IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

ROBERT B. BERGDAHL Sergeant, U.S. Army, *Appellant*, v. PETER Q. BURKE Lieutenant Colonel, AG U. S. Army, in his official capacity as Commander, Special Troops Battalion, U. S. Army Forces Command, Fort Bragg, NC, and Special Court-Martial Convening Authority, and UNITED STATES, *Appellees*.	)	WRIT-APPEAL PETITION FOR REVIEW OF U.S. ARMY COURT OF CRIMINAL APPEALS DECISION ON PETITION FOR WRIT OF MANDAMUS Crim. App. Misc. Dkt. No. ARMY 20150624 USCA Misc. Dkt. No.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES:

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I

Preamble and Request for Recusal

Pursuant to Rules 4(b)(2), 18(a)(4), and 27(b), the All Writs Act, 28 U.S.C. § 1651, and Article 67(a), UCMJ, Sergeant Robert B. Bergdahl prays that the Court reverse an unpublished decision of the U.S. Army Court of Criminal Appeals that denied a petition for writ of mandamus. Ex. 1. The specific relief appellant sought was and is an order directing the United States and LTC Peter Q. Burke (the special court-martial convening authority) to make public forthwith the unclassified exhibits received in evidence in appellant's preliminary hearing and to modify the protective order to permit SGT Bergdahl to make those exhibits available to the public. Expedited consideration is requested. *See* Rule 19(e).

One of the Court's commissioners has been nominated to fill the vacancy created by the expiration of Chief Judge Baker's term. That nomination is pending before the Senate Armed Services Committee. Yesterday, in remarks at the VFW hall in Pelham, NH, Chairman John McCain of that committee informed *The Boston Herald* that he'll call a hearing of the Senate Armed Services Committee if SGT Bergdahl "is allowed to avoid prison," . . . "If it comes out that he has no punishment, we're going to have to have a hearing in the Senate Armed Services Committee." "And I am not prejudging, OK, but it is well known that in the

searches for Bergdahl, after — we know now — he deserted, there are allegations that some American soldiers were killed or wounded, or at the very least put their lives in danger, searching for what is clearly a deserter. We need to have a hearing on that." Laurel J. Sweet, *John McCain Wants Answer If Bowe Bergdahl Avoids Prison: Will Call Hearing If Bergdahl Avoids Prison*, Boston Herald, 12 Oct. 2015, *available at* http://www.bostonherald.com/news_opinion/us_politics/2015/10/john_mccain_wants_answers_if_bowe_bergdahl_avoids_prison.

Passing over the fact that Sen. McCain's comments constitute unlawful congressional influence, we respectfully suggest that the nominee to this Court not participate in any way in the disposition of this writ-appeal petition. *See United States v. Curtis*, 40 M.J. 31 (C.M.A. 1994) (mem.) (Wiss, J.); *cf. United States v. Gleason*, 41 M.J. 356 (C.M.A. 1994) (mem.) (Crawford, J.), *both noted in* EUGENE R. FIDELL & DWIGHT H. SULLIVAN, GUIDE TO THE

RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES § 6.03[7], at 56 (14th ed. 2015).

II

History of the Case

The case is the subject of an Article 32, UCMJ preliminary hearing with respect to charges preferred by appellee Burke on 25 March 2015 under Articles 85 and 99(3), UCMJ. The GCMCA is GEN Robert B. Abrams, Commander, U.S. Army Forces Command. The SPCMCA is LTC Burke, who is Commander, Special Troops Battalion, FORSCOM. He issued a protective order on 25 March 2015.[1]

The preliminary hearing was conducted at Joint Base San Antonio on 17-18 September 2015. The preliminary hearing officer was LTC Mark A. Visger. Except for brief conferences with counsel in the nature of R.C.M. 802 conferences, the entire hearing was conducted in public. Members of the public, including representatives of the news media, were in fact present both in the hearing room and in an overflow room to which the proceedings were piped. A copy of the transcript is submitted herewith, Ex. 2, and is cited herein as Art. 32 Tr.

