COURT OF APPEALS OF THE STATE OF NEW YORK

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TALIB W. ABDUR-RASHID and SAMIR HASHMI,

Appellants,

v.

NEW YORK CITY POLICE DEPARTMENT, *et al*.,

Respondents.

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NOTICE OF MOTION

New York County Index No. 13/101559 & 13/101560

PLEASE TAKE NOTICE that for the reasons set forth in the accompanying papers, including Appellants' Brief in Support of the Motion for Leave to Appeal to the Court of Appeals, dated June 29, 2016, and the exhibits thereto, and upon all of the papers and proceedings heretofore had herein, the undersigned will move this Court at a term to be held at the Courthouse, Court of Appeals Hall, 20 Eagle Street, Albany, New York, on the 11th day of July, 2016, at 10 o'clock in the morning or as soon thereafter as counsel may be heard, for an Order pursuant to CPLR sections 5514(a) and 5602(a) and this Court's Rules of Practice 500.22, granting leave to appeal from those portions of the June 2, 2016 Order of the Appellate Division, First Department, entered on June 3, 2016. The Appellate Division erroneously determined the New York City Police Department properly used the federal Glomar Response (neither confirming nor denying the existence

of the records) in response to a New York State Freedom of Information Law request.

TAKE FURTHER NOTICE that any response to this motion shall be due on July 11, 2016.

Dated: New York, New York
June 29, 2016

Respectfully submitted,

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BRIEF IN SUPPORT OF APPEALLANTS' MOTION FOR LEAVE TO APPEAL

Appellants, Talib W. Abdur-Rashid (Abdur-Rashid) and Samir Hashmi (Hashmi), by their attorneys, the Law Firm of Omar T. Mohammedi, LLC, respectfully submit this brief in support of their motion for leave to appeal from those portions of the June 2, 2016 Order by the Appellate Division, First Department (personally served and entered on June 3, 2016) that determined the New York City Police Department (NYPD) properly used the federal Glomar Response (neither confirming nor denying the existence of the records) in response to a New York State Freedom of Information Law request. (The June 2, 2016 Decision and Order of the Appellate Division, First Department and Notice of Entry are attached as Motion Exhibit A).

PRELIMINARY STATEMENT

In its decision the Appellate Division, First Department, incorporates the Glomar Doctrine, a federally created response under the Freedom of Information Act ("FOIA"), (5 U.S.C. 552), into the New York State Freedom of Information Law ("FOIL") (New York State Public Officer Law ("POL"), Article 6, Sections 84-90). Such a decision undermines several provisions in FOIL, including, its specifically defined exemptions which are intended to be narrowly applied to protect the agency from having to reveal documents. (POL§ 87(2)(a-g)). Such decision further undermines the requirement that the agency certify the completeness of records provided or the efforts to locate records (POL§ 89(3)(a)) and drastically changes the stated purpose of FOIL favoring production (POL§ 84). The Appellate decision has inappropriately undermined legislative prerogative by creating, instead of interpreting the law.

The First Department's decision to allow Glomar as a response to a FOIL request contradicts this Court's consistent precedent since the 1992 decision in *Hanig v. State of N.Y. Dep't. of Motor Vehs*., 79 N.Y.2d 106 (1992), that exemptions are to be narrowly construed with the burden resting

on the agency to demonstrate that the requested material qualifies for exemption.

The Abdur-Rashid and Hashmi cases present a novel issue of law since it is the first time a State Court in all fifty (50) States in this country has authorized the use of the federally created Glomar Doctrine in response to a State Freedom of Information request for documents. Allowing the lower Court decision to stand will dramatically impact access to records statewide and will defeat the purpose of New York State FOIL legislation which calls for open and transparent government. Therefore, we respectfully request that this Court grant the Appellants the permission to brief this Court on this statewide important legal principle.

GLOMAR DOCTRINE

The Federal Appellate Division, D.C. Circuit created the Glomar Doctrine in 1976. See, *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976). *Phillippi* allowed federal agencies with the ability to classify documents pursuant to executive order or an act of Congress to respond to FOIA requests by neither confirming nor denying the existence of records when doing so would reveal information that would otherwise be exempt from disclosure. When availing itself of the Glomar Response, the agency is

required to submit a public affidavit justifying the use of the Glomar Response. *Id* at 1013. Neither the NYPD, nor any other state or local agencies, have the ability to classify documents, as matter of law, or invoke the Glomar Doctrine. The NYPD has admitted it did not have the legal basis to classify documents (Appendix Exhibit A: Abdur-Rashid Record page 125). The NYPD, or for that matter, any state/city agency does not have a legal basis to assert Glomar.

The Glomar Doctrine has been in existence for 40 years - at the time of this writing, yet Abdur-Rashid and Hashmi cases are the first time that a state or local agency has attempted to invoke the doctrine in response to a state FOIL request. Further, over that same 40 year period, the New York State Legislature has amended FOIL at least five times, and at no time have they chosen to adopt the Glomar Doctrine.[1]

As explained in greater details below, while erroneously applying Glomar to FOIL, the Appellate Division First Department neglected important federal requirements imposed on federal agencies before they can benefit from the "we cannot confirm or deny" the existence of documents response. Assuming that arguendo Glomar is appropriately applicable to

[1] See Committee on Open Government "40 Years of FOIL and the Committee on Open Government." Available here: http://www.dos.ny.gov/coog/pdfs/Timeline2014.pdf. Last visited June 10, 2016.

FOIL, the federal Glomar theory cannot be asserted if the federal agency has already admitted the existence of documents. *Wilner v. National SEC. Agency*, 592 F.3d 60, 70 (2009). As explained herein-under the NYPD has already admitted the existence of some of the requested documents, and records, not only in other relevant cases as explained below, but in this case as well (oral argument before the Appellate Division, First Department on March 8, 2016). Under federal requirements a federal agency's acknowledgement of the documents defeats Glomar application. Furthermore, as explained herein-under even under the federal theory Galati's Affidavits were flawed and failed to satisfy the minimal federal standard under Glomar, i.e., reasonableness, good faith, specificity and plausibility, *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982). Though the *Gardels* court ultimately determined that the CIA properly invoked the Glomar Doctrine, it did so based on the filing of three Affidavits from the agency detailing the reasons why admitting the existence of records would negatively impact national security, the filing of a Vaughn Index and the agency's response to two sets of interrogatories. Assuming arguendo that the NYPD is able to claim "we cannot confirm or deny" outside the FOIL narrowly tailored exemptions.

The Appellate Division First Department erred by allowing them to do so based on the sub-standard Affidavits of Chief Galati and the non-existent national security theory to a city agency, afforded only to the federal government, rather than basing its decision on FOIL legislation and the long standing New York state precedent on FOIL. In addition, as also argued herein-under, the claims in the Galati Affidavits were made in bad faith since Galati previously filed a Declaration (Motion Exhibit B) wherein he described the number and type of records gathered and retained by the unit he commanded.

The Appellate Division First Department decision permits the NYPD to operate without any oversight either under FOIL or under the federal law. It allowed the NYPD to have its cake and eat it too. The Appellants intend to argue why this Court should reverse the decision of the Appellate Division, First Department and direct the NYPD to respond to the Appellants' request for documents accordance with FOIL.

STATEMENT OF THE QUESTION PRESENTED

Can the NYPD respond to a New York State FOIL request by "neither confirming nor denying" (a federal Glomar Response) the existence of records?

PROCEDURAL HISTORY

On November 26, 2013, Appellants filed separate CPLR Article 78 Petitions in the Supreme Court, New York County (Appendix Exhibit A: Abdur-Rashid Record page 21, and Appendix Exhibit B: Hashmi Record pages 54). On September 11, 2014, the Honorable Alexander W. Hunter, Jr. dismissed Abdur-Rashid's Petition (Appendix Exhibit A: Abdur-Rashid Record page 11) and on November 14, 2014, the Honorable Peter H. Moulton denied the NYPD's Motion to Dismiss Hashmi's Petition and directed the NYPD to respond to Hashmi's Petition (Appendix Exhibit B: Hashmi Record page 18).

