August 26, 2020

The Honorable Edgardo Ramos
United States Courthouse
40 Foley Square, Courtroom 619
New York, NY 10007

VIA ECF

Re: *ACLU et al. v. DOD et al.*, No. 17 Civ. 9972
New York Times Co. v. DOD, No. 20 Civ. 43

ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION

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Dear Judge Ramos,

I write on behalf of plaintiffs the American Civil Liberties Union, American Civil Liberties Union Foundation, and New York Times Company in the above-captioned cases.

In its letter of August 19, 2020, *ACLU* ECF 37 ("Gov't Letter"), the government calls the Court's attention to two opinions recently issued by the Second Circuit: *Osen LLC v. United States Central Command*, 2020 WL 4577474 (Aug. 10, 2020), and *New York Times v. CIA*, 965 F.3d 109 (2d Cir. 2020). The government excerpts these opinions at length, but the opinions do not affect plaintiffs' cases for three reasons.

First, as the government's letter points out, the new opinions recite the three-prong test for official acknowledgment set forth in *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009)—but neither opinion alters that test. In any event, the parties agree that the *Wilson* test controls official acknowledgment in the Second Circuit, and they have already briefed its application to the facts in the record concerning the Defense Department's Glomar response. *See ACLU* ECF 33 at 9–21; *ACLU* ECF 36 at 2–6; *NYT* ECF 18 at 7–17; *NYT* ECF 21 at 2–5.*

Second, the new Second Circuit opinions address issues tangential to the cases before this Court. Both opinions deal with thorny applications of *Wilson*'s matching and specificity prongs. *See* Gov't Letter at 1–3 (discussing the terms "substantial overlap," "specific records sought," and

* The official acknowledgment doctrine determines whether the Defense Department has waived its ability to issue a Glomar response to the plaintiffs' FOIA requests. Additionally, as the plaintiffs have explained, even if the Defense Department had not officially acknowledged the PSP's existence, all of the defendants' Glomar responses would be unjustified because they are illogical and implausible. *See ACLU* ECF 33 at 22–25; *ACLU* ECF 36 at 8–10; *NYT* ECF 18 at 17–21; *NYT* ECF 21 at 7–10.

"lingering doubts"). But here, application of *Wilson*'s matching and specificity prongs is straightforward, and there are no remotely plausible doubts remaining: the Defense Department has disclosed the existence of a specific record that matches the record described in the plaintiffs' FOIA requests. *See ACLU* ECF 33 at 10–12; *NYT* ECF 18 at 13.

Third, the government's recital of language from *New York Times v. CIA* addressing the declassification process under Executive Order 13,526 is neither here nor there. As the plaintiffs have explained, official acknowledgement does not depend on formal—or even "inadvertent," Gov't Letter at 2 (quotation marks omitted)—declassification. *See ACLU* ECF 33 at 18–21; *ACLU* ECF 36 at 2–6; *NYT* ECF 18 at 14–15; *NYT* ECF 21 at 3–5. In holding that certain presidential tweets were not specific enough to officially acknowledge the existence of responsive records in *New York Times v. CIA*, *see* Gov't Letter at 1–2, the Second Circuit's opinion does not alter that understanding. *See Osen*, 2020 WL 4577474, at *4 ("The official disclosure doctrine prohibits an agency from withholding 'even properly classified information once the Agency itself has officially disclosed it.'" (quoting *Wilson*, 586 F.3d at 186)).

Respectfully submitted,

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cc: Counsel of Record (via ECF)