[1] For the reasons set forth in our submissions in earlier writ litigation, including his status as a Type 1 accuser, LTC Burke should not be serving as SPCMCA and should not be permitted to make any recommendation to GEN Abrams. Nothing in this writ-appeal petition should be deemed a waiver of our objection to his doing so. The Court denied our earlier writ-appeal petition on that issue without prejudice. *Bergdahl v. Burke*, 74 M.J. __ (C.A.A.F. 2015) (mem.).

Among the documents received in evidence was the report of an AR 15-6 investigation conducted by MG Kenneth R. Dahl in 2014 and a 371-page transcript of MG Dahl's 6-7 August 2014 interview of appellant. *See* Art. 32 Tr. iii. These documents are unclassified and have not been sealed. They were repeatedly referred to in testimony in open court in the presence of spectators.

During the hearing, counsel for appellant asked the preliminary hearing officer if he would permit the release of these two documents. As anticipated, LTC Visger indicated that he lacked authority to authorize their release. Art. 32 Tr. 228.

MG Dahl testified that he had no objection to his report or the interview transcript being made public. Art. 32 Tr. 310.

Sergeant Bergdahl wishes these documents to be made public. If the government refuses to make them public immediately, he wishes to have them made public by his attorneys.

Sergeant Bergdahl's counsel sought a ruling from the Department of the Army's Professional Conduct Council on 24 June 2015 as to whether it would violate the Army's *Rules of Professional Conduct for Lawyers* for the defense to make these documents public. Ex. 3. After 82 days, the Council refused to rule, claiming that counsel should ask LTC Burke. Ex. 4. Even though we had already done so in April, we wrote to FORSCOM. Ex. 5. We have received no answer.

On 21 September 2015, SGT Bergdahl sought a writ of mandamus from the U.S. Army Court of Criminal Appeals. That court directed the government to show cause why the relief sought should or should not be granted. On 8 October 2015, it denied the petition in an unpublished decision. *Bergdahl v. Burke*, Misc. No. 20150624 (Army Ct. Crim. App. 2015).[2]

LTC Visger submitted his report of preliminary hearing on 5 October 2015 in accordance with R.C.M. 405(j)(1). Sergeant Bergdahl submitted his objections to and comments on the report on 9 October 2015 in accordance with and within the period prescribed by R.C.M. 405(j)(5).

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[2] On 2 October 2015, Hearst Newspapers, LLC and other major national news media filed a separate access-related mandamus petition with the Army Court seeking

> the immediate public release of unclassified documents received into evidence during the Article 32 preliminary hearing examining charges against Sgt. Robert ("Bowe") Bergdahl held on September 17 and 18, 2015 at Fort Sam Houston in San Antonio, Texas (the "Article 32 Hearing"), as well as the immediate public release of transcripts of the Article 32 Hearing. Respondents have denied the Press Petitioners contemporaneous access to these documents in violation of the public's First Amendment right of access to judicial records. The Press Petitioners also seek an order requiring Respondents to comply with constitutional requirements of public access to future judicial records that are created, filed, or otherwise received in *United States v. Bergdahl*.

Hearst Newspapers, LLC v. Abrams, Misc. Dkt. No. 2015____ (Army Ct. Crim. App.). Sergeant Bergdahl agrees with the Press Petitioners and immediately moved for leave to intervene. The Army Court has taken no action on either the media petition or his motion. One would have expected the two cases to be consolidated below.

III

Reasons Relief Not Sought Below

[Inapplicable]

IV

Relief Requested

Sergeant Bergdahl seeks a writ of mandamus directing respondents (1) to make public forthwith the unclassified exhibits that were received in evidence in the preliminary hearing and (2) to modify the protective order to permit him to make those exhibits public.

V

Issue Presented

ONCE AN UNCLASSIFIED DOCUMENT HAS BEEN ACCEPTED IN EVIDENCE IN A PRELIMINARY HEARING OPEN TO THE PUBLIC, MAY THE CONVENING AUTHORITY REFUSE TO RELEASE IT OR PERMIT THE ACCUSED TO DO SO?

VI

Statement of Facts

The pertinent facts are set forth in § II above.