On July 21, 2015, Abdur-Rashid appealed Judge Hunter's decision to the Appellate Division, First Department (Parties Briefs in Abdur-Rashid are attached herein as Appendix Exhibit C). On September 4, 2015, the NYPD appealed Judge Moulton's decision in the Hashmi matter to the same court (Parties Briefs in Hashmi are attached herein as Appendix Exhibit D). The parties agreed that the appeals would be heard together. Oral arguments were heard on March 8, 2016. On June 2, 2016, the Appellate Division, First Department issued a decision upholding Judge Hunter's decision (dismissing the CPLR Article 78 Petition in the Abdur-Rashid matter) and reversing Judge Moulton's decision (directing the NYPD to respond to the Petition in

the Hashmi matter), thereby dismissing Hashmi's CPLR Article 78 Petition as well (the Appellate Division, First Department's, June 2, 2016 Decision and Order is attached herein as Motion Exhibit A).

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the Appellants' motion for leave to appeal from the June 2, 2016 Decision and Order of the Appellate Division, First Department, pursuant to CPLR 5602(a)(1)(i), which provides that permission by the Court of Appeals for leave to appeal may be taken "in an action originating in the supreme court … from which an order of the appellate division which finally determines the action and which is not appealable as of right."

As noted above, the action giving rise to this appeal was commenced in the Supreme Court of New York County on November 26, 2013. Appellants seek permission to appeal from the June 2, 2016 Order of the Appellate Division, First Department, which finally determined the action by dismissing the Appellants' CPLR Article 78 Petitions.

This case presents a novel issue of law since it is the first time a New York State Appellate Court has authorized the use of the federally created Glomar Doctrine in response to a New York State FOIL request for

documents. Allowing the lower court decision to stand will dramatically impact access to records statewide and will defeat the purpose of FOIL legislation which calls for open and transparent government.

STATEMENT OF FACTS

On October 23, 2012, Hashmi, at the time a student at Rutgers University and the Treasurer of the University's Muslim Student Association ("Rutgers MSA") and Abdur-Rashid, Imam at the Mosque of Islamic Brotherhood, made FOIL requests. They asked for records relating to surveillance of themselves and the organizations to which they belong from the New York City Police Department.

On November 13, 2012, the NYPD provided their first response to the requests. The NYPD acknowledged receipt of the requests and indicated that they were investigating, and advised that a determination would be issued within 20 business days. It was not until June 28, 2013, six months after the above-referenced determination was due, that the NYPD issued determinations denying the requests. The reasons for the denial were as follows:

> A lack of certification of the Appellant's identities. Acknowledging the existence of records would constitute an unwarranted invasion of privacy. The

> Appellants' failure to consent to the release records to their attorney. The release would interfere with law enforcement investigations or judicial proceedings. The release of records would identify a confidential source or confidential information. The release of records would reveal non-routine criminal investigative techniques. The release of records would endanger the life or safety of any person. The release of records would constitute an unwarranted invasion of privacy. The records are pre-decisional inter-agency or intra-agency materials and are specifically exempted from disclosure by state or federal statute. (Appendix Exhibit A: Page 50 & Appendix Exhibit B: page 65).

Inexplicably, the NYPD also referenced federal statutes to justify the denial of the Appellant's requests when it included the following: FOIA exemption for inter and intra–agency communication (5 USC 552(b)(5)) even though they referenced a similar exemption under FOIL (POL § 87(2)(g)). A provision stating that, "The Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure," (50 USC 403-1(i)(1)). A provision that states that the Office of the Director of National Intelligence shall have a General Counsel, (50 USC

403-3(c)(5)). More problematic, the NYPD cited to a federal provision outlining the penalties for disclosure of classified information, not available to the NYPD since they have no legal basis to use it. The NYPD does not have the ability to classify documents, (50 USC 421), which it later admitted in its briefs (Appendix Exhibit A: page 125). The overall response gives the impression that the NYPD believes itself to be governed by federal law instead of state law.

On July 19, 2013, the Appellants appealed the June 28, 2013 determination (POL § 89(4)(a)). On August 7, 2013, Jonathan David, Record Appeals Officer for the NYPD, submitted a 4-page response denying the Appellants' appeals. The stated reasons for the denial included the Appellants' failure to certify their identities or consent to release of documents to their attorney and the failure to reasonably describe the records sought. The alleged vagueness of the request presumably prevented the NYPD from searching for and locating the requested records, yet the NYPD went on to say that the records would be exempt under POL § § 87 - 89. (Appendix Exhibit A: page 54 & Appendix Exhibit B: page 71). It is not clear how the NYPD was able to evaluate whether the requested records were exempt since, according to them, the request was so vague that records could not be located. So much for the detailed explanation the NYPD was

required to offer when denying access to records pursuant to POL § 89(4). The NYPD has the burden to prove how any FOIL exemption applies to record requests, which necessitates an acknowledgement as to whether or not records exist (POL § 89(3)). The burden to demonstrate that the requested records fit within an exemption (see, *Hanig* at 109) cannot be met, when as here; the NYPD merely listed the FOIL provisions without explanation. (Appendix Exhibit A: pages 50 & 54, and Appendix Exhibit B: pages 65 & 71).

On November 26, 2013, Appellants commenced Article 78 proceedings seeking judicial review of the NYPD's denial of their FOIL requests. Respondents moved for dismissal of the Petitions in lieu of responding. Supreme Court, New York County Justice Peter H. Moulton denied the Motion to Dismiss in a 19 page detailed analysis supporting his opinion (Appendix Exhibit B: page 18**)** and Ordered that the Respondents respond to the Petition. In a conflicting decision, Justice Alexander W. Hunter, Jr., in a 5 page decision, dismissed Abdur-Rashid's Petition (Appendix Exhibit A: page 11). Abdur-Rashid appealed Justice Hunter's decision and the NYPD appealed Justice Moulton's decision to the Appellate Division, First Department. The parties agreed to argue the cases together since they involved the same issues. The New York Civil Liberties

Union and the Brennan Center for Justice, as well as The Reporters Committee for Freedom of the Press (representing 20 news organizations) filed *Amici Curiae* briefs supporting the Appellants. (*Amici Curiae* briefs attached as Appendix Exhibits E & F, respectively).

On June 2, 2016, the Appellate Division, First Department issued an Order, which is the subject of this motion for leave to appeal, dismissing the Article 78 Petitions in both cases (Motion Exhibit A), thereby authorizing state and local agencies to use the Glomar Doctrine in response to FOIL requests. The decision failed to provide any guidance regarding the standards to be used in determining whether the doctrine is properly invoked or the provisions of FOIL rendered superfluous by the decision.

If this Court allows the use of the Glomar Doctrine in these cases, it will be ignoring years of precedent regarding the narrow application of exemptions and the burden of proof regarding whether an exemption applies, *see, Gould v. New York City Police Department*, 87 N.Y.2d 267 (1996). Furthermore, allowing the use of the Glomar Doctrine in these cases, contradicts FOIL's plain language which requires the agency to certify that the records provided are accurate or that after a thorough search, records could not be found. *See,* POL§ 89(3). The Appellants intend to argue that this Court should reverse the decision of the Appellate Division, First

Department and direct the NYPD to respond to the Appellants' requests for documents accordance with FOIL.

ARGUMENT

I. The Appellate Division, First Department Erred When it allowed the NYPD to Invoke the Federal Glomar Doctrine in Response to a New York State FOIL Request for Records.

A. Allowing the NYPD to invoke Glomar in response to a New York State FOIL request strikes down years of precedent and creates a void in existing law.

The purpose of the New York State Public Officers Law (POL), Article 6, Sections 84-90, also known as the Freedom of Information Law ("FOIL"), is to further governmental transparency and protect the public's right to know. Accordingly, any FOIL exemptions are interpreted narrowly; *see Matter of Markowitz v Serio*, 11 N.Y.3d 43, 51 (2008).

It is well settled that "[P]ursuant to FOIL, government records are presumptively available to the public unless they are statutorily exempted by Public Officers Law § 87(2)" (citing to *Matter of Fappiano v. New York City Police Dept.*, 95 N.Y.2d 738, 746, [2001]). "Those exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption" (*Matter of Hanig v. State of N.Y. Dept. of Motor Vehs*., 79 N.Y.2d 106, 109, [1992])."

Thomas v. New York City Dep't of Educ., 103 A.D.3d 495, 496, 962 N.Y.S.2d 29, 31 (2013) (emphasis added).

