15-2956

IN THE

FOR THE

AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,
Plaintiffs–Appellants,

– v. –

UNITED STATES DEPARTMENT OF JUSTICE, including its component OFFICE OF LEGAL COUNSEL, UNITED STATES DEPARTMENT OF DEFENSE, and CENTRAL INTELLIGENCE AGENCY,
Defendants–Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS–APPELLANTS

Colin Wicker
Dorsey & Whitney LLP
50 South Sixth Street—Suite 1500
Minneapolis, Minnesota 55402
T: 612.492.6687
F: 952.516.5531
wicker.colin@dorsey.com

Jameel Jaffer
Hina Shamsi
Brett Max Kaufman
Matthew Spurlock
American Civil Liberties Union Foundation
125 Broad Street—18th Floor
New York, New York 10004
T: 212.549.2500
F: 212.549.2654
jjaffer@aclu.org

CORPORATE DISCLOSURE STATEMENT

The American Civil Liberties Union and the American Civil Liberties Union Foundation are affiliated non-profit membership corporations. They have no stock and no parent corporations.

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INTRODUCTION

This case concerns a Freedom of Information Act request submitted by the American Civil Liberties Union for records concerning the purported legal basis for the government's targeted-killing program, the process by which the government adds U.S. citizens to so-called "kill lists," and the government's killing of three Americans in Yemen in 2011. This is the third time that this case has been before this Court. *See N.Y. Times Co. v. DOJ*, 756 F.3d 100 (2d Cir. 2014) ("*N.Y. Times I*"); *N.Y. Times Co. v. DOJ*, 806 F.3d 682 (2d Cir. 2015) ("*N.Y. Times II*"). This appeal concerns certain legal memoranda and other records withheld by the Department of Justice (inc

possessed responsive records but declined to describe or enumerate them—a so-called "no number no list" response. The CIA and DOD both proffered "no number no list" responses. After considering the parties' cross-motions for summary judgment, the district court conc

shared a draft of its opinion with the government (but not with Plaintiffs). SPA163. The court's draft opinion ordered the government to "submit to the Court, on a document-by-document basis, (1) a certification that the document does not contain any 'officially acknowledged material;' or (2) a certification that the document contains 'officially acknowledged material,' but any such material cannot reasonably be segregated from material that has not been 'officially acknowledged' and as to which FOIA exemptions have not been waived." SPA159. In the draft opinion, the court also ordered the agencies to submit a number of documents for *in camera* review. SPA159–60. On June 23, 2015, the district court provided its final opinion to the government for *ex parte* classification review, and on July 16, 2015, the court filed a final version of its opinion on the public docket. SPA160.

The public version of the district court's July 16 opinion is heavily redacted, and as a result it is difficult for Plaintiffs to say, with respect to many of the withheld records, why the court reached the conclusions it did. However, the public version of the opinion makes clear that the court reviewed certain of the records *in camera* and considered the agencies' public and *ex parte* declarations for the remainder. The court determined that the agencies had waived their right to withhold seven categories of information. SPA8–9. (It expressly left "for the Circuit to decide in the first instance" whether the agencies had waived their right

to withhold an eighth category of information. SPA9–10.) Having made this determination, the court ordered the government to disclose parts of seven records—four from the OLC and three from the CIA—on the grounds that the agencies had waived their right to assert FOIA's exemptions by public disclosures. SPA159–60. The court upheld the agencies' withholding of the remaining records on the basis of FOIA Exemptions 1, 3 and/or 5. The court also upheld the Glomar responses from the CIA and DOD for records pertaining to the factual bases for the killings of Samir Khan and Abdulrahman al-Aulaqi.[4]

This Appeal

As noted above, Plaintiffs narrowed their Request after reviewing the agencies' *Vaughn* indices. They further narrow their Request now, as reflected below. While Plaintiffs recognize that their Request still encompasses many records (60 records, to be precise), the agencies have not supplied Plaintiffs with

review. SPA34–38; SPA159.

- **OLC index no. 1:** The agency has not provided any description of this record in its redacted *Vaughn* index or its public declaration, and none appears in the public version of the district court's opinion.

- **OLC index no. 2:** It appears that this record is a "[p]redecisional OLC and/or Department of Justice legal advice document[]." JA115.

- **OLC index nos. 75 and 84:** It appears that these records are "[i]nternal Executive Branch documents reflecting predecisional OLC and/or Department of Justice legal advice." JA115.

- **OLC index nos. 8 and 9:** It appears that these records are "[c]lassified legal analyses prepared for oversight purposes," JA146.

- **CIA index nos. 2, 3, 12, 15, 33, 34, 35, 36, 45, 61, 62, 78, 94, 95, 96, 105, 106, 107, 110, 111, 112, 117, 118, 119, 120, 123, 124, 140, and 142:** The CIA asserts that these records "fall into four broad categories consisting of intelligence products, classified inter-agency correspondence, classified correspondence with Congress, and CIA internal discussions and deliberations," JA557, but neither the agency's public declaration and index nor the district court's redacted opinion indicate which records fall into each category.

