15-2956

IN THE

United States Court of Appeals

FOR THE

Second Circuit

AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,
Plaintiffs–Appellants–Cross-Appellees

– v. –

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

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

REPLY BRIEF FOR PLAINTIFFS–APPELLANTS–CROSS-APPELLEES

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

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I. The government's brief extends the procedural unfairness of this litigation.

As the ACLU explained in its opening brief, the government's purported need for secrecy has disfigured the adversary process in this case to a remarkable degree. *See* ACLU Br. 33–39. The government's opposition brief—riddled with redacted section headings, redacted topic sentences, redacted lists, and entirely redacted pages—perpetuates this problem.[1] The principles of openness and fairness embedded in our court system, as well as in the Freedom of Information Act, demand more. The ACLU recognizes that litigations like this one may require the court and the government to discuss classified matters. *See* ACLU Br. 35. But the government must take reasonable steps to ensure that its legal arguments are intelligible to litigants and the public. *See* ACLU Br. 35–37. Rather than simply redact entire sections, including their headings, the government should summarize at a level of generality that protects properly classified facts.[2] This is not just for

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[1] The ACLU respectfully urges the Court to read at least portions of the district court's redacted opinion and the government's redacted briefs (rather than rely only on the classified, fully unredacted versions), so that it can appreciate the shadowboxing in which Plaintiffs have been forced to engage in this case.

[2] For example, the government could describe a legal memoranda as "related to an unacknowledged specific targeted-killing strike" without revealing *any* of the information the government believes is protected by FOIA's exemptions, but it has chosen to withhold even that sort of generalized description in this case.

the benefit of plaintiffs and the public, but the courts as well. That the district court in this case had to spend "literally hundreds of hours" examining classified documents *in camera*, JA621, is a testament to the failure of the adversary process here. *See Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973) ("But where the documents in issue constitute hundreds or even thousands of pages, it is unreasonable to expect a trial judge to do as thorough a job of illumination and characterization as would a party interested in the case.").

The government's brief also introduces a new problem, because in a number of instances it selectively introduces new factual information about records the government previously refused to describe. For example, the government discloses for the first time that OLC index no. 46 is "a confidential communication by a client to the client's lawyers," apparently "involves a topic that has been publicly revealed in other contexts," "was prepared to assist in the decision whether to undertake a contemplated action and provided analysis relevant to making that decision," was drafted "long after the OLC provided legal advice in the February 2010 and July 2010 Aulaqi memoranda," and is "final" legal advice provided by OLC. Gov't Br. 58 (citing classified appendix). It also discloses for the first time that CIA index no. 59 Tab C concerns a "'messaging' deliberation[] about how to present an existing policy to the public" and involves the National Security Council ("NSC"). Gov't Br. 66–67. While the ACLU of course welcomes any

release of information about these records, the government should have provided this information in *Vaughn* indexes; it should not be selectively disclosing the information now, in its opposition brief on appeal. If the government had disclosed this information five years ago, when it should have, the disclosure would have informed both the ACLU's substantive arguments as well as its decisions about what records to seek in litigation.

II. The government's effort to minimize the implications of its "official acknowledgements" should be rejected.

A. The government fails to address the ACLU's arguments and this Court's precedents.

The government's arguments in favor of a rigid application of the test for official acknowledgment fail to address three critical aspects of the ACLU's argument and are inconsistent with this Court's precedents.

First, the government overlooks the district court's professed confusion about the legal standard set out by this Court, as well as the court's misapprehension of the ACLU's argument with respect to the proper standard. *See* ACLU Br. 15–16; SPA5–10. The government asserts that "the district court applied the test set out in *Wilson v. CIA*, 586 F.3d 171,186 (2d Cir. 2009)," Gov't Br. 39, but the government ignores the fact that the district court expressed frustration and confusion concerning *how* to apply that test. *See* SPA6 ("What the Second Circuit did not do in [*N.Y. Times v. DOJ*, 756 F.3d 100 (2d Cir. 2014)

("*N.Y. Times I*"),] was explain where the line between 'stringent' and 'overly stringent' could be found."). The district court plainly misunderstood the ACLU's argument about the test, which was *not* that the "disclosure of a specific fact entail[s] waiver of exemption for all information about the subject to which that fact pertains," SPA8. The ACLU's argument was, rather, that once the government has chosen to disclose information, it may not withhold closely related information unless it is different in some material respect from what the government has revealed. *See* ACLU Br. 16. The district court's heavily redacted opinion makes it difficult for Plaintiffs to discern whether these errors affected the court's conclusions with respect to specific records and information responsive to the Request, but it seems likely that they did.

Second, the government selectively quotes from *Afshar v. Department of State*, 702 F.2d 1125 (D.C. Cir. 1983), to support its favored "'duplicat[ion]'" standard for official acknowledgment. Gov't Br. 40 (quoting *Afshar*, 702 F.2d at 1130. But it fails to address the ACLU's point that this Court, in *N.Y. Times I*, specifically explained that *Afshar* "does not 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* ACLU Br. 14. The government likewise ignores this Court's observation that *Hudson River Sloop Clearwater, Inc. v. Department of the Navy*, 891 F.2d 414 (2d Cir. 1989)—the only

Second Circuit case cited in *Wilson*—lends no support to the notion that the official-acknowledgment test requires matching. *See* ACLU Br. 14. At the very least, this Court's discussion of *Wilson* left uncertainty surrounding the proper official-acknowledgment test in this Circuit—but (as explained directly below) its application of that test makes clear that the government's cramped reading is erroneous.