This Court expressed its general view of the intent of the Freedom of Information Law in *Gould v. New York City Police Department*, 87 N.Y.2d 267 (1996):

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 see, Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (*id*., 275).

FOIL imposes a broad duty of disclosure upon government agencies. Government records are "presumptively open" to the public, statutory exemptions to disclosure are "narrowly construed," and the agency must articulate a "particularized and specific justification" for nondisclosure, *see*, *Matter of New York Civil Liberties Union v City of Schenectady*, 2 N.Y.3d 657, 661 (2004) (citing Gould). The Appellate Division, First Department ignored this Court's guidance in *Gould* when it disregarded the Court's instruction to construe the exemptions narrowly and to place the burden of demonstrating that the requested documents fall within an exemption on the

agency. Instead of following years of precedent, the lower court completely undermined FOIL and this Court's decisions in applying FOIL. The Appellate Division First Department created new law.

In *Payne v. Tennessee*, 501 U.S. 808 (1991), the United States Supreme Court stated that "*stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." In determining that the NYPD may properly invoke a Glomar Response in reply to a FOIL request, the Appellate Division, First Department has struck down years of precedent cited throughout this brief regarding the application of FOIL.

The first Department's June 2, 2016 Decision and Order, begs more questions than it answers. For instance does the June 2, 2016 decision imply that New York State is adopting almost 40 years of federal case law relating to the Glomar Doctrine? Does it mean that state courts will now spend the next 40 years interpreting the application of the Glomar Doctrine to New York State law? In deciding to allow state and local agencies to invoke the Glomar Doctrine, the lower court did not offer any guidance or discuss the requirements the NYPD would have to fulfill just as its federal counterparts would have to when asserting Glomar. The lower court was equally silent

regarding whether the state courts will also be adopting the more recently created "no number, no list" response as well (a federal judicially accepted response in situations where the agency cannot deny the existence of records, but still refuses to acknowledge the number and substance of the records). See, *Bassiouni v. CIA 2004 WL 1125919 (N.D.Ill. Mar. 31, 2004)*, affirmed 329 F.3d 244 (7th Cir. 2004) and *Jarvik v. CIA*, 741 F. Supp.2d 106 (D.D.C. 2010).

Is the lower court asserting that we repeal FOIL and enact FOIA instead? The lower court's decision creates more problems than it resolves, ignores s*tare decisis* and oversteps the judicial authority by creating legislation instead of applying it. For these reasons, this Court should grant the Appellants' motion for leave to appeal and reverse the Appellate Division's June 2, 2016 Order.

B. <u>The Appellate Division, First Department erred when it usurped legislative prerogative and created a new exemption in FOIL.</u>

In his decision in the Hashmi case, Justice Moulton; focusing on the roles of the legislature and the judiciary, as well as the negative impact of allowing state and local agencies to avail themselves of Glomar, determined that the Glomar response is not available under FOIL. Justice Moulton in Hashmi warned against the "impregnable wall" that would be created

(Appendix Exhibit B: page 34) and the lack of over-sight and likelihood of abuse (Appendix Exhibit B: page 37); ultimately determining that it is up to the legislature, not the courts, to adopt the principles of the Glomar Doctrine. Justice Moulton (Appendix Exhibit B: page 37) also pointed out that there is no evidence that the current statutory structure has hampered the NYPD's ability to protect confidential information and criminal investigations by asserting the FOIL law enforcement exemption. *Hashmi v. NYPD*, 46 Misc.3d 712 (2014). This is true even in *Asian American Legal Defense and Education Fund*, 125 A.D.3d 531 (1st Dep't 2015) (AALDEF) where the Appellate Division correctly applied the FOIL exemptions to a FOIL document request seeking records similar to those sought in this case. The Appellate Division First Department in AALDEF determined that the requested records fell within several exemptions, including the law enforcement exemption (POL § 87(2)(e). In the Abdur-Rashid and Hashmi cases, the Appellate Division First Department failed to follow its own precedent in AALDEF when it allowed the NYPD to "neither admit nor deny" the existence of records.

Our State Constitution establishes a system in which government powers are distributed among three co-ordinate and co-equal branches. *Matter of Nicholas v. Kahn*, 47 N.Y.2d 24 (1979). Extended analysis is not

needed to detail the dangers of upsetting the delicate balance of power existing among the three, for history teaches that a foundation of free government is imperiled when anyone of the co-ordinate branches absorbs or interferes with another. *Oneida County v. Berle*, 49 N.Y.2d 515 (1980). "Courts are not supposed to legislate under the guise of interpretation, and in the long run it is better to adhere closely to this principle and leave it to the legislature to correct evils if any exist." *Bright Homes Inc. v. Wright*, 8 N.Y.2d 157, 162 (1960).

More recently, this Court, in declining to create a new jury instruction in death penalty cases, stated that "we cannot, however, ourselves craft a new instruction, because to do so would usurp legislative prerogative. We have the power to eliminate an unconstitutional sentencing procedure, but we do not have the power to fill the void with a different procedure… ." *People v. Taylor*, 9 N.Y.3d 129, 131 (2007). In a concurring opinion, Justice Smith pointed out that it would be very easy for the legislature to act if it wanted to do it (referring to the creation of a new instruction that complies with the law). The lower Court has done exactly what this Court refused to do. The lower Court added another provision into FOIL legislation that contradicts the explicit FOIL exemptions. The enumerated exemptions under FOIL require the NYPD to admit the existence of documents even

when it did not have to produce them. (POL §87(2)) (Each agency shall, … make available for public inspection and copying all records, except that the agency may deny access to records or portions thereof that: [fall under the listed exemptions (POL §87(2)(a-g) and POL §89(2))]) (Emphasis added). When faced with a record request, POL§ 89 (3) (a) gives the agency three options. It can make the record available, deny the request pursuant to a specified FOIL exemption (POL §87(2)(a-g)) or acknowledge receipt of the request and advise the requestor of the need for a reasonable time to either provide the record or deny the request.

The Public Officers Law sections 87(2) and 89 (2) already protect agencies against disclosure of exempt records. None of the enumerated exemptions created by the legislature provide for a "neither confirm nor deny" response to a New York State FOIL request. The lower Court decision to grant the NYPD the opportunity to state it "cannot confirm or deny" the existence of such documents will have profound effect on NY State FOIL and its open government theory statewide.

This Court, in *Majewski v. Broadalbin- Perth Central School District*, 91 N.Y.2d 577 (1998), stated that "… the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning

thereof." When attempting to determine the intent of the legislature, courts should never opt for an intent that negates explicit provisions of the statute, see, *Id* at 587, (the general principle that legislation is to be interpreted so as to give effect to every provision. A construction that would render a provision superfluous is to be avoided).

Allowing the Appellate Division First Department's decision to stand will make the FOIL exemptions (POL §87(2)(a-g)) and the certification provision (POL§89(3)(a)) in FOIL superfluous as it requires:

> " …[T]he entity shall provide a copy of such record and certify to the correctness of such copy … or as the case may be, shall certify that it does not have possession of such record, or that the record cannot be found after diligent search." (POL§89(3)(a)).

Allowing a state or local agency to neither confirm nor deny the existence of records negates the explicit statutory intent in this provision. How can an agency certify that it does not have possession of records, as required, if it is permitted to neither confirm nor deny the existence of records? More importantly, the exemptions themselves and the agency's burden to show that the requested documents fall under the exemptions become superfluous if state and local agencies are permitted the neither confirm nor deny the existence of records, *see*, *Hanig* at 109. The lower court's decision violates the basic principles in determining legislative

intent, thereby over-stepping the boundary between appropriate interpretations of legislation and usurping the role of the legislature by creating new law.

C. The Lower Court permitted the NYPD to inappropriately, and in a discriminatory fashion, claim "we cannot confirm or deny" based on the identity of the requestors.