- **CIA index nos. 59 Tab C, 109, and 113:** The district court ordered disclosure of redacted versions of CIA index nos. 109 and 113, and the entirety of CIA index no. 59 Tab C. SPA160.

With respect to the DOD, the ACLU seeks:

- **DOD index nos. 1, 31, 38, 39, 46, and 55:** Apart from stating that some of these records "include factual information regarding Aulaqi," JA586–87, the DOD has not further described these records in its public declaration.

SUMMARY OF ARGUMENT

The overarching question posed by this case is familiar to this Court: To what extent can the government withhold basic information—including legal analysis—relating to the government's extrajudicial killing of terrorism suspects? In answering this question, the district court erred in three respects.

First, the court misapplied this Court's test for official acknowledgment. The district court correctly held that the government has officially acknowledged seven categories of information, and that the government has therefore waived its right to withhold this information under FOIA. However, the court erred in concluding that the government had officially acknowledged only these seven categories of

information; in fact the government has acknowledged more. The court applied the official-acknowledgment doctrine too rigidly, failing to recognize that once the government has disclosed particular information, it may not withhold information that is closely related unless there is a *material* difference between that information and the information the government has already revealed. The district court also failed to appreciate and give full effect to the government's disclosures relating to the CIA's operational role in targeted killing. Relatedly, the court erred in declining to hold, despite the government's many disclosures on the topic, that the government had waived its right to withhold records relating to the factual basis for Anwar al-Aulaqi's targeting.

Second, even if the district court correctly decided the waiver issue, it erred in concluding that legal analysis in the withheld records is protected by Exemptions 1 and 3. Legal analysis can be withheld under Exemptions 1 and 3 only to the extent that it is inextricably intertwined with information that is independently protected. The district court plainly did not apply this rule; indeed, it appears not to have considered the segregability issue at all.

Third, the district court erred in concluding that the agencies had justified their invocations—the specifics of which are inscrutable to Plaintiffs in the agencies' public filings—of the common-law privileges encompassed by Exemption 5. And even if the agencies had established the foundation for invoking

those privileges, the district court erred by failing to apply the "working law" doctrine, which strips records of the Exemption 5 privilege to the extent the records contain the agencies' "effective law and policy."

Plaintiffs respectfully request that this Court (i) review *in camera* the records the district court reviewed *in camera* to determine which portions FOIA requires the agencies to release; and (ii) direct the district court to review

right to withhold seven categories of information. However, in its official-acknowledgment analysis, the court made three errors. First, the court applied this Court's official-acknowledgment test too rigidly. Second, the court too narrowly construed the scope of the government's

- "The fact that the Government carried out the targeted killing of al-Aulaqi," *see* Table at 48;
- "The fact that al-Aulaqi was killed in Yemen," *see* Table at 49; and
- The fact that "[t]he FBI was investigating Samir Khan's involvement in terrorism/jihad ."[7]

SPA8–9.

But while the court was correct to hold that the government had waived its right to withhold this information, the redacted version of the court's opinion suggests that the court applied the official-acknowledgement doctrine too "rigid[ly]," *N.Y. Times I*, 756 F.3d at 120 n.19. *See* SPA5–11. At the very least, the court appears to have been confused about the standard it was required to apply.

It is well established that the government cannot withhold information that it has already publicly disclosed. *N.Y. Times I*, 756 F.3d at 114. Thus, even if all of the information the agencies seek to withhold here was once protected by Exemptions 1, 3, and/or 5—and it was not, *see infra* §§ II–III—the agencies cannot lawfully withhold information unless there is a *material* difference between that information and the information the government has already revealed. *N.Y. Times I*, 756 F.3d at 113–14 (discussing application of official-acknowledgment doctrine to Exemptions 1 and 5).

In its first opinion in this case, this Court observed that the official-

[7] This holding is not at issue in this appeal. *See supra* note 4.

acknowledgment doctrine would "make little sense" if it "require[d] absolute identity" between the information that the government has previously disclosed and the information the government seeks to keep secret. *N.Y. Times I*, 756 F.3d at 120. The Court also explained that any "matching" requirement suggested by earlier cases was effectively *dicta*, going back to the test's origins in the D.C. Circuit. *Id.* at 120 n.19. The proper test—and the one this Court has actually applied in this litigation—is that once the government has chosen to disclose information, it may not withhold closely related information unless it is "in some *material* respect different from" information it has already disclosed. *Afshar v. DOS*, 702 F.2d 1125, 1132 (D.C. Cir. 1983) (emphasis added); *see also N.Y. Times I*, 756 F.3d at 120 ("The additional discussion . . . adds nothing to the risk.").

