[ORAL ARGUMENT SCHEDULED FOR FEBRUARY 17, 2016]
No. 15-5217

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

v.

CENTRAL INTELLIGENCE AGENCY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR DEFENDANT-APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici.

The plaintiffs-appellants are the American Civil Liberties Union and the American Civil Liberties Union Foundation. The defendant-appellee is the Central Intelligence Agency.

B. Rulings Under Review.

The ruling under review is the district court's June 18, 2015 order granting summary judgment to the defendant and denying the plaintiffs' cross-motion for summary judgment. The accompanying memorandum opinion is published at ___ F. Supp.3d ___, 2015 WL 3777275 (D.D.C. June 18, 2015), and is reprinted at Joint Appendix 189-222.

C. Related Cases.

This case was previously before the Court. *See ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013). In the earlier appeal, this Court reversed the district court's grant of summary judgment to the CIA, and remanded for further proceedings.

There are no related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C). However, there are other pending actions involving Freedom of Information Act (FOIA) requests for documents relating to the government's use

of unmanned aerial vehicles to conduct targeting operations, which is the subject of the FOIA request that gave rise to this litigation. Those actions include *Leopold v. Department of Justice*, No. 15-5281 (D.C. Cir. filed Oct. 20, 2015), which is currently held in abeyance by the Court's order pending the district court's disposition of a motion for reconsideration. In addition, the Second Circuit currently has two pending appeals involving FOIA requests for similar documents: *New York Times v. Department of Justice*, ___ F.3d ___, 2015 WL 7423815 (2d Cir. Oct. 22, 2015); and *ACLU v. Department of Justice*, No. 15-2956 (2d Cir.). The Second Circuit previously ruled as to the withholdings of certain documents and information relating to the U.S. Government's use of unmanned aerial vehicles to conduct targeting operations. *See New York Times v. U.S. Dep't of Justice*, 756 F.3d 100 (2d Cir. 2014). There is also an additional matter pending in the U.S. District Court for the Southern District of New York involving FOIA requests for certain documents relating to the U.S. Government's use of targeted lethal force against terrorists. *See ACLU v. Dep't of Justice*, No. 15 Civ. 1954 (CM) (S.D.N.Y.).

/s/ Sharon Swingle
Sharon Swingle

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GLOSSARY

ACLU	American Civil Liberties Union and American Civil Liberties Union Foundation
CIA	Central Intelligence Agency
DOD	Department of Defense
DOJ	Department of Justice
FOIA	Freedom of Information Act
JA	Joint Appendix
OLC	Office of Legal Counsel

STATEMENT OF JURISDICTION

The district court had jurisdiction over this action under 28 U.S.C. § 1331. The district court entered judgment for the defendant on June 18, 2015. Joint Appendix (JA) 223. The plaintiffs filed a timely notice of appeal on July 29, 2015. JA 224. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

As it comes to this Court, this Freedom of Information Act (FOIA) action seeks to compel the Central Intelligence Agency (CIA) to disclose certain legal memoranda in its possession relating to the U.S. Government's use of targeted lethal force involving unmanned aerial vehicles (or "drones"), as well as intelligence products compiled by the CIA containing information about the identity of intended targets and assessments of the specific results of drone strikes. The questions presented are: (1) whether the legal memoranda were properly withheld as classified, as otherwise protected by statute, and as covered by the deliberative process, attorney-client, and/or presidential communications privileges under FOIA Exemptions 1, 3, and 5; and (2) whether the intelligence products were properly withheld as classified and otherwise protected by statute under FOIA Exemptions 1 and 3.

PERTINENT STATUTES AND REGULATIONS

Under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(3)(A), "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person."

FOIA exempts certain categories of records and information from compelled disclosure, however. As relevant here, FOIA Exemption 1 protects from public disclosure information and records that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and [] are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Under Executive Order 13,526, an agency may keep secret information that an official with original classification authority has determined to be classified because its "unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security[.]" Exec. Order No. 13,526 § 1.4, 75 Fed. Reg. 707, 709 (Dec. 29, 2009). The information must "pertain[] to" one of the categories of information specified in the Executive Order, including "intelligence activities (including covert action), intelligence sources or methods," and "foreign relations or foreign activities of the United States." *Id.*

FOIA Exemption 3 protects from public disclosure information and records that are "specifically exempted from disclosure by statute * * * if that statute * * * requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue" or "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). Section 102A(i)(1) of the National Security Act of 1947, as amended, requires the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure," 50 U.S.C. § 3024(i)(1), and qualifies as a withholding statute for purposes of Exemption 3. *See ACLU v. DOD*, 628 F.3d 612, 619 (D.C. Cir. 2011).

FOIA Exemption 5 protects from public disclosure "inter-agency or intra-agency memorand[a] or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). That includes records that are covered by the deliberative process, attorney-client, and presidential communications privileges. *See Baker v. Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 321 (D.C. Cir. 2006).

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND AND DISTRICT COURT PROCEEDINGS

This case arises out of several FOIA requests filed by plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation

(collectively, the "ACLU") with the CIA, the Department of Defense ("DOD"), the Department of State ("State"), and the Department of Justice ("DOJ"). Only the request to the CIA (the sole remaining defendant in this case) is relevant to the current appeal.

The ACLU's initial request sought a variety of documents relating to the U.S. Government's use of unmanned aerial vehicles for the purposes of killing targeted individuals, *see* JA 17-32 (although, as discussed in greater detail below, the request was subsequently narrowed by the ACLU). In particular, the request sought records broadly pertaining to ten categories of information:

1. the legal basis for the U.S. Government's use of unmanned aerial vehicles (or "drones") to conduct targeted killings;

2. any agreements, understandings, cooperation or coordination between the U.S. and the governments of Afghanistan, Pakistan, or any other country regarding the use of drones to effect targeted killings in those countries;

3. the selection of human targets for drone strikes and any limits on who may be targeted;

4. civilian casualties in U.S. drone strikes, including but not limited to the determination of the likelihood of civilian casualties, measures to limit civilian casualties, and guidelines about when drone strikes may be carried out despite a likelihood of civilian casualties;

5. the assessment or evaluation of individual drone strikes after the fact;

6. any geographical or territorial limits on the U.S. use of drones to kill targeted individuals;

7. the number of drone strikes that have been executed by the U.S. for the purpose of killing human targets, the location of each such strike,

and the agency of the government or branch of the military that undertook each such strike;

8. the number, identity, status, and affiliation of individuals killed in any U.S. drone strikes, including for each individual strike;

9. who may pilot any U.S. drones, who may cause weapons to be fired from drones, or who may otherwise be involved in the operation of drones for the purpose of executing targeted killings; and

10. the training, supervision, oversight, or discipline of U.S. drone operators and others involved in the decision to execute a targeted killing using a drone.

JA 22-24.

The CIA initially responded with a "Glomar response," declining to confirm or deny its possession of any responsive records.[1] The ACLU brought suit to compel the CIA to process and release any responsive records or additional information about any responsive records. The district court granted summary judgment for the CIA, agreeing with the CIA "that the existence *vel non* of responsive records was exempt under both Exemptions 1 and 3, and that there had been no official acknowledgment sufficient to override those exemptions." *See ACLU v. CIA*, 710 F.3d 422, 426 (D.C. Cir. 2013). The district court also held that, because the fact whether CIA possessed any responsive records was itself classified, the CIA was not required to describe any responsive records in its

[1] The Glomar response was first recognized in *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976), in which the CIA refused to confirm or deny whether it possessed documents relating to a ship, the Glomar Explorer, that had reportedly been used in an attempt to recover a sunken Soviet submarine.

possession or to explain in more detail why any such documents were exempt from disclosure. *See id.*

B. PRIOR APPEAL

The ACLU appealed to this Court. While the appeal was pending, the Executive Branch disclosed publicly certain information about the U.S. Government's use of unmanned aerial vehicles and targeted lethal force, after determining that the public benefit outweighed the potential harm to national security. The President of the United States disclosed that the U.S. Government had used drones against al Qaeda operatives and suspects.[2] John Brennan, then the Assistant to the President for Homeland Security and Counterterrorism, publicly stated that "[t]he United States Government conducts targeted strikes against specific al-Qaida terrorists, sometimes using remotely piloted aircraft, often referred to publicly as drones."[3]

Following these disclosures, the government notified this Court that it could acknowledge the CIA's possession of certain responsive records, and moved for a

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[2] *See* 710 F.3d at 429 & n.5 (citing The White House, *President Obama Hangs out with America* (Jan. 30, 2012), http://www.whitehouse.gov/blog/2012/01/30/president-obama-hangs-out-america; The White House, *Your Interview with the President-2012*, at 28:37-29:23 (Jan. 30, 2012), https://www.youtube.com/watch?v=eeTj5qMGTAI; *id.* at 26:20-30:18.