This Court has held that "the status or need of the person seeking access [to records] is generally of no consequences in construing FOIL and its exemptions." *Matter of Capital Newspapers v. Burns,* 67 N.Y.2d 562, 567 (1986). An agency inquiry into, or release upon the status and motive of a FOIL applicant would be administratively infeasible, and its intrusiveness would conflict with the remedial purposes of FOIL. See, *Matter of Farbman & Sons, Inc. v. New York City Health and Hosp. Corp.*, 62 N.Y.2d 75, 80 (1984). "Entitlement to the requested … reports is not contingent upon the showing of some cognizable interest other than that inhering in being a member of the public." *Matter of Scott, Sardano, & Pomerantz v. Records Access Officer of the City of Syracuse,* 65 N.Y.2d 294, 297 (1985).

It is clear from the record in this case, specifically in the February 11, 2014 Galati Affidavits (Appendix Exhibit A: pages 89-110 and Appendix Exhibit B: pages 78-99) that the NYPD invoked a Glomar Response outside

FOIL, specifically because the Appellants are Muslims. The Affidavits, which are identical in every way except for the names, consist entirely of fear mongering about Muslim terrorists. They contain no specific information regarding the individual requests made by the Appellants except for them (Abdur-Rashid and Hashmi) being Muslims. In fact, the NYPD, in their lower court briefs (Appendix Exhibits C & D) argue that the Appellants' requests are part of a larger attempt by the Muslim community to create a campaign against the NYPD seeking information following the Associated Press reporting that the NYPD surveilled the Muslim community based on religion.[2]

D. The Appellate Division First Department did not support its own precedent in AALDEF.

The Appellate Division's decision (Motion Exhibit A) stated the Appellants' requests are a subset of the requests made in AALDEF. While

[2] *AP's Probe Into NYPD Intelligence Operations*, Associated Press, available at http://www.ap.org/Index/AP-In-The-News/NYPD; Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, Associated Press, August 23, 2011; Chris Hawley & Matt Apuzzo, *NYPD Infiltration of Colleges Raises Privacy Fears*, Associated Press, October 11, 2011; Adam Goldman & Matt Apuzzo, *With Cameras, Informants, NYPD Eyed Mosques*, Associated Press, February 23, 2012; Adam Goldman & Matt Apuzzo, *Documents Show NY Police Watched Devout Muslims*, Associated Press, September 6, 2011; Matt Apuzzo & Adam Goldman, *Inside the Spy Unit that NYPD Says Doesn't Exist*, Associated Press, August 31, 2011; Adam Goldman & Matt Apuzzo, NYPD: *Muslim Spying Led to No Leads, Terror Cases*, Associated Press, Aug. 21, 2012.

the Appellants' requests are a subset of AALDEF records, the NYPD in AALDEF did not invoke the Glomar Doctrine, it appropriately responded to the AALDEF requests in compliance with the FOIL requirements. In AALDEF, the NYPD admitted the existence of the documents, provided some documents responsive to the request (no responsive documents, even redacted documents, have been provided to the Appellants Abdur-Rashid and Hashmi in this matter), and denied access to other documents as being exempt under FOIL. The lower Court issued its decision in AALDEF based on FOIL theory and principle ("… the requested documents are exempt from disclosure under Public Officers Law § 87(2)(e)(iii), (iv), commonly known as the "law enforcement privilege," in that disclosure of the requested documents would identify confidential sources, confidential information relating to criminal investigations, and non-routine investigative techniques or procedures") (AALDEF at 532). The Appellate Division, First Department in AALDEF went on to say that "The [lower] court also properly found that the requested disclosure "could endanger the life or safety of any person,"" *Id*. This argument specifically supports our argument that the Appellate Court properly granted the exemption under FOIL in AALDEF where the NYPD acknowledged the existence of documents but could not produce them claiming production "could endanger the life or

safety of any person" (POL § 87 (2)(f)). This also supports Judge Mouton's opinion in Hashmi that "case law demonstrates that the NYPD has been able to protect sensitive information very well within the existing procedures that FOIL currently provides. [Citing], *Matter of Bellamy v. New York City Police Department*, 87AD3d 874 (1st Dep't 2011); *Matter of Legal Aid Society v. New York City Police Department*, 274 AD2d 207 (1st Dep't 2001); *Matter of Asian American Legal Defense and Education Fund v New York City Police Dep't*, 41 Misc3d 471; *Urban Justice Center v. New York City Police Dep't*, 2010 NY Misc Lexis 4258.)" (Appendix Exhibit B: page 37). The NYPD can and has properly protected sensitive information under the existing FOIL exemptions (POL § 87(2)(a-g)).

The NYPD's response in the AALDEF case is completely different from the manner with which they handled the Appellants' here (Abdur-Rashid and Hashmi). Therefore, the Court erred when it opined that the NYPD in this case, claiming Glomar, is the same objection the NYPD claimed in AALDEF by invoking the law enforcement exemption under FOIL. As a matter of law, FOIL requires the NYPD to search and acknowledge the existence of records (POL § 87(2)) even if it does not have to produce them, which is consistent with the AALDEF ruling. The "cannot confirm or deny" theory under Glomar does not exist in the FOIL law

enforcement exemption. More importantly it does not comply with the strict and explicit requirements under FOIL to claim law enforcement exemption, i.e., that the public should have access to government records (POL § 84), that the agency provide records unless they fit within an exemption (POL §87(2)) or that the agency certify that the records provided are accurate or that they could not locate records (POL §89(3)(a)).

In AADEF the NYPD admitted the existence of documents but invoked FOIL exemption (POL §87(2)(e)) not to produce them. The Appellate Division, First Department did not follow its own precedent in AALDEF as stated in its decision (Motion Exhibit A, page 5). Instead it established another category under FOIL legislation called Glomar.

II. Even Assuming Federal Law Applies, the Application of the Glomar Doctrine Would Still be Inappropriate in the Appellants' Case.

Even when attempting to apply the federal law to the New York State FOIL statute, the Appellate Division First Department failed to properly address the requirements under Glomar. The Appellate Division, in addition to striking down long established state precedent in FOIL, attempts to play the role of the legislature and even contradicts the federal precedent and requirements when considering the use of the Glomar Doctrine.

A. The Galati Affidavit fails to meet the minimum standards for a Public Affidavit required under federal law to justify a Glomar Response.

Under federal law, an agency must file a Public Affidavit justifying their reliance on Glomar. *Phillippi v. CIA*, 546 F.2d 1009, 1013 (1976) (The agency must provide a Public Affidavit explaining in as much detail as possible the basis for its claim that it can be required to neither confirm nor deny the existence of the requested records). [The Affidavit must] survive the test of reasonableness, good faith, specificity and plausibility, *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982).

The Appellants vehemently argue against the adoption of Glomar into state law, especially since state and local agencies do not have the ability to classify documents pursuant to an act of Congress or Executive Order. However, even under the federal standard, for reasons argued below, the Galati Affidavits would be insufficient to satisfy the Glomar Response under federal law. Mere allusion in the Public Affidavit as to why an agency can neither confirm nor deny the existence of documents is not sufficient to justify a Glomar Response. See, *Morley v. CIA*, 508 F.3d1108 (D.C. Cir. 2007).

Under this federal theory, the federal agency must substantiate its Glomar Response with reasonably specific details. See, *Id at* 1126 and *Lane*

v. DOJ, 654 F.2d 917, 928-929 (3rd Cir. 1981) (Both cases considered the sufficiency of the agency's Affidavits in relation to a FOIA exemption, however, the same standard should apply to Public Affidavits justifying a Glomar Response). In 1986, the 11th Circuit stated that a failure to adhere to safeguards "was to give the government an absolute, unchecked veto over what it would and would not divulge, in clear violation of the provisions of the statute [FOIA]. It diverted to the agency the court's obligation to decide these questions according to the law. *Ely v. FBI*, 781 F.2d 1487, 1494 (11th Cir. 1986). In accepting the Galati Affidavits to justify the use of the Glomar Doctrine, without the analysis required by federal case law discussed above, the Appellate Division failed in its obligation, thereby, leaving it to the agency to decide questions of law.

The Galati Affidavits (Appendix Exhibit A: Record pages 89-110 and Appendix Exhibit B: pages 78-99), both sworn to on February 11, 2014, fail to provide any information specific to these Appellants. They speak in generalizations that could apply to any request by any individual as long as he or she is a Muslim. The fact that the Affidavits are identical, except for changes in the names, bolsters the Appellants' argument. To be sufficient, the Galati Affidavits (which the Appellate Division likened to a Public Affidavit) would have had to contain specific information as to each

requester regarding why the acknowledgment of the existence of documents would hamper the functioning of the NYPD, see, *Phillippi supra*.

