17-157

IN THE
United States Court of Appeals
FOR THE
Second Circuit

AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,
Plaintiffs–Appellees,
– v.–
DEPARTMENT OF JUSTICE, including its components the OFFICE OF LEGAL COUNSEL and the OFFICE OF INFORMATION POLICY, DEPARTMENT OF DEFENSE, DEPARTMENT OF STATE, and CENTRAL INTELLIGENCE AGENCY,
Defendants–Appellants.

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

BRIEF FOR PLAINTIFFS–APPELLEES

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CORPORATE DISCLOSURE STATEMENT

The American Civil Liberties Union and the American Civil Liberties Union Foundation are affiliated non-profit membership corporations. They have no stock and no parent corporations.

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INTRODUCTION

Over the past seven years, in an effort to inform the American public about the government's controversial use of targeted killing outside the context of recognized armed conflict, the American Civil Liberties Union has filed a series of Freedom of Information Act lawsuits seeking records related to various aspects of the U.S. targeted-killing program, including its use of drones. Litigation over these requests in this and other federal courts has always involved some measure of secrecy—but neither this Court, nor perhaps any court, has ever seen a case quite like this one.

In this case, the government has not made public the subject of its appeal, and it has redacted any reference to the ruling it challenges from the district court's opinion. But as best as the ACLU can tell, the appeal asks this Court a simple question: Is it a secret that the United States conducts drone strikes in Pakistan? To answer that question, the Court need only read the plain words, spoken in public while in Pakistan, by the United States' former Secretary of State. Reading those words, the only logical and plausible answer to that question is "no."

Nevertheless, in the district court, the government argued that former Secretary of State Kerry's words did not amount to an official disclosure, and it did so in open court. Once the district court apparently agreed with the ACLU, however, the government took its arguments—and the court's ruling—behind

closed doors. The ruling at issue is hidden behind redactions, as are the government's arguments on appeal. What's more, the government now asks this Court to erase the district court's ruling from the books—perhaps even without deciding whether the information at issue is actually a secret.

If the ACLU is correct about the subject of this appeal, the extraordinary secrecy here is absurd. Whatever the government argues behind black ink, those arguments cannot alter that Secretary Kerry unambiguously acknowledged the U.S. drone program in Pakistan. The American public is entitled to take him at his word, and so is this Court. Yet here, the government asks the Court to perpetuate an official secrecy that is as useless as it is implausible. In arguing that Secretary Kerry's statement does not constitute an official acknowledgment (or that he should be permitted now to take it back), the government asks this Court to endorse an alternate reality. The Court should decline that invitation.

JURISDICTIONAL STATEMENT

In March 2015, the American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the "ACLU") filed a complaint in March 2015 raising claims under the Freedom of Information Act ("FOIA"). The district court had subject-matter and personal jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B), 28 U.S.C. § 1331, and 5 U.S.C. §§ 701–706. The district court granted the ACLU's motion for partial summary judgment in part, ordering the

release of a small number of documents and ruling that the government had officially acknowledged certain facts that the government sought to withhold. The district court otherwise granted the government's motion for summary judgment and denied the ACLU's motion for partial summary judgment in a heavily redacted decision filed publicly on August 8, 2016. The district court entered judgment on November 16, 2016, and the government filed a timely notice of appeal on January 17, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Although the government has redacted from the district court's opinion all references to the ruling it appeals, it appears that the issues are whether the district court correctly ruled that the United States has officially acknowledged that it conducts targeted killings in Pakistan, including through the use of drones, and whether the court's ruling should be vacated.

STATEMENT OF THE CASE

I. The ACLU's Freedom of Information Act Request

This litigation concerns a FOIA request (the "Request") submitted by the ACLU in 2013 seeking records pertaining to the U.S. government's targeted-killing program. The Request sought, in essence, (1) the legal basis for the government's use of lethal force against alleged militants or terrorists away from the battlefield; (2) the standards and evidentiary processes by which the

government designates individuals or groups for targeted killing; (3) before-the-fact and after-action assessments of civilian or bystander casualties; and (4) the number, identities, and legal status of those killed or injured.[1] Joint Appendix ("JA") 4. The Request sought information from the Department of Justice ("DOJ"), the DOJ Office of Legal Counsel ("OLC"), the DOJ Office of Information Policy, the Department of Defense ("DOD"), the Department of State, and the Central Intelligence Agency ("CIA"). JA 13.