[3] *See* 710 F.3d at 429 (quoting John O. Brennan, *The Ethics and Efficacy of the President's Counterterrorism Strategy*, *Address Before the Wilson Center* (Apr. 30, 2012), http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy) (Wilson Center speech).

voluntary remand to the district court to allow the district court to consider in the first instance the effect of the government's voluntary disclosures. *See* Motion to Remand for Further Proceedings, *ACLU v. CIA*, No. 11-5320 (D.C. Cir. filed Jun. 20, 2012); 710 F.3d at 431-32. This Court denied the motion, but after oral argument, it subsequently reversed and remanded for further proceedings. 710 F.3d at 422.

This Court noted that the government had argued in district court that revealing whether the CIA possessed responsive documents "would reveal that the CIA was either involved in, or interested in, drone strikes (while denying that it did would reveal the opposite)." 710 F.3d at 427. This information, the CIA had asserted in district court, was itself exempt from disclosure under FOIA Exemptions 1 and 3. *See id.* at 427-28.

This Court emphasized, however, that the President and his Assistant for Homeland Security and Counterterrorism, Mr. Brennan, had publicly acknowledged that the United States uses drone strikes against al Qaeda. Mr. Brennan had also publicly explained that, in deciding whether to carry out a strike, the government draws "'on the full range of our intelligence capabilities' and 'may ask the intelligence community to * * * collect additional intelligence or refine its analysis so that a more informed decision can be made.'" 710 F.3d at 430 (quoting Wilson Center speech) (alteration in original). And then-CIA Director Leon

Panetta publicly stated in 2009 that remote drone strikes were "very precise in terms of the targeting" and "very limited in terms of collateral damage." *Id.* at 430-31.

The Court acknowledged that revealing that the CIA possesses responsive documents would reveal that the CIA "at least has an intelligence interest in drone strikes," but held that, in light of the public disclosures, the CIA's intelligence interest in drone strikes is not classified information or information otherwise protected by statute and thus not covered by Exemptions 1 or 3. *Id.* at 428-29. Because the documents sought by the plaintiffs pertaining to U.S. drone strikes were not limited to documents about "drones operated by the CIA," 710 F.3d at 428, there was no reason to think that disclosing whether the CIA possessed responsive documents would "reveal whether the Agency itself—as opposed to some other U.S. entity such as the Defense Department—operates drones." *Id.*

This Court concluded that, as a consequence, the CIA was not justified in refusing to confirm or deny whether it possessed any records responsive to plaintiffs' request. 710 F.3d at 431-32. The Court recognized, however, that it was an open question how much information the CIA would need to provide about the nature or contents of any responsive documents. *Id.* at 432. Although typically in a FOIA case a "*Vaughn* index indicates in some descriptive way which documents the agency is withholding and which FOIA exemptions it believes

apply," the Court emphasized that "there is no fixed rule establishing what a *Vaughn* index must look like" and that a "district court has considerable latitude to determine its requisite form and detail in a particular case." *Id.* The Court noted that it might be appropriate for a *Vaughn* index to "contain brief or categorical descriptions" in order to protect exempt information, or for the agency to submit supporting affidavits or to seek *in camera* review either of the *Vaughn* index or of the withheld documents themselves. *Id.* at 432-33. The Court further recognized that, in "unusual circumstances," the government might be justified in acknowledging the possession of responsive documents but declining to describe further the number, types, dates, or other descriptive information about the documents—*i.e.*, a so-called "no number, no list" response. *Id.* at 433-34. The Court held that "all such issues remain open for the district court's determination upon remand." *Id.* at 434.

C. PROCEEDINGS IN NEW YORK LITIGATION

While this case was proceeding, similar FOIA litigation was underway in the U.S. District Court for the Southern District of New York and the U.S. Court of Appeals for the Second Circuit. The New York litigation arose out of FOIA requests submitted by two New York Times reporters and a separate FOIA request submitted by the ACLU, which collectively sought records from multiple federal agencies relating to any U.S. Government use of targeted lethal force, including

against U.S. citizens. *See New York Times Co. v. U.S. Dep't of Justice*, No. 11-cv-9336 (CM) (S.D.N.Y. filed Dec. 20, 2011); *ACLU v. U.S. Dep't of Justice*, No. 12-cv-794 (CM) (S.D.N.Y. filed Feb. 1, 2012). The district court granted summary judgment for the government defendants, holding in relevant part that the CIA was justified in making a "no number, no list" response to the FOIA requests because there had been no official public acknowledgment of details about responsive records, including their number or nature. *New York Times Co. v. U.S. Dep't of Justice*, 915 F. Supp. 2d 508, 550-53 (S.D.N.Y. 2013). The court also upheld the withholding of certain responsive documents, including particular Department of Justice Office of Legal Counsel (OLC) opinions addressing the lawfulness of the government's use of targeted lethal force. *See id.* at 535-44, 546-50.

The Second Circuit affirmed in part, reversed in part, and remanded. *New York Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 122, 124 (2d Cir. 2014). The Second Circuit held, citing public statements discussed by this Court in its decision, as well as additional public statements and disclosures that post-dated this Court's decision, that the government had officially acknowledged that the CIA had an "operational role in targeted drone killings," *id.* at 122, although it did not define the contours of what it meant by "operational role." The Second Circuit also held that the government's voluntary public disclosures served to waive Exemption 5 protection for legal analysis in a July 2010 OLC opinion addressing

the lawfulness of using targeted lethal force against Anwar al-Aulaqi, and ordered the government to disclose a court-redacted version of that document. *Id.* at 113-21. The Second Circuit also ordered the CIA to submit a classified *Vaughn* index to the district court on remand for *in camera* inspection. *Id.* at 122-23. And the Second Circuit ordered the district court to consider whether any additional responsive documents should be ordered disclosed in whole or in part. *Id.* at 121, 123.

On remand, the district court in New York first considered whether disclosure was required of ten additional OLC opinions that were responsive to the New York Times FOIA requests. The government withheld nine of those opinions in full, and voluntarily released a redacted version of a tenth opinion: a February 2010 OLC opinion addressing the lawfulness of using targeted lethal force against Anwar al-Aulaqi. The district court upheld the withholding of the redacted portions of that opinion, as well as the withholding in full of the other nine memoranda, holding that the documents were properly protected by Exemptions 1, 3, and 5, because they were properly classified, protected from disclosure by another statute, and covered by the attorney-client and/or deliberative process privileges. The court rejected the plaintiffs' contention that the government had waived the protection of those exemptions. Decision on Remand (Redacted), at 2-6, 12, 15-18, *New York Times Co. v. U.S. Dep't of Justice*, No. 11 Civ. 9336 (CM)

(S.D.N.Y. Oct. 31, 2014). The Second Circuit affirmed that decision on appeal, ruling that the government had not waived the protections of Exemption 5 through any public disclosures, that the withheld opinions were protected by Exemption 1 because they were classified, and that the withheld legal reasoning in OLC opinions did not constitute "working law" that the government was compelled to disclose. *New York Times Co. v. U.S. Dep't of Justice*, ___ F.3d ___, 2015 WL 7423815, at *2-*4 (2d Cir. Oct. 22, 2015).

The district court in New York also upheld on remand the withholding of most of the remaining documents in the possession of OLC, the CIA, and DOD that were responsive to the ACLU's request. Memorandum Decision and Order, *ACLU v. U.S. Dep't of Justice*, No. 12 Civ. 794 (CM) (S.D.N.Y. July 16, 2015). The district court conducted a document-by-document review of the records, and its 170-page decision on remand concludes that virtually all of the withheld records were protected in full by Exemptions 1, 3, and/or 5. The court rejected the argument that the government had officially disclosed the nature of the CIA's operational role in the al-Aulaqi strike, or any other operational details about any particular drone strike. *Id.* at 27-29. However, the district court ordered seven documents disclosed in whole or in part, reasoning that withheld legal analysis and information in those documents was similar to legal analysis and information that the government had previously publicly disclosed. *See id.* at 37, 58-59, 66-67,

110-12, 123-26, 132-32. The ACLU has appealed, and the government has cross-appealed with respect to the seven documents ordered disclosed in whole or in part. *ACLU v. U.S. Dep't of Justice*, Nos. 15-2956, 15-3122 (2d Cir. filed Sept. 18, 2015, and Oct. 2, 2015).

D. PROCEEDINGS ON REMAND IN DISTRICT COURT IN THIS CASE

1. On remand in this case, the CIA filed a new motion for summary judgment, urging the district court to uphold a "no number, no list" response to the ACLU's FOIA request. *See* JA 199. Following the Second Circuit's decision in the first appeal in the New York litigation, however, the CIA withdrew its motion and the parties conferred on how to proceed. *See id.* The ACLU agreed to amend its FOIA request to limit it to two categories of items:

- Any and all final legal memoranda (as well as the latest versions of draft legal memoranda that were never finalized) concerning the U.S. Government's use of armed drones to carry out premeditated killings; and

- Four types of records routinely compiled by the CIA for analytical purposes containing charts or compilations about U.S. Government strikes sufficient to show the identity of the intended targets, assessed number of people killed, dates, status of those killed, agencies involved, the location of each strike, and the identities of those killed if known.