Third (and most conspicuously), the government has no answer to this Court's decision to compel the disclosure of portions of the July 2010 OLC Memo addressing 18 U.S.C. § 956(a) even though it believed that the government had not previously disclosed its analysis of that statute. *See* ACLU Br. 14. In *N.Y. Times I*, the Court explained that once the government had disclosed legal analysis "discussing why the targeted killing of al-Awlaki would not violate several statutes," the release of additional legal analysis would not "add[]" anything "to the risk" of harm to the interests protected by FOIA's exemptions. 756 F.3d at 120. That analysis outright forecloses the government's insistence that "[t]here would be no basis for finding waiver of privilege for legal analysis on the same general topic that has never been disclosed publicly," Gov't Br. 54.[3] Quite simply, if the

[3] Likewise, *N.Y. Times I* forecloses the government's argument that "legal analysis," as a category, cannot be officially acknowledged. *See* Gov't Br. 53; SPA8 (holding that the government had officially acknowledged "[i]nformation

government were correct that *Wilson*'s reference to a "strict test" for official acknowledgment unambiguously supports its rigid position, Gov't Br. 40 (quoting *Wilson*, 586 F.3d at 186), this Court could not have ordered the disclosure of legal analysis relating to section 956(a) using a harm-centered rationale. The government has never accounted for this conflict, and it cannot.

B. The government fails to account for its disclosures regarding the CIA's role in drone strikes.

The government's narrow understanding of the scope of its acknowledgments concerning the CIA's operational role in targeted killings is unpersuasive. Government officials of all stripes have repeatedly discussed the CIA's role—including by making clear that "the nature of that role," Gov't Br. 42, involves the operation of drones. *See* ACLU Br. 46–49. But even if they had not done so, President Obama recently eliminated any doubt on the point by acknowledging that the CIA conducts drone strikes. *See* President Barack Obama, Remarks by the President in a Conversation on the Supreme Court Nomination at the University of Chicago Law School (Apr. 8, 2016), http://1.usa.gov/299J4VE ("[T]his drone program initially came through the intelligence side under classified programs, as opposed to the military."); *id.* (explaining that "decision-making" in

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about the legal basis . . . for engaging in the targeted killings abroad, including specifically the targeted killing of a U.S. national.").

the early years of the drone program "was embedded in decisions that are made all the time about . . . an intelligence team trying to take out a terrorist"); *id.* ("I think that the way that [the drone program] got built up through our intelligence and what's called our Title 50 programs meant that it . . . wasn't subject to the same amount of democratic debate as when we are conducting what are called Title 10 Department of Defense conventional operations."); *id.* ("I don't want our intelligence agencies being a paramilitary organization. That's not their function. As much as possible this should be done through our Defense Department so that we can report, 'here's what we did, here's why we did it, here's our assessment of what happened.'"). In light of those unambiguous acknowledgments, this Court should reevaluate the district court's conclusions with respect to the scope of the CIA's role in targeted killing.[4]

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[4] The president's acknowledgments came after the ACLU filed its brief on appeal, but before the government filed its own. In *N.Y. Times I*, this Court explained that it would take judicial notice of "ongoing disclosures by the Government made in the midst of FOIA litigation." 756 F.3d at 110 n.8; *see id.* ("[T]he circumstances of this case support taking judicial notice of the statements here. *See* Fed. R. Evid. 201(b)(2). The Government's post-request disclosures 'go[] to the heart of the contested issue,' *Powell v. U.S. Bureau of Prisons*, 927 F.2d 1239, 1243 (D.C. Cir. 1991) (internal quotation marks omitted), and, as discussed below, are inconsistent with some of its prior claims, including that the Government has never acknowledged CIA's operational involvement. Taking judicial notice of such statements is the same course taken by the Court of Appeals for the D.C. Circuit in its recent *ACLU v. C.I.A.* decision. 710 F.3d at 431. We conclude that it is the most sensible approach to ongoing disclosures by the Government made in the midst of

It is no longer possible to pretend that the government has kept the CIA's role in targeted killings a secret. As the D.C. Circuit put it in a related context:

> In this case, the CIA asked the courts . . . to give their imprimatur to a fiction of deniability that no reasonable person would regard as plausible. "There comes a point where . . . Court[s] should not be ignorant as judges of what [they] know as men" and women. *Watts v. Indiana*, 338 U.S. 49, 52, 69 S. Ct. 1347, 93 L. Ed. 1801 (1949) (opinion of Frankfurter, J.). We are at that point with respect to the question of whether the CIA [conducts drone strikes].

ACLU v. CIA, 710 F.3d 422, 431 (D.C. Cir. 2013) (first and last alterations added).[5]

C. The government misapprehends the extent and effect of disclosed factual information relating to the targeting of Anwar al-Aulaqi.

Finally, the government is incorrect that the district court concluded that

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FOIA litigation." (second alteration in original)). For the same reasons, the Court should do the same here.

[5] President Obama's recent disclosures obviate the need for the Court to address the government's argument that official disclosures cannot come from legislators in any circumstances. *See* Gov't Br. 41. Nevertheless, that categorical argument is simply at odds with this Court's partial reliance, in *N.Y. Times I*, on statements by the chairpersons of the congressional intelligence committees in its analysis of official acknowledgments concerning the CIA's operational role in targeted killing. *See* 756 F.3d at 119. At the very least, acknowledgments from legislators "establish the context," *id.* at 115, in which the Court must read acknowledgments by executive-branch officials. *See id.* at 119 ("With respect to disclosure of CIA's role, we can be confident that neither Senator Dianne Feinstein, Chairman of the Senate Select Committee on Intelligence, nor Representative Mike Rogers, Chairman of the House Select Committee on Intelligence, thought they were revealing a secret when they publicly discussed CIA's role in targeted killings by drone strikes.").

only "generalized information about Aulaqi . . . has been officially released." Gov't Br. 35. To the contrary, the district court held that the government had officially acknowledged the following specific information:

> 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; *see* SPA9–10 (explaining that "[e]very item listed" above has been officially acknowledged and that the court would so rule if "writing on a clean slate").[6] The government contends that this Court already ruled that none of these facts had been officially acknowledged because it "redacted the entire factual section of the [July 2010 OLC Memorandum]" in *N.Y. Times I*. *See* Gov't Br. 35–36. But that conclusion is facile. In *N.Y. Times I*, this Court did not specifically address the above facts. Perhaps the Court's judgment was that the above facts were inextricably intertwined with other, still-protected facts—but in the absence of any direct analysis, the

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[6] Despite this, the district court committed error by failing to review *any* records for this information, leaving it for this Court "to decide in the first instance" whether its holding was correct *before* applying it to the government's withholdings. *See* ACLU Br. 18–20 (quoting SPA10). The defendant agencies have failed to address the facts surrounding the targeting of al-Aulaqi that the district court found the government acknowledged. *See* ACLU Br. 4–6, 19.

government's conclusion is mere speculation. Moreover, it is clear that the district court believed that whatever this Court's unstated conclusions in *N.Y. Times I*, they warrant wholesale reevaluation in light of the official statements and disclosures presented by the ACLU since that decision was issued.[7] *See* SPA10.

III. The government is incorrect that it can lawfully withhold pure legal analysis under FOIA.

The government continues to insist that it can classify and withhold even pure legal analysis, but in renewing this argument in its brief, the government misstates the ACLU's argument and this Court's precedent.

The ACLU's argument is *not*, as the government puts it, "that legal analysis cannot be properly classified or protected by statute because it is not itself an 'intelligence source or method.'" Gov't Br. 31 (emphasis removed). Rather, the ACLU's argument is simply that neither Exemption 1 nor Exemption 3 justify the *categorical* withholding of pure legal analysis, and that the critical question—which the government avoids—is whether legal analysis is *inextricably intertwined* with classified or otherwise protected information. *See* ACLU Br. 20–25. This

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[7] To be clear, the ACLU does not contest that some intelligence information may be so materially different from the government's official disclosures that the government can lawfully withhold it. But as the government appears to concede, *see* Gov't Br. 36, where such differences are *not* material, the Court should order its disclosure.

Court's observation that "in some circumstances the very fact that legal analysis was given concerning a planned operation would risk disclosure . . . of that operation," 756 F.3d at 119 (cited at Gov't Br. 31), only underscores the ACLU's point: in some circumstances, the government may justify withholding legal analysis by pointing to intertwined, undisclosed, withholdable facts.

With respect to Exemption 1, the ACLU does not dispute that "information is eligible for classification under Executive Order 12,356 if it 'pertains to' an enumerated category" of information in the order, Gov't Br. 31—but the breadth of the government's reading of "pertains" would render the category requirement nearly meaningless. Indeed, to accept the government's view would be to sanction, against the explicit purpose of FOIA's drafters, the creation of a body of secret law. *See* ACLU Br. 22–23.

Moreover, even if the government is correct about the breadth of "pertains," it must still demonstrate that disclosure of the covered information would cause harm to national security. *See* Exec. Order 13,526, 1.4 (prohibiting the classification of information unless "its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security"). But the government has never explained what harm would follow from the disclosure of legal analysis that is not entangled with properly classified facts. *See* ACLU Br. 22–25.

Nor can the government rely on Exemption 3 to withhold pure legal analysis. Both the district court and this Court have already concluded that "legal analysis is not an 'intelligence source or method'" subject to Exemption 3. *N.Y. Times I*, 756 F.3d at 119 (quoting *N.Y. Times v. DOJ*, 915 F. Supp. 2d 508, 540 (S.D.N.Y. 2013)); *see* ACLU Br. 22. The government misleadingly cites *N.Y. Times v. DOJ*, 806 F.3d 682 (2d Cir. 2015) ("*N.Y. Times II*"), as having held that legal analysis can be withheld "under the National Security Act" under Exemption 3—but this Court *never* relied on Exemption 3 (or even named the National Security Act) in its analysis. *See id.* at 687 (holding that the OLC documents "are classified and thus protected under Exemption 1"). The government also miscasts earlier case law from this Circuit as holding that Exemption 3 "protects any information that 'relates to' an intelligence source or method protected by the National Security Act," Gov't Br. 31 (quoting *ACLU v. DOJ*, 681 F.3d 61, 76 (2d Cir. 2012)). But the phrase "relates to" (or, for that matter, "pertains to") does not appear in Exemption 3 or the National Security Act. *See ACLU v. DOD*, 389 F. Supp. 2d 547, 565 (S.D.N.Y. 2005) (explaining that a "[m]emorandum from DOJ to CIA interpreting the Convention Against Torture does not, by its own terms, implicate 'intelligence sources and methods'"). And in the government's cited case, *ACLU v. DOJ*, this Court merely held that Exemption 3 justified the withholding of a fact that "conveys an aspect of information that is important to

intelligence gathering"—in other words, an intelligence source or method. 681 F.3d at 76 (quotation marks omitted).

IV. The government has not established that the withheld records are protected by Exemption 5.

A. The government's Exemption 5 claims are overbroad.

1. The government has invoked the deliberative-process privilege for final documents that are neither "predecisional" nor "deliberative."

The government argues that a redacted list of "predecisional, deliberative documents fall squarely within the scope of the deliberative process privilege," Gov't Br. 45 (citing classified appendix), but its arguments concerning the privilege with respect to specific documents make clear that its invocations are overbroad.