B. Even a federal agency cannot claim Glomar after it has already revealed the existence of documents.

Even under federal law, an agency cannot assert "it cannot confirm or deny" the existence of records after it has already acknowledged their existence. "An agency is therefore precluded from making a Glomar response if the existence or non-existence of the specific records sought by the FOIA request has been the subject of an official public acknowledgment. If the government has admitted that the specific record exists, a government agency may not later refuse to disclose whether that same record exists or not." *Wilner v. National SEC. Agency*, 592 F.3d 60, 70 (2009). "When information has been officially acknowledged, its disclosure may be compelled even over the agency's otherwise valid exemption claim." *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (1990).

The NYPD has acknowledged the existence of records related to their spying on the Muslim community in several instances. In *Asian Am. Legal Def. & Educ. Fund v. New York City Police Dep't*, 41 Misc. 3d 471 (Sup. Ct. 2013). The NYPD acknowledged the existence of records, provided non-exempt documents that were responsive to the request and argued FOIL

exemptions for others. In AALDEF the NYPD acknowledged the existence of surveillance documents and properly asserted the law enforcement exemption under FOIL (POL §87(2)(e)). Having publicly acknowledged the existence of these documents in court, the NYPD cannot now claim Glomar. The lower Court confirmed this fact by stating "the records sought here are subset of the records found properly exempt under FOIL" [in AALDEF](Motion Exhibit A, page 5).

In addition, the NYPD admitted the existence of the requested documents in this case when it argued the documents are a subsection of the documents in AALDEF (Appendix Exhibit C: pages 36-39, and Appendix Exhibit D: pages 6-7). During the oral argument on March 8, 2016, before the Appellate Division, First Department, the NYPD again admitted the existence of documents when they stated that documents were produced in response to another case (Raza *et al* v. City of New York *et al*, 13 CV 3448 (EDNY)) where Plaintiffs claimed constitutional violations against the NYPD for its illegal surveillance of members of the Muslim community based on their religion.

The third example of the NYPD's public acknowledgement of records which are the subject of the Appellants' requests, is a recently discovered Declaration of Thomas Galati, filed in the United States District Court for

the Southern District of New York on or around May 16, 2013 (prior to the Affidavits filed in this matter). In the May 16, 2013 Declaration, Chief Galati described the surveillance activities of the Zone Assessment Unit (later renamed as "The Intelligence Bureau") in the Muslim community, the type of information collected by the unit and the number of records maintained by the unit (attached as Motion Exhibit B).[3]

The NYPD, and Chief Galati himself, were aware that they had already acknowledged the existence of these records prior to invoking Glomar in Hashmi and Abdur-Rashid. The NYPD filed subsequent identical Affidavits in Hashmi and Abdur-Rashid on February 11, 2014 to invoke Glomar. The Appellate Division First Department even when attempting to use the federal law as constructive fatally failed to require the NYPD to at least comply with federal requirements when asserting Glomar.

Under federal law the NYPD would be prohibited from using the Glomar theory when the agency has already admitted the existence of documents, *Wilner* at 70 and *Fitzgibbon* at 765. At minimum, if the Appellate Division analyzed the Glomar requirements under the federal

[3] *Handschu et al v. Special Services Division*, 71 Civ. 2203 (CSH). Though filed in May 2013, Appellants do not believe that this Declaration was made public until January 2016. The declaration is available on the NYPD's website under their legal filing. It can be found here: http://www.nyc.gov/html/nypd/downloads/pdf/pr/declaration_of_thomas_galati_with_exhibit_a.pdf. (last visited June 27, 2016).

context, it would have deemed the NYPD improperly invoked Glomar even within the federal analysis. By not doing so, the Appellate Division First Department has not only allowed the NYPD to evade compliance with FOIL's strict requirements when asserting Glomar, as argued herein-above (page 11), but it has permitted the NYPD to claim a federal theory without having to comply with the federal rules as well. The Appellate Division permitted the NYPD to be free from all judicial oversight (federal or state) allowing it to have its cake and eat it too.

C. It was bad faith for the NYPD to invoke the Glomar Doctrine in response to the Appellants' FOIL request.

Under federal case law, bad faith and the fact that the Affidavit contradicts other evidence in the record is sufficient to defeat the Glomar Doctrine, *Wilner* at 68. Instances of the NYPD's bad faith and wrong-doing have been prevalent in recent years. As an example, the NYPD's abuse and harassment of African-American and Hispanic residents through their overuse of stop and frisk was criticized in *Floyd v. City of New York*, 739 F.Supp.2d 376 (SDNY 2010).

Galati himself, in a June 28, 2012 deposition in the *Handschu* case stated that the activities of the Zone Assessment Unit did not result in any

criminal investigations.[4] Similar to stop and frisk policies, the NYPD in this case abused the Muslim community through their excessive and illegal surveillance based on religion. However, despite claims that the counterterrorism activities of the NYPD thwarted fourteen or more terror plots[5], Galati admitted that the surveillance did not result in prosecutions (*See* FN 6) The Appellate Division erred in accepting the Galati Affidavits in this matter without analyzing their validity, considering the bad faith on the part of the agency. The Affidavits contained misleading information. *See, Gardels* at 1105.

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[4] June 28, 2012 Deposition of Thomas Galati in *Handschu v. Special Services Division*, 71CIV. 2203 (CSH)

> Q. If they make an assessment of what's being brought in, warrants, some action, does that indicate that an investigation has commenced? (96: 16-19)
>
> A. Related to Demographics, I can tell you that information that have come in has not commenced an investigation. (96: 21-23)
>
> Q. You're saying that based on what has occurred during your tenor, correct? (96:24-25)
>
> A. Yes. (97:2)

[5] At least one news organization analyzed and challenged statements by Mayor Bloomberg and Police Commissioner Kelly that the NYPD thwarted 14 terror plots and credibly called those statements into question by pointing out that the plots were actually thwarted by other agencies or that the plots were facilitated by and could not have been accomplished without the assistance of government informants. https://www.propublica.org/article/fact-check-how-the-nypd-overstated-its-counterterrorism-record

Lastly, Galati's May 16, 2013 Declaration filed in the *Handschu* case (Motion Exhibit B), before the Affidavits in the case at bar, admitted the existence of documents and described the number and substance of the documents. Both the Galati deposition and prior declaration, contradict the contents in the February 11, 2014 Affidavits filed in this case establishing on-going bad faith on the part of the NYPD for years. For the foregoing reasons, the Appellate Division should have rejected the February 11, 2014 Galati Affidavits for not fulfilling the federal requirements alone.

CONCLUSION

The Appellants request that this Court grant the motion for leave to appeal the Appellate Division, First Department's June 2, 2016 Decision and Order dismissing the Appellants' CPLR Article 78 Petitions and further request that this Court direct the NYPD to provide the requested documents or satisfy their burden to establish that the individual documents fall within an exemption.

The *Abdur-Rashid* and *Hashmi* cases involve a novel issue of law since this is the first time a New York State Court has permitted the use of the federally created Glomar Doctrine in response to a state FOIL request. In addition, the use of the Glomar Doctrine in response to a FOIL request

has statewide impact and affects the right of every citizen to access government records.

The Appellate Division First Department should not have even considered the Galati Affidavits to establish new provisions contradicting the explicit intent of the legislature under FOIL and the long standing state precedent, including its decision under AALDEF. The Appellate Division should have directed the NYPD to comply with FOIL by acknowledging the existence of documents pursuant to POL§89(3)(a). The Appellate Division should have at the minimum ordered an "*in camera review*" as Judge Moulton ordered (Appendix Exhibit B: page 40). The NYPD has already acknowledged the existence of these documents on three occasions in this case and other cases as explained herein-above. Lastly, bad faith on the part of the Respondents by invoking Glomar even though they previously acknowledged the existence of the records should not be allowed to stand. Appellants request costs and fees.

Dated: New York, New York
June 29, 2016

Respectfully submitted,

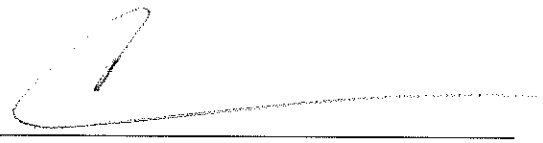

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Exhibit A

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 2, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Andrias, Saxe, Richter, JJ.