II. District Court Proceedings

A. Initial District Court Litigation

After exhausting administrative appeals, the ACLU filed suit on March 16, 2015. JA 12. The government claimed that most of the responsive records fell within the narrow exemptions to FOIA, specifically invoking 5 U.S.C. § 552(b)(1) ("Exemption 1"), § 552(b)(3) ("Exemption 3"), and § 552(b)(5) ("Exemption 5"), among others not relevant here. The parties filed cross-motions for summary judgment.

[1] The district court stayed litigation concerning prongs (3) and (4) of the Request for all agencies pending appellate review of the court's decision in *ACLU v. CIA*, 109 F. Supp. 3d 220 (D.D.C. 2015), *aff'd sub nom. ACLU v. DOJ*, 640 F. App'x 9 (D.C. Cir. 2016). On September 9, 2016, the parties filed a proposed Joint Stipulation and Order of Dismissal of Complaint, dismissing prongs (3) and (4) of the Request with prejudice, which the district court signed on September 12, 2016. *See* Joint Stipulation and Order of Dismissal of Compl., *ACLU v. DOJ*, No. 15 Civ. 1954 (Sept. 9, 2016), ECF No. 92; Joint Stipulation and Order of Dismissal of Compl., *ACLU v. DOJ*, No. 15 Civ. 1954 (Sept. 12, 2016), ECF No. 93.

In accordance with the district court's scheduling orders, the ACLU limited its initial brief to the issue of the government's waiver through public disclosure of otherwise-applicable FOIA exemptions. *See* Mem. of Law in Support of Pls.' Mot. for Partial Summ. J. at 4, *ACLU v. DOJ*, No. 15 Civ. 1954 (Aug. 28, 2015), ECF No. 33; Order Modifying Scheduling Order ¶ 2, *ACLU v. DOJ*, No. 15 Civ. 1954 (July 9, 2015), ECF No. 25. Together with its brief, the ACLU submitted a "waiver table" listing specific public statements in which government officials acknowledged legal analysis and facts concerning the government's targeted-killing program. JA 23–63. In the waiver table, the ACLU included public statements from government officials establishing that the U.S. government conducts targeted killings in Pakistan. JA 48–50. Specifically, the ACLU listed:

(1) an August 2013 statement by then–Secretary of State John Kerry;

(2) a June 2012 statement by then–Press Secretary Jay Carney;

(3) a May 2009 speech by then–CIA Director Leon Panetta; and

(4) a June 2010 interview with then–CIA Director Leon Panetta.

JA 48–50 (waiver table); *see* JA 902–05 (Kerry interview); JA 400–28 (Carney statement); JA 138–51 (May 2009 Panetta speech); JA 173–87 (June 2010 Panetta interview).

Most relevant to this appeal is the disclosure made by Secretary of State Kerry on August 1, 2013, while on a diplomatic mission to Pakistan. Secretary Kerry was interviewed on Pakistan TV by a journalist who specifically asked:

> There has been a lot of tension between the United States and Pakistan, especially vis-à-vis the subject of drones. People in Pakistan feel that not only has it been causing human casualty in Pakistan, but also it has been kind of a blatant disregard of the territorial sovereignty of Pakistan. Can we expect a cessation in these drone strikes, which are causing and mobilizing a lot of sentiment against the Pakistani Government and the United States?

JA 903. In response, Secretary Kerry stated:

> Well, President Obama is very, very sensitive and very concerned about any kind of reaction to any kind of counterterrorism activities, whatever they may be. And the President has spoken very directly, very transparently, and very accountably to our—to all of our efforts. We want to work with the Government of Pakistan, not against it.
>
> This is a program in many parts of the world where the President has really narrowed, whatever it might be doing, to live up to the highest standards with respect to any kind of counterterrorism activities. And I believe that we're on a good track. I think the program will end as we have eliminated most of the threat and continue to eliminate it.

