No. 19-1273.

In the
Supreme Court of the United States.

Assassination Archives and Research Center,

Petitioner,

-v-

Central Intelligence Agency,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR THE PETITIONER

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RULE 29.6 STATEMENT

Petitioner Assassination Archives and Research Center, Inc. ("AARC") is a non-stock, non-profit Virginia corporation dedicated to the collection and dissemination of research materials related to political assassinations. AARC has no parent or subsidiary entities. As noted, as a non-stock, non-profit entity, AARC does not issue stock or other form of ownership.

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This case raises the important issue of whether the CIA can claim a b(5) deliberative process privilege for its search activities in response to a Freedom of Information Act request on a topic of national, indeed global, interest. Those search activities involve purely factual issues which do not qualify for the deliberative process privilege. *EPA v. Mink*, 410 U.S. 73,91 (1973). This case raises the question of overbroad use of the deliberative process privilege. Indeed, the abuse of the deliberative process

privilege has become so pervasive that it is now frequently referred to as the "withhold it because you want to" exemption. *Amici brief* of Reporter's Committee for Freedom of the Press and 28 Media Organizations, S.Ct. #19-547, ***Fish and Wildlife Serv., et al. v. Sierra Club, Inc.*** August 3, 2020, p. 3. Further, Congress has expressed its intent that the deliberative process privilege not be used to withhold records of historical events such as the topic in this case. *See FOIA Improvement Act of 2016,* Public Law 114-185, Section 2, 114th Congress.

In addition this case raises the issue that the Judgment of the Court of Appeals should be reversed because it is in direct conflict with *Dep't. of Justice v. Tax Analysts*, 492 U.S. 136, 109 S.Ct. 2841 (1989). As noted in the Judgment of the Court of Appeals, in this case CIA pointed to the National Archives as the location where responsive records were likely to be found. App. 1, p. 2. Referring a FOIA requester to another agency rather than searching for and accounting for records in the agency's possession is directly contrary to this court's holding in *Dep't. of Justice v. Tax Analysts*, 492 U.S. 136,150 (1989). CIA must account for records under its control regardless of what collections exist at CIA. Given the prevalence of making copies of records, CIA must account for records in its control even if duplicates were sent to the National Archives. And where CIA asserts control of records it has sent to the National Archives, CIA must both search and account for such records as well. The CIA's claim of equities in a document and exemptions are assertions of control. Further the Judgment of the Court of Appeals for the District of Columbia should be reversed because CIA's claims are not properly justified under summary judgment standards as they do not provide Petitioner or the Court with sufficient information to intelligently contest the claims.

REPLY TO CIA'S STATEMENT OF THE CASE

CIA's response ignores entirely the fact that Petitioner's FOIA request relates to a matter of high public importance- new information about the circumstances of the assassination of President Kennedy.

AARC's petition states that the Freedom of Information Act requests at issue in this case seek additional new information related to the events surrounding the assassination of President Kennedy on November 22, 1963, an event that generates ongoing public concern. In 2012 Appellant AARC became aware of a formerly Top Secret document released under the President John F. Kennedy Assassination Records Collection Act, 44 U.S.C. § 2107 note, containing important new information. This document consisted of a memorandum of a briefing of the Joint Chiefs of Staff by the head of Central Intelligence Agency ("CIA") Cuban operations Desmond Fitzgerald on September 25, 1963. During this briefing, Mr. Fitzgerald informed the Joint Chiefs that CIA was attempting to recruit individuals in the Cuban military to join in an effort to overthrow the Castro regime. Mr. Fitzgerald stated that CIA saw a parallel in history, the plot to assassinate Adolf Hitler during World War II, and that the Hitler plot was being studied by CIA "in detail" to develop an approach to dealing with Castro. R. 1-1, page 7, para. 13. ("R." refers to the docket entries in this case, Civil No. 17-0160 in the District Court for the District of Columbia.)