VII

Reasons Why Writ Should Issue

A. Jurisdiction

The jurisdictional basis for the relief sought is the Court's potential appellate jurisdiction under Article 66(b)(1), UCMJ, *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 603-04 (1966),

since the authorized maximum punishment for the offenses with which SGT Bergdahl has been charged qualifies for mandatory appellate review. MCM ¶¶ 9e, 23e. The All Writs Act applies because the Court was established by Act of Congress. 28 U.S.C. § 1651(a). Together, the Code and the All Writs Act confer jurisdiction. *LRM v. Kastenberg*, 72 M.J. 364, 367 (C.A.A.F. 2013). The requested writ is in aid of the Court's appellate jurisdiction, as required by that Act.

The dispute underlying this writ-appeal petition, growing directly out of a critical phase of the court-martial process, and pitting appellant against the putative convening authority, lies well within the scope of this Court's authority, and in no way implicates *Clinton v. Goldsmith*, 526 U.S. 529 (1999).

Nor is *United States v. Arness*, 74 M.J. ___, 2015 CAAF LEXIS 720 (C.A.A.F. 2015), an impediment to this Court's exercise of its All Writs Act power. There, the trial had already been conducted and a sub-jurisdictional sentence adjudged. Moreover, the Judge Advocate General had refused to refer the case to this Court. As a result, the case was no longer in the Court's potential appellate jurisdiction, even though it once had been, given the authorized maximum punishment.

Here, in sharp contrast, there has been no trial, much less a sub-jurisdictional sentence, and of course the Judge Advocate General has never had occasion to decide whether it should be

referred here. *Arness* has no impact on a case in this posture, especially where the authorized maximum punishment remains sufficient to bring the case within the Court's normal appellate jurisdiction, without discretionary action by the Judge Advocate General to do so.

The Army Court disclaimed jurisdiction for reasons that are without merit:

First, the decision below treats *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997), as if it were no longer good law. Ex. 1, at 3. While one judge of this Court has evinced a willingness to have the application of the right to a public trial to preliminary hearings under Article 32 briefed and argued, *United States v. Davis*, 64 M.J. 445, 450 (C.A.A.F. 2007), no judge joined her, and the Court has not overruled *ABC*. It is highly improper for a lower court to deviate from binding precedent of its superior court. Nor should *ABC* be overruled. *Goldsmith* dealt with a matter that was entirely outside the parameters of the military justice process. It provides no basis whatever for abandoning *ABC*.

What is more, the President only a few months ago issued a revised regulation that squarely maintains the public-trial principle for preliminary hearings. R.C.M. 405(i)(4). Just as congressional reenactment is deemed to reflect approval of the existing judicial gloss on legislation, so too, presidential re-

affirmation of public access to preliminary hearings should be understood as reflecting approval of the existing judicial gloss – in this instance, the approach manifest in *ABC*.

Second, the Army Court thought it salient that the protective order "is a military order provided by a commander with application far beyond the Article 32, UCMJ." Ex. 1, at 4. We do not understand this. The only thing here at issue is whether exhibits introduced in a preliminary hearing that are not classified must be made public when the hearing itself is open to the public. That the protective order was issued by a military officer adds nothing to the conversation. Orders of military officers are not outside the reach of the All Writs Act.

The Army Court's insistence that relief "should and must be sought" under FOIA, AR 15-6, and Article 138, UCMJ is not only conclusory but also has nothing to do with whether the matter at hand is within the Army Court's (or this Court's) All Writs Act authority. The Army Court has thus confused jurisdiction with the merits. Its reference to these three remedies is wide of the mark in any event because this is not a case in which a party is seeking access to documents. Sergeant Bergdahl has copies of MG Dahl's AR 15-6 report and his own interview transcript. The Army provided them to him. He therefore doesn't need to get copies from the Army. What he needs is to have them made public or to have the road cleared for him to make them public. The Army's

failure to provide a ruling on whether he can do so without violating professional responsibility rules, Exs. 3-4, is in keeping with the litany of irrelevant and time-wasting alternative remedies suggested by the Army Court.[3]

The Army Court calls this (at 4) "a closer case" than *Goldsmith*. It's not "closer" – it's *clear*. Prompt access to unclassified exhibits admitted in evidence at a public hearing is part and parcel of the hearing. Keeping such records under wraps or thwarting their release is irreconcilable with the public character of the preliminary hearing.