Indeed, this Court has explained that *Wilson v. CIA*, 586 F.3d 171 (2d Cir. 2009)—which was not a FOIA case but a suit in which the plaintiff had asserted a First Amendment right to publish portions of her memoir—did not actually apply a "matching" requirement. *N.Y. Times I*, 756 F.3d at 120 n.19. Rather, the *Wilson* court applied only the third prong of the three-part test—whether the disclosure was "'made public through an official and documented disclosure,'" 586 F.3d at 186 (quoting *Wolf v. CIA*, 473 F.3d 370, 387 (D.C. Cir. 2007)), to conclude that a private letter sent from the CIA to the plaintiff did not constitute an official government disclosure of the plaintiff's employment status with the agency, *id* at

187–89.

Moreover, this Court noted that the only Second Circuit case cited in *Wilson* in connection with official acknowledgment nowhere suggested a "matching" requirement. Instead, *Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, 891 F.2d 414 (2d Cir. 1989), turned on the fact that the purported official acknowledgment involved an entirely different—and undisclosed—secret. *Id.* at 421–22 (concluding that Navy officials' statements that ships were *capable* of carrying nuclear weapons did not officially acknowledge that the Navy *intended to deploy* nuclear weapons on those ships). And this Court further explained that the "ultimate source of the three-part test," the D.C. Circuit's opinion in *Afshar*, failed even to "mention a requirement that the information sought" must match the "information previously disclosed." *N.Y. Times I*, 756 F.3d at 120 n.19 (quotation marks omitted); *see Afshar*, 702 F.2d at 1133.

This Court's conclusions with respect to the withholding of the July 2010 OLC Memo supply useful guidance here. *See also Afshar*, 702 F.2d at 1132. Significantly, the Court ordered disclosure of portions of the memorandum discussing 18 U.S.C. § 956(a) even though the government had not previously disclosed its analysis of that particular statute. *See N.Y. Times I*, 756 F.3d at 116 ("Even though the DOJ White Paper doe

argument concerning the official-acknowledgment standard. SPA8 (characterizing the ACLU's position as being that "the disclosure of a specific fact entail[s] waiver of exemption for *all* information about the subject to which that fact pertains" (emphasis added)); SPA7 ("The ACLU takes the position that official acknowledgment of a fact constitutes waiver with respect to any information that is 'similar' to information disclosed."). This was not the ACLU's argument below, and it is not the ACLU's argument here. The argument, again, is that once the government has chosen to disclose information, it may not withhold information that is closely related unless that information is different in some material respect from the information the government has already disclosed.

Plaintiffs cannot know the extent to which the district court's failure to apply the correct standard affected its conclusions. However, given that the court seems to have applied the official-acknowledgement test too rigidly, and given the extent of the government's official disclosures, *see* Table, it seems likely that the court erred in holding that only seven records were withheld unlawfully.

B. The district court erred by too narrowly construing the scope of the government's official acknowledgments of the CIA's operational role in targeted killing.

In a heavily redacted, 13-page section of its opinion, the court apparently discussed its analysis of the extent to which the government had officially acknowledged the CIA's operational role in targeted killings. SPA16–29. The

court's discussion appears to relate to an OLC document whose index number is redacted, though the discussion likely implicates the court's disposition of other documents. The court observed correctly that the government has engaged in "extensive and explicit publicity" concerning the CIA's operational role in drone strikes, but it concluded that the government can withhold the OLC document nonetheless. SPA26. It seems that the court's conclusion turned on the question of whether statements by legislators can constitute "official acknowledgements." SPA24–26.

Without knowing the precise bases for the district court's decision on this issue, the ACLU can only refer this Court to the numerous and extensive official acknowledgments of the CIA's operational role in targeted killing. *See* Table at 46–48. The ACLU also notes that, contrary to what the district court appears to have held, SPA27, legislators' statements *can* constitute official acknowledgements in some circumstances—and even when legislators' statements do not themselves constitute official acknowledgements, they can affect the weight to be given to other statements. Indeed, this Court's first decision in this case was based in part on the statements of Senator Dianne Feinstein and Representative Mike Rogers about the CIA's role in targeted killings. *See N.Y. Times I*, 756 F.3d at 119 ("With respect to disclosure of the CIA's role, we can be confident that neither [Feinstein] nor [Rogers] thought they were revealing a secret when they

publicly discussed CIA's role in targeted killings by drone strikes."). Indeed, it would have been perverse to suggest that these statements—made by legislators tasked with *overseeing* the CIA—should play no role in the official-acknowledgement analysis. The touchstone for official acknowledgment is whether the disclosure in question leaves "some increment of doubt," or whether, by contrast, it will be understood as reliable, credible, and official. *Wilson,* 586 F.3d at 195.

C. The district court erred by failing to recognize that the government had waived its right to withhold a category of information concerning the factual basis for the government's targeted killing of Anwar al-Aulaqi.

The district court left "for the Circuit to decide in the first instance" whether the agencies have waived their right to withhold an eighth category of information concerning the factual basis for the government's targeted killing of Anwar al-Aulaqi. SPA9–10. The district court explained that this category comprises:

> At least some information about why [the government] killed Aulaqi; his leadership role in al-Qaeda in the Arabian Peninsula, including as an operational planner, recruiter and money-raiser; his role in the failed attempt to bomb the Northwest Airlines jetliner on December 2009 (the Detroit bombing attempt); and his role in planning other attacks (which never took place), including specifically attacks on two US bound cargo planes in October 2010).

