10-4290(L)

10-4289(CON), 10-4647(XAP), 10-4668(XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN CIVIL LIBERTIES UNION; CENTER FOR CONSTITUTIONAL RIGHTS, INC.; PHYSICIANS FOR HUMAN RIGHTS; VETERANS FOR COMMON SENSE; VETERANS FOR PEACE,

Plaintiffs–Appellees–Cross-Appellants,

v.

DEPARTMENT OF JUSTICE, and its component Office of Legal Counsel; CENTRAL INTELLIGENCE AGENCY,

Defendants–Appellants–Cross-Appellees,

DEPARTMENT OF DEFENSE, and its components Department of Army, Department of Navy, Department of Air Force, Defense Intelligence Agency; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; DEPARTMENT OF JUSTICE components Civil Rights Division, Criminal Division, Office of Information and Privacy, Office of Intelligence, Policy and Review, Federal Bureau of Investigation,

Defendants.

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

REPLY BRIEF FOR THE PLAINTIFFS–APPELLEES–CROSS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

PRELIMINARY STATEMENT

The CIA's brief is remarkable in its utter failure to acknowledge the single most salient fact in this case: that the President himself has declared waterboarding to be illegal and, therefore, outside the CIA's mandate. Ignoring this truth permits the CIA to erect the straw man that much of its brief attacks, namely, that Plaintiffs' argument requires the Court to "determin[e] the legality of governmental activities" in a Freedom of Information Act ("FOIA") case. Defs.' Resp. Br. ("CIA Resp. Br.") 16. It does not. The fact that waterboarding is illegal is not in dispute: the President has declared as much, and the CIA does not contest that fact. The only question for the Court is whether the CIA may label waterboarding an "intelligence method" notwithstanding its concession that waterboarding is illegal.

It may not. When the CIA itself concedes that an activity is illegal, it cannot simultaneously base its withholding on the need to protect that unlawful activity. This logic flows from *Central Intelligence Agency v. Sims*, 471 U.S. 159 (1985), *Weissman v. Central Intelligence Agency*, 565 F.2d 692 (D.C. Cir. 1977), and *Navasky v. Central Intelligence Agency*, 499 F. Supp. 269 (S.D.N.Y. 1980), all of which recognized that the phrase "intelligence method" is broad but limited by the CIA's charter. That charter prohibits the CIA from engaging in activity that

violates U.S. law. Therefore, the CIA may not designate an illegal activity as an "intelligence method."

The CIA's brief responds with a sleight of hand: it attempts to broaden Plaintiffs' claim so that readily distinguishable precedent appears pertinent. That precedent—including this Court's decision in *Wilner v. National Security Agency*, 592 F.3d 60 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 387 (2010)—stands for nothing more than the uncontroversial proposition that alleged illegality does not trump an *otherwise valid* claim of exemption. But none of that precedent considered an attempt by the government to conceal a concededly illegal activity by claiming that the illegal activity *itself* was the "intelligence method" deserving of protection. Indeed, except for the CIA's recent attempts to suppress information relating to waterboarding, Plaintiffs are aware of no instance in the history of FOIA of an agency claiming that illegal activity itself is an "intelligence method."

The distinction between this case and cases like *Wilner* cannot be overemphasized, in part because it demonstrates the modesty of Plaintiffs' proposal. In *Wilner*, as in most cases in which requesters have challenged withholdings on the ground of illegality, the plaintiffs did not challenge the *methods* of governmental intelligence-gathering, but rather the *circumstances* of their use. They did not object to the methods of surveillance employed by the National Security Agency ("NSA") in the Terrorist Surveillance Program (the

"signals intelligence" functions), but rather to the allegedly unlawful circumstances of their use (without the prior judicial approval required by law). Crucially, the government's justification for withholding the records requested in *Wilner* rested on the asserted need to protect the unchallenged "signals intelligence" functions. This is to say that in *Wilner*, as in most cases in which requesters challenge only the circumstances of use of an otherwise unchallenged method, the government could point to an *otherwise valid* claim of exemption.

This case differs, however, because no such otherwise valid claim of exemption exists. The CIA does not seek to protect records concerning waterboarding in order to protect its ability to use legitimate "intelligence methods." It seeks to protect records concerning waterboarding because it asserts that waterboarding, which the President himself has declared to be illegal, is itself an "intelligence method." This fact distinguishes not just *Wilner* but virtually all of the cases cited by the CIA.