See id. Although the ACLU was informed that the CIA possessed additional materials about U.S. Government strikes that were *not* routinely compiled by the CIA for analytical purposes, the ACLU agreed that those materials would not be subject to the litigation. *See* JA 199-200. In addition, the ACLU agreed to exclude

from the scope of its request any legal memoranda being considered in the analogous FOIA proceedings in the Southern District of New York. *See* JA 199.

With regard to the first category sought by the ACLU, *i.e.*, legal memoranda concerning the U.S. Government's use of armed drones to conduct targeted killing, but which were not at issue in the New York litigation, the CIA identified twelve responsive documents. *See* JA 84-85, 147-69. One of the twelve memoranda was a classified DOJ white paper that had already been released in redacted form; the other eleven had not been released in whole or in part.

The CIA withheld these memoranda in full under Exemptions 1, 3, and 5, with the exception of the classified DOJ white paper, which was released in redacted form. As explained in the public declaration of Martha M. Lutz, the agency determined that it could release portions of the classified white paper, consistent with earlier disclosures. JA 84 & n.3, 90-91. However, based upon her line-by-line review of the white paper, Ms. Lutz concluded that additional information in the document was properly classified and that its disclosure could reasonably be expected to result in damage, including exceptionally grave damage, to national security. JA 89, 91-92. Ms. Lutz could not provide additional details in a public declaration, but did so in a classified declaration submitted to the court *ex parte* and *in camera*.

Ms. Lutz also explained that the other eleven memoranda likewise were properly classified and that no reasonably segregable information could be released from those memoranda. As with the white paper, she explained that she could not provide additional details about the memoranda on the public record, but did so in a classified declaration submitted to the court *ex parte* and *in camera*.

With regard to the second category of documents sought by the ACLU, *i.e.*, records containing charts or compilations analyzing strikes with information such as "the identity of the intended targets, assessed number of people killed, dates, status of those killed, agencies involved, the location of each strike, and the identities of those killed if known," the CIA identified thousands of intelligence products. *See* JA 85, 200 & n.10. The nature of those records is discussed in the classified Lutz declaration.

The CIA withheld the intelligence products under Exemptions 1 and 3. Ms. Lutz explained that the information in those records "would reveal the sources and methods of underlying intelligence collection," and "would tend to show how the information was gathered, the weight assigned to certain sources, and the types of information tracked by CIA analysts." JA 93. In addition, she noted that the records "would reflect the information available to the CIA at a certain point in time, which could show the breadth, capabilities, and limitation of the Agency's intelligence collection." *Id.* She also noted that there were no reasonably

segregable portions of these records, and that there had been no official disclosure of the information in them. *Id.*

2. The CIA moved for summary judgment. In support of its motion, the CIA submitted to the court *ex parte* and *in camera* the classified declaration from CIA official Martha M. Lutz discussed above. *See* JA 200. The ACLU cross-moved for summary judgment, asserting that withheld information had been officially disclosed. *See id.*

The district court granted summary judgment for the CIA, ruling that the withheld documents and information were protected against compelled disclosure by FOIA Exemptions 1 and 5. JA 189-223.

The district court rejected the ACLU's argument that legal analysis in the withheld legal memoranda could not be properly classified under Executive Order 13,526, and thus was not protected under Exemption 1. JA 206-09. The district court reasoned that information is subject to classification under Executive Order 13,526 if it "*pertains to*" one of the specified categories of information, including "intelligence activities (including covert action), intelligence sources or methods" and "foreign relations or foreign activities of the United States." JA 207 (quoting Exec. Order No. 13,526 § 1.4) (emphasis added by district court). That requirement is satisfied if information is "related or connected to" an intelligence activity, source, or method, or to foreign relations or foreign activities; the

withheld information need not itself constitute an "intelligence source or method" or a "foreign activit[y]". JA 207.

The legal analysis in the withheld documents concerns the U.S. Government's use of armed drones to carry out targeted killings. The district court reasoned that drone strikes are an intelligence activity or method, and that "it is entirely logical and plausible that the legal analyses in the withheld memoranda pertain to intelligence activities, sources, and methods." JA 208. The court also concluded that withheld portions of the classified DOJ white paper, which "discuss[] a contemplated CIA operation in a foreign country—Yemen," "clearly fall[] within Sections 1.4(c) and (d) of [Executive Order No.] 13526 because [the withheld information] relates to intelligence activities and foreign activities of the United States." *Id.*

The district court rejected as "unfounded" the ACLU's "sweeping assertion" that the court's construction of the Executive Order would allow the CIA to "exempt itself from FOIA simply by linking any kind of record to foreign activities." JA 208. The court recognized that the Executive Order imposes three additional requirements for classification, none of which the ACLU has contested here, including that the CIA demonstrate that disclosure of withheld information "could reasonably be expected to cause identifiable or describable damage to the national security." *Id.* (quoting Exec. Order No. 13,526 § 1.4).

The district court also rejected the ACLU's argument that information it sought from CIA intelligence products would not reveal "an intelligence activity, source, or method." JA 208-09. The court noted that the ACLU sought details about U.S. drone strikes including "the identity of the intended targets, assessed number of people killed, dates, status of those killed, agencies involved, the location of each strike, and the identities of those killed if known." *Id.* Disclosing this information, the district court reasoned, "could reveal the scope of the drone program, its successes and limitations, the methodology behind the assessments and the priorities of the Agency and more." JA 209 (quotation marks omitted). The district court had "no doubt that this kind of detail would reveal intelligence activities, sources, and methods and is properly protected under Exemption 1." *Id.*

Furthermore, the district court noted that the CIA had designated the intelligence products containing charts and compilations as relating to the "foreign relations and foreign activities of the United States" under Section 1.4 of Executive Order 13,526. JA 209. Accordingly, those intelligence products were properly classified and were protected by FOIA Exemption 1. *Id.*

Because the district court determined that all of the withheld records were protected by FOIA Exemption 1, it declined to decide whether they were also protected by FOIA Exemption 3. *See id.* n.14.

The district court also held that the legal memoranda were properly withheld under FOIA Exemption 5, because they were protected by the deliberative process privilege, the attorney-client privilege, and/or the presidential communications privilege. *See* JA 210-13. The court rejected the ACLU's contention that the CIA had failed to establish that the documents were privileged, explaining that the classified Lutz declaration filed by the CIA *in camera* and *ex parte* "provides fully detailed descriptions of the legal memoranda with more than sufficient information for this Court to determine the nature of each memo." JA 212. The district court concluded that it was "fully satisfied that the cited privileges have been validly invoked and applied," and that the withheld legal memoranda were properly withheld under Exemption 5. JA 213.

The district court rejected the ACLU's argument that the CIA lost the protections of Exemptions 1 and 5 through "official acknowledgment" of withheld information. *See* JA 213-21. The district court noted that, in order to be officially acknowledged, "(1) the information requested must be as specific as the information previously released; (2) the information requested must match the information previously disclosed; and (3) the information requested must already have been made public through an official and documented disclosure." JA 213 (quoting *ACLU v. DOD*, 628 F.3d at 620-21). The district court held that the

ACLU had failed to meet its burden to demonstrate official acknowledgment. JA 214.

The court first considered the intelligence products sought by the ACLU—*i.e.*, "records routinely compiled by the CIA for analytical purposes containing *charts or compilations* about U.S. Government strikes sufficient to show the *identity of* the intended *targets*, assessed number of *people killed*, *dates*, status of *those killed*, *agencies* involved, the *location* of each strike, and the *identities of those killed* if known." JA 214 (emphasis in district court decision). The ACLU argued that the government has officially acknowledged some "basic facts about U.S. involvement in drone strikes." *Id.* The district court reasoned that the purported disclosures on which the ACLU relied at most "identify the general nature of CIA's connection to drone strikes," not the "granular details about every drone strike recorded on CIA charts or compilations" sought by the ACLU. JA 215. Because the information sought does not "match" the alleged public disclosures, the court held, there has been no waiver of the FOIA Exemptions. *Id.*

The district court dismissed the ACLU's "attempts to string together snippets of facts from various sources" and to argue that the information collectively constitutes an official disclosure. JA 216. The district court concluded that the "ACLU has merely pointed to alleged disclosures of vaguely similar information, but has failed to identify officially disclosed information that

'precisely track[s]' or 'duplicates' the information it has requested." JA 217 (quoting *Public Citizen v. Department of State*, 11 F.3d 198, 203 (D.C. Cir. 1993)).