SPA8.

The district court explained that, in its view, "[e]very item listed" in the category had been officially disclosed by the government. SPA9. Nevertheless, for

reasons that are redacted, the district court declined to rule on this issue. *See* SPA10 ("If I were writing on a clean slate, I would rule that the [REDACTED] have been 'officially acknowledged,' and that FOIA protection is accordingly waived [REDACTED]. I believe it is for this Circuit to decide in the first instance [REDACTED] waive FOIA protection for documents discussing those [REDACTED]."). Importantly, though—as a result of the procedure described above, *see supra* at 4–6—neither the district court nor the agencies have addressed whether any of the withheld records contain information in the eighth category that must be disclosed. Because the court did not *legally* conclude that the government had waived its right to withhold this information, the agencies did not "certif[y]," in their classified declarations, whether documents contained information in this eighth category. *See* SPA11; SPA159–60.

The district court appears to have believed that it was not free to conclude that the government had acknowledged information in the eighth category because this Court declined to reach that conclusion in *New York Times I*. SPA10. But this Court did not squarely address the information in the eighth category at all in *New York Times I*; rather, its opinion was focused almost entirely on the extent to which the government had officially acknowledged *legal analysis*. *See* 756 F.3d at 113–18. The Court left to the lower court the task of considering whether the government's waiver was, in fact, broader. *Id*. at 121 n.20 ("After the Government

submits its classified *Vaughn* indices on remand, the District Court may, as appropriate, order the release of any documents that are not properly withheld.").

As the ACLU has shown, *see* Table, the government has made copious disclosures regarding the factual basis for al-Aulaqi's targeting. *See* Table at 49–50. Having already disclosed this information, the government cannot withhold it here.

II. The District Court Erred in Allowing the Agencies' to Withhold Legal Analysis Under Exemptions 1 and 3.

The district court erred by accepting, without analysis, the agencies' blanket classification of legal analysis. SPA5

withhold certain national security information. However, neither exemption allows for the withholding of legal analysis in its own right.

Under Exemption 1, the government may withhold information that is "specifically authorized under criteria established by an Executive order and . . . properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). The agencies rely on Executive Order 13,526, which provides, *inter alia*, that any information may be classified if (1) it "pertains to" one of the categories listed in the order, and (2) "the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and "is able to identify or describe the damage." Exec. Order 13,526 §§ 1.4, 1.1. Here, the agencies invoke Exec. Order § 1.4(c) ("intelligence sources or methods),[9] and they contend that disclosure would cause harm to national security.[10]

Under Exemption 3, the government may withhold information "specifically exempted from disclosure by statute," 5 U.S.C. § 552(b)(3). The agencies principally rely on the National Security Act, 50 U.S.C. § 3024, which authorizes the Director of National Intelligence to "protect intelligence sources and

[9] *See* JA582–83; JA586; JA563–64; JA160. The CIA alone summarily invokes Exec. Order 13,526 § 1.4(d) ("foreign relations or foreign activities of the United States"), but does not tie its invocation to any particular record. *See* JA559–60.

[10] *See* JA564–65; JA173–74.

methods."[11]

found to justify withholding the documents, [the government] may not automatically withhold the full document as categorically exempt without disclosing any segregable portions."). That view is consistent with FOIA's legislative history, which makes clear that one of FOIA's "principal purposes" was to "eliminate secret law"—a phenomenon that Congress thought of as pernicious and corrosive to democratic values. *Jordan v. DOJ*, 591 F.2d 753, 781 (D.C. Cir. 1978) (Bazelon, J., concurring) (quotation marks omitted).

The district court did not consider this question. Rather, as noted above, the court's global ruling upheld the agencies' classification of all records without individual analysis. *See* SPA5. Although much of the opinion is redacted, the boilerplate rulings for each record also indicate a summary treatment of Exemptions 1 and 3, without consideration of whether and how legal analysis could be segregated from protected information.[13]

This was error. FOIA mandates a consideration of segregability. 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exemption under this subsection."). And there is every reason to believe that the legal analysis

at issue here could be segregated from classified and statutorily protected "sources and methods." In its review of the July 2010 OLC Memo, this Court carefully disentangled officially acknowledged legal analysis from information that was independently protected. *See N.Y. Times I*, 756 F.3d at 119. The government has itself extricated legal analysis from sensitive facts about the targeted-killing program in many other contexts. Senior government officials have managed to speak publicly about the legal analysis underlying the drone program. *See id.* at 114–15. They have drafted white papers without disclosing properly classified facts. *See* May 2011 White Paper (JA358–79); DOJ, *White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida of an Associated Force* (Nov. 8, 2011) ("November 2011 White Paper") (JA340–56). They have released OLC memoranda without disclosing classified facts. *See* David Barron, Acting Assistant Attorney Gen., OLC, *Memorandum for the Attorney General: Lethal Operation Against Shaykh Anwar Al-Aulaqi . . . [REDACTED]* (Feb. 19, 2010), http://1.usa.gov/21XqIs9 ("February 2010 OLC Memo"); July 2010 OLC Memo (JA380–411). Many of these disclosures are redacted, but that is the point: segregability review allows the release of legal analysis without disclosing "sources and methods" under Exemptions 1 and 3.

