception of the NYPD's Muslim surveillance program is wholly exempt from disclosure because each record "may" interfere with some unidentified future investigation or proceeding. No authority supports the application of FOIL exemptions under such sweeping, entirely speculative circumstances. Moreover, because neither the NYPD nor the Supreme Court identified an end to the surveillance program, the court's holding allows all records to be withheld indefinitely.

Not only is this holding contrary to FOIL's public policy, it is not supported by the cases that the Supreme Court relied on to reach this all-encompassing conclusion. To the contrary, *Council of Regulated Adult Liquor Licenses* highlights why the Supreme Court's ruling was in error. In that case, the First Department held that "the requested documents would not enable petitioners or similar entities to frustrate pending or prospective investigations or to use the information to impede a prosecution, and are

therefore not exempt for disclosure." 300 A.D.2d at 17. This Court reasoned that "the information at issue is now almost two years old and is for the most part not relevant to any current or future investigation or prosecution" and that "to the extent that documents refer to prospective policy activity, *those references should be redacted*." *Id.* (emphasis added). Thus, under *Council of Regulated Adult Liquor Licenses*, redaction is the appropriate remedy for records that may interfere with a prospective investigation or proceeding—a holding that the Supreme Court ignored completely.

Likewise, nothing in *DeLuca* or *Lesher* sanctions the wholesale withholding in perpetuity of every Intelligence Division record concerning the NYPD's Muslim surveillance program. *DeLuca* concerned an "open investigation" into the shooting of Police Officer William DeLuca who was incapacitated after being shot in the head while off duty in a Brooklyn bar. 689 N.Y.S.2d at 488. DeLuca's family filed a FOIL request seeking documents relating to this "open investigation." *Id.* This Court held that the family could not have access to this material until either (i) the NYPD determined based upon sufficient evidence that DeLuca was permanently incapable of being interviewed or (ii) the NYPD interviewed DeLuca. *Id.* After either of these events, this Court held that the NYPD must either close

the investigation, thereby allowing access to the records, or submit sworn statements that DeLuca's interview "furnished new information which *is being actively followed up*." *Id.* (emphasis added). Thus, unlike the Supreme Court's decision in this case, the *DeLuca* court plainly did not allow the NYPD to indefinitely withhold the requested records based on nothing more than the possibility that they "may" one day interfere with some speculative unidentified future investigation.

Similarly, although *Lesher* recognized that there may be some "unusual circumstance" in which records unrelated to a pending criminal investigation or judicial proceeding should be withheld because "disclosure might compromise a related case," the Court of Appeals noted that "criminal cases are typically wound up within a *reasonable time* after a crime is committed." 19 N.Y.3d at 68 (emphasis added). In the instant case, there is no criminal case or related case that will be would up in a reasonable time upon which the NYPD is relying. Furthermore, the *Lesher* court did not sanction the indefinite withholding of records based on the unusual circumstances of a related case. To be sure, the Court of Appeals noted that "cold cases" may be open "perhaps for a long time" or that cases concerning fugitives from justice "might be uncertain of occurrence or timing," but even here, the Court of Appeals' *dicta* referred to *specific identifiable* cold cases

or fugitives fleeing from justice, and not to all records within a particular NYPD department. *See id.*

(b) The Supreme Court erred in holding that the requested records would interfere with the *Handschu* litigation.

The only specific identifiable judicial proceeding that the NYPD claimed disclosure of the requested documents would interfere with is *Handschu v. Police Department of the City of New York*, which is pending in the United States District Court for the Southern District of New York. The Supreme Court erred when it accepted this argument, holding in passing that every record relating to the NYPD's Muslim Surveillance Program was exempt from disclosure because disclosure would interfere with discovery in *Handschu*. *See* R. at 12-13 (Decision) (citing POL § 87(2)(e)(i)).

The *Handschu* litigation was brought by political activists in 1971 alleging that NYPD's unconstitutional surveillance ad intelligence gathering violated their First Amendment rights. The parties settled the dispute in 1985 and entered into a Stipulation of Settlement that incorporated by reference a set of "Guidelines" that addressed future collection, retention, and dissemination of information by the NYPD's Intelligence Division. Although neither the settlement agreement nor the Guidelines provide plaintiffs' class counsel with the authority to request documents from the NYPD to monitor its compliance with the Guidelines, class counsel is

allowed to bring a dispute to court if it has a good faith belief that the NYPD has violated the Guidelines. One such dispute arose in 2011, when class counsel asserted that "they have reason to believe that the NYPD, in its investigation of the Muslim communicates that form a part of the plaintiff class, as a matter of policy retains information about class members' political activity that does not relate to potential unlawful or terrorist activity" in violation of the Guidelines. *See Handschu*, 2012 U.S. Dist. LEXIS 169255, at *23-24 (S.D.N.Y. Nov. 26, 2012). In connection with their allegations, class counsel moved to obtain discovery of the information collected and retained by the NYPD Intelligence Division's Demographics Unit.

As a general rule, discovery obligations in pending litigation have no impact on an agency's disclosure obligations under FOIL. *See Gould*, 653 N.Y.S.2d at 57 ("However, insofar as the Criminal Procedure Law does not specifically preclude defendants from seeking these documents under FOIL, we cannot read such a categorical limitation into the statute."); *M. Farban & Sons, Inc. v. N.Y.C. Health & Hosps. Corp.*, 476 N.Y.S.2d 69, 81 (N.Y. 1984) (holding that CPLR regarding discovery does not determine reach of FOIL and "that FOIL's mandate of open disclosure requires that an agency's public records remain as available to its litigation adversary as to any other

person"); *Pittari v. Pirro*, 696 N.Y.S.2d 167, 169 (2d Dep't 1999) ("Nor did the fact that Cajigas, as a defendant in a criminal proceeding, was entitled to disclosure pursuant to CPL article 240 preclude him from seeking disclosure pursuant to FOIL.").