AARC's petition further states that former CIA Director Allen Dulles wrote extensively about the July 20, 1944 plot to kill Hitler in his book *Germany's Underground, the Anti-Nazi Resistance,* 1947, 2000 Da Capo Press, pp. 1-11. Dulles had personal involvement with the July 20 plotters from his position in Bern, Switzerland as a principal

officer of the Office of Strategic Services ("OSS"), forerunner of the CIA. *Id.* at xi-xii.[1] Dulles served as CIA Director in the Kennedy administration until the failure of the Bay of Pigs invasion after which Kennedy replaced Dulles. Dulles served as an active member of the Warren Commission that investigated President Kennedy's assassination.

As Warren Commission member and former head of the CIA, Dulles had personal knowledge of the CIA's plots to assassinate Castro. Despite Dulles' personal knowledge of the facts of these plots they were withheld from the Warren Report notwithstanding their bearing on President Kennedy's assassination. R. 8-5 (President Gerald Ford foreword). Although subsequent investigations of President Kennedy's assassination included plots to assassinate and overthrow Castro, information was not provided about CIA's detailed study of the plot to assassinate Hitler. R. 8-3 (Church Committee excerpt); R.8-4 (CIA Inspector General's Report on plots to assassinate Castro); R. 26-1, *Politico* article on Castro plots; R.30-3 (Church Committee excerpt). Information about U.S. plots to assassinate Castro was believed significant because of the possibility of retaliation against U.S. leaders, or that these plots themselves may have been turned against President Kennedy.

To AARC's knowledge, this additional information about studying the 1944 plot to kill Hitler to develop an approach to overthrow Castro is new information that has not

[1] The plot to assassinate Hitler was attempted unsuccessfully on July 20, 1944, and is known as the "July 20 plot" or "Valkyrie plot". Valkyrie was the codename for a Nazi Germany secret plan to suppress internal rebellion by foreign slave workers. The July 20 plot planners attempted to use the Valkyrie operation to overthrow Hitler's regime, however Hitler was only slightly wounded and quickly reasserted his authority. Dulles, Allen Welsh, *Germany's Underground*, Da Capo Press (2000), p. 1; Casey, William, *The Secret War Against Hitler*, The Berkley Publishing Group, (1989), p. 138. As noted, Allen Dulles was a Director of the CIA and a member of the Warren Commission that investigated President Kennedy's assassination.

been previously investigated by U.S. government agencies. Through its FOIA requests, AARC is attempting to find and reveal additional information about this episode to fill out the public record. The Court of Appeals has properly recognized the high public interest in the subject of the Kennedy assassination, stating, "(w)here that subject is the Kennedy assassination — an event with few rivals in national trauma and in the array of passionately held conflicting explanations — showing potential public value is relatively easy." *Morley* v. *Central Intelligence Agency ("Morley IX"),* 810 F.3d 841,844 (D.C.Cir. 2016). The CIA response ignores that this case involves factual material at the heart of the unresolved issue as to whether the plots to assassinate Castro may be linked to the assassination of the President.

As noted in CIA's response, CIA's search for responsive records initially failed to find any records. Upon a subsequent search caused by AARC's FOIA lawsuit, CIA produced one responsive record titled "Propagandists Guide to Communist Dissensions". The CIA invoked Exemption 5's deliberative process privilege to withhold information related to its searches. Due to representations made by CIA referring Petitioner to the National Archives, AARC believes that the withheld material relates to CIA's handling of its materials accessioned to the National Archives under either the President John F. Kennedy Assassination Records Collection Act, Pub. L. No. 102-526, 44 U.S.C. §2107, note, or the Nazi War Crimes Disclosure Act, Pub. L. 105-246, 5 U.S.C. *§ 552 note.*

CIA's assertion of the deliberative process privilege in this context is inappropriate because it impedes the search for responsive records. Logically, if there were no responsive records there would be no need for an exemption claim for a substantial amount of text as has been asserted. This withheld information is in the category of factual material which

is not subject to an Exemption 5 claim under this Court's decision in *EPA* v. *Mink*, 410 U.S. 73,91 (1973).

