UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs–Appellants,

v.

Docket Nos.
13-422(L), 445(Con)

UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES DEPARTMENT OF DEFENSE, CENTRAL INTELLIGENCE AGENCY,

Defendants–Appellees.

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APPELLANT ACLU'S OPPOSITION TO THE GOVERNMENT'S MOTION FOR LEAVE TO SUBMIT *EX PARTE* CLASSIFIED AND PRIVILEGED SUPPLEMENTAL DECLARATIONS IN SUPPORT OF ITS PETITION FOR REHEARING EN BANC

Appellants American Civil Liberties Union and American Civil Liberties Union Foundation (together, "Plaintiffs") respectfully request that the Court deny the motion of Appellees the United States Department of Justice, the United States Department of Defense, and the Central Intelligence Agency (together, the "government") for leave to file, *ex parte* and *in camera*, two supplemental declarations in further support of their petition for rehearing.

First, the type of relief the government seeks is granted only in truly extraordinary circumstances. *See, e.g.*, *Shahar v. Bowers*, 120 F.3d 211, 212 (11th

Cir. 1997) ("While we have the authority to supplement a record even after we have rendered both a panel opinion and then an *en banc* opinion on a case, the law's strong interest in finality dictates that supplementation of the record at such a late stage would be an especially extraordinary event and would require the clearest showing of just need to warrant the supplementation."); *see also* Gov't Mot. at 11 (conceding that submission of supplemental declarations in support of a petition for rehearing en banc is "not a common practice"). It would be particularly inappropriate to grant the relief here because, as the panel noted, the government has already had "three opportunities to claim justified exceptions to *Vaughn* index disclosures—first, in its brief on the merits, second, in the pending petition for rehearing, and third, in its response to the Court's *ex parte* letter of June 10, submitting for *in camera* review the Court's proposed Revised Opinion." *N.Y. Times Co. v. DOJ*, Nos. 13-422 & 13-445, 2014 WL 3396075, at *4 (2d Cir. July 10, 2014) (denying rehearing in part). The relief the government seeks on rehearing—reversal of the panel's order to disclose various entries on the OLC's classified *Vaughn* index—has not changed since it filed its petition in early June. There is no reason that the declarations the government seeks to submit now could not have been submitted earlier.[1]

[1] That the government failed to do so is particularly puzzling given that when the panel denied the government's motion to file its rehearing petition entirely *ex parte*, the panel specifically invited the government to file "*ex parte* and *in camera*

The government's reliance on *August v. FBI*, 328 F.3d 697 (D.C. Cir. 2003), is misplaced. In *August*, a panel of the D.C. Circuit allowed the government to submit declarations addressing various Freedom of Information Act ("FOIA") exemptions only because the government "mistaken[ly] but reasonabl[y] belie[ved] that it would have an opportunity to raise the[] exemptions" at a later stage of the litigation. *Id.* at 701. Here, by contrast, the government knew as early as *February 10, 2014*, that the panel had ordered the release of the classified *Vaughn* index. *See N.Y. Times Co. v. DOJ*, 2014 WL 2209003, at *1.

Second, there is no merit to the government's contention that the panel erred in ordering the government to disclose a heavily redacted version of the already-submitted *Vaughn* index rather than directing the government to produce a new *Vaughn* index specifically for Plaintiffs. To the contrary, the course the government now says the panel should have taken would only result in needless delay and burden on the district court, this Court, and the parties. The government would require some time—weeks, certainly—to produce the new *Vaughn* index. If

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those portions of its petition for rehearing (including supporting documents) that it believe[d] in good faith require[d] secrecy." *See N.Y. Times Co. v. DOJ*, Nos. 13-422 & 13-445, 2014 WL 2209003, at *3 (2d Cir. May 28, 2014). Moreover, nothing prevented the government from seeking leave to file an oversized petition for rehearing at that time. *See* Fed. R. App. P. 35(b)(2) ("*Except by the court's permission*, a petition for an en banc hearing or rehearing must not exceed 15 pages . . . ." (emphasis added)); Fed. R. App. P. 40(b) (same for panel rehearing); *see also* 2d Cir. Local R. 35.1(c) (contemplating that a petition for rehearing may, in some cases, "exceed[] 50 pages").

the government's new *Vaughn* index turned out to be obfuscatory—as it likely would be, given the positions the government has previously taken in this and related litigation—there would be extended litigation in the district court over the adequacy of the index. And *that* litigation would lead to an appeal before the same panel of this Court for the same determinations it has already made. *See N.Y. Times Co.*, 2014 WL 3396075, at *4 n.13.[2]

The panel's order sensibly avoids this pointless merry-go-round. While it is true that the government most commonly produces *Vaughn* indices that are meant to be public, there is nothing sacred about that convention. The entire *Vaughn* process is judge-made law, *see id.*, at *1–2, and the panel surely had the authority here to implement the *Vaughn* process in a manner sensitive to the importance of the documents at issue, the costs to the public of delay, and the burdens that the alternatives would place on the parties, the district court, and (eventually) this Court as well.