For example, with respect to OLC index no. 46—a final OLC opinion containing legal advice regarding targeted killing—the government argues that *final* OLC legal advice is necessarily *predecisional* because the OLC "is not a decisionmaker with respect to the targeted use of lethal force." Gov't Br. 59. The district court rejected that far-reaching argument out of hand, as should this Court. *See* SPA38 ("The legal advice contained in the document cannot be both 'predecisional' and 'final;' it is either one or the other."). That the OLC does not pull any trigger does not render it incapable of being a "decisionmaker" in this context. *See Tax Analysts v. IRS*, 294 F.3d 71, 81 (D.C. Cir. 2002) ("It is not

necessary that the [memoranda] reflect the final *programmatic* decisions of the program officers . . . [so long as they] represent [the Office of Chief Counsel's] final *legal* position . . . ."). When OLC issues a final legal opinion, its "decision" (and, at the very least, the decision of the DOJ) with respect to the correct view of the law has been made.[8] As the ACLU explained in its opening brief, the deliberative-process privilege safeguards the quality of agency decisions by shielding non-final analysis from disclosure. *See* ACLU Br. 27. The OLC's *draft* opinions might be "deliberations comprising part of a process by which governmental decisions and policies are formulated," *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975); *see Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. DOJ*, 697 F.3d 194, 202 (2d Cir. 2012) ("[A] document is predecisional if it

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[8] Of course, final OLC opinions about targeted killing do much more, as this Court has already held. *See N.Y. Times I*, 756 F.3d at 111 (holding that OLC legal advice "establishes the legal boundaries within which [the CIA] can operate" (quotation marks omitted)); *see also* May 2013 Holder Letter at JA442 (explaining that OLC memoranda set out "the circumstances in which [the government] could lawfully use lethal force"); David J. Barron, Acting Assistant Attorney Gen., OLC, *Memorandum for Attorneys of the Office* 1 (July 16, 2010), http://1.usa.gov/29acGlS ("OLC's core function, pursuant to the Attorney General's delegation, is to provide *controlling advice* to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government." (emphasis added); Josh Gerstein, *Official: FOIA Worries Dampen Requests for Formal Legal Opinions*, Politico (Nov. 5, 2015, 3:05 p.m.), http://politi.co/29adB5w ((quoting acting head of OLC) "The vast majority of our advice is provided informally—is delivered orally or in emails. That is still authoritative. It is still binding by custom and practice in the executive branch. It's the official view of the office. People are supposed to and do follow it.").

was generated before the adoption of an agency policy and deliberative if it reflects the give-and-take of the consultative process.") (quoting *Pub. Citizen v. OMB*, 598 F.3d 865, 874 (D.C. Cir. 2009)). But OLC's *final* opinions plainly are not—rather, they *are* the relevant "governmental decisions" about the proper view of the law.

The government's invocation of the deliberative-process privilege for other specifically identified records is similarly misguided. For example, it argues that disclosure of CIA index no. 59 Tab C—a "memorandum . . . set[ting] forth the legal framework for targeting U.S. citizens who are engaged in terrorist activities," SPA110–11—would expose the process by which the government determined its "messaging" about the program to the public. Gov't Br. 66. It also contends that the document is a "draft . . . which was never finalized." *Id.*[9]

First, the government does not, as is required to invoke the deliberative-process privilege, "pinpoint the specific agency decision to which" the Tab C memorandum "correlates" or "verify that the document precedes . . . the 'decision' to which it relates." *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (citing *Providence Journal Co. v. Dep't of Army*, 981 F.2d 552, 557 (1st Cir.

[9] So far as the ACLU can discern, the government did not invoke the attorney–client privilege for this document. SPA108–09.

1992)).[10]

Second, the fact that an agency describes a document as a "draft" does not control its status under FOIA. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 869 (D.C. Cir. 1987) (stating that FOIA does not permit an agency to "promulgate[] a body of secret law which it is actually applying . . . but which it is attempting to protect behind a label"). Importantly, it is the agency's burden to establish that FOIA exemptions apply—not Plaintiffs' burden to establish that they do not. This Court previously admonished the government for inconsistently labeling a responsive legal memorandum a "draft" and failing to disclose it. *See N.Y. Times I*, 756 F.3d at 110 n.9 ("The Government offers no explanation as to why the identical text of the DOJ White Paper, not marked 'draft,' . . . was not disclosed to ACLU."); *see also* SPA110–11 ("The fact that Tab C is a draft is of no moment; so is Tab B, the Draft White Paper, which was obtained by NBC News in February 2013. Both set forth the legal framework for targeting U.S. citizens who

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[10] In *Tigue*, the Second Circuit recognized that "while an agency need not actually demonstrate that a specific decision was made in reliance on the allegedly predecisional material, the government must show that the material was prepared to assist the agency in the formulation of some specific decision." *Tigue v. DOJ*, 312 F.3d 70, 80 (2d Cir. 2002) (citing *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1094 (9th Cir.1997)); *see Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1987) ("Characterizing these documents as 'predecisional' simply because they play into an ongoing audit process would be a serious warping of the meaning of the word.").

are engaged in terrorist activities.").[11] And indeed, the district court expressly rejected the government's characterization of CIA index nos. 109 and 113 as drafts. *See* SPA126 ("There is absolutely no indication on [CIA index no. 109] that it is predecisional (indeed, it is talking points about the legality of an operation that has already taken place) or a draft of any sort, let alone a discussion draft); SPA132 (same as to CIA index no. 113).[12]

Third, to the extent any of the withheld records contain discussions reflecting decisions already reached—such as the "legal framework for the

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[11] To be clear, Plaintiffs have not sought true drafts in this litigation. Plaintiffs sought only drafts for which no associated final record appeared on the agencies' *Vaughn* indices. *See* ACLU Br. 4 n.3. Plaintiffs preserved their request for such "drafts" because of the history of the government's treatment of drafts in this litigation.

In its brief, the government describes several "draft" records over which it has asserted the deliberative-process privilege. *See* Gov't Br. 60 (describing OLC index no. 50 as "a one-page email from the Assistant Attorney General for OLC to herself" containing "a draft two-paragraph proposed insert to an earlier draft of the document that eventually became the [November 2011 White Paper]"); Gov't Br. 47 (describing "drafts and outlines, some of which contain handwritten notations"); Gov't 48 (describing "draft documents and briefing papers [that] show an interim stage in the agencies' respective deliberations[and] represent the views of their authors and not the agencies"). If the Court determines that these descriptions are accurate, Plaintiffs no longer seek those documents.