ARGUMENT

1. CIA argues that AARC did not in its appeal challenge CIA's segregation efforts required by the FOIA statute, however, AARC specifically argued segregability in its brief filed in the case in the Court of Appeals (Case no. 18-5280, Doc. 1799186, p. 31), and reiterated segregability in its reply brief (Doc. 1799187, p. 22). In any event, the Court of Appeals has held that a court must consider the segregability issue *sua sponte.* Morley v. CIA ("Morley II"), 508 F.3d 1108,1123 (D.C.Cir. 2007). The FOIA text 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." 5 U.S.C. § 552(b). "[T]he District Court had an affirmative duty to consider the segregability issue *sua sponte.*" Trans-Pac. Policing Agreement v. U.S. Customs Serv., 177 F.3d 1022,1028 (D.C.Cir. 1999) Thus, "a district court clearly errs when it approves the government's withholding of information under the FOIA without making an express finding on segregability." PHE, Inc. v. Dep't. of Justice, 983 F.2d 248,252 (D.C.Cir. 1993). The district court's failure to fulfill this responsibility requires a remand. Morley II, 508 F.3d at 1123.

2. This Court granted of a writ of *certiorari* in case #19-547, *Fish and Wildlife Serv., et al. v. Sierra Club, Inc.* on February 28, 2020, and oral argument is set for November 2, 2020. That case arises from the Ninth Circuit and presents a b(5) deliberative process issue closely similar to one in Petitioner's case. The results of the two cases are in conflict in that the *Fish and Wildlife Service* case presents an issue of compelled release under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552(a), of draft documents for which the government asserts

a deliberative process privilege under FOIA Exemption 5 [§ 552(b)(5)]. Similarly but with a contrary outcome, Petitioner AARC's case involves the Central Intelligence Agency's successful assertion of the Exemption 5 deliberative process privilege for information reflecting CIA's search activities in responding to Petitioner's FOIA request.

Under Rule 10(a) of the Supreme Court Rules, this case is a prime candidate for a writ of certiorari because a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. Also the subject matter of Petitioners request, is a matter of high public importance. AARC suggested in its petition that this Court could grant a writ in this case and consolidate this case with the *Fish and Wildlife Service* case for consideration of the conflicting approaches to the Exemption 5 deliberative process privilege. At a minimum this Court could hold this case pending the decision in the *Fish and Wildlife Service* case.

While this petition was being prepared the Second Circuit ruled that a part of an EPA computer program used to forecast the likely responses of automakers to proposed EPA greenhouse gas emissions standards is not deliberative and is not exempt from release under Exemption 5. *Nat'l. Resources Defense Council* v. *EPA*, Docket No. 19-2896, Document 73-1, U.S. Court of Appeals for the Second Circuit, opinion decided April 1, 2020. The Second Circuit's decision is in conflict with the approach of the D.C. Circuit in Petitioner's case in which CIA search information was found to be deliberative.

3. The Judgment of the Court of Appeals dated October 11, 2019 (App. 1) upholds CIA's deliberative process exemption claim under Exemption 5 of the FOIA [§ 552(b)(5)]. The material withheld is documentation of CIA's search for records responsive to AARC's FOIA requests.

As noted in the petition, Justice White of this Court in the seminal Exemption 5 case *EPA* v. *Mink* recognized the broad pro-public disclosure purpose of the FOIA. 410 U.S. 73,80 (1973). He wrote for the Court, "(w)ithout question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *Id.*

Justice White further explained in a later case, "It is sufficient to note for present purposes that the Act seeks "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S.Rep. No. 813, 89th Cong., 1st Sess., 3 (1965) (hereinafter S.Rep. No. 813); *EPA v. Mink, supra* at 410 U. S. 80. As the Act is structured, virtually every document generated by an agency is available to the public in one form or another unless it falls within one of the Act's nine exemptions." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132,136 (1975).