The CIA also continues to withhold the "one-page photo of Abu Zubaydah" without any adequate explanation. It attempts to fabricate an explanation from several generic and conclusory statements in its declaration, but none of those statements explain what "intelligence method" or "intelligence activity" would be revealed by releasing the photograph. Indeed, the CIA's latest and most telling explanation for the withholding—that the photograph "depicts Abu Zubaydah

during the time frame when he was in CIA custody overseas and was being interrogated by the CIA," CIA Resp. Br. 42 (emphasis added)—strongly suggests that the photograph does not actually depict any protected method or activity but simply that it was taken around the time when such methods or activities were in use. This fact does not protect the photograph from disclosure under FOIA.

The Court should reverse the district court's judgment allowing the CIA to withhold information relating to waterboarding and the photograph of Abu Zubaydah.

ARGUMENT

I. Under *Sims*, Illegal Activities Are Not "Intelligence Methods."

As Plaintiffs set out in their opening brief, the term "intelligence method" within the meaning of the CIA's withholding authorities is broad but not without limit. It does not encompass activities that the government itself concedes to be illegal.

The Supreme Court's decision in *Central Intelligence Agency v. Sims*, 471 U.S. 159 (1985), confirms this fact. In *Sims*, the Supreme Court rejected an extra-textual limitation on the meaning of the phrase "intelligence sources," stating that the "'plain meaning' of [the National Security Act] may not be squared with any limiting definition that goes beyond the requirement that the information *fall within the Agency's mandate* to conduct foreign intelligence." *Id.* at 169 (emphasis

added). In other word, the phrase "intelligence sources and methods" is limited only by its surrounding text in the CIA's charter, which defines the CIA's "mandate to conduct foreign intelligence." The charter itself, however, forbids the CIA from engaging in illegal or unconstitutional activity. *See* 50 U.S.C. § 403-1(f)(4) ("The Director of National Intelligence shall ensure compliance with the Constitution and laws of the United States by the Central Intelligence Agency . . . ."); *id.* § 403-4a(d)(1) ("The Director of the Central Intelligence Agency shall . . . collect intelligence through human sources and by other *appropriate* means . . . ." (emphasis added)). Illegal activity, thus, does not "fall within the Agency's mandate" and cannot be an "intelligence method" within the meaning of the CIA's withholding authorities.

Weissman and *Navasky* affirm this interpretation of *Sims*. Each case rejected a putative "intelligence method" because that method was foreclosed by the text of the CIA's charter. In *Weissman*, the D.C. Circuit held that the phrase "intelligence sources and methods" did not protect the CIA's domestic investigation of an individual because the CIA's charter forbade the CIA from undertaking domestic law-enforcement functions. 565 F.2d at 695–96.[1] And in *Navasky*, a district court

[1] The fact that *Weissman* primarily concerned withholding under Exemption 7 is irrelevant. *See* CIA Resp. Br. 29–30. The D.C. Circuit analyzed the meaning of "intelligence source and method" and concluded that it did not encompass domestic investigations. *Weissman*, 565 F.2d at 695–96. That statutory construction applies irrespective of the exemption claimed. The CIA's alternative

rebuffed the CIA's designation of "clandestine book publishing activities" as "intelligence methods," because those activities were not "contemplated by Congress" in the CIA's charter. 499 F. Supp. at 274–75.[2] The text of the CIA's charter similarly forbids the CIA from engaging in illegal activity. Illegal activity therefore may not be considered an "intelligence method."

It is important to again emphasize the modesty of this argument. *See* Pls.' Br. 26–27. *Sims*, *Weissman*, and *Navasky* do not suggest that an agency record loses its protection under FOIA simply because it describes illegal conduct. But the concededly illegal conduct cannot *itself* form the basis for withholding. In other words, records describing waterboarding might be properly withholdable for any number of reasons, but the government cannot withhold them by claiming that

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suggestion, that the remand in *Weissman* proves that Exemption 3 might apply despite the Exemption 7 holding, CIA Resp. Br. 30, also misses the mark. The court remanded to allow the district court to untangle the complicated interaction of overlapping claims to exemption, some of which had been upheld and some of which had been denied. *Weissman*, 565 F.2d at 698.

