Granted

No. 98-1904

In the Supreme Court of the United States

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF JUSTICE, AND UNITED STATES DEPARTMENT OF STATE,
Petitioners,

v.

LESLIE R. WEATHERHEAD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Must the Government prove to the Court that it has satisfied the requirements of the Executive order relied upon to invoke Exemption 1 to the Freedom of Information Act, which specifically requires that information withheld thereunder be "in fact properly classified pursuant to [the applicable] Executive order," or is an Exemption 1 claim by the Government beyond judicial review absent an explanation for the claim that is "implausible (even after giving it utmost deference)"?

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. Founded in 1958, the NACDL is dedicated to advancing and disseminating knowledge regarding criminal law and practice, to promoting

[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court as required by Supreme Court Rule 37. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amicus*, its members, or counsel, contributed money or services to the preparation or submission of this brief.

research in the field of criminal law and furthering the integrity, independence and expertise of criminal defense lawyers. To advance these objectives, the NACDL has appeared before this Court regularly as an *amicus*. *See, e.g., Strickler v. Greene*, 119 S. Ct. 1936 (1999); *City of Chicago v. Morales*, 119 S. Ct. 1849 (1999); *Lilly v. Virginia*, 119 S. Ct. 1887 (1999); *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310 (1995); *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139 (1990).

The NACDL's objectives include ensuring the proper administration of justice and ensuring that federal statutes, including the open government laws, are construed and applied properly. The NACDL has used and instructed others on the use of the Freedom of Information Act ("FOIA") and has litigated cases under FOIA including *Nat'l Ass'n of Criminal Defense Lawyers, Inc. v. Dep't of Justice*, 182 F.3d 981 (D.C. Cir. 1999) (exposing major problems in the FBI crime laboratory).

The NACDL has an interest in this FOIA case because the Court's resolution of it will affect the access of criminal defendants and their lawyers to all types of law enforcement-related records that involve or reflect communication between the United States and a foreign government. Records from foreign governments play an ever increasing role in United States law enforcement because of globalization. These records provide critical assistance to defense lawyers seeking to understand and fairly defend criminal prosecutions.

Respondent and the NACDL do not seek access to records received from a foreign government which are shielded from release by Exemption 7 to the FOIA.[2]

[2] Exemption 7 provides that the FOIA does not apply to matters that are:

> records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or safety or physical safety of any individual.

5 U.S.C. § 552(b)(7).

Importantly, the Government has never invoked Exemption 7 in this case. Instead, the Government invokes Exemption 1, which protects from disclosure records whose production would harm national security. The Government also asks that the Court create a new standard of judicial review, not provided for by the FOIA, to sustain its Exemption 1 claim. The Court should not grant the Government's request for unfettered use of Exemption 1 simply because Exemption 7 is not available and the law enforcement material requested involves communication with a foreign government.

The NACDL asks the Court to rule in favor of Respondent Weatherhead's position and affirm the decision of the United States Court of Appeals for the Ninth Circuit that the Government has not carried its burden of proof under Executive Order 12,958 and therefore may not rely upon FOIA's Exemption 1 here to withhold information from the public.

STATEMENT OF THE CASE

This is a case of statutory interpretation. The issue is whether the Freedom of Information Act ("FOIA") requires independent judicial review of the Government's compliance with Executive Order 12,958 where the Government relies on FOIA's Exemption 1 to withhold a letter from the public. Exemption 1 protects from public disclosure only those matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Executive Order 12,958 controls the Government's application of Exemption 1, and explicitly requires the Government to identify or describe the damage to national security that reasonably could be expected to occur from the disclosure. The Court of Appeals ruled that the Government's affidavits in this case contain only conclusory statements that disclosure of the extradition letter at issue could harm national security by breaching the trust between the United States and the United Kingdom. The Court of Appeals correctly exercised its authority under Section (a)(4) of the FOIA to review *de novo* the Government's affidavits and the letter and concluded that the Government had failed to articulate the harm to national security required to satisfy Executive Order 12,958 and thus Exemption 1 to the FOIA. *Weatherhead v. United States*, 157 F.3d 735 (9th Cir. 1998), *cert. granted*, 120 S. Ct. 34 (1999).