The district court also rejected the ACLU's argument that the CIA has officially disclosed information that is contained in the withheld legal memoranda. JA 219-21. The district court ruled that, based on its "careful review of the classified Lutz Declaration, which contains detailed descriptions of the legal memoranda, the Court concludes that ACLU has not met its burden to show that there has been official acknowledgment of any of the withheld legal memoranda." JA 220-21.

Finally, the district court rejected the ACLU's assertion that there is segregable information in the withheld documents that can be disclosed. JA 221-22. The district court pointed to the CIA's explanation "that it conducted a page-by-page and line-by-line review of responsive materials," and that the only segregable portions are the portions of a classified legal memorandum that have already been given to the ACLU. JA 222. The district court concluded that the two public declarations and one classified declaration from Martha Lutz "provide a reasonably detailed justification that any non-exempt material cannot be segregated and released." *Id.* The court also concluded that "any isolated words or phrases that might not be redacted for release would be meaningless." *Id.*

SUMMARY OF ARGUMENT

The district court's rulings should be upheld in full, because the responsive documents are protected from disclosure by FOIA Exemptions 1, 3, and 5.

A. The district court correctly upheld the withholding under Exemption 1 of responsive legal memoranda, including a classified DOJ white paper withheld in part and eleven other memoranda withheld in full. The CIA explained, both in its public declaration and in more detail in the classified declaration, that the withheld information in the memoranda was properly classified because its release would reveal classified intelligence activities, sources, and methods, and could reasonably be expected to cause damage to national security.

Contrary to the ACLU's argument, Executive Order 13,526 authorizes classification of legal analysis just like other information if it "pertains to" an intelligence source or method or foreign activity of the United States, and its disclosure could reasonably be expected to cause damage to national security. The Executive Order does not require that legal analysis must itself be an intelligence source or method in order to be classified; it need only concern or relate to an intelligence source or method, or to a foreign activity of the United States, and meet the other requirements of the Executive Order.

The district court did not abuse its discretion in ruling on the basis of the CIA's declarations, without conducting an *in camera* review of the documents. *In*

camera review of classified documents is neither necessary nor appropriate where the court can rule on the basis of agency affidavits.

The district court correctly concluded that the legal memoranda also were properly withheld under Exemption 5 because the memoranda are protected by the deliberative process, attorney-client, and/or presidential communications privileges. The classified declaration submitted by the CIA, which provided detailed descriptions of the memoranda, sufficiently established that the privileges were validly invoked and applied.

The ACLU's argument that the withheld legal memoranda are "working law" or "secret law" is erroneous (and waived). The legal memoranda do not set rules to adjudicate individual rights or require or forbid particular conduct by the public. They might describe the legal parameters of what an agency is permitted to do, but they do not themselves determine agency policy. In any event, the "working law" doctrine does not strip a document of the attorney-client or presidential communications privilege, and thus cannot result in the disclosure of the memoranda at issue here.

B. The district court was correct to uphold under Exemption 1 the withholding in full of CIA intelligence products compiled for analytical purposes and containing charts or compilations about U.S. Government strikes. Although the precise nature of the information in those intelligence products cannot be

discussed in a public setting, the agency's declarations (both public and classified) provide an ample basis for the district court's conclusion that disclosure of the information sought by the ACLU would compromise intelligence sources and methods and that the information is therefore properly classified.

C. All of the withheld documents are also exempt under FOIA Exemption 3, which provides an alternative ground for affirmance even though not reached by the district court. Compelled disclosure would reveal intelligence sources and methods protected by Section 102A(i)(1) of the National Security Act of 1947, as amended, which qualifies as an Exemption 3 statute because it refers to particular types of matters to be withheld.

D. None of the withheld information has been officially disclosed and thus the district court correctly rejected plaintiff's argument of waiver. Under this Court's precedent, in order to establish official disclosure that strips a document of Exemption 1 protection, the ACLU must identify specific information in the public domain that duplicates the information being withheld. The ACLU speculates that publicly disclosed legal analysis is the same as the content of the withheld legal memoranda. But the district court recognized that the generalized disclosures that the ACLU identifies do not match the "granular details about every drone strike recorded on CIA charts or compilations" that the ACLU seeks. JA 215.

The ACLU's efforts to string together snippets of information to attempt to establish official disclosure is at odds with this Court's strict application of the doctrine. It is not enough to show that some information in a withheld document may be in the public domain; the requester must show that the specific information in the withheld document is the same as information already disclosed as an official government matter.

In any event, the legal memoranda are protected under Exemption 5 because they are covered by the attorney-client, deliberative process, and/or presidential communications privileges even if the government has disclosed the same legal analysis contained in withheld memoranda in previous public disclosures. Public disclosure of a privileged document containing legal analysis does not waive privilege for the legal analysis in all other documents on a similar subject.

E. The district court correctly found that there is no segregable information in the withheld documents based on the CIA's declaration explaining its page-by-page and line-by-line review of the withheld documents, and that was a sufficiently detailed justification to establish that there is no reasonable segregable material.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's grant of summary judgment in a FOIA action. *See Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 769 (D.C.

Cir. 2015). Where the government invokes FOIA Exemptions in cases implicating national security concerns, however, "courts 'must accord *substantial weight* to an agency's affidavit concerning the details of the classified status of the disputed record.'" *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (emphasis in original) (quoting *Miller v. Casey*, 730 F.2d 773, 776-77 (D.C. Cir. 1984) (quoting in turn *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)). "[S]ummary judgment is warranted on the basis of agency affidavits when the affidavits describe the justifications for nondisclosure with reasonably specific detail * * * and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Wolf*, 473 F.3d at 374 (quotation marks omitted; ellipses in original). A reviewing court must "take into account * * * that any affidavit or other agency statement of threatened harm to national security will always be speculative to some extent, in the sense that it describes a potential future harm." *Id.* (ellipses in original) (quoting *Halperin v. CIA*, 629 F.2d 144, 149 (D.C. Cir. 1980)). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Judicial Watch, Inc. v. U.S. Dep't of Defense*, 715 F.3d 937, 941 (D.C. Cir. 2013).

ARGUMENT

THE DISTRICT COURT CORRECTLY RULED THAT THE RESPONSIVE DOCUMENTS IN CIA'S POSSESSION WERE PROPERLY WITHHELD UNDER FOIA

A. The Legal Memoranda Were Properly Withheld Under Exemption 1 As Classified, and Under Exemption 5 As Protected By The Attorney-Client, Deliberative Process, And/Or Presidential Communications Privileges.

The district court properly upheld under Exemption 1 the withholding in full of eleven legal memoranda and the redacted portions of a DOJ white paper because that information was properly classified and therefore protected from disclosure. Ms. Lutz explained in her public declaration that the redacted portions of the classified DOJ white paper would reveal classified intelligence activities, sources, and methods, which "could be exploited by [Anwar al-Aulaqi's] associates in Al-Qa'ida in the Arabian Peninsula and other terrorist organizations to defeat the U.S. Government's counterterrorism efforts." JA 91-92. Release of that information could reasonably be expected to cause harm to the national security. *Id.* Furthermore, disclosure of the eleven memoranda would reveal classified intelligence activities, sources, and methods, which "could reasonably be expected to cause damage to national security." JA 92. Ms. Lutz explained that she had "considered the information released in the course of the [New York] litigation and other government disclosures and ha[d] confirmed that there has been no official acknowledgement of this information." *Id.* Ms. Lutz also explained that the legal

memoranda were properly withheld under Exemption 5, because they are protected by the deliberative process, attorney-client, and/or presidential communication privileges. JA 94-96.

None of the ACLU's arguments undermine the district court's conclusion that the legal memoranda were protected from disclosure under Exemptions 1 and 5.

1. Legal analysis is properly classified and protected under FOIA Exemption 1 if it "pertains to" "intelligence sources and methods" or "foreign activities of the United States" and poses the national security risk required to be classified.

The ACLU did not challenge in the district court the agency's conclusion that disclosure of the memoranda could reasonably be expected to cause damage to national security, and they make no argument to that effect (beyond a cursory footnote) in this Court.[4] Instead, the ACLU argues that legal analysis cannot be classified under § 1.4(c) of Executive Order 13,526. App. Br. 13-19. However, the ACLU's assertion that legal analysis must itself be an "intelligence source[] or method[]" in order to be eligible for classification is wrong.

[4] The ACLU argues in a footnote in its brief that the legal analysis in the withheld memoranda was not properly classified because its disclosure would not reasonably be expected to cause identifiable or describable damage to the national security. Brief for Plaintiffs-Appellants (App. Br.) 23 n.9. That argument has been waived, both in the district court, *see* JA 205-06, and in this Court. *See Davis Broadcasting Inc. v. FCC*, 63 F. App'x 526, 527 [2003 WL 21186042, *1] (D.C. Cir. 2003).