Indeed, the only cases limiting NYPD's FOIL disclosure obligations in light of pending discovery concern discovery in *related criminal* cases. *See Collins v. N.Y.C. Police Dep't*, 2013 N.Y. Misc. LEXIS 77 (N.Y. Sup. Ct. Jan. 7, 2013) (noting that "the only judicial proceeding relevant for purposes of POL § 87(2)(e)(i) is a criminal proceeding involving the FOIL petitioner, or a related prosecution arising from the same transactions"); *see also The Law Offices of Adam D. Perlmutter, P.C. v. N.Y.C. Police Dep't*, 2013 NY Slip Op. 32532(U), at **7 (N.Y. Sup. Ct. Oct. 17, 2013) ("There are admittedly no pending specific law enforcement investigations or judicial proceedings at issue in this petition. . . . . The several thousand pending cases referenced by the various prosecutors above would not be disturbed by granting this petition. . . . .").[28] The particular concerns about giving criminal defendants greater access to discovery than they would be

[28] Indeed, even the case cited by the Decision, *Matter of Campbell v. N.Y.C. Police Dep't*, 2012 NY Slip Op 30145(U), at **4 (N.Y. Sup. Ct. Jan. 20, 2012), denied a FOIL appeal on the grounds that it would interfere with the petitioner's "pending criminal appeal."

entitled to receive under New York rules of criminal procedure are not relevant to this case.

But, even if the Supreme Court's holding were not erroneous as a matter of law (which it clearly was), as a practical matter, the *Handschu* litigation does not justify withholding responsive records because the *Handschu* proceeding is separate and apart from the NYPD's disclosure obligations under FOIL. Neither AALDEF nor Muslim Advocates are class plaintiffs; the *Handschu* settlement does not bar non-parties from using FOIL to access information concerning the NYPD's intelligence activities; and the *Handschu* court did not issue an order preventing the NYPD from disclosing records in another litigation.

Moreover, even if the Supreme Court's conclusory statement that "the requested documents would interfere with a pending discovery dispute in [the *Handschu* proceeding]" were correct, it still fails to account for the fact that any purported interference with the *Handschu* litigation did not warrant a blanket denial for every document requested. R. at 12 (Decision). The *Handschu* parties have moved to obtain discovery solely of information collected and retained by the NYPD Intelligence Division's Demographics Unit. R. at 179 (Memorandum in Support of Verified Answer); *see also Handschu et al. v. Police Dep't of the City of New York*, 2012 U.S. Dist.

LEXIS 169255, *23-24 (S.D.N.Y. Nov. 26, 2012). Because AALDEF and Muslim Advocates seek records relating to the NYPD's Muslim surveillance program irrespective of the particular NYPD unit that gathered the information, the *Handschu* plaintiffs, therefore, seek documents that are a subset of the documents that AALDEF and Muslim Advocates seek in this proceeding.

(c) The Supreme Court erred in holding that the requested records were wholly exempt from disclosure pursuant to the exemption concerning confidential sources or information relating to a criminal investigation.

The Supreme Court erred in holding that every record concerning the NYPD's suspicionless surveillance program was wholly exempt from disclosure under section 87(2)(e)(iii). *See* R. at 12 (Decision). That provision states that records "compiled for law enforcement purposes" may be withheld if disclosure would "identify a confidential source or disclose confidential information relating to a criminal investigation." POL § 87(2)(e)(iii). As an initial matter, this exemption does not apply to a vast number of the records at issue because they are not "relating to a criminal investigation." *See Gould*, 653 N.Y.S.2d at 57 (holding that FOIL's "exemptions are to be construed narrowly"). It is undisputed that, at least in some cases, the NYPD spied on Muslim individuals, businesses, schools and religious institutions *without* any suspicion of wrongdoing. *See* Statement of

Facts at 11-16. This is made clear in both the redacted documents released by the Associated Press—for example, stating that a location could be monitored simply because it attracted a "devout [Muslim] crowd"—and in the deposition of Assistant Chief Galati where he admitted that "a business can be labeled a 'location of concern' whenever police can expect to find "groups of Middle Easterners there." *Id.* at 11-12. Moreover, the NYPD engaged in the suspicionless surveillance in part to "[i]dentify and map residential concentrations within the Tri-State area" and "[i]dentify and map ethnic hot spots." *Id.* at 15-16. Such suspicionless surveillance and mapping cannot reasonably be considered as "relating to a criminal investigation." Consequently, any records pertaining to these activities fall outside of the scope of section 87(2)(e)(iii).

Furthermore, the trial court record establishes that at least some of the potentially responsive records do not contain any confidential information or could not possibly reveal confidential sources. The records released by the Associated Press reveal that some of the responsive records are filled with information that cannot be considered "confidential." *See Exoneration Initiative v. New York City Police Dep't*, 966 N.Y.S.2d 825, 829 (Sup. Ct. 2013) aff'd as modified, 980 N.Y.S.2d 73 (1st Dep't 2014) (holding that in order to claim a source is confidential under POL § 87(2)(e)(iii), an agency

must show that either the source was explicitly promised confidentiality or the circumstances give rise to a clear inference that such a promise was assumed by the source); *see, e.g.*, *Johnson v. New York City Police Dep't*, 694 N.Y.S.2d 14, 19 (1st Dep't 1999) ("While we do not disagree with the fundamental premise that information imparted in confidence to the police, and in reliance on the expectation that such confidentiality will be respected, should be exempt from FOIL, it is clear that respondents' attempt to apply such an exemption to all information imparted by all witnesses under any circumstances is overly broad."); *Newsday LLC v. Nassau Cnty. Police Dep't*, 42 Misc. 3d 1215(A) (N.Y. Sup. Ct. 2014) ("The statement that the records sought are highly sensitive, are protected even within NCPD itself, and that disclosure would pose an actual risk to the lives of the individuals involved, including undercover officers, is unsupported by any detail as to why and how records of payments to unidentified informants could result in the identification of such persons and the resultant risk.").

For example, the Moroccan Locations report noted, among other prosaic observations, that the Jour et Nuit restaurant and cafe had "an ATM machine located by the entrance." *See* Statement of Facts at 14. The Syrian Locations of Concern report observes that an employee at a Muslim owned travel agency in Brooklyn "recommends the Royal Jordanian Airline." *Id.*

Just as important, some of the requests by their nature do not call for information that could possibly reveal a confidential source. For instance, Requests 18 and 19 seek, among other things, maps and request 26 seeks, among other things, information concerning the duration or reason for intelligence gathering. *See* R. at 74 (FOIL Request). Finally, to the extent that certain records do contain source identifying or confidential information, New York courts have held repeatedly that the records should be disclosed with the exempt information redacted. *See Data Tree LLC v. Romaine*, 9 N.Y.3d 454, 464 (N.Y. 2007); *Johnson*, 694 N.Y.S.2d at 19-20 (rejecting the NYPD claim of a blanket exemptions and ordering a disclosure of the requested records with names and other identifying information redacted).