The parties to this action agree that Congress requires *de novo* judicial review of Government exemption claims under the FOIA, including Exemption 1 national security claims. In this regard, the parties also agree that Congress requires the Government to prove that its Exemption 1 claim is proper and authorizes *in camera* review of the record in question to facilitate *de novo* judicial review. Indeed, FOIA is unequivocal on these points. Section (a)(4)(B) of the FOIA provides that in each case "the court shall determine

the matter *de novo*, and may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld under *any* of the exemptions set forth in subsection (b) of this section, and the *burden* is on the *agency* to sustain its action." 5 U.S.C. § 552(a)(4)(B) (emphasis added).

The Government accepts that it may not deny public access to the letter at issue if *de novo* review requires it to prove (absent utmost deference) that it has met the specific requirements of the current Executive Order 12,958 setting forth the standards for the administration of Exemption 1. That Executive order forbids classification of information unless "the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security *and* the original classification authority is able to identify or describe the damage." Executive Order No. 12,958, § 1.2(a)(4) (emphasis added). Unable to articulate the harm to national security from disclosure of the record at issue in this case, as is required by Executive Order 12,958, the Government asks the Court to abrogate the text of FOIA and conclude that *de novo* review of an Exemption 1 claim requires complete deference by the Court regardless of how general or conclusory the explanation for the exemption claim. According to the Government, any national security claim should be sustained, regardless of the specific requirements of the President's Executive order, unless the Government's explanation is entirely "implausible (even after giving it utmost deference)." Brief for the Petitioners ("Pet. Br.") at 47.

The Government strains to reconcile its opposition to genuine *de novo* judicial review of its Exemption 1 claims with the 1974 Amendments to the FOIA, which it admits "were intended to give courts some role in reviewing decisions to withhold information under Exemption 1...." Pet. Br. at 46. In 1974, Congress amended the FOIA in response to this Court's decision in *E.P.A. v. Mink*, 410 U.S. 73, 93 S.Ct. 827 (1973). The Court in *Mink* rejected the

argument that Congress in enacting the FOIA had intended the substantive propriety of the Government's classification decisions to be subject to judicial review. Congress responded by amending the FOIA in 1974 to expressly provide for *de novo* judicial review of the Government's substantive and procedural compliance with its national security executive order. In particular, Congress provided for *in camera* review of records to facilitate the Court's *de novo* review of Government Exemption 1 claims, and narrowed Exemption 1 to require that information withheld thereunder is "in fact properly classified pursuant to [an] Executive order." 5 U.S.C. § 552(b)(1). It is this plain statutory requirement of Exemption 1 and the plain language of the sitting President's Executive order that Respondent and *Amicus* NACDL ask the Court to enforce.[3]

[3] The Court has declared that a clear statute may not be interpreted to avoid a constitutional concern. *Peretz v. United States*, 501 U.S. 923, 932, 111 S.Ct. 2661, 2667 (1991). Here there is no constitutional separation of powers concern raised by enforcement of the clear requirements of FOIA, contrary to the Government's suggestion. Exemption 1 applies the substantive classification standards established by the President in an Executive order. *De novo* judicial review ensures that the President's Executive order is properly administered by his subordinates. The President is free to change these classification standards at any time.

ARGUMENT

THE GOVERNMENT'S SUGGESTION OF AN "UTMOST DEFERENCE" STANDARD OF JUDICIAL REVIEW IS INCONSISTENT WITH THE DE NOVO REVIEW REQUIRED BY FOIA AND WOULD RENDER MEANINGLESS EXEMPTION 1'S REQUIREMENT THAT INFORMATION WITHHELD THEREUNDER BE "IN FACT PROPERLY CLASSIFIED PURSUANT TO THE [THE APPLICABLE] EXECUTIVE ORDER."