630-
631 Index 101559/13

In re Talib W. Abdur-Rashid,
Petitioner-Appellant,

-against-

New York City Police Department, et al.,
Respondents-Respondents.

- - - - -

In re Samir Hashmi,
Petitioner-Respondent,

-against-

New York City Police Department, et al.,
Respondents-Appellants.

- - - - -

New York Civil Liberties Union, Brennan Center for Justice, Reporters Committee for Freedom of the Press, Advance Publications, Inc., American Society of News Editors, AOL-Huffington Post, Association of Alternative Newsmedia, Association of American Publishers, Inc., Bloomberg L.P., Buzzfeed, Daily News, LP, the E.W. Scripps Company, First Look Media, Inc., Hearst Corporation, Investigative Reporting Workshop at American University, the National Press Club, National Press Photographers Association, the New York Times Company, North Jersey Media Group, Inc., Online News Association, the Seattle Times Company, Society for Professional Journalists and Tully Center for Free Speech,
Amici Curiae.

_____

Law Firm of Omar T. Mohammedi, LLC, New York (Omar T. Mohammedi of counsel), for Talib W. Adbur-Rashid and Samir Hashmi, for appellant/respondent.

Zachary W. Carter, Corporation Counsel, New York (Devin Slack of counsel), for New York City Police Department and Raymond Kelly, respondents/appellants.

Mariko Hirose, New York, Jordan Wells, New York, and Christopher Dunn, New York, for New York Civil Liberties Union, amicus curiae.

Michael Price, New York, for Brennan Center for Justice, amicus curiae.

Davis Wright Tremaine LLP, New York (Alison Schary of counsel), for Reporters Committee for Freedom of the Press, Advance Publications, Inc., American Society of News Editors, AOL-Huffington Post, Association of Alternative Newsmedia, Association of American Publishers, Inc., Bloomberg L.P., Buzzfeed, Daily News, LP, the E.W. Scripps Company, First Look Media, Inc., Hearst Corporation, Investigative Reporting Workshop at American University, the National Press Club, National Press Photographers Association, the New York Times Company, North Jersey Media Group, Inc., Online News Association, the Seattle Times Company, Society for Professional Journalists and Tully Center for Free Speech, amici curiae.

Judgment, Supreme Court, New York County (Alexander W. Hunter, J.), entered September 25, 2014, denying the petition brought pursuant to CPLR article 78 seeking to compel respondents New York City Police Department (NYPD) and NYPD Commissioner Raymond Kelly to disclose documents requested by petitioner Talib W. Abdur-Rashid pursuant to the Freedom of Information Law (FOIL) (Public Officers Law § 84 *et seq.*), and granting respondents'

motion to dismiss the proceeding, unanimously affirmed, without costs. Order, same court (Peter H. Moulton, J.), entered on or about November 17, 2014, which denied respondents' motion to dismiss the petition brought pursuant to CPLR article 78 seeking to compel them to disclose documents requested by petitioner Samir Hashmi pursuant to FOIL, and ordered respondents to submit an answer to the petition, unanimously reversed, on the law, without costs, the motion to dismiss granted, and the order to submit an answer vacated. The Clerk is directed to enter judgment dismissing the proceeding brought by petitioner Samir Hashmi.

FOIL does not prohibit respondents from giving a Glomar response to a FOIL request — that is, a response "refus[ing] to confirm or deny the existence of records" where, as here, respondents have shown that such confirmation or denial would cause harm cognizable under a FOIL exception (*Wilner v Natl. Sec. Agency*, 592 F3d 60, 68 [2d Cir 2009], *cert denied* 562 US 828 [2010] [interpreting the Freedom of Information Act [FOIA]). Although petitioners contend that such a response is impermissible in the absence of express statutory authorization, the Glomar doctrine is "consistent with the legislative intent and with the general purpose and manifest policy underlying FOIL"

(*Matter of Hanig v State of N.Y. Dept. of Motor Vehs.*, 79 NY2d 106, 110 [1992] [internal quotation marks omitted]), since it allows an agency to safeguard information that falls under a FOIL exemption.

Although federal case law regarding FOIA is not binding on this Court, it is "instructive" when interpreting FOIL provisions (*Matter of Lesher v Hynes*, 19 NY3d 57, 64 [2012] [internal quotation marks omitted]), and the application of the Glomar doctrine to FOIA requests has been widely approved by federal circuit courts (*see Wilner*, 592 F3d at 68 [citing decisions of four other circuit courts upholding or endorsing the Glomar doctrine as applied to FOIA requests]). We have considered the differences between the two statutes, as identified by petitioners, amici curiae, and the *Hashmi* court (46 Misc 3d 712, 722-724 [Sup Ct, NY County 2014]), but find that they do not justify rejecting the Glomar doctrine in the context of FOIL.

Respondents' invocations of the Glomar doctrine were not affected by an error of law (*see Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y.*, 87 AD3d 506, 507 [1st Dept 2011], *lv denied* 18 NY3d 806 [2012]). Respondents met their burden to "articulate particularized and specific justification" for declining to confirm or deny the existence of the requested

records, which sought information related to NYPD investigations and surveillance activities (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275 [1996] [internal quotation marks omitted]). In particular, respondents showed that answering petitioners' inquiries would cause harm cognizable under the law enforcement and public safety exemptions of Public Officers Law § 87(2) (*see* § 87(2)[e], [f]; *see generally Gould*, 89 NY2d at 274-275).

The affidavits submitted by NYPD's Chief of Intelligence establish that confirming or denying the existence of the records would reveal whether petitioners or certain locations or organizations were the targets of surveillance, and would jeopardize NYPD investigations and counterterrorism efforts. The records sought here are a subset of the records found properly exempt under FOIL in *Matter of Asian Am. Legal Defense & Educ. Fund v New York City Police Dept.* (125 AD3d 531, 532 [1st Dept 2015], *lv denied* 26 NY3d 919 [2016]). We see no reason to depart from this recent precedent.

By this decision, we do not suggest that any FOIL request for NYPD records would justify a Glomar response. "An agency resisting disclosure of the requested records has the burden of proving the applicability of [a FOIL] exemption" and must

submit "a detailed affidavit showing that the information logically falls within the claimed exemptions" and "the basis for [the agency's] claim that it can be required neither to confirm nor to deny the existence of the requested records" (*Wilner*, 592 F3d at 68 [internal quotation marks omitted]). In view of the heightened law enforcement and public safety concerns identified in the affidavits of NYPD's intelligence chief, Glomar responses were appropriate here.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 2, 2016

CLERK

Exhibit B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

BARBARA HANDSCHU, RALPH DiGIA, ALEX MCKEIVER, SHABA OM, CURTIS M. POWELL, ABBIE HOFFMAN, MARK A. SAGAL, MICHAEL ZUMOFF, KENNETH THOMAS, ROBERT RUSCH, ANNETTE T. RUBINSTEIN, MICKEY SHERIDAN, JOE SUCHER, STEVEN FISCHLER, HOWARD BLATT, ELLIE BENZONI, on behalf of themselves and all others similarly situated,

Plaintiffs,

- versus -

SPECIAL SERVICES DIVISION, a/k/a Bureau of Special Services; WILLIAM H.T. SMITH; ARTHUR GRUBERT; MICHAEL WILLIS; WILLIAM KNAPP; PATRICK MURPHY; POLICE DEPARTMENT OF THE CITY OF NEW YORK; JOHN V. LINDSAY; and various unknown employees of the Police Department acting as undercover operators and informers,

Defendants.

----------x

DECLARATION OF THOMAS GALATI

71 Civ. 2203 (CSH)

DECLARATION OF THOMAS GALATI

THOMAS GALATI, declares under penalty of perjury and pursuant to 28 U.S.C. §1746 that the following statements are true and correct:

1. I am Commanding Officer of the Intelligence Division for the New York City Police Department ("NYPD"). I submit this declaration in support of Defendants' Opposition to Class Counsel's Motion for Injunctive Relief and for Appointment of an Auditor or Monitor. Specifically, this declaration sets forth facts related to the NYPD's Zone Assessment Unit (formerly known as the Demographics Unit) about which Class Counsel complains. This

declaration is based upon personal knowledge, books and records of the NYPD, and upon information received from officers and employees of the NYPD which I believe to be true.