The district court correctly recognized that the ACLU's argument is at odds with the plain language of Executive Order 13,526. Section 1.4 of the Executive Order provides that information

> shall not be considered for classification unless its unauthorized disclosure can reasonably be expected to cause identifiable or describable damage to the national security in accordance with section 1.2 of this order, and *it pertains to* one or more of the following:
> * * *
> (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology;
>
> (d) foreign relations or foreign activities of the United States, including confidential sources * * *.

Exec. Order No. 13,526 § 1.4(c), (d) (emphasis added).

The Executive Order does *not* require that information must itself *be* an intelligence source or method in order to be classified, but only that the information must *pertain to* an intelligence source or method. "For something to pertain to something else, it must be related or connected to such a thing." JA 207. The district court explained that the withheld legal memoranda concern the U.S. Government's use of armed drones to carry out targeted killings, and the district court was correct to find it "entirely logical and plausible that the legal analyses in the withheld memoranda pertain to intelligence activities, sources, and methods." JA 207-08. The district court also held that the withheld information pertains to "the foreign relations and foreign activities of the United States," which the ACLU did not contest. JA 207, 209.

The ACLU argues that "pertain" is sometimes understood more narrowly to mean "to belong as a part, member, accessory, or product." App. Br. 16 (citation omitted). But "pertain *usually means* 'to relate to; concern.'" Bryan A. Garner, *A Dictionary of Modern Legal Usage* 68 (2d ed. 1995) (emphasis added); *see, e.g.*, *City of Philadelphia v. Civil Aeronautics Bd.*, 289 F.2d 770, 774 (D.C. Cir. 1961) (reasoning that a statutory clause that "relates to" each of three preceding definitions obviously "pertains to" all three). The district court properly applied the usual meaning of "pertains to" in this circumstance to the legal analysis about the use of armed drones for targeted killing. *See, e.g.*, *ACLU v. Department of Justice*, 681 F.3d 61, 70 (2d Cir. 2012) (upholding withholding of information that "pertains to an intelligence activity"); *see also, e.g.*, *New York Times Co. v. U.S. Dep't of Justice*, 915 F. Supp. 2d 508, 535 (S.D.N.Y. 2013) ("legal analysis that 'pertains to' [specified categories in § 1.4] can indeed be classified"), *aff'd in relevant part*, 756 F.3d 100, 113 (2d Cir. 2014) ("We agree with the District Court's conclusion[] that the OLC-DOD Memorandum was properly classified * * *.").

The ACLU claims that the district court's construction of "pertains to" in Section 1.4 of Executive Order No. 13,526 would allow the CIA to classify information too broadly and "render the Executive Order's classification categories" in Section 1.4 "irrelevant." App. Br. 16-17. But the government

sustains its burden under the FOIA to show that information is properly classified and protected under Exemption 1 "'by giving reasonably detailed explanations of how' [the withheld information] pertains to a classified intelligence activity." *ACLU v. Department of Justice*, 681 F.3d at 70. In addition, as the district court recognized, the government must establish that the unauthorized disclosure of the withheld information "could reasonably be expected to cause identifiable or describable damage to the national security." JA 208. The district court's ruling does not exempt the CIA from the FOIA, it merely enforces the statutorily guaranteed protection for classified information.

This Court has recognized that the CIA's classification decision is entitled to "substantial weight," and must be upheld so long as it is "logical" and "plausible." *Morley v. CIA*, 508 F.3d 1108, 1124 (D.C. Cir. 2007). The district court properly upheld the withholding under Exemption 1 of the responsive legal memoranda as properly classified.

***2. The district court did not abuse its discretion in upholding the applicability of Exemption 1 to the legal memoranda based on detailed affidavits, and declining to review the documents* in camera.**

The ACLU argues that the district court abused its discretion by upholding the CIA's withholding of the legal memoranda under Exemption 1 on the basis of the agency's unclassified and classified declarations, without also reviewing the withheld documents *in camera*. App. Br. 21-23.

But the FOIA's "*in camera* review provision is discretionary by its terms, and is designed to be invoked when the issue before the District Court could not be otherwise resolved." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978); *see* 5 U.S.C. § 552(a)(4)(B) (providing that a court "*may* examine the contents of such agency records in camera") (emphasis added). An agency may meet its burden to show that responsive documents and information are covered by Exemption 1 "by submitting affidavits and other evidence to the court to show that the documents are properly classified and thus clearly exempt from disclosure." *Hayden v. National Sec. Agency*, 608 F.2d 1383, 1386 (D.C. Cir. 1979). "When the agency meets its burden by means of affidavits, *in camera* review *is neither necessary nor appropriate*." *Center for Auto Safety v. EPA*, 731 F.2d 16, 23 (D.C. Cir. 1984) (emphasis added); *accord Weissman v. CIA*, 565 F.2d 692, 696-97 (D.C. Cir. 1977). And that is all the more true in national security cases, where *in camera* review is "particularly a last resort." *Larson v. Dep't of State*, 565 F.3d 857, 870 (D.C. Cir. 2009).

The ACLU claims that the agency's public declaration fails to meet its burden to show that withheld documents are exempt in their entirety. App. Br. 20-21. But the agency need not justify its withholdings in a public declaration if doing so would disclose the sensitive information sought to be protected. *See Hayden*, 608 F.2d at 1384-85. Here, the classified Lutz declaration provided a

detailed and comprehensive explanation why the withheld documents were protected in full under Exemption 1. Classified Lutz Decl. 13-16, 22-33. The district court did not abuse its discretion in declining to review the withheld documents before granting summary judgment to the CIA.[5]

3. The responsive legal memoranda were also properly withheld under Exemption 5 as covered by the attorney-client, deliberative process, and/or presidential communication privileges.

The district court also properly upheld the withholding of the legal memoranda under Exemption 5, which protects from disclosure "inter-agency or intra-agency memorand[a] or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "Exemption 5 encompasses the privileges that the Government could assert in civil litigation against a private litigant," including the attorney-client privilege, the deliberative process privilege, and the presidential communications privilege. *See National Sec. Archive v. CIA*, 752 F.3d 460, 462 (D.C. Cir. 2014); *Baker*, 473 F.3d at 321; *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)

[5] The ACLU argues in the alternative that, even if the district court did not abuse its discretion in declining to review the withheld legal memoranda, this Court should do so. App. Br. 22-23. This Court, however, is one of "review, not of first view." *United States v. Peyton*, 745 F.3d 546, 557 (D.C. Cir. 2014). The district court properly ruled based on the extensive record in support of withholding, and this Court need not conduct an additional *in camera* review "on the theory that 'it can't hurt.' " *Larson*, 565 F.3d at 870.

(Exemption 5 protects all documents "normally privileged in the civil discovery context").

The attorney-client privilege "protects confidential communications made between clients and their attorneys * * * for the purpose of securing legal advice," including a government agency's communications with its attorneys. *In re Lindsey*, 158 F.3d 1263, 1267-69 (D.C. Cir. 1998); *see also Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). The deliberative process privilege "covers deliberative, pre-decisional communications within the Executive branch," in order to enable "the candid and frank exchange of ideas in the agency's decisionmaking process." *National Sec. Archive*, 752 F.3d at 462. The presidential communications privilege protects "communications directly involving and documents actually viewed by the President, as well as documents solicited and received by the President or his immediate White House advisers with broad and significant responsibility for investigating and formulating the advice to be given to the President." *Loving v. Department of Defense*, 550 F.3d 32, 37 (D.C. Cir. 2008) (quotation marks, brackets, and ellipses omitted). The presidential communications privilege "preserves the President's ability to obtain candid and informed opinions from his advisors and to make decisions confidentially." *Id.*

Because the memoranda are classified, the CIA's declarant was unable to provide a detailed description of the memoranda in her public declaration. The ACLU therefore accuses the government of failing to supply an adequate basis to conclude "that the documents are in fact covered by the privileges the government invokes." App. Br. 27. The district court correctly ruled, however, that "the classified Lutz Declaration, which was provided to the Court for *ex parte*, *in camera* review, * * * provides fully detailed descriptions of the legal memoranda with more than sufficient information for [the district court] to determine the nature of each memo." JA 212. That classified declaration "provided the information on which a privileged determination would be made," and was sufficient to "fully satisf[y]" the district court that the deliberative process, attorney-client, and presidential communication privileges "have been validly invoked and applied." JA 213. This Court can also review that declaration, which establishes the applicability of the relevant privileges to each withheld legal memorandum. Classified Lutz Decl. 13-16, 34-37.