Segregation would also defeat the government's claim that the disclosure of

"predecisional" and "deliberative." *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 356 (2d Cir. 2005). A document is "predecisional" if it was "prepared in order to assist an agency decisionmaker in arriving at his decision" and "deliberative" if it is "actually . . . related to the process by which policies are formulated." *Id.* at 356 (quotation marks omitted). The deliberative-process privilege is intended to "prevent injury to the quality of agency decisions" by shielding non-final analysis from disclosure. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). Thus, "[t]here may . . . be circumstances in which what might easily be labeled 'deliberative' rather than 'factual' material must be disclosed because it would not reveal the deliberative process within the agency." *Mead Data Cent. Inc. v. Dep't of Air Force*, 566 F.2d 242, 256 n.40 (D.C. Cir. 1977).

Similarly, the attorney–client privilege is narrowly cabined to protect communications from clients to their attorneys made for the purpose of securing legal advice. *Brennan Ctr.*, 697 F.3d at 207. The privilege "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." *Fisher v. United States*, 425 U.S. 391, 403 (1976). Importantly, the privilege only protects communications from attorneys to their clients insofar as necessary to "protect the secrecy of the underlying facts" obtained from the client. *Mead*, 556 F.2d at 254 n.28.

Likewise, the presidential-communications privilege is to "be construed as

narrowly as is consistent with ensuring that the confidentiality of the President's decision-making process is adequately protected." *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997); *see Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1123 (D.C. Cir. 2004) (explaining that the privilege protects the narrow category of documents that are authored or "solicited and received by the President or his immediate advisers in the Office of the President" (quotation marks omitted)). Only the President himself may invoke the privilege. *See Ctr. on Corp. Responsibility, Inc. v. Shultz*, 368 F. Supp. 863, 872–73 (D.D.C. 1973); *cf. United States v. Reynolds*, 345 U.S. 1, 7–8 (1953) (holding that the closely related states-secrets privilege must be formally "lodged by the head of the department which has control over the matter"). *But see Judicial Watch*, 365 F.3d at 1114 (explaining that the issue remains an "open question" in the D.C. Circuit); Memorandum Order Directing Production of Documents for In Camera Review at 6, *ACLU v. DOJ*, No. 15 Civ. 1954 (S.D.N.Y. Mar. 4, 2016), ECF No. 66. The privilege does not extend "to staff outside the White House in executive branch agencies," and it must not be used "as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President." *In re Sealed Case*, 121 F.3d at 752.

The district court erred in finding the government had established the application of these privileges.

While the agencies assert the privileges over various withheld records, the agencies' public declarations and indices do not, in most cases, make clear which privilege is claimed for which record. *See* JA117–19 (OLC's summary invocation of deliberative-process, attorney–client, and presidential-communications privileges); JA567–68 (same for CIA); JA586 (no discussion of privileges for DOD documents at issue in this appeal).

Further, the agencies' public declarations do not describe individual documents and are entirely conclusory. For example, with respect to the deliberative-process and attorney–client privileges, the agencies do not explain how the withheld documents were produced and at whose request, how they were used, and who they were shared with—let alone what they address. And the agencies have not established that the records for which they invoke the presidential-communications privilege were authored or received by close presidential advisors and kept confidential, or that the privilege was invoked by the President. *See, e.g.*, JA119; JA569. The agencies' declarations lack anything approaching the justification courts have required in other cases. *See, e.g.*, *Senate of P.R. on Behalf of Judiciary Comm. v. DOJ*, 823 F.2d 574, 584 (D.C. Cir. 1987) (agency must provide sufficient information "so that a reviewing court can sensibly determine whether each invocation" of an Exemption 5 privilege "is properly grounded"). The agencies have not supplied the ACLU (or the public) with a basis

("[D]ocument[s] claimed to be exempt will be found outside of Exemption 5 if [they] closely resemble[] that which FOIA affirmatively requires to be disclosed," including "'statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register.'" (quoting 5 U.S.C. § 552(a)(2)(A)–(C))). To the contrary, FOIA mandates the disclosure of such "working law" to the public. *See* 5 U.S.C. § 552(a)(2)(A)–(B). As the Supreme Court explained in *Sears*, any judicial application of Exemption 5 must account for the "strong congressional aversion to secret [agency] law" and the "affirmative congressional purpose to require disclosure of documents which have the force and effect of law." 421 U.S. at 153 (quotation marks omitted). As this Court has explained, an agency's assertion "that it may adopt a legal position while shielding from public view the analysis that yielded that position is offensive to FOIA." *La Raza*, 411 F.3d at 360.