The Supreme Court's holding that every record was wholly exempt from disclosure under section 87(2)(e)(iii) ignored governing law such as *Data Tree* and *Johnson*. *See* R. at 12 (Decision). Although the Supreme Court cited *Johnson*, it inexplicably failed to address whether the requested records should be produced with the purportedly source revealing and/or confidential information redacted, to the extent any actually exists. *See id.* The lower court's ruling should be reversed on this basis alone.

The Supreme Court's holding should also be reversed because it uncritically accepted the Cohen Affidavit and ignored contrary evidence in the record. Citing the Cohen Affidavit, the lower court held it was "satisfied that respondents have demonstrated that the raw, unevaluated field reports, derivative reports, and intermediate reports contain not only highly detailed information, but also contain source revealing information that could potentially jeopardize the effectiveness of the NYPD's undercover program." R. at 12 (Decision) (citing the Cohen Aff. at ¶¶ 6-7, 41-42, 67). But even if this is true as to some records, the documents released by the Associated Press reveal that it is not true as to all records. *See supra* at 36-37. And some of the requests seek documents, such as maps and the compilation of demographic information for Muslim communities, that are very unlikely to reveal the identity of undercover officers and informants. *See id.*; R. at 12 (Decision) (stating that NYPD claimed "disclosure of the requested documents would easily reveal the identity of undercover officers and informants"). *See, e.g., Grand Cent. P'Ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999) ("A district court in a FOIA[29] case may grant

[29] FOIA case law is instructive when interpreting FOIL. *See, e.g., Lesher*, 19 N.Y.3d at 64 (FOIL's "legislative history . . . indicates that many of its provisions . . . were patterned after the Federal analogue. Accordingly, Federal case law and legislative history . . . are instructive" when interpreting such provisions [citations omitted]).

summary judgment in favor of an agency on the basis of agency affidavits if they contain reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith.") (internal citations omitted).[30]

Furthermore, the Supreme Court did not provide any reason why the end user reports should not be disclosed, which even the Cohen Affidavit conceded are "prepared in a manner protecting [confidential] sources." Cohen Aff. ¶ 23(d). Indeed, the NYPD has produced end user reports in an unrelated litigation. *See Dinler v. City of New York*, 607 F.3d 923, 931 (2d Cir. 2010) (noting that the NYPD "produced to plaintiffs the 600 pages of End User Report").

Given that the NYPD's own documents make clear that, contrary to the statements in the Cohen Affidavit, not *all* potentially responsive records contain "highly detailed," "source revealing information," the Supreme

[30] The Supreme Court's unquestioning acceptance of the Cohen Affidavit—even though there was contrary evidence in the lower court record—is particularly troubling because the NYPD has a well-documented history of making misstatements about its Muslim surveillance program. For example, the NYPD has previously denied that the Demographics Unit exists, but that obviously is not true. *See* Statement of Facts at 12 n.13. And after the NYPD finally acknowledged the Demographics Unit's existence, it falsely claimed that the information gathered by that unit had led to an investigation or the commencement of criminal proceedings. *See id.* at 16.

Court should not have uncritically accepted the Cohen Affidavit. Instead, the Supreme Court should have reviewed the responsive records *in camera* to determine which types of records actually contain confidential source revealing information and, to the extent that any records had such information, required the NYPD to produce the responsive records with the exempt information redacted. *See, e.g., N.Y. Civil Liberties Union v. N.Y.C. Police Dep't*, 2009 N.Y. Misc. Lexis 2542, at *13 (N.Y. Sup. Ct. June 26, 2009) (requiring NYPD to submit withheld records for *in camera* review); *Legal Aid Soc'y*, 274 A.D.2d at 210-12 (NYPD offered to submit withheld records for *in camera* review).

(d) The Supreme Court erred in holding that the requested records were wholly exempt from disclosure pursuant to the exemption concerning non-routine "criminal investigative techniques or procedures."

The Supreme Court held that every record relating to the NYPD's Muslim surveillance program was wholly exempt from disclosure under section 87(2)(e)(iv), which applies to information that was "compiled for law enforcement purposes" and whose disclosure would "reveal criminal investigative techniques or procedures, except routine techniques and procedures." *See* R. at 10, 12-13 (Decision); POL § 87(2)(e)(iv). This holding is fatally flawed for several reasons and should be reversed. First, many of the requested records plainly do not "fall[] squarely within the

ambit" of section 87(2)(e)(iv) and should have been produced. *Gould*, 653 N.Y.S.2d at 57 (NYPD had burden to prove a requested record "falls squarely within the ambit of one of [FOIL's] statutory exemptions"). For example, certain requests largely seek maps, policy guidelines, and statistics—none of which are likely to reveal investigative techniques and procedures. *See* R. at 73-75 (FOIL Request).

Second, the Court of Appeals has held that section 87(2)(e)(iv) applies only to non-routine investigative procedures, and records reflecting routine techniques and procedures should be disclosed. *Fink*, 419 N.Y.S.2d at 471 (holding that only non-routine investigative techniques are exempt from disclosure); *Beyah v. Goord*, 766 N.Y.S.2d 222, 226 (3d Dep't 2003) (police reports that merely set forth "the routine process of contacting participants and witnesses" are not exempt from disclosure). At least some records regarding the NYPD's suspicionless surveillance program concern routine techniques and procedures. In fact, the NYPD conceded in its denial of the requested records that it sometimes deploys routine "time-tested techniques and procedures in the course of its intelligence investigations." R. at 92 (Appeals Denial) (contrasting NYPD's use of "novel and unique" techniques with its use of "time-tested techniques"). The redacted records released by the Associated Press provide further evidence that the NYPD uses routine

techniques and procedures in its suspicionless surveillance program. For example, the "Moroccan Initiative" report describes "debriefings"—i.e., interviews—with Moroccan New Yorkers about topics such as English language classes, gyms, and barbershops that Moroccans frequent.[31] There is nothing novel our unique about such interviews. *See Beyah*, 766 N.Y.S.2d at 226. Nor is there anything "novel and unique" about monitoring Muslim owned businesses and noting whether "[l]ocal newspapers are available inside." *See* Statement of Facts at 14-15.