This Court has repeated these pro-disclosure requirements of FOIA in subsequent cases, stating that the FOIA "requires federal agencies to make Government records available to the public, subject to nine exemptions for categories of material." *Milner* v. *Dept. of Navy*, 562 U.S. 562, 565 (2011). Ultimately, "disclosure, not secrecy, is the dominant objective of the act." *Dept. of Air Force* v. *Rose*, 425 U.S. 352,361 (1976). "For this reason, the 'exemptions are explicitly made exclusive... and must be 'narrowly construed.'" *Milner* at 565 (citations omitted).

In the case *EPA v. Mink* this court held that severable factual material in otherwise deliberative records must be released under FOIA. 410 U.S. at 91. In this case the Court of Appeals upheld CIA's withholding of factual material related to CIA's search for responsive

records. This is vital information needed to determine the adequacy of CIA's search and what responsive records CIA may hold. *EPA v. Mink* is consistent with the language of the FOIA statute, 5 U.S.C. § 552(b), which requires that segregable portions or responsive records must be provided to a requester. That statute provides, "Any 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."

The D.C. Circuit has held that a court must consider the segregability issue *sua sponte. Morley v. CIA ("Morley II"),* 508 F.3d 1108,1123 (D.C.Cir. 2007). "[T]he District Court had an affirmative duty to consider the segregability issue *sua sponte.*" *Trans-Pac. Policing Agreement* v. *U.S. Customs Serv.,* 177 F.3d 1022,1028 (D.C.Cir. 1999) Thus, "a district court clearly errs when it approves the government's withholding of information under the FOIA without making an express finding on segregability." *PHE, Inc. v. Dep't. of Justice,* 983 F.2d 248,252 (D.C.Cir. 1993). The district court's failure to fulfill this responsibility requires a remand. *Morley II*, 508 F.3d at 1123.

The FOIA explicitly empowers the district court to make a *de novo* review of the agency's handling of a FOIA request, and authorizes the court to review the content of all agency records, *in camera*, if necessary. 5 U.S.C. Section 552(a)(4)(B). Given the extensive amount of material withheld under Exemption 5 in this case, this Court should undertake an *in camera* review of the withholdings and order release of the material, or remand the case to the lower court for such *in camera* review.

4. As noted in the Judgment of the Court of Appeals, in this case CIA pointed to the National Archives as the location where responsive records were likely to be found. App. 1, p. 2. Referring a FOIA requester to another agency rather than searching and accounting for

records in the agency's possession is directly contrary to this court's holding in *Dep't. of Justice v. Tax Analysts*, 492 U.S. 136,150 (1989). CIA must account for records under its control regardless of what collections exist at CIA, yet CIA's response in this case does not address this issue. Given the prevalence of making copies of records, CIA must account for records in its control even if duplicates were sent to the National Archives. And where CIA asserts control of records it has sent to the National Archives, CIA must search for and account for such records. The CIA's claim of equities in a document and exemptions are assertions of control.

To date CIA has not explicitly addressed whether it retains copies of records accessioned to the National Archives, or for which it retains control. Such retained or controlled records would be subject to FOIA and must be accounted for. CIA's response does not address these issues, nor do the CIA declarations filed in the case. This case should be remanded so that CIA is required to specifically address whether it retains copies of records, or maintains control of records accessioned to the National Archives that are responsive to Petitioner's FOIA request.

5. The Judgment of the Court of Appeals for the District of Columbia should be reversed because CIA's claims are not properly justified under summary judgment standards as they are not made on personal knowledge and do not provide Petitioner or the Court with sufficient information to intelligently contest the claims. Further, relevant material is erroneously withheld under the b(5) exemption.

Agency affidavits regarding the search for responsive records are inadequate to support summary judgment where they "do not note which files were searched or by whom, do not reflect any systematic document location, and do not provide information specific enough to enable [the plaintiff] to challenge the procedures utilized." *Weisberg* v. *United*

States Dept. of Justice (Weisberg), 627 F.2d 365, 371 (D.C.Cir.1980). D.C. Circuit decisions have long held that agency declarations must describe in detail how searches were conducted, including search terms that were used, and results yielded in the search of each component of an agency. *Reporter's Committee for Freedom of the Press* v. *FBI (Reporter's Committee),* 877 F.3d 399, 403-4 (D.C. Cir. 2017).