JA 903. The journalist then asked Secretary Kerry: "And there is no timeline that you envisage for ending this strike?" JA 903. Secretary Kerry responded, "Well, I do. And I think the President has a very real timeline and we hope it's going to be very, very soon." JA 903.

In the district court, the ACLU argued that Secretary Kerry's statement officially acknowledged that the United States conducts targeted killings in

Pakistan, including through the use of drones. The government disputed this assertion, arguing that Secretary Kerry's statement merely acknowledged "counterterrorism activities" generally, not drone strikes in particular. *See* Gov't Consolidated Mem. of Law in Opp'n to Pls.' Mot. for Partial Summ. J. and in Supp. of Defs.' Cross-Mot. for Partial Summ. J. at 35, 37, *ACLU v. DOJ*, No. 15 Civ. 1954 (Oct. 3, 2015), ECF No. 46; Reply Mem. of Law in Further Supp. of Defs.' Mot. for Partial Summ. J. at 11–12, *ACLU v. DOJ*, No. 15 Civ. 1954 (Dec. 22, 2015), ECF No. 58.

On June 21, 2016, U.S. District Judge Colleen McMahon issued an order granting in part and denying in part the ACLU's Motion for Partial Summary Judgment. At the time, Judge McMahon did not release this opinion publicly, but instead provided it to the government for classification review. JA 939.

B. The Government's Motion for Reconsideration

The government apparently reviewed the district court's opinion not only for classified information, but on the merits. According to the district court, on July 14, 2016, the government "submitted, under seal, what was, in essence, a motion for reargument, couched in the form of calling to [the court's] attention material that it thought [the court] might have overlooked in connection with two rulings." JA 939 (noting also that the government had not updated the docket sheet to reflect

its sealed filing); *see also* Gov't Br. 14.[2] The government's motion urged the district court to "reconsider its ruling that the United States had officially acknowledged [REDACTED]." Gov't Br. 15. According to the government's brief on appeal, this official-acknowledgment ruling is relevant to two documents responsive to the ACLU's FOIA request, at least one of which the district court reviewed *in camera*. *See* Gov't Br. 36–38. The ACLU only learned of the government's motion for reconsideration on July 25, 2016, when the district court filed a Summary of Sealed Activity for Public Record. JA 939.

In response to the government's motion, the district court made a "few modest changes (none of which altered the conclusions reached)." JA 939. Ultimately, the district court appears to have rejected the government's arguments. JA 939. It is unclear on the public record whether the government offered arguments in its motion that went beyond the arguments it offered in its district-court brief.

C. The District Court's Opinion and the Issue on Appeal

On August 8, 2016, the district court publicly filed the redacted version of its Memorandum Decision and Order. Special Appendix ("SPA") 1–191.

The government has redacted the disputed ruling and analysis in the district court's public opinion, and in the government's description of that ruling in its own

[2] Citations to "Gov't Br." refer to the publicly filed, redacted version of the government's brief.

appeal brief, but it is clear that the issue on appeal involves official acknowledgment of a fact. *See* Gov't Br. 7–9 ("The district court's initial ruling was based [REDACTED]. On the basis of [REDACTED], the district court made the following ruling: [REDACTED]. The district court found, however, that [REDACTED]. Based upon this reasoning, the district court found that the United States had officially acknowledged [REDACTED]."); *see also* Addendum (partial reproduction of the government's redacted brief).

In its opinion, the district court noted that "[v]oluntary disclosure by the Government of all or part of a document may waive an otherwise valid FOIA exemption." SPA 8. Accordingly, the court considered each of the ACLU's proposed official acknowledgments in turn before turning to analysis of individual documents withheld by the government.