A document constitutes working law if it has "the force and effect of law," *Sears*, 421 U.S. at 153, and sets out the "positive rules that create definite standards" for agency action, *Jordan*, 591 F.2d at 774. Neither the deliberative-process nor the attorney–client privilege shields an agency's effective law and policy. *Sears*, 421 U.S

(rejecting application of privilege to presidential policy directive because it would "permit[the President] to convey orders throughout the Executive Branch without public oversight—to engage in what is in effect governance by 'secret law'").

Because the agencies have not provided individualized descriptions of the documents withheld, or (in the case of the CIA) disclosed which records correspond to broadly described categories, *see* JA582; JA586, the ACLU is unable to direct the Court to specific records which constitute "effective law and policy." There is good reason to believe, however, that at least some of the withheld records represent the effective law and policy of the targeted-killing program.[15] The CIA and DOD have played operational and intelligence roles in drone strikes in multiple countries for over a decade. *See* Table at 46–48. It is simply not credible that they have done so without consideration of the lawfulness of the strikes, and without having established standards that govern agency conduct. The agencies have surely considered, for example, the lawfulness of the strikes under domestic law (including applicable Executive Orders and congressional authorizations) and international law. Indeed, senior government

[15] It appears that certain OLC memoranda describing the effective law and policy of the targeted-killing program were among the records this Court considered in *N.Y. Times II*. *See* 806 F.3d 682. The ACLU has petitioned for rehearing on the discrete issue of whether OLC opinions—like legal opinions written by other government agencies and components—can in some circumstances can lose the protection of Exemption 5 under the "working law" doctrine. Petition for Panel Rehearing or Rehearing En Banc, *N.Y. Times II*, No. 14-4432 (2d Cir. Jan. 7, 2016), ECF No. 141.

officials—including the CIA's General Counsel—have repeatedly answered questions about the targeted-killing program by assuring the public that the agencies involved in the program are subject to clear legal standards and protocols.[16]

IV. Procedural unfairness in this case has undermined the adversarial process.

Beyond the specific errors discussed above, this litigation has been marked by procedural unfairness. The government has effectively excused itself from justifying its withholdings on the public record, and the district court has acquiesced. Indeed, though the district court plainly invested an extraordinary amount of time and energy in reviewing documents *ex parte* and writing a lengthy opinion, it allowed the government to redact the opinion so heavily that Plaintiffs cannot even tell which issues the court addressed, let alone how it reached its conclusions. To guide the district court on remand, Plaintiffs respectfully urge the Court to reaffirm that the government has an obligation to justify its withholdings as much as possible on the public record; that the government's failure to meet this obligation means it has "improperly withheld" records within the meaning of

[16] *See, e.g.*, Stephen W. Preston, General Counsel, CIA, Remarks at Harvard Law School (Apr. 10, 2012), http://1.usa.gov/1JT5zUf; *see also* May 2011 White Paper at JA358 ("This white paper sets forth the legal basis upon which the Central Intelligence Agency . . . could"Thi-17.5236 -okh-14.8026-2.0004s in1vrs fencthiYernm agPlasle

FOIA, 5 U.S.C. § 552(a)(4)(B); and that courts have an obligation, when redactions to an opinion are unavoidable, to ensure that the redacted opinion conveys, at a minimum, what issues the court addressed, what conclusions it reached, and why it reached those conclusions.

Because individuals who request records under the FOIA rarely know precisely what the records contain, FOIA litigation presents special challenges. *Vaughn*, 484 F.2d at 823 ("In light of [FOIA's] overwhelming emphasis upon disclosure, it is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information."); *see id.* at 825 ("The problem is compounded at the appellate level."); *see also*, *e.g.*, *N.Y. Times II*, 806 F.3d at 687 ("The Appellants are understandably in a difficult position to present their argument for disclosure of the redacted portions of the District Court's opinion because they have not seen them."). In recognition of these special challenges, and with the aim of "restor[ing] the adversarial balance needed to allow the court to reach a just and fair result," courts require agencies to describe responsive records in an "index." *Brown v. FBI*, 658 F.2d 71, 74 (2d Cir. 1981) ("In an effort to compensate for this obvious disadvantage, courts have required agencies to itemize and index the documents requested, segregate their disclosable and non-disclosable portions, and correlate each non-disclosable portion with the FOIA provision

which exempts it from disclosure."); *see Kimberlin v. DOJ*, 139 F.3d 944, 950 (D.C. Cir. 1998); *Church of Scientology Int'l v. DOJ*, 30 F.3d 224, 229 (1st Cir. 1994); *Phillippi*, 546 F.2d at 1013; *Vaughn*, 484 F.2d at 823–28.

Even against this background, however, this case stands out for the extent to which the purported need for secrecy has disfigured the ordinary process of litigation. For years the government claimed it could not even "confirm or deny" the existence of responsive records; then it acknowledged it had records but contended it could not publicly identify or describe them; now it concedes it can publicly list *some* of them but it contends that it cannot explain on the public record why it is withholding *any* of them. After five years of litigation, Plaintiffs still do not know which agencies wrote the withheld legal memoranda, when they were written, or what they address. Plaintiffs know even less about the other withheld records.