2. I will have been a member of the NYPD for 29 years as of July 2013. In 2006, I was appointed as Commanding Officer of the NYPD Intelligence Division, while holding the rank of Deputy Chief. Most recently, I was promoted to Assistant Chief in December 2008, and continue to serve as Commanding Officer of the NYPD Intelligence Division to date. In this role, I am the highest ranking uniformed officer in the NYPD Intelligence Division and report directly to the Deputy Commissioner of Intelligence, David Cohen. I have overall responsibility for the various units of the NYPD Intelligence Division, including the Zone Assessment Unit.

3. Prior to becoming the Commanding Officer of the NYPD Intelligence Division, I held numerous ranks and commands over the course of my 29 year career with the NYPD. Some of the more prominent positions and corresponding ranks include: Deputy Chief and Commanding Officer of the Gang Division, Inspector and Commanding Officer of the 46th Precinct, Deputy Inspector and Commanding Officer of the 47th Precinct, Captain and Commanding Officer of the Bronx Anti-Crime Unit, Captain and Commanding Officer of the Bronx Tracer Unit, and Lieutenant and Platoon Commander of the Street Crime Unit.

4. In an effort to resolve the concerns raised by Class Counsel about the Zone Assessment Unit, I was deposed by Class Counsel in response to their request to have someone speak about the Zone Assessment Unit and the information this unit collected. My deposition took place on 28 June 2012. Prior to my deposition, the NYPD Intelligence Division made available to Class Counsel samples of the reports generated by the Zone Assessment Unit. The purpose of this production was to allow Class Counsel to see the type of information collected and retained by the Zone Assessment Unit.

The Mission of the Zone Assessment Unit

5. The Zone Assessment Unit, then known as the Demographics Unit, was created in the wake of the 11 September 2001 terrorist attack on New York City to provide the NYPD with an understanding of particular ethnic and nationality concentrations within New York City. The ethnicities and nationalities that the Zone Assessment Unit focused on were ones whose home countries were identified by the federal government as containing incubators for Islamists radicalized to violence – i.e., terrorists. The goal was to institutionalize our knowledge of where these ethnicities and nationalities were concentrated in the New York City area and to obtain information about the locations and types of businesses or institutions within that area, including mosques and other religious institutions. This effort drew heavily on cataloging related data contained in the U.S. Government 2000 Census. This core data was then updated and made more granular via visits to the census-identified areas by the Zone Assessment Unit.

6. While the Zone Assessment Unit collected publicly available information about the ethnic concentration within an area, it did not, and its mission never was to, conduct criminal investigations or conduct investigations as set out in Section V of the Modified Handschu Guidelines.

7. The retention of the information collected by the Zone Assessment Unit serves several purposes related to deterring and detecting terrorism and unlawful activity. First, it assists the NYPD Intelligence Division in understanding where an Islamist radicalized to violence might try to blend in and secrete himself before or after carrying out a terrorist act. A comprehensive understanding of where certain ethnicities are concentrated provides a roadmap in the event the NYPD receives information about the characteristics of an Islamist terrorist who

is believed to be secreting himself in the New York City area, as he may likely try and blend in by gravitating to a community bearing the same traits as himself. Second, the information assists in identifying where that same terrorist might try and recruit assistance from those with common traits – language, dialect, region of origin, religious sect, etc. Third, the information assists the NYPD in deploying resources in the face of potential ricochet violence from events taking place here or abroad, such as sectarian or nationalist violence. In other words, the NYPD will be in a position to deploy its resources efficiently and effectively when it is necessary to ascertain a community's reaction to current events which the NYPD believes could result in violence.

8. For instance, in the wake of the Boston Marathon bombings which occurred on 15 April 2013, the Zone Assessment Unit was deployed to neighborhoods in which individuals from the Caucasus geographic region, which include Chechens, live in New York City to: (i) help ascertain whether people in these neighborhoods were at risk of victimization through retaliatory acts of violence in response to the bombings; and (ii) be prepared in the event the perpetrators attempted to blend in within an area where persons from the Caucasus geographic region reside and frequent. The Zone Assessment Unit was able to quickly respond to these neighborhoods because of the previous cataloging efforts identifying where people from the Caucasus geographic region lived.

9. Similarly, in April 2013, the Zone Assessment Unit responded to the Hazara community in New York City in response to a suicide attack targeting the leader of the Hazara community in Quetta, Pakistan – the attack was perpetrated by Lashkar-i-Jhangvi, a foreign terrorist organization based in Pakistan. Again, the Zone Assessment Unit's knowledge of the communities in New York City enabled this outreach mission to be achieved.

10. The Zone Assessment Unit has conducted similar cataloging of predominantly non-Muslim ethnicities and nationalities in the New York City area for some of the same purposes identified above. Those included the Sri Lankan community in regards to the Liberation Tigers of Tamil and Eelam (LTTE), an ethno-nationalist terrorist group; the Russian community in regards to Russian Organized Crime; the Mexican community in regards to a swine flu epidemic; and the Indian Sikh community in reaction to Indian riots after a Sikh shooting in Australia; the Egyptian Coptic and Muslim community reaction to anti-Coptic riots in Egypt; and more recently to the Azeri and Armenian communities in the wake of the threat of war between both countries earlier this year. The NYPD Intelligence Division also maintains extensive knowledge of New York City Jewish community concentrations and locations.

11. Class Counsel attempts to make much of the fact that I testified at my deposition that since my time as Commanding Officer of the NYPD Intelligence Division in 2006, none of the visits conducted by the Zone Assessment Unit resulted in an investigation. While that fact is true, the critical point is that the Zone Assessment Unit was not created to trigger investigations or otherwise generate "leads." As I describe above, the Zone Assessment Unit's mission was to further identify concentrations of certain ethnicities and nationalities in New York City beyond what was available in the U.S. Government 2000 Census so that the NYPD would be in a better position to respond to terrorist threats or potential violence, to gauge community reaction to public events here or abroad in order to protect against ricochet violence or civil unrest, and to effectively outreach to the community in the face of such threats.

The Information Retained From the Zone Assessment Unit's Visits to Public Places

12. In order to carry out its mission, plainclothes police officers assigned to the Zone Assessment Unit visit public places and events. While most of the activities of the Zone

Assessment Unit do not concern the "investigation" of "political activity" as those terms are defined under the Modified Handschu Guidelines, when the Zone Assessment Unit's activities arguably fall within the scope of those terms, the Zone Assessment Unit is authorized under § VIII(A)(2) of the Modified Handschu Guidelines to carry out its mission by such visits.

13. Information retained from these visits to public places mainly consists of factual information. This includes, for example, common pedigree information, such as the name and address of the place visited, the nature of the business or establishment (i.e. restaurant, coffee shop, deli, mosque), the type of building, the general ethnicity of the customers and/or owner, and sometimes the name of the owner. In addition, on some field reports, a conversation that occurred at the location is noted if there is a specific focus of concern at the time of the visitation, such as concern about the potential for violence in the wake of a Danish newspaper's publishing several cartoons depicting the Prophet Muhammad in the fall of 2005. There was a strong negative reaction to the publication of the cartoons by Muslims overseas which resulted in dozens of casualties, including many deaths. The Zone Assessment Unit would be sensitive to this type of risk of potential ricochet violence from events abroad.

14. The form in which the information from the public visits by the Zone Assessment Unit has been retained has evolved over time. In the earlier years of the Zone Assessment Unit's existence (then known as the Demographics Unit), the information was put into a Microsoft Word document. Subsequent to that, a weekly field report was prepared. Currently, a field report is prepared on a per visit basis and the information is also inputted into the Zone Assessment Unit's standalone desktop computer. Sometimes reports are generated from this information which illustrates one such reason for inputting such information into the Zone Assessment Unit's standalone desktop computer.