There is only one subsection of the district court's opinion that involves official acknowledgement in which both the ruling and some supporting analysis are redacted. In that subsection, the district court considered whether the fact that "[t]he Government conducts targeted killings in Pakistan, including through the use of drones," had been officially acknowledged. SPA 22. The district court explained that the ACLU had argued that the government had acknowledged this fact through four public statements, and listed each: (1) an August 2013 statement by Secretary of State John Kerry; (2) a June 2012 statement by White House Press

Secretary Jay Carney; (3) a May 2009 speech by then–CIA Director Leon Panetta; and (4) a June 27, 2010[3] interview with Director Panetta. SPA 22.

The district court's public opinion analyzed three of these four public statements—one by then–Press Secretary Carney, and two by then–CIA Director Panetta—and concluded with respect to each that the relevant official had not officially acknowledged that the government conducts targeted killings in Pakistan, including through the use of drones. SPA 25–29.

However, nowhere in the public version of the district court's opinion is there any ruling on or analysis of whether Secretary Kerry's interview on Pakistani television—in which he was asked about drone killings in Pakistan and provided a responsive statement—constituted an official acknowledgment.[4] Following the district court's introductory paragraph in this subsection, there are six paragraphs that are almost entirely redacted. SPA 22–25. The only unredacted information relates to the fact that the government had "t[aken] the opportunity to reargue" the redacted point during the government's classification review. SPA 23.

[3] Although the district court initially refers to this as a "June 10, 2009" interview, the citation and the content discussed show that the district court is actually describing a June 27, 2010 interview.

[4] Similarly, the government's public brief does not mention Secretary Kerry's interview on Pakistani television. It does, however, discuss the district court's conclusions regarding the June 2012 Carney statement and the 2009 Panetta speech. *See* Gov't Br. 29–30.

Ultimately, the district court ruled in the ACLU's favor concerning a number of officially acknowledged facts. SPA 39–40. However, the district court declined to release any documents relevant to this appeal because it apparently held that documents implicated by those facts were otherwise protected from disclosure. Gov't Br. 36. The district court entered judgment on November 16, 2016. JA 11; SPA 192.

The government filed its notice of appeal on January 17, 2017. JA 954. The government noted in its Pre-Argument Statement (Form C) that the discussion of the district court's ruling at issue on appeal had been redacted from the Memorandum Decision and Order. *See* ECF No. 13, Addendum A. In an effort to minimize unnecessary secrecy and facilitate effective litigation in the Court of Appeals, the ACLU sent the government a letter by email on February 28, 2017, requesting that the government again conduct a classification review of the relevant portions of the district court opinion before filing the government's opening brief. By email dated March 27, 2017, the government informed the ACLU that it had determined that no additional information could be released.

SUMMARY OF ARGUMENT

The government makes two arguments about why this Court should vacate the district court's official-acknowledgment ruling, but neither withstands scrutiny.

First, the government argues that the particular fact at issue—which the government has redacted from its brief and from the district court's opinion—has not been officially acknowledged, and thus any reference to the district court's ruling concluding otherwise should be stripped from the court's opinion. It appears that the officially acknowledged fact is that the United States conducts targeted killings in Pakistan, including through the use of drones. But that fact was plainly and unambiguously acknowledged by Secretary Kerry during a public August 2013 interview in Pakistan. Secretary Kerry's discussion of the U.S. drone program in Pakistan easily satisfies this Court's test for official acknowledgment.

Moreover, the government contends that in considering official acknowledgment of the fact at issue, the district court improperly disregarded a classified declaration addressing the potential harm to national security that might result from disclosure of that fact. But because Secretary Kerry's statement satisfies the official-acknowledgment test, the classified declaration is irrelevant. In addition, the government's other arguments concerning harm—flowing from either the Pakistani government's reaction or the district court's ruling—are neither logical nor plausible. The Pakistani government has repeatedly criticized the U.S. drone program in that country, in multiple public fora, before and after Secretary Kerry's statement. Any harm that could have resulted from Secretary Kerry's statement necessarily already occurred at the time he made that statement.