The Army Court engages in a transparent delaying tactic when it claims appellant should wait until there is a military judge assigned. This utterly disregards the concept of potential appellate jurisdiction that is universally accepted in the All Writs Act jurisprudence. It is sufficient that the potential disposition and sentence would bring the case within the Court's appellate jurisdiction. If there were standing trial courts, we would have applied there. But there aren't. The Army Court and this Court are, however, standing courts, and are open and func-

[3] Lest the Court be under any illusions about the efficacy of FOIA as administered by the Army, petitioner early this year sought records relating to certain rule changes the Army promulgated or caused DoD to promulgate for the purpose of adversely affecting his rights under various personnel and pay regulations. Those requests are still pending. Moreover, we are reliably informed that various media outlets have repeatedly requested MG Dahl's report and have gotten nowhere.

tioning. Sergeant Bergdahl has no duty to wait until there is a referral any more than the media did when Sergeant Major of the Army McKinney was facing an Article 32 pretrial investigation.

Finally, according to the decision below (at 5), SGT Bergdahl must *now* show potential prejudice to *future* findings and sentence. We disagree. He has a right to have these documents made available to the public now. Whether or not withholding them will have downstream effects is irrelevant. As long as the public discourse in our Nation is polluted by repeated characterizations of SGT Bergdahl as a traitor by the leading contender for the Republican nomination for President of the United States, it is profoundly unfair to deny him the tools to refute those defamatory claims in the court of public opinion. Mr. Trump and the echo chamber that has amplified his voice beyond all reason have a right to free speech. Simple fairness demands that SGT Bergdahl at least be able to defend himself by permitting public access in real time to documents that put the lie to the kind of character assassination to which he is being subjected.

Here, for example, is Mr. Trump speaking at a rally in Las Vegas last week:

> Republican presidential front-runner Donald Trump said Thursday that Army Sgt. Bowe Bergdahl should have been executed for leaving his post in Afghanistan.

> "We're tired of Sgt. Bergdahl, who's a traitor, a no-good traitor, who should have been executed," Trump said to cheers at a rowdy rally inside a packed Las Vegas theater at the casino-hotel Treasure Island.
>
> "Thirty years ago," Trump added, "he would have been shot."

Associated Press, *Donald Trump says Bowe Bergdahl should have been executed*, 9 October 2015, *available at* http://www.foxnews.com/politics/2015/10/09/donald-trump-says-bowe-bergdahl-should-have-been-executed/

Mr. Trump has made similar remarks on at least seven other occasions. On 11 October 2015, a Fox News commentator who calls herself "judge" based on long past service on the Westchester, N.Y., county court, made equally rabid remarks. *See* Jeanine Pirro, *White House Wants Deserter Bergdahl to Walk*, Justice with

Judge Jeanine, Fox News, 11 Oct. 2015, available at http://www.foxnews.com/on-air/justice-jeanine/index.html#/v/4550020035001.

B. Error

Not content to find a lack of jurisdiction, the Army Court found SGT Bergdahl's petition lacking in merit. In this too it erred.

"Preliminary hearings are public proceedings and should remain open to the public whenever possible." R.C.M. 405(i)(4). It makes an utter mockery of that rule, and the principle that closures should be done wielding a scalpel rather than a meat-axe, if unclassified documents introduced in evidence and referred to in the course of the hearing themselves remain inaccessible in their entirety. This is a particularly appalling outcome given the stringent test (and requirement for particularized written factual findings) the President has prescribed for closing a hearing: there must be "an overriding interest . . . that outweighs the value of an open preliminary hearing." No such interest supports the effective sequestration of these public documents. After all, but for the interest in conserving valuable hearing time, the parties could literally have read them into the record from cover to cover. The conservation of hearing time is not a basis for withholding documents from the public.

In *Center for Constitutional Rights v. United States*, 72 M.J. 126, 130 (C.A.A.F. 2013) (3-2 decision), the Court held that the parties seeking relief had "failed to meet their burden of establishing that [it] or the CCA has jurisdiction to grant [them] the relief they seek." Significantly, the accused there, PFC Manning, did not join the organizations seeking access to documents.