15. The information retained from the Zone Assessment Unit's visits to public locations (e.g., the name and address of the business, the ethnicity or nationality associated with the location, and other similar "phone book" type of information) is a useful and necessary component to allow the NYPD to respond to potential unlawful or terrorist activity. Not having that basic information at hand could lead to valuable time lost when deciding where to deploy resources in the face of preventing or pursuing a terror suspect, conducting an investigation, or responding to potential ricochet violence arising from events here or abroad. Multiple visits to the same location are necessary to ensure that the information is kept up to date; re-visits to a previously visited location may be directed by leadership in response to overseas or domestic events, such as the Boston Marathon bombing.

16. The Federal Bureau of Investigation ("FBI") similarly recognizes the importance of collecting this type of demographic data. The FBI's Domestic Investigations and Operations Guide ("DIOG"), dated 16 December 2008, states:

> The DOJ guidance and FBI policy permit the FBI to identify locations of concentrated ethnic communities in the Field Office's domain, if these locations will reasonably aid the analysis of potential threats and vulnerabilities, and overall, assist domain awareness for the purpose of performing intelligence analysis. If, for example, intelligence reporting reveals that members of certain terrorist organizations live and operate primarily within a certain concentrated community of the same ethnicity, the location of that community is clearly valuable – and properly collectible – data. Similarly, the locations of ethnic-oriented businesses and other facilities may be collected if their locations will reasonably contribute to an awareness of threats and vulnerabilities, and intelligence collection opportunities. Also, members of some communities may be potential victims of civil rights crimes and, for this reason, community location may aid enforcement of civil rights laws. Information about such communities should not be collected, however, unless the communities are sufficiently concentrated and established so as to provide a reasonable potential for intelligence collection that would support FBI mission

programs (e.g., where identified terrorist subjects from certain countries may relocate to blend in and avoid detection).

The relevant pages from the DIOG are attached as Exhibit A A copy of the DIOG can be found online at http://www2.hn.psu.edu/faculty/jmanis/poldocs/FBI-Dom-Inv-Op-Guide/original.pdf.

The Recent Boston Marathon Bombing

17. A prime example of the usefulness of this type of information is illustrated by the events following the recent terror attack at the Boston Marathon and related planned attack on New York City's Times Square. The Zone Assessment Unit police officers were deployed after the bombings into areas previously mentioned in paragraph 8 above in order to fulfill two objectives: ensure that any retaliatory threats to the community would be surfaced to the NYPD quickly; and anticipate the possibility of the Boston Marathon bombers seeking a location to blend into within New York City. This became especially vital when the NYPD learned that the Tsarnaev brothers mentioned Manhattan in the period immediately before being intercepted by police on Thursday evening, just three days after the attack, which resulted in an extended battle with police during which one brother was killed and the other apprehended. The NYPD has since learned the Tsarnaev brothers were on the way to New York City armed with multiple explosive devices.

Conversations Retained

18. As part of my 28 June 2012 deposition by Class Counsel, I was asked about some of the conversations that were retained in the Zone Assessment Unit's field reports or the Zone Assessment Unit's standalone desktop computer. I explained why the conversations were of value in assessing potential unlawful or terrorist activity. The language spoken at a location is a piece of information which can be useful should the NYPD be pursuing a terrorist, conducting an investigation, or trying to gather information about potential unlawful activity due to events

occurring domestically or abroad. Among other things, under exigent circumstances, a unique language environment can help law enforcement officers choose which locations to visit first when searching for an unidentified individual who has been reported to have traveled to New York with the intention of committing a terrorist act. The 15 April 2013 Boston Marathon bombing example is a prime case in point. It was critical to know in advance where Russian speaking locations existed as that was one of the languages spoken by the Tsarnaev brothers.

19. I instructed my staff to review the sample set of documents chosen by Class Counsel from the years 2006, 2010 and 2011, and identify the number of visits to public places and the number of conversations set out. That review revealed that there were 346 visits and 31 conversations memorialized. That equates to conversations being retained on approximately 8.9% of visits. Notably, the overwhelming majority of the conversations captured were at a time when there were current events that caused the NYPD to fear for the safety of New York City's residents, such as conversations relating to the Danish cartoons, tensions between United States and Iran, tensions between United States and Pakistan, violent conflicts between Sunni and Shite Muslims and terrorist groups including al-Qaeda.

20. Because Class Counsel allege that the NYPD has a widespread practice or policy by the Zone Assessment Unit to retain conversations heard on their visits to public places, I requested a review of all the field reports created by the Zone Assessment Unit over the most ***recent*** three year period, between 1 January 2010 and 4 April 2013, to identify the number of conversations retained in the field reports. That review revealed that, out of 4,247 field reports created during this time period, 207 field reports contained conversations. On a percentage basis, that equates to conversations being retained in 4.9% of all the visits made by the Zone Assessment Unit over the most recent three year period. A review of the content of the

conversations retained reveals that most of these conversations were noted at a time when there were current events that caused the NYPD to fear for the safety of New York City's residents. Out of the 207 field reports which contained conversations, my staff identified 161 reports that were reactions to overseas events. This number equals 78% of all the conversations retained. The topics of these overseas events include, but are not limited to, the death of Osama Bin Laden, the arrest of Faisal Shahzad, the Arab Spring, and various terrorist attacks around the world.

21. Out of those 207 field reports which contained conversations, only six include the names of individuals participating in the conversation. This number equals 2.8% of all the conversations retained and one tenth of a percent of all the field reports written during this period. In the six field reports that included the names of individuals participating in the conversation, there were two field reports in which an individual's first and last names were memorialized and four field reports in which only an individual's first name was memorialized. None of the reports reviewed by my staff memorialized any unique identification information, such as a date of birth or a social security number, and no other further inquiries or computer checks were conducted.

22. Moreover, none of those conversations were heard in a mosque, a Muslim Student Association, a university, or a non-governmental organization.

23. The Zone Assessment Unit members make a judgment about what information needs to be memorialized that potentially relates to unlawful or terrorist activity. The Zone Assessment Unit members are the most familiar with the communities in which they are receiving information, based in part on their ethnicities and language capabilities, and as a result are well equipped to make such judgments. In paragraph 20, I have pointed out that a review of

the Zone Assessment Unit's reporting for the last three years shows that only 4.9% of the field reports contained reporting of conversations. It is evident from those statistics that it is rare for conversations to be memorialized. It should be kept in mind that the Zone Assessment Unit police officers have overheard many conversations in crowded eateries, but have chosen to memorialize just a fraction of these conversations based on their determination that the conversation may be helpful to NYPD in its counterterrorism mission or in protecting its citizens from violent reactions to events occurring outside of New York City.

24. While the conversations memorialized by the Zone Assessment Unit members in field reports are retained, access to the field reports is strictly limited. The Zone Assessment Unit field reports that are more than 30 days old are placed in an electronic compartment ("sealed compartment") that only may be accessed by the administrator of the Intelligence Division Data System, the NYPD's Assistant Commissioner, Legal Matters for Intelligence Affairs and his staff attorneys. Only the Deputy Commissioner of Intelligence or, if the Deputy Commissioner of Intelligence is unavailable, myself or the Executive Officer of the Intelligence Division may authorize access to information in a sealed field report. This will only occur after receiving a legal recommendation from the NYPD's Assistant Commissioner, Legal Matters for Intelligence Affairs. Regarding the Zone Assessment Unit's standalone desktop computer, the information retained is accessible to and utilized only by members of the Zone Assessment Unit to enable them to perform their duties.

Dated: New York, New York
May 16, 2013

THOMAS GALATI

COURT OF APPEALS OF THE STATE OF NEW YORK

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TALIB W. ABDUR-RASHID and SAMIR HASHMI,

Appellants,

v.

NEW YORK CITY POLICE DEPARTMENT, *et al.*,

Respondents.

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AFFIDAVIT OF SERVICE

New York County
Index No.
13/101559 & 13/101560

Heela Masood, being duly sworn, deposes and says that she is over eighteen years of age and is not a party to the action.

That on the 29th day of June, 2016, deponent served (2) true copies of Appellants' Brief in Support of the Motion for Leave to Appeal to the Court of Appeals, upon Zachary W. Carter, Corporation Counsel of the City of New York by personally delivering and leaving the same with City of New York Law Department, Office of Corporation Counsel.

Sworn to before me this
29th day of June, 2016

Heela Masood

Notary

ELIZABETH K KIMUNDI
Notary Public, State of New York
No. 02KI6295507
Qualified in Kings County
Commission Expires Jan. 06, 2018