The ACLU cites no support for its apparent argument that the government must establish the applicability of a FOIA exemption through public declarations. This Court's binding precedent is to the contrary. *See Hayden*, 608 F.2d at 1385 (holding that, where the public disclosure of information justifying withholding under a FOIA exemption would itself reveal information protected by the

exemption, the "proper procedure for a district court * * * is to accept sensitive affidavits *in camera*"); *see also Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973) (recognizing that the agency cannot provide detailed descriptions of withheld documents on a public index if that would "compromise the secret nature of the information").

4. The withheld legal memoranda are not "working law" or "secret law" required to be publicly disclosed.

Finally, the ACLU argues that the district court's construction of Exemption 1 "would effectively sanction 'secret law.'" App. Br. 18. And it also contends that responsive legal memoranda cannot be withheld under Exemption 5, because, in plaintiff's view, they constitute agency "law and policy" that is subject to mandatory disclosure. App. Br. 28-30.

The ACLU did not argue in district court that the withheld legal memoranda constitute the agency's "secret law" or "working law" that must be publicly disclosed under FOIA and the argument is accordingly waived. In any event, however, the ACLU's arguments fail on the merits. The "secret law" (or "working law") doctrine has never been applied to defeat Exemption 1 and compel disclosure of a classified document. This Court and the Supreme Court have applied the doctrine to hold only that specific information or a specific document is not protected by the deliberative process privilege and thus cannot be withheld based on that privilege under Exemption 5. The ACLU offers no support for the

proposition that Congress intended that FOIA's general requirement that agencies make available final opinions or statements of agency policy, 5 U.S.C. § 552(a)(2), would somehow compel disclosure of classified information, nor does the ACLU offer any limiting principle to this broad argument (which presumably would apply to any "final" policy statement even if it directly revealed intelligence sources and methods). Because the withheld legal memoranda are protected by Exemption 1, it is irrelevant whether they are also protected by Exemption 5 based on the deliberative process privilege.

Nor, in any event, do the withheld legal memoranda contain "working law" or "secret law" that cannot be withheld under Exemption 5. The "secret law" that Congress intended to be made public under the FOIA is those agency "rules governing relationships with private parties and its demands on private conduct." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 n.20 (1989) (quoting Frank H. Easterbrook, *Privacy and the Optimal Extent of Disclosure Under the Freedom of Information Act*, 9 J. Legal Stud. 775, 777 (Dec. 1980)). When the Supreme Court held in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975), that "'working law' is not protected by exemption 5," it relied on sources that all understood "working law" to be limited to "those policies or rules, and the interpretations thereof, that 'either create or determine the extent of substantive rights and liabilities of a person.'" *Afshar*, 702 F.2d at 1141 (quoting

Cuneo v. Schlesinger, 484 F.2d 1086, 1090 (D.C. Cir. 1973)). As is clear from the classified declaration submitted by Ms. Lutz, Classified Lutz Decl. 14-16, the withheld legal memoranda do not fall within that definition.

The ACLU points to public statements by government officials that the CIA follows "the rule of law" and that "[t]he Office of Legal Counsel advice establishes the legal boundaries within which we can operate," as well as a book by a former CIA official.[6] The ACLU then speculates that the withheld legal memoranda *must* include an analysis by the CIA's Office of General Counsel of the lawfulness of drone strikes or "standards that govern agency conduct." App. Br. 28-29.

But a legal opinion about the lawfulness of particular conduct is *not* working law, as this Court recognized in *Electronic Frontier Foundation v. Department of Justice*, 739 F.3d 1 (D.C. Cir. 2014). There, a FOIA requester argued that an OLC legal opinion must be "working law" because it was "controlling" and "precedential." *Id.* at 9. This Court disagreed, reasoning that "[e]ven if the OLC Opinion describes the legal parameters of what the FBI is *permitted* to do, it does not state or determine the FBI's policy." *Id.* at 10; *see also, e.g., Brinton v. Department of State*, 636 F.2d 600, 604-05 (D.C. Cir. 1980) (legal memoranda

[6] The ACLU's reliance on a book by a former CIA official is particularly off-base, as publications by former officials are not attributable to the CIA, even if the publications underwent prepublication review. *See, e.g., Afshar*, 702 F.2d at 1133-34.

prepared by State Department attorneys were not working law); *Murphy v. Department of Army*, 613 F.2d 1151, 1154 & n.9 (D.C. Cir. 1979) (legal memoranda prepared by Army attorneys were "unquestionably" covered by the deliberative process privilege).

The ACLU claims, incorrectly, that the government argued in its brief in *New York Times Co. v. U.S. Dep't of Justice*, No. 14-4432 (2d Cir. filed Apr. 2, 2015), that the kind of agency memoranda at issue here "constitute agency law." App. Br. 30. The government did no such thing. The government's brief in that case distinguished between legal advice that may define the legal parameters of what the agency is permitted to do, but does not itself constitute agency policy; and rules or agency interpretations that "create or determine the extent of the substantive rights and liabilities of a person." *See* Brief for Defendants-Appellees 50-52. The government pointed to examples of the latter type of "working law"—Department of Energy interpretations of regulations given precedential effect within the agency, and IRS documents setting out the agency's final legal position concerning the Internal Revenue Code, tax exemptions, and proper procedures. *Id.* at 50. The government contrasted those types of documents from OLC legal opinions, which "are of an entirely different character." *Id.* The legal memoranda at issue here, like the OLC legal opinions at issue in *New York Times Co. v. U.S. Department of Justice*, No. 14-4432 (2d Cir.), are not agency "working law." *See*

New York Times Co. v. U.S. Dep't of Justice, ___ F.3d ___, 2015 WL 7423815, *4 (2d Cir. Oct. 22, 2015) (holding that OLC opinions "are not 'working law' but, "[a]t most," "legal advice as to what a department or agency is *permitted* to do").

Even if, as the ACLU speculates, the withheld legal memoranda analyze whether particular conduct is lawful, they do not compel any particular action by the CIA or any other government agency, nor do they determine what government policy will be. The withheld legal memoranda accordingly remain protected under Exemption 5 and the deliberative process privilege.

Furthermore, the withheld legal memoranda here retain the protections Exemption 5 because they are also covered by the attorney-client and/or presidential communications privilege. The "working law" at issue in *Sears* was an agency memorandum that would have otherwise been protected by the deliberative process privilege, but was no longer pre-decisional because it had been adopted by the agency as its own policy. 421 U.S. at 152-53. *Sears* held that a document may not simultaneously be "predecisional" (and thus protected by the deliberative process privilege) and also a "final opinion."

As noted above, this Court has already recognized that a legal opinion analyzing the permissibility of particular conduct is *not* working law. *See Electronic Frontier Foundation v. U.S. Department of Justice*, 739 F.3d 1, 9-10 (D.C. Cir. 2014). For the same reasons the OLC legal opinion in *Electronic*

Frontier Foundation remained protected by the deliberative process privilege, the withheld legal opinions here remain protected by the deliberative process and attorney-client privileges. And even if a document covered by the presidential communications privilege could somehow constitute "working law" because it governs the substantive rights and liabilities of an individual, there is no reason to think that it would lose its protection under Exemption 5 as a result. The need to protect a confidential presidential communication would remain even if that communication contained a final policy decision. *See Federal Open Market Committee v. Merrill*, 443 U.S. 340, 360 n.23 (1979) ("It should be obvious that the kind of mutually exclusive relationship between final opinions and statements of policy, on one hand, and predecisional communications, on the other, does not necessarily exist between final statements of policy and other Exemption 5 privileges."). All of the withheld memoranda thus remain protected under Exemption 5.

B. The Responsive Intelligence Products Were Properly Withheld Under Exemption 1 As Properly Classified.

The ACLU also challenges the district court's rulings concerning responsive intelligence products—*i.e.*, "records routinely compiled by the CIA for analytical purposes containing charts or compilations about U.S. Government strikes sufficient to show the identity of the intended targets, assessed number of people

killed, dates, status of those killed, agencies involved, the location of each strike, and the identities of those killed if known." JA 214 (emphases omitted).

The district court correctly concluded that compelling disclosure of this type of detailed information "could reveal the scope of the drone program, its successes and limitations, the 'methodology behind the assessments and the priorities of the [CIA]' and more." JA 209 (quoting JA 93). CIA official Martha Lutz explained in a public declaration that disclosure of the information sought "would tend to show how the information was gathered, the weight assigned to certain sources, and the types of information tracked by CIA analysts." JA 93. Disclosure of that information, in turn, would not only "compromise the specific intelligence sources and intelligence methods used, but would also reveal the methodology behind the assessments and the priorities of the Agency." *Id.* Furthermore, the records would disclose "the information available to the CIA at a certain point in time, which could show the breadth, capabilities, and limitations of the Agency's intelligence collection." *Id.* That information is classified, and was properly withheld in full under Exemption 1.

Of course, a more detailed explanation of the precise nature of the records and the basis for the agency's conclusions cannot be made in a public setting. However, Ms. Lutz provides additional support and justification for the

withholding of the intelligence products in her classified declaration. Classified Lutz Decl. 16-33.