Second, the government argues that the district court's ruling should be vacated because it is "unnecessary and inappropriate" for the district court to rule on a claim of official acknowledgment if other exemptions justify the government's withholding of documents related to that claim. The government makes the extreme assertion that, before ordering vacatur, this Court need not even consider whether the district court's ruling was correct as a matter of law. But in assessing the validity of the government's official-acknowledgment argument, the district court acted entirely within its statutory mandate. To rule as the government suggests would subvert the purposes of FOIA, waste judicial resources, and conflict with common-sense court practice that allows district courts discretion in the administration of their own FOIA cases. The government cannot justify the extraordinary remedy it seeks here, and the Court should deny its request.

STANDARD OF REVIEW

This Court reviews a district court's ruling on a motion for summary judgment *de novo*. *Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir. 1999); *accord* 5 U.S.C. § 552(a)(4)(B). When the government invokes a FOIA exemption to withhold information, any "justification must be 'logical' and 'plausible.'" *N.Y. Times Co. v. DOJ* ("*N.Y. Times I*"), 756 F.3d 100, 119 (2d Cir. 2014). The burden is on the government to demonstrate "that an exemption applies to each item of information it seeks to withhold, and all doubts as to the applicability of the

exemption must be resolved in favor of disclosure." *Florez v. CIA*, 829 F.3d 178, 182 (2d Cir. 2016) (quoting *Ctr. for Constitutional Rights v. CIA*, 765 F.3d 161, 166 (2d Cir. 2014)). The government's voluntary disclosure of information waives its right to claim an exemption with respect to that information. *N.Y. Times I*, 756 F.3d at 114; *see ACLU v. CIA*, 710 F.3d 422, 426 (D.C. Cir. 2013) ("[W]hen an agency has officially acknowledged otherwise exempt information through prior disclosure, the agency has waived its right to claim an exemption with respect to that information."). This Court has held that "[w]hether the government's justifications for withholding information in the name of national security go too far is a question that must be evaluated in the context of the particular circumstances presented by each case." *Ctr. for Constitutional Rights*, 765 F.3d at 167.

ARGUMENT

I. The government has officially acknowledged that the United States conducts targeted killings in Pakistan, including through the use of drones.

The government first contends that this Court should vacate the district court's official-acknowledgment ruling because it was incorrect on the merits. Although the ACLU cannot know for sure what ruling the government is appealing, it seems clear that the ruling concerns the government's official acknowledgment that it conducts targeted killings in Pakistan, including through

the use of drones. If so—and the ACLU will proceed on that basis—then the district court's ruling was correct, and this Court should not disturb it.

It appears that the district court agreed with at least some of the ACLU's arguments that, during an August 2013 interview on Pakistani television, then–Secretary of State John Kerry officially acknowledged that the United States uses drones to conduct targeted killings in Pakistan.[5] The grounds for the government's appeal are largely inscrutable in its redacted brief, the public text of which merely hints at the government's arguments. Nevertheless, whatever the government has secretly told the Court, it cannot change Secretary Kerry's public statement, which plainly and unambiguously acknowledges the U.S. drone program in Pakistan. In arguing otherwise, the government essentially asks this Court "to give [its] imprimatur to a fiction of deniability that no reasonable person would regard as plausible." *ACLU v. CIA*, 710 F.3d at 431.

Secretary Kerry's statement falls squarely within this Court's test for official acknowledgment. Moreover, the government's emphasis on a classified declaration to support its argument concerning Secretary Kerry's statement is irrelevant to the legal question concerning official acknowledgment. Likewise, the government's

[5] The ACLU maintains that Secretary Kerry's statement officially acknowledged that "[t]he government conducts targeted killings in Pakistan, including through the use of drones." SPA 22. While it seems likely that this is the fact to which the district court's ruling relates, it is impossible to tell from the redacted opinion or the government's redacted brief whether the district court agreed with all, or only part, of that statement.

claims of potential harm that might result from disclosure have no bearing on the official-acknowledgment question, or are otherwise baseless.