The NYPD appears to assume that it may withhold every record concerning its Muslim surveillance program because the program itself is a "confidential and non-routine" "terrorism" investigation. *See* R. at 92-94 (Appeals Denial). But section 87(2)(e)(iv) only exempts from disclosure information that would reveal non-routine "criminal investigative *techniques* and *procedures*." § 87(e)(iv) (emphasis added). This provision plainly does not shield entire categories or types of investigations from disclosure. The NYPD's overly broad—and, indeed, unprecedented—reading of the "criminal investigative techniques and procedures exemption" violates the

[31] R. at 352-55 (Moroccan Initiative).

Court of Appeals' mandate that "the exemptions are to be construed narrowly." *Gould*, 653 N.Y.S.2d at 57.

Finally, the Court of Appeals has made clear that if a responsive record contains both exempt information (non-routine investigative techniques) and non-exempt information (routine investigative techniques), the NYPD must produce the responsive records with the exempt information concerning non-routine investigative techniques redacted. *Fink*, 419 N.Y.S.2d at 472 (ordering disclosure of a manual created to instruct investigator regarding nursing home fraud, with specialized techniques subject to law enforcement exemption redacted).

The Supreme Court ignored binding Court of Appeals precedent, the nature of certain of the requests, the documents that have been released by the Associated Press, and once again chose to uncritically accept the Cohen Affidavit. It endorsed Deputy Commissioner Cohen's statement that each of the requested records "would provide 'a roadmap of investigation decisions, techniques and information that could be prepared'" because even "heavily redacted documents will contain 'strands of information . . . [that] can still be used to decipher sources, methods, and capabilities.'" R. at 12 (Decision) (quoting Cohen Aff. ¶ 19). And the court credited Deputy Commissioner Cohen's statement that the NYPD's "intelligence gathering

and counterterrorism activities 'constitute detailed, specialized methods of conducting investigation into [potential future terrorist attacks]." *Id.* (quoting Cohen Aff.).

The Supreme Court's wholesale endorsement of Deputy Commissioner Cohen's "strand" theory means that, in practice, no portion of any document created during the entire history of the NYPD's Muslim surveillance program can ever be disclosed because would-be terrorists could decipher the NYPD's secret investigative techniques by piecing together strands of innocuous information.[32] The two cases cited by the Supreme Court—*Matter of Urban Justice Center v. New York Police Department* and *Fink*—do not support this sweeping vision of police secrecy. *See* R. at 12 (Decision) (citing *Urban Justice Center* and *Fink*). *Fink* and *Urban Justice Center* sanctioned only the withholding of specific parts of particular records that would reveal non-routine techniques, not the complete withholding of an entire division's records. *See Fink*, 419 N.Y.2d at 471-72 (affirming withholding portions of an NYPD manual that would reveal "investigative techniques" into nursing home fraud but requiring the

[32] Presumably, even under the "strand" theory, some information could be disclosed after the NYPD's surveillance of individuals, businesses, and institutions associated with Muslim "ancestries of interest" concludes, but neither the Supreme Court nor Deputy Commissioner Cohen gave any indication of when that might occur.

disclosure portions of the manual that was "simply a routine technique" that would be used in any audit); *Matter of Urban Justice Ctr. v. N.Y. Police Dep't*, 2010 N.Y. Slip Op 32400, at *18-19 (N.Y. Sup. Ct. Sept. 1, 2010) (affirming withholding of *nine specific pages* in a policy manual that contained "detailed specialized methods of conducting" undercover prostitution investigations).

Just as important, the trial court record suggests that Deputy Commissioner Cohen's "strand" theory is, at best, an exaggeration. The Associated Press released redacted versions of thousands of pages of NYPD documents relating to the NYPD's monitoring of Muslim "ancestries of interest." *See* Statement of Facts. Yet, tellingly, the NYPD did not produce any evidence in the trial court that this disclosure has given would-be terrorists the keys to unlock the secrets of its surveillance program or otherwise interfered with legitimate police operations. *See generally* R. at 219-61 (Cohen Aff.). It is not surprising that the disclosure of these records, which are often filled with the NYPD's mundane observations about daily life in Muslim communities, *see* Statement of Facts, has not thwarted the NYPD's ability to investigate and respond to genuine terrorist threats. Moreover, Deputy Commissioner Cohen's "strand" theory is not credible on its face. It is neither plausible nor logical that *every* piece of information in

the thousands of potentially responsive records—no matter how innocuous or mundane—has the potential to unravel the NYPD's Muslim surveillance program.

Given these facts, the Supreme Court should not have uncritically adopted Deputy Commissioner Cohen's "strand" theory. Like the courts in *Urban Justice Center* and *Fink*, the Supreme Court should have reviewed the requested documents *in camera* to determine if the documents actually revealed non-routine criminal investigative techniques, and required the NYPD to produce redacted documents—to the extent that the documents actually contain exempt information. *See Fink*, 419 N.Y.S2d at 469 (reviewing documents *in camera* and ordering disclosure of police manual with specialized techniques subject to the law enforcement exemption redacted); *Matter of Urban Justice Ctr.*, 2010 N.Y. Slip Op 32400, at *18 (similar).