The D.C. Circuit has emphasized that summary judgment is inappropriate if "a review of the record raises substantial doubt" as to the search's adequacy, "particularly in view of 'well defined requests and positive indications of overlooked materials.'" *Valencia-Lucena* v. *U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999)(quoting *Founding Church of Scientology* v. *NSA*, 610 F.2d 824, 837 (D.C. Cir. 1979)). "We review *de novo* the adequacy of the [agency's] search." *DiBacco* v. *U.S. Army*, 795F.3d 178, 188 (D.C. Cir. 2015). *Reporter's Committee* at 402. Agency actions under the FOIA are subject to *de novo* review. 5 U.S.C. § 552(a)(4)(B). "This requires the court to 'ascertain whether the agency has sustained its burden of demonstrating that the documents requested ... are exempt from disclosure under the FOIA."' *MultiAg Media LLC* v. *Dept. of Agriculture*, 515 F.3d 1224, 1227 (D.C.Cir.2008)(citations omitted).

Rather than describing its search and results in adequate detail, in this case CIA goes so far as to withhold five records that describe the search and its results. CIA claims an Exemption 5 FOIA pre-decisional privilege exemption for this information that in fact should be provided as part of CIA's justification of its search. *CIA Vaughn index,* Joint .Appendix, D.C. Cir No 18-5280, pp. 217-219, entries 2-6 described as "Internal Agency search information in response to Plaintiffs' FOIA request". R. 19-4. The *Vaughn* index for these records states "Exemption (b)(5) was asserted to protect pre-decisional intra-

agency deliberations regarding the search results and does not represent the final determination." *Id.* The results of the search are not described. Nor is there information presented showing any pre-decisional character to the withheld information.

To come within Exemption 5, a document must be a direct part of the pre-decisional process in that it makes recommendations or expresses opinions on legal or policy matters to be decided by the agency, and the government must carry its burden of establishing the existence of a genuine pre-decisional process. *Vaughn* v. *Rosen (II)*, 523 F.2d 1136,1144 (D.C.Cir. 1975). In this case, from the little information disclosed, the withheld information appears to be largely information about the searches conducted and to be conducted, rather than legal or policy matters.

CIA's first substantive response to AARC's amended FOIA request came in a letter dated June 5, 2015 that stated, "We did not locate any records responsive to your request." J.A. page 29. R. 1-6. On November 2, 2015 CIA rescinded their earlier letter with a letter stating, "Please be advised that our letter to you of 5 June 2015 was sent to you in error. Your request is still under review. We apologize for any inconvenience." J.A. page 30. CIA reversed course again in a letter dated 29 April 2016, which stated, "Our previous 5 June 2015 response to your request remains unchanged…" J.A. page 31.

CIA's multiple reversals and self-admitted errors in conducting this search and reporting it to AARC raise significant questions as to the conduct of the search. Most telling, CIA's declarations submitted in this case do not attempt to explain or even address CIA's multiple reversals and errors in the search. By withholding the five documents under Exemption 5, CIA denies requester information that could explain the reversals and errors.

When the adequacy of the agency's search is in dispute, summary judgment for an agency is inappropriate as to that issue. *See Founding Church of Scientology, Inc.* v. *Nat. Sec. Agency (Founding Church),* 610 F.2d 824, 836-37 (D.C.Cir.1979)("To accept its claim of inability to retrieve the requested documents in the circumstances presented is to raise the specter of easy circumvention of the [FOIA] . . . and if, in the face of well-defined requests and positive indications of overlooked materials, an agency can so easily avoid adversary scrutiny of its search techniques, the Act will inevitably become nugatory.").

In addition to ordering a new and competent search, this Court should allow AARC to conduct discovery on CIA's handling of this search in the form of a deposition or depositions of the officials who conducted the searches and are responsible for the contradictory responses. *Neugent* v. *U.S. Dept. of Interior,* 640 F.2d 386,391 (D.C. Cir. 1981) (holding that discovery should be answered in the interests of clarifying the matter). *Judicial Watch v. Dept. of State*, Civil No. 14-1242 (RCL)(D.D.C. March 2, 2020 Memorandum Order, ECF Doc. #161)(holding that depositions are permitted in a FOIA case where adequacy of agency search is not clear).