[12] Although the district court did not expressly address whether OLC index nos. 144 and 145 were truly predecisional and deliberative (or at least did not do so in the unredacted portions of its opinion), it is apparent that it did not credit the government's conclusory labeling of these documents in order to protect them under the deliberative-process privilege. *See* SPA63–66.

targeting of U.S. citizens who are engaged in terrorist activities," SPA110–11 (describing CIA index no. 59 Tab C)—they would not be protected by the deliberative-process privilege. *See Grand Cent. P'ship*, 166 F.3d at 482 (predecisional document must "precede[], in temporal sequence, the decision to which it relates" (quotation marks omitted)). The government may not invoke the privilege to "shield documents that simply state or explain a decision the government has already made . . . unless the material is so inextricably intertwined with the deliberative section of documents that its disclosure would inevitably reveal the government's deliberations." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). The district court's opinion suggests that, at the very least, three of the records it ordered disclosed are in this category. *See* SPA110–11 (CIA index no. 59 Tab C); SPA126 (CIA index no. 109); SPA132 (CIA index no. 113).

Fourth—and crucially—even if CIA index no. 59 Tab C predates a final "messaging" determination, Gov't Br. 66, the deliberative-process privilege does not protect deliberations concerning how to present government policies to the public. Indeed, such discussions are at the core of what FOIA requires to be released. *See Sears*, 421 U.S. at 151–52 (noting distinction between "predecisional communications, which are privileged, and communications made after the decision *and designed to explain it, which are not*" (emphasis added) (citations omitted)); *see also Nat'l Day Laborer Org. Network v. ICE*, 811 F. Supp. 2d 713,

736 (S.D.N.Y. 2011) ("The privilege . . . does not extend to materials related to the explanation, interpretation or application of an existing policy, as opposed to the formulation of a new policy." (*quoting Resolution Tr. Corp. v. Diamond*, 137 F.R.D. 634, 641 (S.D.N.Y. 1991))). Because messaging deliberations "typically do not relate to the type of substantive policy decisions Congress intended to enhance by frank discussion," they are privileged only to the extent that "their release would reveal the status of internal deliberations on substantive policy matters." *Fox News Network, LLC v. Dep't of Treasury*, 739 F. Supp. 2d 515, 545 (S.D.N.Y. 2010); *see Fox News Network, LLC v. Dep't of Treasury*, 911 F. Supp. 2d 261, 277 (S.D.N.Y. 2012) (distinguishing unprivileged documents consisting of "advice regarding messaging" from privileged documents revealing "deliberations with respect to the underlying substantive policy . . . [that] would reveal alternatives that were not chosen, and reasoning that might inaccurately reflect the ultimate rationale for a policy"). In other words, the privilege "does not protect a document which is merely peripheral to actual policy formation, the records must bear on the formation or exercise of policy-oriented judgment." *Tigue v. DOJ*, 312 F.3d 70, 80 (2d Cir. 2002) (quotation marks omitted). Here, the district court safeguarded the government's legitimate interests in its predecisional policy deliberations by segregating Tab C from its cover memorandum and still-undisclosed attachments. SPA109–112 (describing CIA no. 59 as consisting of a "cover memo and . . . four

attachments"). The narrow deliberative-process privilege does not allow the government to withhold more.

2. The government has not justified its invocations of the attorney–client privilege.

The government identifies a handful of records that it asserts are protected by the attorney–client privilege. *See* Gov't Br. 46 (describing "requests to OLC for legal advice concerning a contemplated operation against Aulaqi (OLC 75, 84), and factual material provided to OLC in connection with those requests (OLC 64–66, 70–71, 73, 76, 83, 90–91, 95, CIA 2, 3)"); Gov't Br. 46 n.[redacted] (describing DOD index no. 1 as "a memorandum from the DOD general counsel to the Secretary of Defense, providing legal advice regarding the analysis contained in the OLC's Aulaqi opinions"). But as the ACLU has explained, the government has never publicly provided the information required to assess those claims, and the government's *ex parte* submissions cannot do the job on their own. *See* ACLU Br. 29–30. Moreover, even if the government has properly invoked the attorney–client privilege over these documents, their contexts—which appear to be identical to or very closely related to that surrounding the July 2010 OLC Memorandum—suggest that the government has likely waived its right to withhold them. *See N.Y. Times II*, 806 F.3d at 686; *see also infra* § IV.C.

3. The government has not justified its invocations of the presidential-communications privilege.

The government contends that an entirely redacted set of documents "reflect communications between and among the President's closest advisors and/or information gathering by senior presidential advisors in connection with potential advice to the President, and as such are protected in their entirety by the presidential communications privilege." Gov't Br. 50. The government has not offered any description of the documents withheld under the presidential–communication privilege on the public record. *See* ACLU Br. 27–29. Moreover, the district court appears not to have addressed the privilege in its ruling. *See*, *e.g.*, SPA39–41 (ruling with respect to OLC index no. 75).[13] This Court should ensure that the government's claims of executive privilege are properly supported and applied "as narrowly as is consistent with ensuring that the confidentiality of the President's decisionmaking process is adequately protected." *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997); *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1115 (D.C. Cir. 2004) (remarking upon "the dangers of expanding [the privilege]

[13] As far as the ACLU is able to discern from the agencies' filings and the district court's redacted opinion, the government invokes the presidential-communications privilege for six documents: OLC index nos. 55 & 75; CIA index nos. 15, 61 & 62. The government has not provided any details regarding the basis for its invocation of the privilege. *See* Second Lutz Decl. ¶ 21 (JA553); Second Bies Decl. ¶ 22 (JA119); Gov't Br. 48–51.

too far"); *Ctr. for Effective Gov't v. DOS*, 7 F. Supp. 3d 16, 27 (D.D.C. 2013) (explaining that because the privilege does not "extend to documents created by the President and widely transmitted to multiple agencies and their staffers who serve in non-advisory roles to the President" (emphases removed)).