Of course, the government contends that the documents at issue here are especially sensitive, and Plaintiffs do not doubt that at least some of them are. Still, it is illuminating to compare the government's public declarations in this litigation to the declarations the government has filed in other national security cases, including in other cases involving records as sensitive as the ones at issue here.

For example, in *ACLU v. DOD*, No. 04 Civ. 4151 (S.D.N.Y. filed June 2, 2004), the ACLU sought (among many other things) the presidential Memorandum

of Notification ("MON") in which President Bush provided the initial authorization for the CIA's interrogation and detention program. The MON was among the most highly compartmentalized secrets in the entire government. *See* Eighth Decl. of Marilyn Dorn, CIA Info. Review Officer, ¶ 70, *ACLU v. DOD*, No. 04 Civ. 4151 (S.D.N.Y. June 8, 2007), ECF No. 226 ("June 2007 Dorn Declaration") ("In accordance with the [National Security Council's] direction to the CIA to establish a special access program for information relating to the CIA terrorist detention and interrogation program, the CIA is charged with strictly controlling access to the information contained in" the MON.).[17] Yet the CIA was able to publicly describe the document extensively. It provided the document's length; it confirmed the document's date; it revealed the document's author and the agency components to which the document was sent; it generally described the document's contents, and it provided details about the document's contents and genesis. *See id.* ¶¶ 66–79. In the same case, when the CIA sought to withhold records relating to destruction of video tapes documenting the agency's use of waterboarding on detainees, the agency produced a *Vaughn* index that described 65

documents and justifications for their withholding. *See* Decl. of Leon Panetta,

ACLU v. DOD

To guide the district court on remand, this Court should reaffirm that the

structure. In numerous places, section headings have been redacted. *See, e.g.*, SPA30. It is not clear whether the court made an independent judgment as to the necessity of redactions, or whether the court simply acceded to the government's demands. *See, e.g.*, SPA46–47. But the court has an obligation to make an independent judgment about these matters, and it also has an obligation to ensure that the redacted opinion conveys, fairly and publicly, the reasons why presumptively public records must be kept secret. *See, e.g., In re Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1015 (Foreign Int. Surv. Ct. Rev. 2008) ("The foregoing paragraph is a summary of our holding on this issue. We discuss with greater specifity [*sic*] the petitioner's argument, the government's safeguards, and our order in the classified version of this opinion."). Those obligations are not just to plaintiffs in particular litigations, but to the public at large.

CONCLUSION

For the reasons above, the Court should reverse in part the district court's judgment.

Plaintiffs respectfully submit that this Court should review *in camera* the records the district court also reviewed *in camera*. *See* OLC index nos. 1, 2, 75, 8, and 9;[18] CIA index nos. 45, 59, 96, 109, 113, and 124; DOD index nos. 1, 31, and

[18] Because of redactions in the opinion, Plaintiffs cannot be sure whether the

5; *see also*

TABLE OF OFFICIAL ACKNOWLEDGMENTS

Waiver	Source of Disclosure
Analysis of 18 U.S.C. § 1119, which prohibits the killing or attempted killing of a U.S. national outside of the United States	July 2010 OLC Memo at JA382–89 May 2011 White Paper at JA362–74 November 2011 White Paper at JA350–54
Analysis of 18 U.S.C. § 956(a), which criminalizes conspiracy to commit murder abroad	July 2010 OLC Memo at JA405–07 May 2011 White Paper at JA374–75 November 2011 White Paper at JA353
Analysis of the War Crimes Act, 18 U.S.C. § 2441(a), including discussion of Common Article 3 of the Geneva Convention	July 2010 OLC Memo at JA407–08 May 2011 White Paper at JA357–377 November 2011 White Paper at JA355–365
Analysis of the "public authority" doctrine	July 2010 OLC Memo at JA384–407 May 2011 White Paper at JA364–71 November 2011 White Paper at JA350–54
Analysis of the assassination ban in Executive Order 12,333	February 2010 OLC Memo at 1, 4, 7

Waiver	Source of Disclosure
	March 2010 Koh Speech[21] at JA103 November 2011 White Paper at JA355 March 2012 Holder Speech[22] at JA537 December 1989 Parks Memo[23] at 8

Waiver	Source of Disclosure
	November 2011 White Paper at JA348 March 2010 Koh Speech at JA102–03 March 2012 Holder Speech at JA538–39 May 2013 Holder Letter[24] at JA442 May 2013 Fact Sheet[25] at JA608–09 September 2015 Ambassador Letter[26] at 2
Analysis of the term "imminence"	November 2011 White Paper at JA347–48 February 2010 OLC Memo at 6–7 July 2010 OLC Memo at JA391, JA397, JA409 May 2011 White Paper at JA377–78 March 2012 Holder Speech at JA537–38 May 2013 Fact Sheet at JA608

[24] Letter from Eric Holder, Attorney Gen., to Patrick Leahy, Chairman of the Senate Comm. on the Judiciary (May 22, 2013).