POINT II

The Supreme Court Erred in Holding that the Requested Records Were Wholly Exempt From Disclosure Pursuant to the Exemptions Concerning "Life or Safety" and "Privacy"

The Supreme Court's holding that each of the requested records were wholly exempt from disclosure because disclosure "would endanger the life or safety" of the undercover officers and confidential informants or "would

constitute an unwarranted invasion of privacy" is contrary to the governing law and the trial court record. R. at 13 (Decision) (citing POL §§ 87(2)(b), (f) and 89(2)). To invoke the "life or safety" exemption under section 87(2)(f), the NYPD must demonstrate that each of the requested records posed at least "a possibility of endangerment." *Matter of Bellamy v. New York City Police Dep't*, 87 A.D.3d 874, 875 (1st Dep't 2011). This "possibility" must be more than "speculative." *Cf. The New York Times Co. v. City of New York Police Dep't*, No. 116449, 2011 WL 5295044 (N.Y. Sup. Ct. Oct. 3, 2011). And to invoke the "privacy" exemption under §§ 87(2)(b) and 89(2), the NYPD must prove that disclosure would be "offensive and objectionable to a reasonable person of ordinary sensibilities." *See Bellamy*, 87 A.D.3d at 875; *see also Matter of New York Times Co. v. City of N.Y. Fire Dep't*, 4 N.Y.3d 477, 485 (N.Y. 2005). Finally, the "privacy" exemption requires the Court to balance the public interest in the disclosure of this information with the privacy interests at stake. *See id.* at 485-86 ("The recognition [of] a legally protected privacy interest, however, is only the beginning of the inquiry. We must decide whether disclosure . . . would injure that interest . . . and whether the injury to privacy would be 'unwarranted' within the meaning of FOIL's privacy exception.").

The NYPD had the burden to prove that each withheld record fell "squarely within the ambit" of the "life or safety" and the "privacy" exemptions. *See Gould*, 653 N.Y.S.2d at 57. The NYPD, however, did not satisfy its burden. Many of the Requests do not seek information identifying any individuals, but instead seek information regarding record-keeping, retention, and policy guidelines and statistics. Requests 12 and 13, for example, seek "guidelines, policies and procedures (in addition to the Patrol Guide)" relating to certain NYPD units, including the Demographics Unit, the Terrorist Interdiction Unit, and the Special Services Unit. R. at 72-73 (FOIL Request).

In addition, many of the documents released by the Associated Press demonstrate that at least some responsive documents do not even contain names or any other personal identifying information, making it impossible for the disclosure of those records to endanger anyone or invade their privacy. For example, a disclosed NYPD presentation about the Demographics Unit provides basic information about unit objectives, identification methods, and "ancestries of interest," but does not mention specific individuals, locations, or other identifying information. *See* R. at 281-87 (Demographics Unit).

The Supreme Court, however, ignored the nature of the requests and the already disclosed NYPD documents, and erroneously held that *all* of the requested documents could "impair the lives and safety of" certain individuals or could "contain personal information" about certain individuals that would "[cause] harm to the reputation of such individual[s]." R. at 13 (Decision). The cases the Supreme Court cites do not support the NYPD's blanket withholding. Many of the requested records, which likely do not contain any personally identifying information, differ drastically from the documents at issue in many of the cases that the Supreme Court and NYPD cite. *See, e.g.*, *Bellamy*, 87 A.D.3d 874, 875 (seeking documents listing names and statements of witnesses who did not testify at petitioner's trial); *Matter of Dobranski v. Houper*, 154 A.D.2d 736, 738 (3d Dep't 1989) (seeking unredacted personal reference cards of other inmates that would contain inmates' prison identification numbers, dietary requirements, and the names and addresses of their next of kin); *Matter of Scarola v. Morgenthau*, 246 A.D.2d 417, 418 (1st Dep't 1998) (denying access to statements made by individuals alleged by petitioners to be "known informants"). By failing to acknowledge these important distinctions, the Supreme Court once again ignored the factual record before it.

The Supreme Court also committed reversible error because it failed to recognize that the exempt material could be redacted. Indeed, the very cases that the Supreme Court cites acknowledge this possibility. *See, e.g.*, *Stronza v. Hoke*, 148 A.D.2d 900, 900 (3d Dep't 1989) (involving FOIL requests seeking only *unredacted* documents after petitioners had received a production of redacted documents from respondents); *Matter of Bellamy*, 87 A.D.3d at 875 (same); *see also Sanders v. Bratton*, 278 A.D.3d 10, 13 (1st Dep't 2000) (finding that most records sought in FOIL request with regard to undercover officers' expenses and daily logs could be redacted and released without risking danger to the officers). Notably, unlike the Supreme Court's order, none of these cases sanction the blanket denial and withholding of all documents.

Additionally, the Supreme Court did not even attempt, as required by §§ 87(2)(b) and 89(2), to balance the public interest in the disclosure of this information with the privacy interests at stake. The Supreme Court reasoned only that the "disclosure that an individual or entity may have been named during the course of an investigation of possible terrorist activity or otherwise involved in the investigation . . . [could cause] harm to the reputation of such individual or entity." R. at 13 (Decision). The Supreme Court did not once acknowledge the enormous public interest in the

disclosure of NYPD's Muslim surveillance program, and the fact that the release of these records would serve the public interest by providing much-needed transparency and accountability for agency action. *See Associated Press v. U.S. Dep't of Defense*, 554 F.3d 273, 285 (3d Cir. 2009).

Moreover, the Supreme Court assumed, contrary to the record before it, that all responsive records concerned an investigation of "terrorist activity." But the NYPD records disclosed by the Associated Press make clear that a large number of these records do little more than document daily life in communities of Muslim "ancestries of interest." *See* Statement of Facts at 11-16. Whatever harms may befall a business when it is revealed that the NYPD monitored it simply because, in the words of Assistant Chief Galati, "groups of Middle Easterners [were] there," pale in comparison to the public's interest in gaining greater insight into the NYPD's Muslim surveillance program. The Supreme Court's repeated failure to consider the record before it, coupled with its refusal to weigh the public interest against the privacy interests of those swept up in the NYPD's surveillance program, resulted in a lop-sided decision that is contrary to the controlling law and FOIL's policy of open government.

POINT III

The Supreme Court erred in denying access to certain of the requested documents on the ground that they were inter- or intra-agency materials

AALDEF and Muslim Advocates' request No. 20 seeks "[r]ecords provided by the New York Taxi and Limousine Commission to the NYPD in connection with the NYPD's counterterrorism investigations or information gathering activities and records reflecting the NYPD's request for such records from the TLC." R. at 74 (FOIL Request). The Supreme Court erroneously held that this request was exempt from disclosure under section 87(2)(g), which applies to certain "inter-agency or intra-agency." *See* R. at 14 (Decision). Section 87(2)(g) was designed "to permit people within an agency to exchange *opinions*, *advice* and *criticism* freely and frankly, without the chilling prospect of public disclosure." *New York Times Co. v. City of New York Fire Dep't*, 4 N.Y.3d at 488 (emphasis added). Thus, section 87(2)(g) expressly does not exempt from disclosure "statistical or factual tabulations or data," "instructions to staff that affect the public," or "final agency policy or determinations." *See generally* POL § 87(2)(g)(i)-(iii); *see also Gould*, 653 N.Y.S.2d at 58 ("Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or

determination."). Notably, New York courts have roundly rejected the argument that "an entire record can be exempt from disclosure where it contains both factual and non-factual information. Even if a document contains exempt portions, the remainder of the document must be disclosed." *Newsday, Inc. v. New York Police Dep't,* 518 N.Y.S.2d 966, 974 (1st Dep't 1987); *see also Ingram v. Axelrod*, 456 N.Y.S.2d 146 (3d Dep't 1982); *Polansky*, 81 A.D.2d at 104.