The government also disputes the ACLU's argument that the President must personally invoke the presidential-communications privilege. *See* Gov't Br. 50. Although the Second Circuit has not ruled on that question, which also remains open in the D.C. Circuit, *see Judicial Watch*, 365 F.3d at 1114, there is good reason to require a personal invocation. In *United States v. Reynolds*, 345 U.S. 1 (1953), the Supreme Court held that the closely related state-secrets privilege may be lodged only by the "head of the department which has control over the matter." *Id.* at 8. It reasoned that this procedural requirement, which places the formal responsibility for invoking a weighty privilege in the hands of the individual best situated to ensure that the invocation is legitimate, was a crucial safeguard against the privilege being "lightly invoked." *Id.* at 7; *see id.* at 8 n.20; *United States v. Burr*, 25 F. Cas. 187, 192 (1807); *Dellums v. Powell*, 561 F.2d 242, 247 (D.C. Cir. 1977). *Reynolds*'s logic applies just as forcefully here. Only the president (and perhaps his closest advisors) are in a position to know what role any particular record played in the decision-making process that the privilege is meant to protect. *See Burr*, 25 F. Cas. at 192; *Dellums*, 561 F.2d at 247; *see also In re Sealed Case*,

121 F.3d at 744 n.16 (reviewing personal invocations of the privilege by Presidents Nixon and Clinton).

B. Some of the withheld records contain the agencies' working law.

The government claims that none of the withheld documents constitute "working law" because even those that the government concedes "provid[e] legal advice about what an agency 'is *permitted* to do'" do not dictate policy. Gov't Br. 51 (quoting *N.Y. Times II*, 806 F.3d at 687). This analysis is misguided.[14]

First, the government's argument misreads this Court's opinion in *N.Y. Times II*. As the government acknowledges, in *N.Y. Times II* the Court addressed only ten OLC memoranda that it had examined *in camera*, and it determined that none of those documents constituted the government's working law. Gov't Br. 14. But the Court's decision should not be read to stand for the sweeping proposition that OLC opinions can *never* constitute working law unless they are expressly adopted by an agency. Indeed, neither of the cases cited by the panel support such a holding.[15] In *Electronic Frontier Foundation v. DOJ*, 739 F.3d 1 (D.C. Cir.

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[14] Importantly, the working-law doctrine overcomes the attorney–client and deliberative-process privileges, *see Brennan Center*, 697 F.3d at 208 ("[W]hen a document has been relied upon sufficiently to waive the deliberative-process privilege, that reliance can have the same effect on the attorney–client privilege."), and the presidential-communications privilege, *see Ctr. for Effective Gov't*, 7 F. Supp. 3d at 27.

[15] *See supra* note 8.

2014), for example, the D.C. Circuit concluded, "on the record before" it, *id.* at 4, that a particular OLC opinion did not constitute the working law of the FBI, *id.* at 8–10. The opinion in question, however, was prepared four years after the FBI discontinued the "flawed practice" to which the opinion related, and addressed an investigative technique that the FBI had disavowed. *Id.* at 12. And in *Brennan Center v. DOJ*, 697 F.3d 184, 203–204 (2d Cir. 2014), while the Second Circuit declined to hold that the particular OLC memoranda before it constituted working law because there was no evidence that they were "essentially binding," 697 F.3d at 204 n.16, the Court plainly contemplated that OLC opinions—like legal opinions written by other government agencies and components—can, at least in some circumstances, constitute working law. *See id.* at 201–02 (explaining that the working-law and "express adoption" doctrines are distinct and "separate path[s] towards the loss of Exemption 5's protection"). Although *N.Y Times II* concluded that the OLC opinions at issue were not working law, the Court did not question *Brennan Center*'s framework.

Second, even if the government's cramped view of the working-law doctrine were correct with respect to the OLC, it would have no application to the kinds of CIA and DOD *intra-agency* memoranda at issue in this case.[16] Agency documents

[16] Indeed, the government itself has conceded, in related litigation, that agency memoranda could constitute agency "working law." *See* Gov't Br. 50–51, *N.Y.*

that set out, explain, or interpret the legal standards governing drone strikes, and establish the framework within which decisions are made, constitute the working law of the agency. *See, e.g.*, *Sears*, 421 U.S. at 153 (explaining that final agency memoranda that have "the force and effect of law" are working law (quotation marks omitted)); *Tax Analysts v. IRS*, 294 F.3d 71, 81 (D.C. Cir. 2002) ("[I]t is not necessary that the [memoranda] reflect the final *programmatic* decisions of the program officers . . . [so long as they] represent the [Office of Chief Counsel's] final *legal* position . . . ."). To be sure, not *every* agency legal memoranda will constitute the agency's working law—but where the contents and context indicate that the agency is relying on agency legal advice as controlling, that legal advice lies at the core of the working-law doctrine. Indeed, there is good reason to believe that at least *some* of the withheld legal memoranda represent the agencies' effective law and policy with respect to the targeted-killing program. As Plaintiffs have explained, it is not plausible that the CIA and DOD—each of which maintained operational and intelligence roles in lethal strikes for over a decade—

Times v. DOJ, No. 14-4432 (2d Cir. Apr. 4, 2015), ECF No. 89 (contrasting OLC memoranda that the government argued merely set out legal advice with agency memoranda that have "precedential effect within [an] agency" or that "set[] out [an] agency's final legal position").

have not memorialized the standards governing the program. ACLU Br. 32–33.[17]

C. The government's official acknowledgments waive its right to withhold certain records under Exemption 5.

The government fails in its various attempts to inoculate assertedly privileged records from the consequences of its official disclosures.