Judge Stucky pointedly wrote for the Court:

> Finally, this case differs in a very important respect from [*ABC, Inc. v.*] *Powell*, 47 M.J. 363 [C.A.A.F. 1997)]. In that case, which dealt with the closure of an Article 32 investigation to the press and the public, the accused joined in the proceedings in order to vindicate his right to a public trial. Id. Here, the accused has steadfastly refused to join in the litigation, or, despite the Court's invitation, to file a brief on the questions presented. We thus are asked to adjudicate what amounts to a civil action, maintained by persons who are strangers to the court-martial, asking for relief -- expedited access to certain documents -- that has no bearing on any findings and sentence that may eventually be adjudged by the court-martial.

72 M.J. at 129. Equally tellingly, he observed:

> More immediately, the accused in Powell joined the media as a party in seeking a writ of mandamus to vindicate his constitutional right to a public trial -- something which had immediate relevance to the potential findings and sentence of his court-martial. We are not foreclosing the accused from testing the scope of public access, but he has not done so here.

Id. at 129-30. The decision below inexplicably disregards these critical portions of *CCR*.

This petition presents the very situation the Court found missing in *CCR* (a decision whose correctness we do not concede). Sergeant Bergdahl affirmatively wishes MG Dahl's report and his own interview to be made available to the public – whether by the Army or by himself, but in either case forthwith. Whatever the news media's rights may be (and we believe they too have a judicially enforceable real-time right to these and similar unclassified documents from an Article 32 preliminary hearing), his right to use and disseminate these documents -- of which he lawfully has copies -- as he wishes cannot be constrained by LTC Burke's protective order.

Even though the Army has long known that SGT Bergdahl wished to have the documents at issue made available to the public one way or the other, it wasted time by providing a non-answer to counsel's request for an ethics ruling and has taken none of the transparency measures it belatedly took in the *Manning* case, as recounted in *Center for Constitutional Rights v. Lind*, 954 F. Supp. 2d 389, 403-04 (D. Md. 2013). It has no excuse for having failed to incorporate reading room arrangements in the elaborate preparations for the preliminary hearing. Given the effort and resources expended on building- and hearing-room security, it is a pity this important aspect of the sound administration of justice was disregarded. As we noted below, "[i]f the government were trying to erode public confidence in the ad-

ministration of military justice, it would be hard-pressed to find a more effective way to do so than its response to SGT Bergdahl's petition for a writ of mandamus." Petitioner's Reply to Government Response to Petition for Writ of Mandamus, *Bergdahl v. Burke*, *supra*, at 2.

Only a little more need be said in response to the three reasons advanced by the Army Court (at 5-6) for denying relief on the merits. As we have already explained, the alternative remedies proposed by the Army are inapposite or unreliable or both. Relief from a military judge some time down the road does nothing to cure the unfairness that has impelled SGT Bergdahl to institute this case. Reopening the preliminary hearing is quite simply unresponsive to his claim.

The second prong of this part of the decision below (at 5-6) strings together several theories, none of which withstand scrutiny. Thus, the decision claims that preliminary hearings "are not an apples-to-apples comparison to trials on the merits." But in fact nothing distinguishes these two phases *from the standpoint of public access*. Precisely the same standards apply to public access and closure determinations. The decision below offers no support for the notion that the access-to-documents issue must or may be resolved differently as between these two critical phases of the military justice process.

The Army Court also claims (at 6) that "comparisons to civilian practice are difficult." Not so. The revised Article 32 is plainly inspired by preliminary hearings under Fed. R. Crim. P. 5.1. Probable cause determinations under that rule are public. We know of no authority for the proposition that unclassified evidence submitted at such a hearing would be withheld from public scrutiny, or that the defendant, if she chose to do so, could not make it.

The Army Court refers to the fact that the rules of evidence do not apply at preliminary hearings. But the same is true of preliminary hearings under Fed. R. Crim. P. 5.1. *See* Fed. R. Evid. 1101(d)(3). Moreover, important evidentiary rules *do* apply: M.R.E. 301-303, 305, 412, and Section V dealing with privileges. *See* M.R.E. 1101(d)(2). An Article 32 preliminary hearing is scarcely a "law-free zone."