The ACLU suggests that it is "not logical or plausible" that disclosure of the data it seeks would reveal intelligence activities, sources, and methods. App. Br. 32-33. But the specific information that the ACLU requests—including the identity of intended targets, assessed number of people killed, dates, status of those killed, agencies involved, the location of each strike, and the identities of those killed if known—would self-evidently be revealing of the CIA's intelligence capabilities. Any change in that information over time would also tend to reveal intelligence sources and methods. *Cf. CIA v. Sims*, 471 U.S. 159, 176 (1985) ("Disclosure of the subject matter of the Agency's research efforts and inquiries may compromise the Agency's ability to gather intelligence as much as disclosure of the identities of intelligence sources.").

In any event, the government also showed that the withheld information was properly subject to classification because it pertained to the "foreign relations and foreign activities of the United States." *See* JA 209 (quoting Exec. Order No. 13,526 § 1.4(d). As the district court noted, the ACLU did not challenge this designation, thereby conceding the argument. JA 209. Although the ACLU now claims that it was unaware that the government was relying on Section 1.4(d), App. Br. 33 n.14, the government's summary judgment briefing was clear that the

information was classified on that basis. *See* Memorandum of Points and Authorities, Dkt. 67-1, at 18, *ACLU v. CIA*, No. 1:10-cv-00436-RMC (D.D.C. filed Nov. 25, 2014) ("[T]he intelligence products likewise incorporate information about U.S. government drone strikes, which would also implicate the foreign relations or foreign activities of the United States.").

The ACLU also argues that it is not "logical or plausible" to conclude that disclosure of the withheld information would cause harm to national security because the government has "already disclosed much of the information." App. Br. 33. But the withheld information is wholly different from any information that has been publicly disclosed, as Ms. Lutz explains. JA 92. The fact that the CIA has an intelligence interest in drone strikes does not disclose how the CIA tracks the categories of information sought by the ACLU; how successfully it obtains that information if it seeks it; whether its monitoring changes over time, and more. *See also* Classified Lutz Decl. 17-21, 22-31, 32-33. Information of that type has not been publicly disclosed, and is properly withheld under Exemption 1. *Cf. Sims*, 471 U.S. at 177 ("The inquiries pursued by the Agency can often tell our adversaries something that is of value to them."). In any event, the government's decision to voluntarily release some classified information does not demonstrate that there would be no risk of harm in releasing similar or related information. *See*,

e.g., *Students Against Genocide v. Department of State*, 257 F.3d 828, 835-36 (D.C. Cir. 2001).

C. All of the Withheld Documents Were Also Protected From Disclosure by Exemption 3 Because They Are Exempted From Disclosure By Another Statute.

Although the district court did not reach the issue, see JA 209 n.14, all of the withheld responsive documents are also protected by FOIA Exemption 3, which protects from disclosure records that are "specifically exempted from disclosure by [another] statute" if the relevant statute "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue" or "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). Exemption 3 provides an alternative basis for affirmance of the district court's ruling. *See, e.g.*, *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1098 (D.C. Cir. 2015).

Section 102A(i)(1) of the National Security Act of 1947, as amended, requires the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1); *see also DiBacco v. United States Army*, 795 F.3d 178, 197-99 (D.C. Cir. 2015) (recognizing that the CIA may invoke Section 102A as a withholding statute for the purposes of Exemption 3). This Supreme Court and this Court have recognized that the National Security Act vests the government with "broad power to protect the

secrecy and integrity of the intelligence process." *Sims*, 471 U.S. at 169; *see also Fitzgibbon v. CIA*, 911 F.2d 755, 762-64 (D.C. Cir. 1990). Pursuant to that authority, the CIA and other agencies may protect any information—even "superficially innocuous" information—that "might enable an observer" to identify the government's intelligence sources and methods. *Sims*, 471 U.S. at 178. An agency invoking the National Security Act does not have to demonstrate that disclosure is likely to harm national security, *see id.* at 167, and it may withhold even records relating to sources and methods that are "generally known" or "so basic and innocent that [their] release could not harm the national security." *Fitzgibbon*, 911 F.2d at 762-63.

The classified Lutz declaration makes clear that the withheld responsive documents relate to intelligence sources and methods. Classified Lutz Decl. 32-34; *see also* JA 89-90, 93-94. The responsive documents are thus protected in full from public disclosure by Exemption 3, in addition to Exemption 1. *See Halperin v. CIA*, 629 F.2d 144, 147 (D.C. Cir. 1980).

D. The ACLU Has Not Shown That Withheld Information Has Been Officially Disclosed.

The ACLU argues that the CIA should be compelled to disclose at least some of the information in the withheld responsive records, arguing that that information has been "officially disclosed" and has therefore lost the protection of

otherwise-applicable FOIA exemptions. App. Br. 39-44. The district court correctly rejected this contention.

As an initial matter, this Court should reject the ACLU's invitation to abandon its longstanding test for official disclosure in favor of an amorphous standard finding public disclosure whenever "similar" information has been released to the public. As this Court has held repeatedly, in order for information to be "officially acknowledged," "(1) the information requested must be as specific as the information previously released; (2) the information requested must match the information previously disclosed; and (3) the information requested must already have been made public through an official and documented disclosure." *ACLU v. DOD*, 628 F.3d at 620-21; *accord, e.g., Wolf*, 473 F.3d at 378; *Public Citizen v. Department of State*, 11 F.3d 198, 202 (D.C. Cir. 1993); *Fitzgibbon*, 911 F.2d at 765; *Afshar*, 702 F.2d at 1130.

The ACLU cites dictum in the Second Circuit's decision in *New York Times* for the proposition that "rigid application" of this standard is not justified, App. Br. 39, but that argument is foreclosed by binding precedent of this Court, as the district court correctly recognized. *See* JA 213 n.16. This Court's holdings require "strict" application of the test, *Moore v. CIA*, 666 F.3d 1330, 1333 (D.C. Cir. 2011), and make clear that prior disclosure of "similar information does not suffice; instead, the *specific* information sought by the plaintiff must already be in

the public domain by official disclosure." *ACLU v. DOD*, 628 F.3d at 621 (quoting *Wolf*, 473 F.3d at 378); *see also Assassination Archives & Research Center v. CIA*, 334 F.3d 55 (D.C. Cir. 2003) (waiver occurs only when the public disclosures "precisely track the records sought to be released"). A looser or less predictable waiver rule would "effectively penalize an agency for voluntarily declassifying documents" and "would give the Government a strong disincentive ever to provide its citizenry with briefings of any kind on sensitive documents." *Public Citizen*, 11 F.3d at 203.

To invoke the waiver doctrine, the ACLU has "'the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld.'" *Wolf*, 473 F.3d at 378 (quoting *Afshar*, 702 F.2d at 1130). Here, the ACLU simply speculates that some portions of withheld documents must be similar to statements appearing in previously disclosed documents and public statements by government officials. App. Br. 43-44 ("As detailed below, the government has disclosed both legal analysis and factual information relating to the targeted-killing program. To the extent that the withheld records contain the same or similar information, the CIA must disclose them."). The ACLU provides a lengthy chart purporting to show the scope of official disclosures (App. Br. 44-52), but the actual disclosures they identify are highly generalized. For example, the ACLU notes that the government has officially acknowledged that "[t]he

government uses drones to carry out targeted killings" and that the government conducts targeted killings in Pakistan and Yemen. App. Br. 48-50. This does not suffice to meet the ACLU's burden.

The ACLU is particularly off-base to speculate that withheld documents must contain legal analysis similar to the analysis that has been disclosed in connection with the New York litigation, because the parties agreed to narrow the request in this case to exclude any documents that were the subject of litigation in that case. The most likely inference, therefore, is that any withheld legal analysis here is *not* similar to legal analysis that has been disclosed, or it would have been a responsive document in the New York litigation, and as a result would *not* have been deemed to be responsive to the narrowed request here.

Notably, *none* of the disclosures the ACLU lists in its brief is the same as the detailed information sought by the ACLU regarding "records routinely compiled by the CIA for analytical purposes containing charts or compilations about U.S. Government strikes sufficient to show the identity of the intended targets, assessed number of people killed, dates, status of those killed, agencies involved, the location of each strike, and the identities of those killed if known." JA 214 (emphases omitted). And the district court correctly held that the generalized information identified by the ACLU is a far cry from the "granular details about

every drone strike recorded on CIA charts or compilations" that the ACLU has requested. JA 215.

The ACLU's efforts "to string together snippets of facts from various sources in the hopes that such information collectively is 'as specific as' and 'matches' the information that has been withheld" was also properly rejected by the district court. JA 216. The district court recognized that this Court has repeatedly and consistently held that even partial disclosure of classified information in withheld documents does not result in waiver, because any disclosure does "not precisely track the records sought to be released." JA 216 (quoting *Assassination Archives*, 334 F.3d at 60).