First, this Court has already rejected the government's view that the official-acknowledgment doctrine does not apply to Exemption 5 privileges. *See N.Y. Times I*, 756 F.3d at 114 (explaining that "the attorney–client and deliberative privileges, in the context of Exemption 5, may be lost by disclosure"); *N.Y. Times II*, 806 F.3d at 686. The government's focus on the alleged distinction between official acknowledgment (in the context of Exemptions 1 and 3) and waiver (in the context of Exemption 5), *see* Gov't Br. 54–55, is a red herring. The relevant question—under either label—is whether the release of publicly disclosed information would reveal information protected by the corresponding FOIA exemption. Thus, under Exemption 1, courts ask whether disclosure of officially

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[17] Importantly, "it is the government's burden to prove that the [Exemption 5] privilege applies, and not the plaintiff's to demonstrate th[at] documents" are working law. *Brennan Center*, 697 F.3d at 201–02. Here, the government's categorical descriptions and redactions prevent the ACLU from pointing to specific documents that likely set forth the agencies' working law. *See* ACLU Br. 32. In these circumstances, the ACLU respectfully requests that the Court examine documents whose unredacted descriptions suggest that they constitute the agencies' effective law and policy.

acknowledged information would reveal *other* (still-secret) classified information that is inextricably "intertwined" with the information that has been made public. *N.Y. Times I*, 756 F.3d at 119. Similarly, under Exemption 5, courts ask whether disclosure of already-public information would undermine *another* interest in confidentiality or candor protected by one of the common-law privileges. *N.Y. Times II*, 806 F.3d at 686. Although the government's public disclosure of information may not *automatically* waive the government's Exemption 5 privileges with respect to the same (or materially similar) information in other documents, it clearly *may* waive the privileges when properly segregated disclosure does not undermine independently privileged interests.

Second, the government's attempt to narrowly cabin "waiver" analysis to the context of single communications or documents is not supported by precedent. The government claims that because the attorney–client privilege "attaches to *communications*, not information," official disclosures of anything other than a particular "privileged communication" have no effect on other records the government withholds via the attorney–client privilege. Gov't Br. 55. But in *N.Y. Times I*, this Court held that official acknowledgments from a variety of sources, such as public speeches and official documents, waived the government's Exemption 5 privileges. *See* 756 F.3d at 114. The government also argues that any waiver of the deliberative-process privilege applies singly to a "specific

deliberative document that has been disclosed," and not "related material." Gov't Br. 56. But again, that assertion flies in the face of *N.Y. Times I*, in which the Court found waiver of portions of the July 2010 OLC Memorandum after canvassing an array of public statements by senior government officials discussing the lawfulness of targeted killing. *N.Y. Times I*, 756 F.3d at 114. Likewise, it conflicts with *N.Y. Times II*, which explicitly contemplated that the government might have waived portions of a 2002 OLC memorandum based on disclosures similar to those reviewed in *N.Y. Times I*. *See N.Y. Times II*, 806 F.3d at 685–86. Indeed, the Court cautioned that it did "not mean to imply that a Government official's public statement made after preparation of a legal opinion can never result in waiver of protection for that opinion." *Id*. at 686; *see id.* (explaining that the Court's own precedent "dispels such a broad implication").[18]

Moreover, the cases cited by the government do not support its position. The government relies on *In re von Bulow*, 828 F.2d 94, 102–03 (2d Cir. 1987), for the

[18] Although the Court stated that "it would be difficult to explain in detail why the context of the legal reasoning in the [2002 OLC opinion] differs from the context of the public explanations given by senior Government officials eight years later without revealing matters that are entitled to protection," *N.Y. Times II*, 806 F.3d at 686, it noted that the opinion "concerns actions and governing legal standards different from those later publicly discussed." *Id.* at 687. The government has provided no reason to assume that the responsive records at issue in this case involve contexts as different from the disclosures as the one considered by this Court in *N.Y. Times II*.

proposition that public disclosures of privileged information cannot waive disclosure of the same information contained in different communications. Gov't Br. 55–56. But *von Bulow* did not go so far. There, the Second Circuit turned down a civil plaintiff's bid to compel discovery of "those parts of . . . four identified conversations not made public" in a book published by the defendant's attorney. *Id.* at 101. The Court explained that while "[m]atters actually disclosed in publish lose their privileged status . . . related matters not so disclosed remain confidential." *Id.* at 103. In other words, the Court held that the information sought by the plaintiffs had not actually been publicly disclosed. *See id.* at 101 ("examin[ing] the breadth of th[e] waiver" and "[s]cope of the [w]aiver," not the mere possibility of waiver); *see also United States v. Cunningham*, 672 F.2d 1064, 1073 n.8 (2d Cir. 1982) (cited at Gov't Br. 55) (holding only that loss of privilege of an underlying fact does not necessarily waive privilege with respect to the distinct fact of "whether or not [the client] communicated that fact to his counsel").

Indeed, the common law on which the Exemption 5 privileges are based prohibits parties from selectively disclosing information for use as a sword while protecting related information behind a shield of privilege. For example, in appropriate instances, "the voluntary disclosure of privileged material subject to the attorney–client privilege . . . 'waives the privilege, not only as to the specific communication disclosed but often as to all other communications relating to the

same subject matter.'" *In re Sealed Case*, 121 F.3d at 741 (citing *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982)). The inquiry is context-specific, "and depend[s] heavily on the factual context in which the privilege is asserted." *In re Sealed Case*, 877 F.2d 976, 981 (D.C. Cir. 1989); *accord Gen. Elec. Co. v. Johnson*, No. 00-cv-2855, 2006 WL 2616187 at *19 (D.D.C. 2006) ("The scope of subject-matter waiver is a matter that rests with the Court's discretion."). The government's numerous and selective disclosures related to targeted killing plainly implicate this doctrine. *See N.Y. Times v. DOJ*, 915 F. Supp. 2d at 524 (describing the government's "extensive public relations campaign in order to convince the public that its [legal] conclusions are correct"); Tr. of Oral Argument at 12:19–21, *ACLU v. CIA*, No. 11-5320 (D.C. Cir. Sept. 20, 2012) (question of Griffith, J., describing a "pattern of strategic and selective leaks at very high levels of the Government").