[2] The CIA's quotation of dicta from *Navasky*, relating to the irrelevance of allegations of illegality to withholding, should not distract from two essential points about the case. First, as with many of the cases cited by the CIA, *Navasky* simply concluded that "illegality is not a bar to an *otherwise valid* justification" for exemption. 499 F. Supp. at 273 (emphasis added). It does not suggest that illegal activities may themselves qualify as valid "intelligence sources and methods." Second, the court ultimately held that the source or method at issue—book-publishing propaganda—could not be withheld because it was not authorized by the CIA's charter. *Id.* Plaintiffs urge the same analysis here: as with book-publishing propaganda, a concededly unlawful interrogation technique does not fall within the CIA's charter and thus may not be withheld as an "intelligence method."

waterboarding is the protectable "intelligence method" when the government simultaneously concedes that waterboarding violates the law and, therefore, the CIA's own charter.

To hold otherwise would allow the executive to determine unilaterally the breadth of its own withholding authority, irrespective of limits placed upon that authority by Congress. *See generally Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 905 (N.D. Ill. 2006) (expressing concern that the NSA's interpretation of its withholding statute, "if . . . taken to its logical conclusion, . . . would allow the federal government to conceal information regarding blatantly illegal or unconstitutional activities simply by assigning these activities to the NSA or claiming they implicated information about the NSA's functions"); *People for the Am. Way Found. v. Nat'l Sec. Agency*, 462 F. Supp. 2d 21, 31 (D.D.C. 2006) (agreeing with the court in *Terkel* that the NSA's withholding authority is "not without limits").

A. The CIA misinterprets *Sims*.

The CIA's remarkable claim that waterboarding—an interrogation technique that it concedes is criminal—is protected from disclosure as an "intelligence method," is based on a misleading interpretation of *Sims*. *See* CIA Resp. Br. 25–28. Under the CIA's view, *Sims* authorizes the withholding of any activity that the

CIA claims is an "intelligence method," regardless of the textual boundaries imposed on that phrase by Congress. This is plainly incorrect.

As *Weissman* and *Navasky* both recognized, Congress imposed several textual limits on the phrase "intelligence sources and methods." *Sims* did not question those congressional limits; it merely declined to impose by judicial fiat limitations that Congress had not imposed itself. *See Sims*, 471 U.S. at 169. It held that the lower court's proposed limitation lacked a textual basis:

> [The statute] does not state, as the Court of Appeals' view suggests, that the [CIA] is authorized to protect intelligence sources only if such protection is needed to obtain information that otherwise could not be acquired. Nor did Congress state that only confidential or nonpublic intelligence sources are protected. [The statute] contains no such limiting language.

Id.

But the CIA's withholding statute does contain *other* language limiting the phrase "intelligence method." In *Weissman*, for example, the D.C. Circuit cited the statute's explicit prohibition of "law-enforcement powers" and "internal-security functions" in rejecting the CIA's reliance on the phrase "intelligence method" to conceal a domestic investigation. 565 F.2d at 695–96. And the court in *Navasky* likewise rejected the CIA's withholding of "covert propaganda activities" because Congress had not "intended to include such activities" within the meaning of the phrase "intelligence sources and methods." 499 F. Supp. at 274.

Congress has also expressly prohibited illegal activities in the CIA's charter, by requiring the Director of National Intelligence to "ensure compliance with the Constitution and laws of the United States by the Central Intelligence Agency," 50 U.S.C. § 403-1(f)(4), and by restricting the CIA's intelligence-gathering to "appropriate means," *id.* § 403-4a(d)(1). Given these restrictions, "intelligence method" cannot plausibly encompass conduct that the CIA has conceded violates U.S. law.[3]

The CIA resists this interpretation of *Sims*, noting that the Supreme Court upheld the withholdings in *Sims* despite the President's repudiation of portions of the drug-experimentation program at issue. CIA Resp. Br. 26–28. But the plaintiff in *Sims* was not challenging the CIA's withholding of records concerning the

[3] The CIA alternatively argues that, even if it may not withhold concededly illegal methods under the National Security Act, it may do so under the CIA Act's protection of "functions." CIA Resp. Br. 31. This argument is frivolous. The CIA Act was expressly enacted "further to implement [the National Security Act's requirement] that the Director of National Intelligence shall be responsible for protecting intelligence sources and methods." 50 U.S.C. § 403g. Even if that statute's protection of "the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency," extended beyond its modest terms to the actual intelligence-gathering activity of the CIA, it certainly would not extend beyond the protection of "intelligence sources and methods" that Congress intended it "further to implement." *See Phillippi v. Cent. Intelligence Agency*, 546 F.2d 1009, 1015 n.14 (D.C. Cir. 1976) (rejecting a broad interpretation of "functions"); *Military Audit Project v. Casey*, 656 F.2d 724, 736 n.39 (D.C. Cir. 1981) (same); *see also Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes.").