Indeed, this Court's precedents reject ACLU's fundamental premise that disclosure of information on a topic in one context necessarily requires disclosure of all information that related in any way to that topic regardless of its context. In *Public Citizen*, for example, FOIA requester Public Citizen sought six documents prepared by then-Ambassador to Iraq, April Glaspie, concerning a meeting between Ambassador Glaspie and Iraqi President Saddam Hussein on July 25, 1990. 11 F.3d at 199. Ambassador Glaspie had testified about the same meeting in public sessions of the Senate Foreign Relations Committee and the Middle East Subcommittee of the House Foreign Affairs Committee. *Id.* at 200. Public Citizen argued that the Ambassador's public testimony about the very subject of the

withheld documents served to waive protection under Exemptions 1 and 5 for the documents. *Id.* at 199. Public Citizen also complained, as does the ACLU here, that the government should not be permitted to "selectively reveal[] privileged information for its own advantage." *Id.* at 203; *see* App. Br. 40-41.

This Court rejected those arguments and upheld the withholdings. *Public Citizen*, 11 F.3d at 203-04. The Court emphasized that it is not sufficient for a FOIA requester to show that "similar information has been released" or that "some formerly classified information about [the] subject" has been made public. *Id.* at 201, 202. Rather, the plaintiff must show that the public disclosure is "'as specific as' the documents it seeks" and that the public disclosures "'match[]' the information contained in the documents." *Id.* at 203 (quoting *Fitzgibbon*, 911 F.2d at 765). The Court thus affirmed the district court's ruling that, even though public disclosure "concededly revealed certain facts contained in the disputed documents," disclosure would not be compelled because "the *context* in which the information appeared in the documents was significantly different." *Id.* at 201 (emphasis in original).

Similarly, in *Assassination Archives & Research Center. v. CIA*, 334 F.3d 55 (D.C. Cir. 2003), the FOIA requester sought disclosure of a multi-volume compendium of information on Cuban nationals prepared by the CIA in 1962. *Id.* at 56-57. The plaintiff challenged the CIA's withholding in full of the

compendium, arguing that at least a portion of the withheld compendium had been officially disclosed by the government's release of approximately 300,000 pages of CIA records, a very high percentage of which concerned Cuba, Cuban exiles, and Cuban exile organizations. *Id.* at 59-60. This Court nevertheless upheld the withholding in full. The Court assumed that some publicly disclosed information could be included in the withheld compendium, but reasoned that the plaintiff was required to make a "*specific* showing" that publicly disclosed "information duplicates the contents of the Compendium and it has not met this burden." *Id.* at 60-61.

And in *Military Audit Project v. Casey*, 656 F.2d 724 (D.C. Cir. 1981), the plaintiff sought classified documents regarding the Glomar Explorer project. *Id.* at 727. Although the entire project was initially classified, the government subsequently disclosed that a classified operation had taken place that involved the use of the Glomar Explorer; that the United States Government initially tried to hide its sponsorship of the operation and that Hughes Tool Company had acted as its agent; that a successor organization of Hughes Tool Company, Summa Corporation, also undertook certain functions on behalf of the United States; and that the government subsequently acknowledged ownership of the Glomar Explorer and declassified portions of its contract with Summa Corporation. *Id.* at 732. The government also released approximately two thousand pages of

responsive documents. *Id.* at 735. However, the government withheld additional information under Exemption 1, including information about the purpose of the Hughes Glomar Explorer project and the technology used in the project. *Id.* at 742-44.

This Court upheld the withholdings in full, reasoning that the government's voluntary disclosure of certain previously classified information did not require disclosure of the information sought by the plaintiff. *Military Audit Project*, 656 F.2d at 744-46. Like the Court in *Public Citizen*, the *Military Audit Project* Court specifically rejected the argument that, once the government publicly released certain information about a classified subject, it could no longer withhold additional information about the same subject. *Id.* at 752-53. The Court reasoned that "[t]he release of over two thousand pages of documents after a thorough review suggests to us a stronger, rather than a weaker, basis for the classification of those documents still withheld." *Id.* at 754. Here, too, the government has provided certain public disclosures about its use of unmanned aerial vehicles for targeted lethal force, in order to provide greater transparency on a topic of significant public interest. That effort should not be penalized by compelling the disclosure of additional classified and privileged information that neither matches nor is as specific as the information that has been publicly disclosed, and the

disclosure of which reasonably could be expected to cause harm to national security.

The district court specifically found in this case, based on its review of the classified Lutz declaration, that the ACLU has failed to show that any of the public disclosures it identifies are as specific as, and match, information in the CIA records containing charts and compilations that has been withheld under Exemption 1. JA 219. The district court also held that the ACLU has failed to meet its burden to show that legal analysis that has been publicly disclosed by the government constitutes official disclosure of the contents of the twelve withheld legal memoranda. JA 220-21. That holding is correct, and should be affirmed by this Court.

Finally, even if the "official disclosure" doctrine might be applied to information that has been withheld under Exemptions 1 and 3, the ACLU is wrong to assert that the doctrine waives Exemption 5 protection for the twelve legal memoranda. The ACLU's argument for "official disclosure" of the twelve legal memoranda is that public disclosure of legal analysis on a particular subject waives protection for similar legal analysis in every other government document. App. Br. 43-48. This Court has recognized, however, that waiver of the deliberative process privilege and the presidential communications privilege is not an "all-or-nothing approach," and the public "release of a document only waives these

privileges for the document or information specifically released, and not for related materials." *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997).

It is also well-settled that an attorney-client communication remains privileged even if the client discusses the very same information in public. Because the attorney-client privilege attaches to specific communications rather than to information in the abstract, *see Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981), waiver requires a disclosure of the privileged communication itself; "revealing the information communicated is not a waiver regardless of how much such disclosure may sap the value of the privilege." 26A Wright & Graham, *Federal Practice & Procedure: Evidence* § 5729 (1st ed. 1992 & Supp. 2015); *see, e.g.*, *United States v. O'Malley*, 786 F.2d 786, 793-94 (7th Cir. 1986). Moreover, even when waiver occurs, the scope of the waiver is usually limited to the specific communication disclosed. *See* Fed. R. Evid. 502(a); *In re von Bulow*, 828 F.2d 94, 103 (2d Cir. 1987).

These rules confirm that the legal memoranda here were properly withheld under Exemption 5. Even if they contain legal analysis that is similar or identical to legal analysis that the government has publicly disclosed, the documents communicating that advice in any particular instance would remain confidential and privileged.

E. The District Court Properly Concluded That There Is No Reasonably Segregable Non-Exempt Information In The Withheld Documents.

Under 5 U.S.C. § 552(b), "any reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt." However, an agency need not disclose non-exempt material that is so "inextricably intertwined" with exempt material that "the excision of exempt information would impose significant costs on the agency and produce an edited document with little informational value." *Neufeld v. IRS*, 646 F.2d 661, 666 (D.C. Cir. 1981), *abrogated on other grounds by Church of Scientology v. IRS*, 792 F.2d 153 (D.C. Cir. 1986). Furthermore, a district court need not "order an agency to commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content." JA 221 (quoting *Mead Data Cent.*, 566 F.2d at 261 n.55).

A court "may rely on government affidavits that show with reasonable specificity why documents withheld pursuant to a valid exemption cannot be further segregated." *Juarez v. Department of Justice*, 518 F.3d 54, 61 (D.C. Cir. 2008). "Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007).

Here, the CIA released portions of the classified DOJ white paper, but concluded based on its page-by-page and line-by-line review of the remaining responsive materials "that there [are] no reasonably segregable, non-exempt portions of documents that can be released without potentially compromising classified information, intelligence sources and methods, and/or material protected by privilege." JA 96. The district court correctly concluded that the three declarations of Ms. Lutz "provide a reasonably detailed justification that any non-exempt material cannot be segregated and released." JA 222. The court also concluded "that any isolated words or phrases that might not be redacted for release would be meaningless." *Id.* That determination should be affirmed.

The ACLU argues that the district court erred in not requiring segregation of legal analysis in the withheld legal memoranda from classified facts. App. Br. 19-21. But that argument is predicated on the erroneous proposition that legal analysis cannot itself be classified. As we have already explained (*supra* pp. 28-31), that is incorrect.

The ACLU also argues that there must be non-exempt portions of the CIA records containing charts or compilations about U.S. Government strikes that could be released in redacted form, suggesting that the CIA could redact the date, location, or agency responsible before releasing "summary strike data." But the agency has explained in both its public and classified declarations why the actual

information sought by the ACLU is classified and cannot be revealed. The ACLU's speculations about potential redactions do not undermine the government's showing.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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DECEMBER 2015

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,237 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Sharon Swingle
SHARON SWINGLE

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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