Congress considered the FOIA necessary "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny . . . ." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361, 96 S.Ct. 1592, 1599 (1976). This Court has declared that "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 242, 98 S.Ct. 2311, 2326-2327 (1978). In the quarter century since its passage, the FOIA has been expanded and copied by every state in this country. The FOIA is recognized worldwide as one of the strongest open government laws, and foreign governments are on notice that information submitted to United States is subject to disclosure under the FOIA. 5 U.S.C. § 552; Executive Order 12,958, 3 C.F.R. § 333 (1996).

The FOIA reversed the presumption against disclosure of Government records. *Mink*, 410 U.S. at 79. Under the FOIA, Government records must be disclosed unless such records are specifically exempted from disclosure under one of nine exemptions. 5 U.S.C. §§ 552(a)(3), 552(b); *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755, 109 S.Ct. 1468, 1472-1473 (1989). The Court has warned that "these limited exemptions do not obscure the basic policy that disclosure,

not secrecy, is the dominant objective" of FOIA. *Rose*, 425 U.S. at 361. Thus FOIA's statutory exemptions "must be narrowly construed." *Id.*

In contrast to the traditional standards for judicial review of agency action, which require the plaintiff to prove that Governmental agency action is "arbitrary, capricious or contrary to law" or not supported by "substantial evidence," the FOIA "expressly places the burden 'on the agency to sustain its action,' with respect to its exemption claims, and directs the district courts to 'determine the matter de novo.'" *Reporters Committee*, 489 U.S. at 755 (*quoting* 5 U.S.C. § 552(a)(4)(B)); *compare* 5 U.S.C. §§ 504 and 706(2)(A) *with* 5 U.S.C. § 552(a)(4)(B).[4] In FOIA cases, the court may not rely upon the administrative record, but must independently develop its own record to determine whether the agency's exemption claim as to certain information is proper. *Mink*, 410 U.S. at 93. To insure that a Government agency is not withholding non-exempt information, the FOIA explicitly authorizes the court to evaluate "*any*" exemption claim by "examin[ing] the contents of . . . agency records *in camera*...." 5 U.S.C. § 552(a)(4)(B) (emphasis added); *Rose*, 425 U.S. at 378.

FOIA's judicial review requirements apply to all FOIA exemptions, including Exemption 1. 5 U.S.C. § 552(a)(4)(B). Congress enacted Exemption 1 to the FOIA in recognition of the need to protect from public disclosure certain information in the interests of national security. As previously stated, Exemption 1 permits the Government to withhold matters that are "(A) *specifically authorized under criteria established by an Executive order* to be kept secret

[4] The Court has interpreted *de novo* review to mean a independent review by the Court to satisfy itself that the law has been applied correctly. *See, e.g., Choctaw Nation v. United States*, 119 U.S. 1, 30, 7 S. Ct. 75, 91-92 (1886) (for *de novo* judicial review the court must consider the matter "from the beginning, and as if [the issues] were new and had freshly arisen"); *United States v. First City Nat'l Bank*, 386 U.S. 361, 368 (1967), 87 S. Ct. 1088, 1093 ("*de novo*" means that "the court should make an independent determination of the issues").

in the interest of national defense or foreign policy and (B) *are in fact properly classified* pursuant to such Executive order." 5 U.S.C. § 552(b)(1) (emphasis added). Each of these separate and independent statutory requirements must be satisfied for Exemption 1 to permit the Government to withhold information from the public. Accordingly, the Government's Exemption 1 claim may not be sustained if the Government fails to prove that the information withheld has been "in fact properly classified pursuant to [the applicable] Executive order."

I. FOIA's Plain Text Bars Judicial Review of Exemption Claims on the Basis of "Utmost Deference."

A statute must be given its plain meaning. *United States v. Ron Pair Enterprises,* 489 U.S. 235, 241, 109 S. Ct. 1026, 1030 (1989) ("[w]here, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms.") (internal quotations omitted). As explained herein, the FOIA plainly mandates independent court review of record withholding by a Government agency. The explicit statutory requirement of Exemption 1(B) that information be "in fact properly classified pursuant to [the applicable] Executive Order," and the requirements of the FOIA taken as a whole, bar the Government's proposal that its Exemption 1 claims be free of judicial review unless the claim is entirely "implausible (even after giving it utmost deference)." Pet. Br. at 47.