repudiated portions of the CIA's program; indeed, the facts surrounding the CIA's program had already been publicly acknowledged by the CIA. *See Sims*, 471 U.S. at 162–63 & nn.2–3. The issue before the Supreme Court was, instead, whether the CIA could withholding the identities of its "intelligence sources." *Id.* at 163–64. This result accords with Plaintiffs' modest argument here. While the CIA publicly released details of its drug experimentation, it withheld—and the Supreme Court approved the withholding of—information *independently* exempt from disclosure (i.e., the names of researchers and institutions affiliated with the program). As elaborated upon below in the discussion of *Wilner* and related caselaw, illegality does not compel the disclosure of all agency records related to the illegality, only of those lacking a claim of exemption independent of the illegality. Here, the illegal conduct itself—waterboarding—forms the sole basis for the CIA's withholding. That withholding is therefore improper.

Plaintiffs' opening brief acknowledged that several courts, including the D.C. Circuit, have allowed the withholding of details relating to "enhanced interrogation techniques," Pls.' Br. 30–31 & n.11, but explained that the D.C. Circuit did not address Plaintiffs' argument here and in fact announced a rule *consistent* with Plaintiffs' claim: "that illegal activities [may] produce classified documents," *Am. Civil Liberties Union v. Dep't of Def.*, 628 F.3d 612, 622 (D.C. Cir. 2011). That is undoubtedly true (as in *Sims*). The CIA overreaches, however,

when it claims support from that decision's rejection of an argument not made by Plaintiffs: that the mere discontinuation of an interrogation method exposes the technique to disclosure under FOIA. *See* CIA Resp. Br. 26. The President has more than merely discontinued waterboarding; he has declared it to be criminal, and the CIA has conceded that fact. Although a discontinued technique may be available for later use, an undisputedly unlawful one is not and, therefore, cannot fall within the CIA's mandate.[4]

B. The CIA misinterprets *Wilner* and related caselaw.

The majority of the CIA's brief relies upon a misinterpretation of *Wilner* and related cases. *See* CIA Resp. Br. 21–24, 37. Those cases establish only that illegality does not defeat an otherwise valid claim of exemption. That truism does not permit withholding, however, when the illegal conduct is *itself* the claimed basis for withholding—where there is, in other words, no otherwise valid claim of exemption. Moreover, none of those cases involved an attempt by the CIA to label as an "intelligence method" an activity that the CIA *concedes* to be criminal and to violate its own charter. Thus, the CIA's repeated warning that FOIA is not the proper venue for determining the legality of governmental action is disingenuous.

[4] A decision of the Southern District of New York also upheld the withholding of details about "enhanced interrogation techniques," notwithstanding allegations of illegality. *Amnesty Int'l USA v. Cent. Intelligence Agency*, 728 F. Supp. 2d 479 (S.D.N.Y. 2010). The court relied primarily on an erroneous interpretation of *Wilner*, discussed below.

Plaintiffs ask for no such determination. They merely argue that waterboarding, a concededly illegal interrogation technique, cannot be an "intelligence method" within the meaning of the CIA's charter because that charter expressly forbids illegal activity.

In *Wilner*, this Court considered a FOIA request for "records showing whether the government ha[d] intercepted" particular communications. 592 F.3d at 64. The NSA refused to confirm or deny the existence of such records, arguing that to do so would compromise the secrecy and efficacy of its "signals intelligence" functions. *Id.* at 74–75 (responding "would provide our adversaries with critical information about the capabilities and limitations of the NSA"). This Court upheld the CIA's response on that basis. *Id.* at 75. The most important fact of the case—ignored by the CIA here—is that the NSA did *not* base its withholding on an asserted need to protect the allegedly illegal Terrorist Surveillance Program ("TSP"). Rather, the NSA sought to protect its signals intelligence functions, upon which many programs, not just the TSP, relied. For this reason, the Court determined—consistently with the concession of the requesters, *id.* at 77—that the legality of the TSP was "beyond the scope of *this* FOIA action."[5] *Id.* (emphasis added); *see also Founding Church of Scientology v.*

[5] The CIA misleadingly alters its quotation of this phrase from *Wilner*, attempting to derive a general proposition from a case-specific observation. CIA Resp. Br. 21–22 ("this Court held that an analysis of the legality of government

Nat'l Sec. Agency, 610 F.2d 824, 829 n.49 (D.C. Cir. 1979) ("Although NSA would have no protectable interest in suppressing information simply because its release might uncloak an illegal operation, it may properly withhold records gathered illegally if divulgence would reveal *currently viable* information channels, albeit ones that were abused in the past." (emphasis added)).