[25] White House, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (May 23, 2013).

[26] Letter from Amb. Keith M. Haper, U.S. Rep. to U.N. Human Rights Council, to Special Rapporteurs, U.N. Human Rights Council (Sept. 2, 2015), https://spdb.ohchr.org/hrdb/31st/USA_02.09.15_(5.2015)_Pro.pdf.

Waiver	Source of Disclosure
	February 2013 Brennan Testimony[27] at JA239–40 September 2015 Ambassador Letter at 3
Analysis of the term "feasibility of capture"	July 2010 OLC Memo at JA410–11 May 2011 White Paper at JA359 November 2011 White Paper at JA346–48 March 2012 Holder Speech at JA538 May 2013 Fact Sheet at JA608
Analysis of international legal principles governing respect for other countries' national sovereignty	March 2012 Holder Speech at JA537 March 2010 Koh Speech at JA102 May 2013 Fact Sheet at JA609
The government conducts before- and after-the-fact legal and factual analysis of lethal strikes	May 2013 Fact Sheet at JA608–09 May 2015 White House Statement[28]

[27] *Nomination of John O. Brennan to be Director of the Central Intelligence Agency: Hearing Before the S. Select Comm. on Intelligence*, 113th Cong. (Feb. 7, 2013).

[28] White House, Press Briefing by Press Secretary Josh Earnest (April 23, 2015) http://1.usa.gov/1U02sTB.

Waiver	Source of Disclosure
	September 2015 Ambassador Letter at 3–4

II. Disclosures related to the facts of the targeted-killing program.

Waiver	Source of Disclosure
The Government uses drones to carry out targeted-killings overseas.	*See N.Y. Times I*, 756 F.3d at 118–20. May 2013 Obama Speech[29] April 2012 Brennan Speech[30] at JA61 February 2013 Brennan Testimony at JA239–41

Waiver	Source of Disclosure
	June 2010 Panetta Interview[31] at JA425–26 March 2011 Gates Speech[32] February 2014 Clapper Testimony[33] October 2011 Panetta Statement[34] February 2013 Rogers Interview[35] March 2012 Feinstein Letter[36] February 2013 Feinstein Statement[37]

[31] *This Week* (1Syta Stateme0 TcqTm0 Tc0 Tw(Week)Tj1,ev6Sgion broadcast, 0 9 47, 451.). T

Waiver	Source of Disclosure
The fact that al-Aulaqi was killed in Yemen.	*See N.Y. Times I*, 756 F.3d at 117

III. Disclosures related to factual-basis for the targeting of Anwar al-Aulaqi.

Waiver	Source of Disclosure
Information about Anwar al-Aulaqi's leadership role in al-Qaeda in the Arabian Peninsula	February 2011 Leiter Statement[43] at JA473–74 September 2011 Obama Speech[44] at JA513 July 2010 Treasury Designation[45] at JA437
Information about Anwar al-Aulaqi's role in the Detroit bombing attempt	February 2012 Sentencing Memorandum[46] at JA518–19 July 2010 Treasury Designation at JA437

[43] Understanding the Homeland Threat Landscape – Considerations for the 112th Congress, Hearing Before the Committee on Homeland Security, House of Representatives (Feb. 9, 2011).

[44] Remarks by the President at the "Change of Office" Chairman of the Joint Chiefs of Staff Ceremony (Sept. 30, 2011).

[45] Treasury Designates Anwar al-Al-Aulaqi, Key Leader of Al-Qa'ida in the Arabian Peninsula, U.S. Department of Treasury (July 16, 2010).

[46] Government's Sentencing Memorandum, *United States v. Abdulmutallab*, No. 10-cr-20005 (E.D. Mich. Feb. 10, 2012), ECF No. 130.

Waiver	Source of Disclosure
Information about Anwar al-Aulaqi's role in planning other attacks, including attacks on two US-bound cargo planes	September 2011 Obama Speech at JA513
The government believed that it could lawfully use lethal force against Anwar al-Aulaqi	May 2013 Holder Letter at JA440–44

Date: March 8, 2016

Respectfully submitted,

/s/ Jameel Jaffer

Colin Wicker
Dorsey & Whitney LLP
50 South Sixth Street—Suite 1500
Minneapolis, Minnesota 55402
T: 612.492.6687
F: 952.516.5531
wicker.colin@dorsey.com

Jameel Jaffer
Hina Shamsi
Brett Max Kaufman
Matthew Spurlock
American Civil Liberties Union Foundation
125 Broad Street—18th Floor
New York, New York 10004
T: 212.549.2500
F: 212.549.2654
jjaffer@aclu.org

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,365 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface

CERTIFICATE OF SERVICE

On March 8, 2016, I filed and served the foregoing BRIEF FOR PLAINTIFFS–APPELLANTS via this Court's electronic-filing system.

/s/ Jameel Jaffer
Jameel Jaffer
Counsel for Plaintiffs–Appellants

Date: March 8, 2016