In this case CIA continues to withhold the Exemption 5 material which contains information about the search conducted in this case and the results of the search. AARC and this Court are denied access to that material, while required to argue and decide the adequacy of the search. CIA bears the burden of justifying its search, and providing the parties and the Court with as much information as possible to illuminate the discussion.

As previously noted, agency affidavits regarding the search for responsive records are inadequate to support summary judgment where they "do not note which files were searched or by whom, do not reflect any systematic document location, and do not

provide information specific enough to enable [the plaintiff] to challenge the procedures utilized." *Weisberg* v. *United States Dept. of Justice (Weisberg)*, 627 F.2d 365, 371 (D.C.Cir.1980). Precisely this information is withheld in this case.

Summary judgment is appropriate if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Hall* v. *C.I.A.*, 668 F.Supp.2d 172,178 (D.D.C. 2009), citing *Fed.R.Civ.P.* 56(c). A District Court may award summary judgment "solely on the information provided in affidavits or declarations that describe 'the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'" *Id*., quoting *Military Audit Project* v. *Casey*, 656 F.2d 724,738 (D.C.Cir.1981).

As noted in *King* v. *United States Department of Justice (King)*, 830 F.2d 210, 218 (D .C .Cir .1987) "[t]he significance of agency affidavits in a FOIA case cannot be underestimated." The reason for this is that ordinarily the agency alone possesses knowledge of the precise content of documents withheld. Thus, "the FOIA requester and the court both must rely upon its representations for an understanding of the material sought to be protected." *Id* . The agency's assertions are critical because "'[t]his lack of knowledge by the party see[k]ing disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution,' with the result that '[a]n appellate court, like the trial court, is completely without the controverting illumination that would ordinarily

accompany a lower court's factual determination.'" *Id*., quoting *Vaughn* v. *Rosen*, 484 F.2d 820, 824-825 (D.C.Cir. 1973).

As *King* also stated: Specificity is the defining requirement of the *Vaughn* index and affidavit; affidavits cannot support summary judgment if they are "conclusory, merely reciting statutory standards or sweeping." To accept an inadequately supported exemption claim "would constitute an abandonment of the trial court's obligation under the FOIA to conduct a *de novo* review." *King*, 830 F.2d at 219 (citations omitted).

This index "must describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of disclosing the sought after information." *Id*, at 223-224 (emphasis in original). "Furthermore, a reproduction of the redacted documents can only show the court the context from which an item has been deleted, and context may or may not assist the court in assessing the character of the excised material and the grounds for its deletion." CIA's submissions in this case in support of its Exemption 5 claims are conclusory and lacking in detail and fail to meet this standard.

King also made clear that courts must be wary of the categorization of exemption claims. It laid down specific instructions for evaluating such claims: Categorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate. To support its Exemption 1 claims the agency affidavits must for each redacted document or portion thereof, identify the document, by type and location in the body of documents requested; (2) note that the Exemption is claimed; (3) describe the document withheld or any redacted portion thereof, disclosing as much information as possible without thwarting the exemption's purpose; (4) explain how this information falls within one or more of the categories of

information authorized by the governing executive order, and (5) explain how disclosure of the material in question would cause the requisite degree of damage to the national security. *Id*. at 224 (footnote omitted). These guidelines apply every bit as much to Exemption 5's deliberative process privilege as they do to Exemption 1.

CIA fails to meet the summary judgment standard for FOIA cases by withholding relevant information about the scope, method and results of the search, and because its submissions in support of its position are conclusory and lacking in detail and specificity, the D.C. Circuit's peremptory orders upholding summary judgment must be denied.

CONCLUSION

Petitioner continues to rely on all arguments and assertions of its petition for a writ of certiorari. For all these reasons, this Court should grant the petition.

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