The other TSP case cited by the CIA, *People for the Am. Way Found.*, 462 F. Supp. 2d at 31, confirms this interpretation: it upheld the claimed withholdings because, whether or not the TSP was illegal, disclosing the records sought by the requesters would compromise the NSA's general "signals intelligence functions," the legality of which had never been questioned. *See id.* ("While the Court agrees that the scope of [the NSA's withholding statute] is not without limits, it need not grapple with the problem of defining those limits here, for the well-established operation of Section 6, which forbids disclosure of information relating to the NSA's SIGINT activities, is not implicated by the ongoing debate regarding the legality of the TSP."); *id.* (noting that the TSP was "one of the NSA's many SIGINT programs involving the collection of electronic communications").

The other cases cited by the CIA are not to the contrary. In *Lesar v. U.S. Department of Justice*, 636 F.2d 472 (D.C. Cir. 1980), the D.C. Circuit held only

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action is 'beyond the scope of [a] FOIA action'" (alteration in original) (quoting *Wilner*, 592 F.3d at 77)).

that a generalized allegation of impropriety would not defeat a specific and otherwise valid claim of exemption. *Id.* at 483 ("Although the FBI's surveillance of Dr. King strayed beyond the bounds of its initial lawful security aim, that does not preclude the possibility that the actual surveillance documents and the Task Force materials that comment upon those documents may nevertheless contain information of a sensitive nature, the disclosure of which could compromise legitimate secrecy needs. In this case, Special Agent Small averred that disclosure of the Task Force summaries would reveal an intelligence source. . . . [T]he bare assertion that the Task Force summaries cannot contain information of a sensitive nature because the overall purpose of the FBI's original investigation of Dr. King was unrelated to a legitimate national security aim will not suffice."); *see also Sirota v. Cent. Intelligence Agency*, No. 80 Civ. 2050 (GLG), 1981 WL 158804, at *3 (S.D.N.Y. Sept. 18, 1981) ("the fact that the underlying intelligence activity may have been illegal will not defeat an *otherwise valid* exemption under § 552(b)(3)").

And in *Agee v. Central Intelligence Agency*, 524 F. Supp. 1290 (D.D.C. 1981), the court carefully distinguished between evidence of illegal activity and information that would reveal validly withheld secrets, holding that, under the facts of the case, it could not order the disclosure of one without revealing the other. *Id.* at 1293 ("The Court also acknowledges that the documents describe aspects of the

CIA's efforts which raise unanswered and in some respects serious questions as to the legality of the CIA's conduct. These two threads are tightly interwoven so that it is not possible to isolate facts bearing solely on possible illegalities from facts that are properly claimed to be exempt under (b)(1) or (b)(3)."); *see also Bennett v. U.S. Dep't of Def.*, 419 F. Supp. 663, 666 (S.D.N.Y. 1976) (distinguishing between protected "information vital to the national security" and "the [allegedly unlawful] means employed to obtain it").

None of these cases considered the unprecedented attempt by the CIA here to withhold documents purely on the basis of the concededly illegal conduct they evidence. That attempt should be rejected.

C. Exemption 1 does not support the CIA's withholdings.

The CIA alternatively urges affirmance under Exemption 1, arguing that releasing records relating to waterboarding would disclose (1) "intelligence activities (including special activities), [and] intelligence sources or methods," or (2) "foreign relations or foreign activities of the United States, including confidential sources." CIA Resp. Br. 33 (alteration in original). This basis for withholding fails.

First, the definition of "intelligence activities" or "intelligence sources or methods" under Exemption 1 is identical to that under Exemption 3. *See* Pls.' Br. 20 n.6. The CIA cannot, therefore, categorize waterboarding as an "intelligence

method" under Exemption 1 while simultaneously conceding that the technique is criminal and outside of its authority. This is especially true where the CIA seeks to protect an activity under a presidential executive order even though the President himself has pronounced that activity illegal.