Third, the government's focus on the fact that Plaintiffs never sought a redacted version of the classified OLC *Vaughn* index, *see* Gov't Mot. at 11, misses

[2] Such a result would plainly be at odds with FOIA's purpose—a point underscored by the D.C. Circuit in *August*, on which the government principally relies in its motion. *See August*, 328 F.3d at 699 (articulating "the interest in judicial finality and economy, which has 'special force in the FOIA context, because the statutory goals—efficient, *prompt*, and full disclosure of information—can be frustrated by agency actions that operate to delay the ultimate resolution of the disclosure request'" (emphasis in original) (quoting *Senate of the Commonwealth of P.R. v. DOJ*, 823 F.2d 574, 580 (D.C. Cir. 1987))).

the point. Plaintiffs have been seeking *Vaughn* indices from the three defendant agencies for more than two years. The government does not dispute that Plaintiffs are now entitled to these indices from all three agencies. *See* Gov't Mot. at 16. The panel's order simply ensures that the Plaintiffs will receive one of these indices promptly, and, equally important, that the index provided to Plaintiffs will include the appropriate level of detail.

Finally, the government's contention that it was improper for the panel to conduct a "declassification review" without the benefit of detailed declarations from intelligence officials, Gov't Mot. at 12, misunderstands the basis for the panel's decision. The panel did not "*declassify*" the facts it has ordered released on the OLC *Vaughn* index—rather, it held that the government had waived the protections of FOIA (including those permitting the withholding of classified information) by officially acknowledging those facts.[3] Thus, it is irrelevant that

[3] *See N.Y. Times Co.*, 2014 WL 2838861, at *12 ("After senior Government officials have assured the public that targeted killings are 'lawful' and that OLC advice 'establishes the legal boundaries within which we can operate,' and the Government makes public a detailed analysis of nearly all the legal reasoning contained in the [July 2010 OLC memorandum ('OLC–DOD Memorandum')], waiver of secrecy and privilege as to the legal analysis in the Memorandum has occurred."); *id.*, at *15 ("It is no secret that CIA has a role in the use of drones."); *id.*, at *18 ("[T]he statements of [Leon] Panetta when he was Director of CIA and later Secretary of Defense, set forth above, have already publicly identified CIA as an agency that had an operational role in targeted drone killings"); *id.*, at *14 ("It is no secret that al-Awlaki was killed in Yemen."); *id.*, at *14 (holding that the government had officially acknowledged that both DOD and the CIA "had an operational role in the drone strike that killed al-Awlaki").

courts generally review agency "classification decisions" on the basis of "evidentiary submissions" that "fully explain the basis" for those decisions, Gov't Mot. at 12, for the panel was not engaging in a review of classification decisions at all. Nor did the panel attempt to determine whether information on the classified *Vaughn* index had been properly withheld in the first instance.[4] Instead, the disclosures the panel ordered after an exhaustive line-by-line analysis of the OLC *Vaughn* index are reflections of the panel's legal judgment concerning the government's extensive official acknowledgments. The declarations the government seeks to put before the Court would add nothing that could change the panel's rulings as to the information whose withholding the government has already waived through official acknowledgment.

For these reasons, the Court should deny the government's motion.

[4] The government represents that "the issue whether specific entries in [the classified OLC *Vaughn*] index were properly classified or privileged was not an issue in this litigation until the panel *sua sponte* elected to parse individual entries in the OLC index." Gov't Mot. at 13–14. But whether the information in the "individual entries" on the classified *Vaughn* index "were properly classified or privileged" was precisely the issue before the district court. *See* ACLU Br. at 44 ("Even assuming for the sake of argument that the agencies' declarations establish that there are some responsive documents that cannot be identified or described without disclosing information protected by Exemptions 1 or 3, the declarations do not logically or plausibly establish that this is true of every responsive document. Indeed, the declarations do not even try to establish it. But this is the agencies' burden."). The government's contention that it did not prepare the OLC *Vaughn* index "with public release in mind" ignores the fact that it was the government's burden to justify the withholding of *all* of the information on the index even before the district court.

Dated: July 25, 2014

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