The NYPD refused to confirm or deny whether documents responsive to Request 20 contained any factual information. R. at 210 (NYPD's Memorandum of Law in Support of Verified Answer). Instead, the NYPD argued that all information in these records—whether factual or non-factual—would reveal "the mental impressions and deliberative process of the NYPD regarding the investigative value of the requested material." *Id.*

The Supreme Court apparently accepted these arguments, holding that records responsive to Request 20 "were properly withheld pursuant to the inter and intra-agency exemption." R. at 14 (Decision). But binding Court of Appeals precedent makes clear that the Supreme Court was not at liberty to accept the NYPD's novel argument that factual data could be not disclosed because that would reveal the NYPD's "mental impressions" concerning what facts are considered important. *See, e.g.*, *The New York*

Times Co. v. City of New York Fire Dep't, 4 N.Y.3d at 487 (holding that Fire Department dispatch calls from September 11, 2001 contained a mix of factual and non-factual data and must be "disclosed to the extent they consist of factual statements or instructions affecting the public, but that they be redacted to eliminate nonfactual material—i.e., opinions and recommendations"); *Matter of Gould v. N.Y. City Police Dep't*, 89 N.Y.2d 267, 277 (1st Dep't 1996) (rejecting the Respondent's argument that none of the content of complaint follow-up reports constituted factual data; providing a definition of factual data for the purposes of the Public Officers Law § 87; and emphasizing that details such as names, addresses, physical descriptions of individuals, and indications of actions taken at crime scenes all constituted factual data); *Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133 (N.Y. 1985) ("To the extent the reports contain "statistical or factual tabulations or data" (Public Officers Law § 87(2)(g)(i)), or other material subject to production, they should be redacted and made available to appellant.").

The Supreme Court should have reviewed the responsive records *in camera*, as AALDEF and Muslim advocates proposed, to determine if they contained factual information, and should have required the NYPD to disclose any responsive factual information with the non-factual opinion

material redacted. *See, e.g., N.Y. Civil Liberties Union v. N.Y.C. Police Dep't*, 2009 N.Y. Misc. Lexis 2542, at *13 (requiring NYPD to submit withheld records for *in camera* review); *Legal Aid Soc'y*, 274 A.D.2d at 210-22 (NYPD offered to submit withheld records for *in camera* review). The Supreme Court's holding creates dangerous precedent that would allow the exception to swallow the rule. Taken to its logical conclusion, it effectively shields from disclosure all factual data within the Intelligence Division because *any* factual data, no matter how unadorned, could arguably "reflect the mental impressions and deliberative process of the NYPD regarding the investigative value of the requested material." But this Court need not pause long to consider the implications of the lower court's holding; that holding should be reversed because it is plainly contrary to *New York Times*, *Gould*, and numerous other cases holding the inter- and intra-agency exemption does not prevent the disclosure of factual information.

POINT IV

The Supreme Court erred in determining that AALDEF and Muslim Advocates did not "reasonably describe" the documents requested

The Supreme Court held that AALDEF and Muslim Advocates did not "reasonably describe" the requested records as required by section 89(3), but this holding should be reversed because it was, once again, based on an

uncritical acceptance of the Cohen Affidavit.[33] *See* R. at 14 (Decision). Based on publicly available information found in the Associated Press reports, AALDEF and Muslim Advocates submitted detailed requests for records related to the NYPD's surveillance of Muslim, Arab, and South Asian mosques, individuals, businesses, schools and other institutions within and outside New York City. The requests include a factual background section, a legal background section, and encompass eleven single-spaced pages, including sixty-one footnotes. *See generally* R. at 66-76 (FOIL Request). The requests therefore easily satisfied FOIL's requirement to "*reasonably* describe" the requested records.[34]

The Supreme Court erroneously reached a contrary conclusion because it unquestioningly relied on the Cohen Affidavit's statement that

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[33] Section 89(3), in relevant part, provides that "[e]ach entity subject to the provisions of this article, within five business days of the receipt of a written request for a record *reasonably described*, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with subdivision five of this section." POL § 89(3) (emphasis added).

[34] Tellingly, although the NYPD contends that it required more information to locate responsive records, the NYPD *never* asked AALDEF and Muslim Advoates to describe the records in more detail. This is just further evidence that the NYPD's claim that the Requests did not "reasonably describe" the documents is disingenuous; the NYPD never intended to produce the documents, regardless of how the requested documents were described.

"there is no combination of search terms that would yield the universe of responsive documents" because "the vast majority of investigative records held by the NYPD Intelligence Division are not filed or organized along racial, religious or ethnic classifications." *See* R. at 15 (Decision) (citing Cohen Aff. at ¶ 10). The documents released by the Associated Press refute this assertion. The Intelligence Division has a unit called the *Demographics* Unit and, as one document released by the Associated Press revealed, its moniker lived up to its mission.[35] According to the NYPD's own document, the three identified objectives of the Demographics Unit were to (i) "[i]dentify and map *ethnic* residential concentrations within the Tri-State area," (ii) "[i]dentify and map *ethnic* hot spots," and (iii) "[m]onitor current events and investigations and pulse the identified [*ethnic*] hot spots as appropriate." *See* Statement of Facts at 15 (emphasis added). A redacted NYPD report released by the Associated Press boasts that the NYPD had identified 263 "*ethnic* hot spots," and it contains an "*ethnic* breakdown" of the ethnicities associated with the most "hot spots"—Pakistani, Jordanian, Bangladeshi, West Indian, Sudanese, Syrian, and Egyptian. *See id.* at 15-16

[35] The Demographic Unit's name was changed to the more inscrutable Zone Assessment Unit in 2010.