Second, the CIA's concern over "foreign relations or foreign activities" is easily addressed by limited redactions. *See* 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."). Plaintiffs do not seek any information relating to foreign involvement in CIA interrogations or to the foreign location of interrogations.

Finally, the CIA mistakenly states that Plaintiffs do not dispute the CIA's claims of harm relating to the disclosure of details of waterboarding. CIA Resp. Br. 35. Plaintiffs contested those claims before the district court. *See, e.g.*, Pls.' Fifth Cross-Mot. for Partial Summ. J. at 23–28, Joint Appendix ("JA") 68, No. 367. On appeal, however, the claims of harm are ultimately irrelevant as the CIA's two asserted exemptions—Exemptions 1 and 3—fail at the first step: waterboarding cannot be an "intelligence source and method" because it is concededly unlawful.

In any event, the CIA's asserted harms are plainly insufficient to justify the withholding of the records at issue here. The first proposed harm—that textual

descriptions of waterboarding would serve as propaganda for our enemies, CIA Resp. Br. 34—is sweeping, unprecedented, and dangerous. Never before has the government sought to withhold textual descriptions of its own misconduct on the ground that such descriptions would inflame the countries' enemies. And never before has a court authorized the withholding of evidence of governmental misconduct on this basis. This Court should not be the first. Moreover, acceptance of the CIA's propaganda claim would turn FOIA on its head by allowing the greatest protection from disclosure of records documenting the worst governmental misconduct. This would be true even though the CIA has already officially acknowledged its use of, and significant detail about, waterboarding. The CIA has never attempted to explain why release of the information sought would cause harm when the CIA has already disclosed significant details about its use of waterboarding. *See* Pls.' Br. 5.

The CIA's second proposed harm—that our foreign allies would "perceive that the CIA is unable to keep secret even its most sensitive records," CIA Resp. Br. 34—proves far too much. Were this claim of harm sufficient, the CIA would be exempt from FOIA altogether, which it is not. Congress has already determined that the CIA is subject to FOIA, with limited exemptions not applicable here, *see, e.g.*, 50 U.S.C. § 431 (operational files), and has thereby rejected the proposition that the CIA must keep its records secret in every instance. Finally, as with the

other claim of harm, the CIA here too fails to explain its need to keep these records secret when it has already released records describing the actual use of waterboarding.

Relatedly, the CIA claims that the government has not "publicly released . . . documents concerning the application of EITs in actual CIA interrogations overseas." CIA Resp. Br. 6. This is flatly contradicted by documents released in this very litigation. The government released, for example, a report of the CIA's Inspector General, which documented the ways in which the CIA's actual use of waterboarding exceeded even the minimal limits imposed by Department of Justice legal memoranda.[6] And it released four of those legal memoranda, which catalogued some of the CIA's *actual* experiences with "enhanced interrogation techniques."[7]

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[6] *See, e.g.*, JA 916 ("the Agency interrogator [redacted] continuously applied large volumes of water to a cloth that covered the detainee's mouth and nose"); JA 924 ("Agency interrogators [redacted] applied the waterboard technique to Khalid Shaykh Muhammad 183 [redacted]"); JA 970 ("Khalid Shaykh Muhammad received 183 applications of the waterboard in March 2003 [redacted]."); JA 969 ("Interrogators applied the waterboard to Abu Zubaydah at least 83 times during August 2002.").

[7] *See generally* JA 422–545 (four memos). *See, e.g.*, JA 429 ("[Walling] is not intended to—and based on experience you have informed us that it does not—inflict any injury or cause severe pain"); JA 429–30 (same for the "abdominal slap"); JA 432 ("We understand from you that no detainee subjected to this technique by the CIA has suffered any harm or injury, either by falling down and forcing the handcuffs to bear his weight or in any other way."); JA 432 n.15 ("Specifically, you have informed us that on three occasions early in the program,

For these reasons, the Court should reverse the judgment of the district court and remand for the district court to determine whether information relating to waterboarding may be segregated from properly classified information. If it can, it must be disclosed.