The words "utmost deference" nowhere appear in Exemption 1 or the FOIA. Instead, FOIA's judicial review provision expressly states that the court has jurisdiction "to order the production of any agency records *improperly* withheld from the complainant [and] [i]n such a case the court shall determine the matter *de novo*...." 5 U.S.C. § 552(a)(4)(B) (emphasis added). This mandated *de novo* standard of review is at odds with "utmost deference." Moreover, FOIA's judicial review provision affirmatively

puts the burden on the Government to prove that particular information falls with one of these narrow exemptions to mandatory disclosure and expressly authorizes the court to conduct an *in camera* review of the withheld information to determine whether it is exempt. 5 U.S.C. § 552(a)(4)(B). These statutory provisions would be superfluous to an utmost deference standard of review; they are meaningful only with independent judicial review of the Government's exemption claims. Each statutory provision should be given meaningful effect. *Bennett v. Spear*, 520 U.S. 154, 166, 117 S. Ct. 1154, 1163 (1997).

"Utmost deference" is at odds not only with FOIA's *de novo* review provision, but also with Exemption 1 itself. Exemption 1 may allow withholding of information only if that information is "in fact properly classified pursuant to [the applicable] Executive Order." 5 U.S.C. § 552(b)(1). A court cannot determine whether information is "properly" classified without the ability to substitute its judgment for that of the Government agency that claims to have classified that information. Exemption 1(B) thus on its face requires an independent determination by the court that the substantive requirements of the applicable Executive order are met. Furthermore, this straightforward reading of "properly" in Exemption 1 comports with Congress's requirement of *de novo* judicial review to determine whether "to order production of any records *improperly* withheld." 5 U.S.C. § 552 (a)(4)(B) (emphasis added). The Court has repeatedly held that same or similar terms in a statute should be interpreted the same way. *Sullivan v. Stroop*, 496 U.S. 478, 484-85, 110 S. Ct. 2499, 2503-2504 (1990); *United Sav. Ass'n v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 371, 108 S.Ct. 626 (1988).

The only text of the FOIA cited by the Government in support of its argument is the "substantial weight" standard of review of agency determinations with respect to the technical feasibility of accessing electronic records. 5 U.S.C. § 552(a)(4)(B) ("In addition to any other matters to which a court accords substantial weight, a court shall accord

substantial weight to an agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B)"). But that standard of review is separate and independent from the *de novo* required for exemption claims, which Congress has not amended since 1974. *See infra.*, Section II, at pp. 11-16.[5]

"Utmost deference" is no more than the Government's modern day formulation of the complete discretion to withhold information that it enjoyed before Congress enacted the FOIA. "Utmost deference" is precluded by FOIA's unambiguous language and purpose "to open agency action to the light of public scrutiny." *Rose*, 425 U.S. at 361. For this reason alone, the Government's proposal to substitute "utmost deference" for "*de novo*" review should be rejected and the decision of the Court of Appeals affirmed.

II. FOIA's Legislative History Underscores that "Utmost Deference" is an Impermissible Standard of Review of Exemption Claims.

FOIA's unequivocal text renders resort to its legislative history unnecessary. *United States v. Gonzales*, 520 U.S. 1, 4, 117 S.Ct. 1032, 1035 (1997). FOIA's legislative history nevertheless reinforces that Congress intended the Government's Exemption 1 claims to be subject to independent judicial review. FOIA has always required *de novo* judicial review of Government agency exemption claims. As originally enacted in 1966, FOIA provided that "the court shall determine the matter *de novo* and the burden shall be upon the agency to sustain its action." 5 U.S.C. § 552(c)(1966). Congress required independent court determination of the correctness of the FOIA exemption

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[5] Also *compare* FOIA's *de novo* review for exemption claims *with* FOIA's arbitrary and capricious standard of review for disciplinary proceedings against agency employees for improper withholding of agency records, 5 U.S.C. § 552(a)(4)(F)(FOIA).

claim "in order that the ultimate decision as to the propriety of the agency's action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion." S. Rep. No. 813, 89th Cong., 1st Sess., 2, 8 (1965); H. R. Rep. No. 1497, 89th Cong., 2d Sess., 9 (1966).