(emphasis added).[36] Given the NYPD's singular focus on identifying, mapping, and monitoring *ethnic* residential concentrations and "hot spots," it is very likely that there are *many* more Intelligence Division documents "filed or organized along racial, religious or ethnic classifications." *See, e.g.*, *Grand Cent. P'Ship, Inc.*, 166 F.3d at 478 (holding that summary judgment may not be granted if affidavit is contradicted by evidence in the record or by evidence of agency bad faith) *see also Scott*, 550 U.S. at 380 (similar).

Moreover, even if the "vast majority" of documents are not organized by ethnicity, the Supreme Court erred when it failed to address AALDEF and Muslim Advocates' argument that the NYPD has other ways to locate the responsive records—namely, by nationality. The Associated Press has released NYPD documents that are organized by nationality: the Albanian Locations of Concern Report, the Egyptian Locations of Interest Report, the Syrian Locations of Concern Report, and the Moroccan Locations. *See* Statement of Facts at 13. There are likely many similar reports that have not been disclosed for the NYPD maintains a list of twenty-eight Muslim "ancestries of interest." *See id.* Indeed, an Intelligence Division document

[36] This document suggests that, at least in some instances, the NYPD uses nationality and ethnicity interchangeably.

with the subject "Nationality Trends Working Group" states that the mission of the group is to create "analytic products that will be organized by nationality and will not represent compilations of data." R. at 340 (Moroccan Locations Report). The document also states that the group "will harvest the intelligence contained in the pertinent DD5s and will incorporate that intelligence in a nationality-specific report." *Id.* Thus, the NYPD's purported inability to search for responsive records by ethnicity in no way relieved the NYPD of its duty under FOIL to conduct a search for potentially responsive records.

POINT V

The Supreme Court erred in determining that certain of the records were wholly exempt from disclosure by state or federal statute

The Supreme Court erroneously held that all records responsive to Requests 12, 13, and 20 were wholly exempt from disclosure because they were "generated by the NYPD and TLC for use by the CIA." R. at 14 (Decision). Section 87(2)(a) allows an agency to withhold records that are specifically exempted from disclosure by state or federal statute, so long as the agency makes a showing that the record is within the confidentiality provision of the exempting statute. *See LaRocca v. Bd. of Educ. Of Jericho Union Free Sch. Dist.*, 632 N.Y.S.2d 576, 580 (2d Dep't 1995); *Muniz v. Roth*, 620 N.Y.S. 2d 700, 703 (Sup. Ct. 1994).

The NYPD argued that Requests 12, 13, and 20 were exempt because its surveillance efforts are "often undertaken in cooperation, coordination and in conjunction with . . . the CIA and the New York City Taxi and Limousine Commission," and as a result, AALDEF and Muslim Advocates' requests for documents concerning the NYPD's activities conducted in cooperation with the CIA or the TLC should be withheld pursuant to section 102A(i)(1) of the National Security Act ("NSA") and the inter- and intra-agency exception of federal Freedom Of Information Act ("FOIA"). R. at 212 (NYPD's Memorandum of Law in Support of Verified Answer). That the NYPD argued that certain efforts are "often" undertaken with other agencies emphasizes its failure to satisfy its burden to show that Requests 12, 13, and 20 fell "squarely within the ambit" of those federal statutes. Any records implicating the NYPD's activities with the CIA are but a small sub-category of the documents sought in Requests 12 and 13; the remainder of those Requests is directed towards the Demographics Unit, the Terrorist Interdiction Unit, and the Special Services Unit. *See* R. at 72-73 (FOIL Request). And Request 20, which asks for records provided by the TLC to the NYPD, does not, on its face, ask for *any* information having to do with the CIA. *See id.* at 74. Thus, even a cursory analysis of the Requests makes it impossible to accept the NYPD's wholly unsupported assumption that *all*

of the documents responsive to Requests 12, 13, and 20 "involve sources and methods of operation, and undoubtedly include memo and letters exchange with the CIA." R. at 213 (NYPD's Memorandum of Law in Support of Verified Answer). The Supreme Court, therefore, committed reversible error when it held that all records responsive Requests 12, 13, and 20 were exempt because they related to joint operations with the CIA.[37] R. at 14 (Decision).

Just as important, section 102A(i)(1) of the NSA applies only to "intelligence sources and methods" and the federal inter- and agency-exemption applies only to non-final agency documents that reflect the "personal opinions of the writer," as opposed to the agency. *See* 50 U.S.C. §§ 403-1(i)(1); *Grand Cent. P'ship, Inc.*, 166 F.3d at 482 (holding that the federal inter-and intra-agency exemption applies when "the document "(i) formed an essential link in a specified consultative process, (ii) reflect[s] the personal opinions of the writer rather than the policy of the agency, and (iii) if released, would 'inaccurately reflect or prematurely disclose the views of the agency"). Thus, to extent that the NSA and federal inter-and-intra agency exemptions are even applicable to Requests 12, 13, and 20, the

[37] The Supreme Court should have conducted an *in camera* review to determine if records responsive to Request 20 concerned joint operations with the CIA and if they otherwise fit within section 87(2)(a).

Supreme Court should have ordered the disclosure of the responsive records with any "intelligence sources and methods" and any non-final "personal opinions" redacted. *See Polansky*, 81 A.D.2d at 104 (holding that "not all of a document is necessarily exempt because a portion of it would be"); *Hopkins v. U.S. Dep't of Hous. & Urban Dev.*, 929 F.2d 81, 84 (2d Cir. 1991) (the federal FOIA requires redaction of factual materials if it is "reasonably segregable" from the exempt non-final opinion information"). The Supreme Court's failure to take this action was contrary to controlling law, and its holding should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Supreme Court and order the NYPD to produce all responsive records with any exempt information redacted. Alternatively, this Court should reverse and remand to the Supreme Court with instructions to review a sampling of potentially responsive records *in camera* and order the NYPD to produce all responsive records with the exempt information redacted.