II. The CIA Has Not Justified Its Withholding of a One-Page Photograph of Abu Zubaydah.

Plaintiffs' opening brief established that the CIA had altogether failed to justify its withholding of a "one-page photo of Abu Zubaydah," because the CIA itself offered no explanation for its withholding and because the explanation

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the interrogation team and the attendant medical officers identified the potential for unacceptable edema in the lower limbs of detainees undergoing standing sleep deprivation, and in order to permit the limbs to recover without impairing interrogation requirements, the subjects underwent horizontal sleep deprivation."); JA 433 ("You have informed us that to date, more than a dozen detainees have been subjected to sleep deprivation of more than 48 hours, and three detainees have been subjected to sleep deprivation of more than 96 hours; the longest period of time for which any detainee has been deprived of sleep by the CIA is 180 hours."); JA 474 ("The interrogation team 'carefully analyzed [detainee] Gul's responsiveness to different areas of inquiry' during this time and noted that his resistance increased as questioning moved to his 'knowledge of operational terrorist activities.'"); JA 475 (recounting CIA's conclusion that a detainee "feigned memory problems . . . in order to avoid answering questions"); JA 475 (stating that the CIA responded to the detainee's feigned memory problems by using "'more subtle interrogation measures [such as] dietary manipulation, nudity, water dousing, and abdominal slap'"); JA 475 ("Twelve days into the interrogation, the CIA subjected al-Nashiri to one session of the waterboard during which water was applied two times."); JA 498 n.28 (a particularly disturbing account of the CIA's decision to "use[] the waterboard one more time on Abu Zubaydah").

proffered by its counsel for the first time during an *in camera* and *ex parte* hearing was deficient. Pls.' Br. 32–36. In response, the CIA offers (1) a handful of generic claims from its declaration to justify its novel categorization of the "one-page photo" as an "operational photograph," and (2) a misleading interpretation of the district court's *in camera* review of the photograph. Still, however, the CIA conspicuously refuses to explain precisely how disclosing a photograph of a detainee it has already officially confirmed that it detained and questioned would reveal protectable "intelligence methods" or "intelligence activities." The simplest way to do so would be to state that the photograph actually depicts the use of specific (and legitimate) interrogation techniques or methods on Abu Zubaydah. But the CIA does not make this claim, and the only possible explanation is because the photograph simply does not depict actual intelligence methods or activities. Rather, as the CIA candidly and tellingly reveals, the photograph only "depicts Abu Zubaydah *during the time frame* when he was in CIA custody overseas and was being interrogated by the CIA." CIA Resp. Br. 42 (emphasis added). This explanation and the rest offered by the CIA fall short of justifying the withholding of the photograph.

Because the CIA's declaration is bereft of any specific justification for its withholding of the photograph, the CIA is compelled to assemble a handful of generic statements from the declaration in the hope of arriving at an explanation.

The generic statements offered do not suffice. The CIA first states that the photograph relates to "'the contents of 92 destroyed videotapes of detainee interrogations that occurred between April and December 2002.'" CIA Resp. Br. 40 (quoting JA 583). This is true, of course, by virtue of the district court's order that the CIA process "records relating to the content of the [destroyed] tapes [from] April through December 2002." JA 63, No. 339; *see also* JA 1371. That fact does not explain, however, why releasing the photograph would disclose protected information.

The CIA next states that that each record described in its declaration was "'purposefully selected for review based on the sensitive operational information [it] contain[s].'" CIA Resp. Br. 40 (alterations in original) (quoting JA 589). This is not true. The records described in the CIA's declaration are a 65-record subset of 580 records responsive to the district court's order to process records relating to the contents of the destroyed tapes. *See* Pls.' Fifth Cross-Mot. for Partial Summ. J. at 4, JA 68, No. 367. The parties narrowed the sample to sixty-five records based upon neutral criteria—"every tenth contemporaneous cable and all non-cable contemporaneous records," *id.*—and the district court approved those criteria. JA 64, No. 344 (district court's order adopting the parties' proposal, attached to the order). The photograph was therefore included within the sample as a "non-cable contemporaneous record[]." Even were it true that the CIA selected the

photograph due to the CIA's belief that it contained "sensitive operational information," that fact would not discharge the CIA's obligation to demonstrate that the photograph does in fact contain withholdable information that cannot be redacted.