In 1973, the Court held in *Mink* that a court in a FOIA case must require the Government to prove by detailed affidavits and oral evidence that its exemption claims are proper before requiring *in camera* inspection by the court of the withheld information. 410 U.S. at 93. The Court explained that *de novo* review under FOIA provides that the Government "agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the District Court that the documents sought fall clearly [within the exemption]. The burden is, of course, on the agency resisting disclosure, . . . and if it fails to meet its burden without *in camera* inspection, the District Court may order such inspection." *Id.* The Court remanded the case to allow the district court to develop the factual record necessary to enable it to segregate non-exempt information from exempt information in each record at issue. *Id.*

In reaching this result, *Mink* required *de novo* review of the Government's Exemption 5 claim but not its Exemption 1 claim. 410 U.S. at 84, 93-94. The Court interpreted Exemption 1 as then written to require only that the record have been marked classified pursuant to an Executive order, a fact that the parties in *Mink* did not dispute. *Id.* at 84. At the time of the *Mink* decision Exemption 1 protected from disclosure information "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." *Id.* at 81. The Court ruled that that language of Exemption 1 did not authorize judicial review of the Government's

compliance with the substantive requirements of its Executive order. *Id.* at 84.[6]

In 1974, Congress amended Exemption 1 to the FOIA to also require that information withheld thereunder be "in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1)(1976). In addition, Congress codified the Court's interpretation of *de novo* review set forth in the *Mink* decision. The 1974 amendments to the FOIA authorize *in camera* review of records withheld as exempt under any FOIA exemption and require the Government to segregate and release non-exempt information from records containing exempt information. 5 U.S.C. § 552(a)(4)(B)(1976). As a result of the 1974 amendments, the FOIA requires that "the court shall determine the matter *de novo*, and may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld under *any* of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B)(emphasis added). It also requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b).

The Conference Report explaining these amendments declares their purpose is to provide for *de novo* review of Exemption 1 claims:

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[6] In his concurring opinion in *Mink*, Justice Stewart seized upon Congress' failure to provide the courts with a "means to question an Executive decision to stamp a document 'secret,' however, cynical, myopic, or even corrupt that decision might have been." *Mink*, 410 U.S. at 95. Under Exemption 1 as then written, "the only 'matter' to be determined *de novo* under § 552(b)(1) is whether in fact the President has required by Executive Order that the documents in question are to be kept secret." In Justice Stewart's estimation, "Congress chose . . . to decree blind acceptance of Executive fiat." *Id.*

> In *EPA v. Mink, et al.*, 410 U.S. 73 (1973), the Supreme Court ruled that *in camera* inspection of documents withheld under Section 552(b)(1) of the law, authorizing the withholding of classified information, would ordinarily be precluded in Freedom of Information cases, unless Congress directed otherwise. H.R. 12741 amends the present law to permit such *in camera* examination at the discretion of the court. . . . Before the court orders *in camera* inspection, the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure. The burden remains on the Government under this law.

S. Rep. No. 1200, 93rd Cong., 2d Sess. at 9 (1974); *see* Pub. L. 93-502, §§ 1-3, 88 Stat. 1561 (1974). The Conference Report further declares that

> [w]hen linked with the authority of the courts in this conference substitute for *in camera* examination of contested records as part of their *de novo* determination in Freedom of Information cases, [the new requirements of Exemption 1] clarifies Congressional intent to override the Supreme Court's holding in the case of *E.P.A. v. Mink, et al.*, supra, with respect to *in camera* review of classified documents.