As with the attorney–client privilege, whether and to what extent the deliberative-process privilege has been waived depends, in large part, on context. Indeed, courts have long recognized that the interests protected by the privilege "ha[ve] finite limits, even in civil litigation," *EPA v. Mink*, 410 U.S. 73, 87 (1972), and that they may merit less-than-absolute protection through proper segregation and redaction, *see id.* at 87–88 (explaining that "memoranda consisting only of compiled factual material or purely factual material contained in a deliberative

memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government"). Of course, in limited contexts, even factual material may be "so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *In re Sealed Case*, 121 F.3d at 737. As this Court recognized in examining the OLC opinions, there is no basis for abandoning these principles when determining if the government has waived the deliberative-process privilege. Again, the cases cited by the government are not to the contrary. For example, in *National Security Archive v. CIA*, 752 F.3d 460, 464–65 (D.C. Cir. 2014) (cited at Gov't Br. 56), the D.C. Circuit rejected a waiver argument because it found that a draft volume of CIA history of the Bay of Pigs invasion contained new, different, and still undisclosed information than had been published in earlier, final volumes.

Here, the district court correctly determined that the government had waived its privileges with respect to a portion of OLC index no. 46, and all of CIA index no. 59 Tab C.[19]

The government attempts to shield publicly disclosed information found in

[19] As Plaintiffs explain above, the district court erred by reading the government's disclosures too narrowly with respect to some facts and legal analysis. *See supra* § II.

OLC index no. 46 by claiming that it was written "long after the OLC provided legal advice" in the disclosed 2010 OLC opinions. Gov't Br. 58. Although the government redacted the document's date (and all other information) from its *Vaughn* index, *see* JA136, OLC index no. 46 likely follows the 2010 disclosures by *at most* two years, *see* JA112 (describing OLC's search for responsive records in June 2012), and relates to the same subject, *see* SPA38 (describing waived information in OLC index no. 46 as "legal analysis about the targeting of Aulaqi"). *N.Y. Times I* and *II* are instructive: This Court premised its waiver holding concerning the July 2010 OLC Memo on similar circumstances. *See N.Y. Times II*, 806 F.3d at 686 (explaining that waiver in *N.Y. Times I* was based on public disclosures both before and "less than three years" after it was written). In contrast, the 2002 OLC opinion that this Court determined retained its full privilege preceded the relevant disclosures by eight years, and addressed an entirely different subject. *See id.* at 686–87 (describing the 2002 OLC Opinion, which long predated the government's interest in targeting al-Aulaqi, as concerning Executive Order 12,333). Moreover, the district court order's order is limited to the portions of OLC index no. 46 for which the privilege has been waived. *See* SPA38; *see also N.Y. Times I*, 756 F.3d at 117 (segregating portions of July 2010 OLC Memo "warrant[ing] continued secrecy"). It is no secret that the OLC was considering the legality of the targeted-killing program during this period—and the district court

concluded that the paragraph ordered disclosed would not reveal any independently privileged information. Similarly, CIA index no. 59 Tab C is closely related to the public information in Tab B—a publicly available November 2011 White Paper "set[ting] forth the legal framework for targeting U.S. citizens who are engaged in terrorist activities"—and concerns the same subject. SPA110–11.[20]

As both this Court and the district court have recognized, the common-law privileges in Exemption 5 may be waived by official disclosures in some circumstances. The relevant inquiry for the Court is whether already disclosed information may be segregated from *other* information that warrants continued secrecy. Here, the district court correctly held that, at least in some cases, the government's disclosures waived its Exemption 5 privileges. However, the extent of the government's official acknowledgments, and the number of responsive records, cast doubt on whether the district court went far enough in examining whether the government had waived its right to withhold information in the

[20] The other records the district court ordered released are also closely related to the same disclosures. *See* SPA66 (describing OLC index no. 144 as discussing publicly-disclosed information about the legal basis for the targeted killing of a U.S. citizen); SPA67 (same with respect to OLC index no. 145); SPA125 (describing portions of CIA index no. 109 as "information about the legality of the Aulaqi operation that is already in the public domain"); SPA132 (describing portions of CIA index no. 113 as "simply repeat[ing] information contained in the [November 2011] White Paper and [July 2010 OLC] Memorandum").

hundreds of others whose withholding the court affirmed.

CONCLUSION

For the reasons above, the Court should affirm the district court's judgment insofar as the court held that the government had not justified the withholding of certain documents, and otherwise reverse.

Plaintiffs respectfully submit that the Court should review *in camera* (1) records that the district court also reviewed *in camera*, and (2) records identified as containing factual-basis information about the targeting of Anwar al-Aulaqi. Plaintiffs also respectfully suggest that the Court should order the district court, on remand, to review the remainder of the records still at issue *in camera*. *See* ACLU Br. 40–41.

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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. 28.1 because it contains 8,619 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Jameel Jaffer
Jameel Jaffer
Counsel for Plaintiffs–Appellants–Cross-Appellees

Date: July 5, 2016

CERTIFICATE OF SERVICE

On July 5, 2016, I filed and served the foregoing BRIEF FOR PLAINTIFFS–APPELLANTS–CROSS APPELLEES via this Court's electronic-filing system.

/s/ Jameel Jaffer
Jameel Jaffer
Counsel for Plaintiffs–Appellants–Cross-Appellees

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