Next, the CIA relies on its declaration's conclusory statement that the withheld records contain "'details of *actual* intelligence activities.'" CIA Resp. Br. 41 (quoting JA 587). That recitation of the withholding criterion relied upon by the CIA fails to establish that the photograph does in fact depict intelligence activities. *See, e.g.*, *Halpern v. Fed. Bureau of Investigation*, 181 F.3d 279, 293 (2d Cir. 1999) ("Such a conclusory statement completely fails to provide the kind of fact-specific justification that either (a) would permit appellant to contest the affidavit in adversarial fashion, or (b) would permit a reviewing court to engage in effective *de novo* review of the FBI's redactions."); *accord Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999). In any event, the quoted phrase does not apply to the photograph. The phrase comes from a paragraph in the CIA's declaration attempting to distinguish between the textual descriptions of the "enhanced interrogation techniques" already revealed through legal memoranda released by the President and the textual descriptions of those same techniques contained in the withheld records. JA 587–88. The CIA does not claim, however,

that the photograph contains any descriptions or depictions of "enhanced interrogation techniques."

Finally, the CIA claims that releasing the photograph would disclose "intelligence methods" and other protectable information "insofar as it depicts Abu Zubaydah *during the time frame* when he was in CIA custody overseas and was being interrogated by the CIA." CIA Resp. Br. 42 (emphasis added). As noted above, this explanation suggests only that the photograph does not actually depict "intelligence methods" or other withholdable information. If it did, the CIA would simply state as much rather than attempt to withhold the photograph due to its indirect, temporal relationship with intelligence activities that it does not depict.

The CIA also argues that the Court should defer to the district court's *in camera* review of the photograph. CIA Resp. Br. 44. As explained in Plaintiffs' opening brief, however, the district court's conclusions during that review do not support the withholding of the photograph. Here, again, is the entire exchange relating to the photograph:

> THE COURT: [Item] 65 is a photograph.
>
> MR. LANE: Correct. That was the next one I wanted to bring to the Court's attention. As the Court is aware, for photographs from the Department of Defense that the Court has considered, those photographs were not photographs taken by the Department of Defense, but rather by third-party individuals—
>
> THE COURT: Let me cut this short. You've given out various names, but as I recall, nobody's picture has been given out.

> MR. LANE: Not by the U.S. government, no, that's correct, your Honor.
>
> THE COURT: So, on the theory that a person's picture gives out a lot more information, in addition to knowing the name, you want to keep that secret.
>
> MR. LANE: Right. And because this is actually a CIA photo of a person in custody.
>
> THE COURT: I defer to that position. Have we done everything?

Special Appendix ("SPA") 75–76, JA 1164–65; *see also* SPA 26, JA 1115 (district court statement from subsequent public hearing: "I think that the image of a person in a photograph is another aspect of information that is important in intelligence gathering, and I defer in that respect as well.").

The CIA misleadingly interprets this dialogue to claim that the district court agreed that release of the photograph would disclose "intelligence activities." *See* CIA Resp. Br. 41–42. This is false. The district court apparently believed that the CIA could protect the photograph simply because it was a photograph ("a person's picture gives out a lot more information, in addition to knowing the name"), or that the CIA is entitled categorically to withhold photographs of its prisoners ("this is actually a CIA photo of a person in custody"). Neither proposition is sustainable as a matter of law, Pls.' Br. 35–36, and neither supports the CIA's claim that the photograph depicts "intelligence activities." Indeed, the district court's brief exchange fatally undermines that position. If the photograph depicted "intelligence

activities," the district court would not have resorted to the broad logic it did in allowing the withholding of the photograph.[8]

For these reasons, the Court should reverse the district court's judgment and remand for the district court to order the CIA to disclose the photograph. Remand for additional explanation is unnecessary here. *See* CIA Resp. Br. 45. The district court has already reviewed the photograph *in camera*, and the district court's silence during that hearing as to the CIA's theory on appeal makes clear that the photograph does not actually depict "intelligence activities" and that, therefore, remand would be a wasted endeavor.

CONCLUSION

For the foregoing reasons, the Court should (1) reverse the judgment of the district court and hold that waterboarding is not an "intelligence method" within the meaning of the CIA's withholding authorities, and (2) reverse the judgment of the district court and hold that the CIA has not justified the withholding of the "one-page photo of Abu Zubaydah." The Court should thus remand to the district court for that court to order disclosure of information relating to waterboarding that is segregable from properly classified information, and to order disclosure of the photograph of Abu Zubaydah.

[8] The CIA's claim that releasing the photograph would harm national security by demonstrating that the CIA is "unable to keep secret even its most sensitive records" fails for the same reasons given above. *See supra* Part I.C.

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Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(C) because it contains 6,155 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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