Nor is the Army Court correct that there is no "judicial officer" in a preliminary hearing. R.C.M. 405(h)(4) states: "In applying these rules to a preliminary hearing, the term 'military judge,' as used in these rules, shall mean the preliminary hearing officer, who shall assume the military judge's authority to exclude evidence from the preliminary hearing. . . ." The Army's own recently-issued guide confirms that preliminary hearing officers exercise quasi-judicial functions. *See* Dep't of the Army Pamphlet 27-17, *Legal Services: Procedural Guide for the Ar-*

ticle 32 Preliminary Hearing Officer ¶¶ 1-4(a) (18 June 2015) ("As an officer detailed to conduct an impartial hearing, you will be performing a quasi-judicial function"), 2-1(b) ("The Article 32 preliminary hearing is a quasi-judicial proceeding and plays a necessary role in the due process of law in military justice").[4]

As for the Army Court's concern (at 6) about creating "an uneven power dynamic," that has no application where, as here, it is the accused who seeks release of preliminary hearing exhibits. To block such release on the basis that "an accused does not have full access to discovery until after referral" (as appellant knows all too well) is perverse. And as for the suggestion (also at 6) that what we request "would allow a party to introduce into the public sphere information that is inadmissible at trial and whose evidentiary value may be minimal," suffice to say that public discourse under the First Amendment is not and -- thank God -- never has been confined to that which is admissible in evidence in a court of law.[5]

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[4] The Army Court's concern (at 6 n.4) about sensitive matter such as social security numbers, graphic photos, or medical records is misplaced. First, the two documents here at issue contain no such information. The Army previously redacted any such information from the interview transcript. But even if they did, the simple solution would be to direct that the Army make the necessary redactions -- forthwith.

[5] The Army Court's casual citation to Rule 3.6 of the *Army Rules of Professional Conduct for Lawyers* is perfect chutzpah given the Army's months-long slow-rolling and ultimate refusal to an-

The final paragraph (at 7) of the Army Court's reasons for denying relief shows the desperation of that court's effort. Neither R.C.M. 405(i)(9) (concerning sealing) nor M.R.E. 506(e)(1)(D) (concerning sensitive information) bear on this case in any way. The preliminary hearing officer has power to seal, R.C.M. 1103A(a), but the only exhibits that have been sealed here are the few that are classified. *See* Art. 32 Tr. Iv. And nothing in the AR 15-6 report or the interview transcript is "sensitive information." We have no objection to the Court's examining these documents *in camera* to satisfy itself on this score.

C. Prudential Considerations

Two salient prudential considerations bear on the exercise of the Court's All Writs Act authority.

First, failing to grant the relief requested at this time will subvert the President's clear directive that preliminary hearings be conducted in public. To permit massive amounts of relevant, material, unclassified information to remain unavailable to the public, even when the accused prefers that these materials be made available, blows a gaping hole in the public hearing requirement and is indefensible. The resulting opacity

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swer appellant's counsel's inquiry about the applicability of that rule. The Army Court was aware of that refusal as the pertinent documents had been filed with it.

does not contribute to public confidence in the administration of military justice.

Second, it is perfectly obvious that SGT Bergdahl has been the subject of a record-shattering campaign of vilification in the right-wing media for more than a year. That campaign seriously threatens both his reputation and his right to a fair trial if any charge is referred for trial. He thus has a compelling interest in making MG Dahl's report and his own statement available to those in American society who wish to inform themselves about what actually happened. Forcing him to wait until the military justice process has run its course is unfair and this Court should not, by denying relief, ratify it.

VIII

Respondents' Contact Information

[Inapplicable]

Conclusion

For the foregoing reasons, the decision below should be reversed. A writ of mandamus should issue directing respondents (1) to make public forthwith the unclassified exhibits received in evidence in the preliminary hearing and (2) to modify the protective order to permit SGT Bergdahl to make those exhibits public.

Respectfully submitted,

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Certificate of Filing and Service

I certify that I have, this 12th day of October, 2015 filed and served the foregoing Writ-Appeal Petition by emailing copies to the Clerk of Court, the Government Appellate Division, and counsel for the Center for Constitutional Rights, which was an *amicus curiae* below, at the following email addresses:

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