S. Rep. No. 1200, *supra*, at 12.

The legislative history of the 1974 amendments to the FOIA further reflects that Congress considered and rejected a proposal to limit judicial review of the Government's Exemption 1 claims. In particular, Congress rejected legislation that would have provided that

> (ii) In determining whether a document is in fact specifically required by an Executive order or statute to be kept secret in the interest of national defense or foreign policy, ... [i]f there has been filed in the record an affidavit by the head of the agency certifying that he has personally examined the documents withheld and has determined after such examination that they should be withheld under the criteria established by statute or Executive order referred to in subsection (b)(1) of this section, *the court shall sustain such withholding unless*, following its in camera examination, *it finds the withholding is without a reasonable basis under such criteria.*

S. 2543, 93d Cong., 2d Sess., § b(2) (emphasis added), *reprinted in* Staffs of Senate Committee on Government Operations, Freedom of Information Act and Amendments of 1974 (P.L. 93-502): Source Book: Legislative History, Texts, and Other Documents (Committee Print 1975 (hereafter cited as Source Book), at 282 (emphasis added). The Committee Report accompanying this unsuccessful legislation explained that "this standard of review does not allow the court to substitute its judgment for that of the agency – as under a *de novo* review." S. Rep. No. 93-854, 93rd Cong., 2d Sess. (1974), *reprinted in* Source Book, *supra*, at 168. This legislative proposal to establish a special "reasonable basis" standard of review in national security cases was voted down on the Senate floor and Congress instead provided for full *de novo* review of the Government's Exemption 1 claims. 120 Cong. Rec. 17031-17032 (1974); 5 U.S.C. § 552(a)(4)(B).

The Government correctly notes that the Conference Report to the 1974 amendments states that "the conferees expect that Federal courts, in making *de novo* determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." S. Rep. No. 1200, *supra*, at 12. *Amicus* agrees that the courts should consider important to their independent determinations *detailed* affidavits from the Government in support of its exemption claims. The deference to factual representations regarding foreign affairs or national security

is based on the knowledge and expertise of the Executive branch in these areas. However, a Conference Report statement urging courts to accord "substantial weight" to *detailed* affidavits says nothing about conclusory affidavits such as those filed by the Government in this case, nor may it alter the *de novo* standard of review expressly required in the statute. *City of Chicago v. EDF*, 511 U.S. 328, 337, 114 S. Ct. 1588, 1593 (1994) (legislative history may not trump clear statutory language). Extraordinarily, the Government now proposes that this Court go beyond giving the Government's detailed affidavits "substantial weight" to establish an "utmost deference" standard of review for the ultimate question of proper classification that would negate the 1974 FOIA amendments. Pet. Br. at 13. The President vetoed the 1974 FOIA amendments because the statutory language does not restrict the requirement of *de novo* review or the propriety of *in camera* examination with respect to Exemption 1 claims for which the Government bears the burden of proof. Message from the President of the United States Vetoing H. R. 12471 An Act to Amend Section 552 of Title 5, United States Code, Known as the Freedom of Information Act, H.R. Doc. No. 93-983, 93rd Cong., 2d Sess., *reprinted in* Source Book, *supra*, note 28, at 483-485. Congress overrode this veto. Freedom of Information Act Veto Override, Congressional Record at S.19823 (November 21, 1974), *reprinted in* Source Book, *supra* note 28, at 431-434 and 480. There is no basis in FOIA's text or legislative history for an "utmost deference" standard of review of the Government's Exemption 1 claims and the Government's proposal therefore should be rejected.

An utmost deference standard of review for Government's Exemption 1 claims would eviscerate the public's right under the FOIA statute to challenge those claims, and would permit just the judicial rubber-stamping of agency discretion that Congress intended *de novo* judicial review to prevent. In so doing, it would permit Exemption 1 to become a catch-all exemption under the FOIA for any information that is not otherwise exempt and that the

Government, for whatever reason, does not want the American people to know.

CONCLUSION

For the reasons stated, the *Amicus Curiae* National Association of Criminal Defense Lawyers urges this Court to affirm the decision of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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