Dated: New York, New York
March 21, 2014

Respectfully submitted,

Samaa A. Haridi
Gregory Silbert
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
[Tel.] (212) 310-8000
[Fax] (212) 310-8007

Attorneys for Petitioners-Appellants Asian American Legal Defense and Education Fund and Muslim Advocates

Printing Specifications Statement

I, Gregory Silbert, attorney for the Petitioners-Appellants, hereby certify that this brief is in compliance with § 600.10(d)(1)(v). The brief was prepared using Microsoft Word 2010. The typeface is Times New Roman. The main body of the brief is in 14 point. Footnotes and Point Headings are in compliance with § 600.10(d)(1)(i). The brief contains 13,085 words counted by the word-processing program.

Dated: March 21, 2014

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

.....

ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, and MUSLIM ADVOCATES

Petitioners,

-against-

Index No.: 103802/2012

NEW YORK CITY POLICE DEPARTMENT, and RAYMOND KELLY, in his official capacity as Commissioner of the New York City Police Department,

PRE-ARGUMENT STATEMENT

Respondents.

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

.....

Petitioners-Appellants, the Asian American Legal Defense and Education Fund ("AALDEF") and Muslim Advocates, respectfully submit this Pre-Argument Statement pursuant to § 600.17(a) of the Rules of the Appellate Division, First Department:

1. Title of Action: The title of the action is as captioned above.

2. Full Names of Parties: The full names of the original parties are as stated in the caption above.

3. Name, Address, and Telephone Number of Counsel for Petitioner-Appellants:

Samaa A. Haridi
Gregory Silbert
767 Fifth Avenue
New York, NY 10153
Tel: (212) 310-8000
Fax: (212) 310-8007

4. Name, Address, and Telephone Number of Respondent:

Michael A. Cardozo
Jeffrey S. Dantowitz
Corporation Counsel for the City of New York
100 Church Street, Room 2-121
New York, NY 10007
Tel: (212) 788-0939

5. Court and County From Which Appeal Is Taken: This appeal is taken from the Decision and Judgment of the Supreme Court of the State of New York, County of New York (Hunter, J.) dated May 6, 2013 (the "Order") and entered in the Office of the County Clerk of the County of New York on May 21, 2013. A true and correct copy of the Notice of Entry of the Order is attached hereto as Exhibit A.

6. Nature of Cause of Action: AALDEF and Muslim Advocates seek NYPD records of activities unrelated to criminal investigations involving a controversial religion-based spying program. Their request emanated from a series of Pulitzer Prize-winning articles in August 2011 that revealed the New York Police Department's ("NYPD") extensive spying on Muslims in New York and other locations in the Northeast. In an effort to better understand the policies, procedures, and scope of the NYPD's covert surveillance program, AALDEF and Muslim Advocates submitted requests for documents and information under the Freedom of Information Law ("FOIL") in September 2011. The request was particularly important because NYPD officials had publicly misstated the nature of the program on multiple occasions. In March 2012, the NYPD denied the requests, withholding all but 26 pages of every record created since September 11, 2001 relating to its surveillance of the Muslim community in the Northeast. AALDEF and Muslim Advocates appealed the NYPD's blanket denial in April 2012 through the NYPD's Records Access Appeals Officer, but the NYPD denied the appeal in May 2012. On September 18, 2012, AALDEF and Muslim Advocates commenced a proceeding under Article

78 of the Civil Practice Law and Rules ("Article 78 petition") to compel the NYPD to comply with its obligations under FOIL and provide Petitioners with documents and information responsive to a limited subset of their requests.

7. Result Reached in the Court Below: On May 6, 2013, the Supreme Court dismissed AALDEF and Muslim Advocates' Article 78 petition in its entirety, holding that various exemptions to FOIL shielded the requested documents and information from disclosure.

8. Grounds for Seeking Reversal: By dismissing the Article 78 petition in its entirety, the Supreme Court created a blanket exemption for almost every NYPD record created since 2001 that relates to the NYPD's surveillance of Muslims in the Northeast. The Supreme Court's blanket exemption is contrary to the Court of Appeals's clear holding in *Gould v. New York City Police Department* that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government." 653 N.Y.S.2d 54, 57 (N.Y. 1996). To make matters worse, the Supreme Court created this blanket exemption without reviewing any of the requested records to determine if they fell within an exemption. Instead, the Supreme Court simply accepted at face value the NYPD's assertions concerning the requested records and ignored AALDEF and Muslim Advocates' request for an *in camera* review of randomly selected responsive documents.

AALDEF and Muslim Advocates' grounds for appeal also include, without limitation, the following:

(a) The Supreme Court erred in holding that requested records were wholly exempt from disclosure because they were "compiled for law enforcement purposes and which, if disclosed would: (i) interfere with law enforcement investigations or judicial proceedings; . . .

(iii) identify a confidential source or disclose confidential information relating to a criminal investigation; or (iv) reveal criminal investigative techniques or procedures." *See* Public Officers Law § 87(2)(e)(i), (iii), and (iv).

(b) The Supreme Court erred in determining that the requested documents were wholly exempt from disclosure because, if disclosed, they would constitute an unwarranted invasion of privacy under the provisions and/or endanger the life or safety of any person. *See* Public Officers Law §§ 87(2)(b), 89(2), and 87(2)(f).

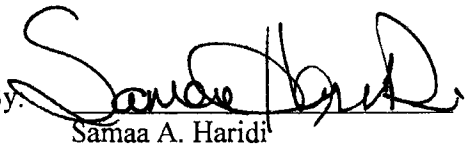
(c) The Supreme Court erred in denying access to certain of the requested documents on the ground that they were inter- or intra-agency materials. *See* Public Officers Law § 87(2)(g).

(d) The Supreme Court erred in determining that AALDEF and Muslim Advocates did not "reasonably describe" the documents requested. *See* Public Officers Law § 89(3).

(e) The Supreme Court erred in determining that certain of the records were wholly exempt from disclosure because they were specifically exempted from disclosure by state or federal statute. *See* Public Officers Law § 87(2)(a).

Dated: New York, New York
June 21, 2013

Respectfully submitted,
WEIL, GOTSHAL & MANGES LLP

By: 
Samaa A. Haridi
Gregory Silbert
Weil, Gotshal & Manges LLP

767 Fifth Avenue
New York, NY 10153
Tel: (212) 310-8000
samaa.haridi@weil.com
Counsel for Asian American Legal Defense and Education Fund and Muslim Advocates