A. Secretary Kerry's public statement is an official acknowledgment.

In its redacted brief, the government appears to advocate for a rigid application of the three-pronged test for official acknowledgment laid out in *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009) (explaining that: (1) the information must be "as specific as the information previously released"; (2) it must "match" the information previously disclosed; and (3) the information must have been "made public through an official and documented disclosure." (citation omitted)). But this Court has already rejected the "rigid" application of *Wilson*. *See N.Y. Times I*, 756 F.3d at 120 n.19.

In *New York Times I*, the Court described and applied a more functional test for official acknowledgment. The Court explained that *Wilson*—which was not a FOIA case, but a suit in which the plaintiff asserted a First Amendment right to publish portions of her memoir—did not actually apply a "matching" requirement, and that the Court understood any "matching" requirement suggested in earlier cases cited in *Wilson* to be, in essence, *dicta*. *Id.* at 120 & n.19. According to the Court, the official-acknowledgment doctrine would "make little sense" if it "require[d] absolute identity" between the information the government has disclosed and information the government seeks to keep secret. *Id.* at 120.

The Court's application of the official-acknowledgment test in *New York Times I* shows that its test is not a rigid one. There, the Court determined that the bulk of a 41-page memorandum (the "OLC–DOD Memorandum") had been officially acknowledged by the government's publication of a 16-page white paper ("November 2011 White Paper") that included similar, but not identical, material.[6] *See N.Y. Times I*, 756 F.3d at 120; *see id.* at 116 (finding that "substantial overlap" of the withheld OLC–DOD Memorandum and the public November 2011 White Paper "fully establishe[d]" waiver of the government's FOIA privileges over the former), 120 (explaining that the government may not continue to justify secrecy of information where immaterial differences "add[] nothing to the risk" of potential harm caused by disclosure); *see also Afshar v. DOS*, 702 F.2d 1125, 1132 (D.C. Cir. 1983) (explaining that the test examines whether the information the government seeks to protect differs in "some material respect" from information publicly acknowledged by the government). Moreover, the Court found various public statements by government officials to "establish the context in which" the

[6] The documents in that case were: David Barron, Acting Assistant Attorney Gen., OLC, *Memorandum for the Attorney General: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar Al-Aulaqi [REDACTED]* (July 16, 2010), https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16_-_olc_aaga_barron_-_al-aulaqi.pdf; DOJ, *White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida of an Associated Force* (Nov. 8, 2011), *available at* https://fas.org/irp/eprint/doj-lethal.pdf .

Court was required to analyze the OLC–DOD Memorandum, even if those statements did not amount to official acknowledgments themselves. *N.Y. Times I*, 756 F.3d at 115; *see Florez*, 829 F.3d at 186 (rejecting the government's argument that the official "disclosures of other federal agencies . . . are never relevant and must be wholly disregarded" under FOIA, and holding that "a third party agency's disclosures . . . may well shift the factual groundwork upon which a district court assesses the merits of" an agency's FOIA response).

Here, though, the outcome is the same regardless of how rigidly the Court applies the official-acknowledgement test: Secretary Kerry officially acknowledged that the United States uses drones in Pakistan to conduct targeted killings. As described above, Secretary Kerry's acknowledgment came in a public interview on Pakistani television. Early in the interview, the journalist Mariam Chaudhry asked:

> There has been a lot of tension between the United States and Pakistan, especially vis-à-vis the *subject of drones*. People in Pakistan feel that not only has it been causing human casualty in Pakistan, but also it has been kind of a blatant disregard of the territorial sovereignty of Pakistan. Can we expect a cessation in *these drone strikes*, which are causing and mobilizing a lot of sentiment against the Pakistani Government and the United States?

JA 903 (emphases added). Secretary Kerry began his response by addressing the United States' "counterterrorism activities," and then moved on to answer the

direct question concerning "the subject of drone strikes," which Secretary Kerry referred to as "the program":

> *This is a program* in many parts of the world where the President has really narrowed, whatever it might be doing, to live up to the highest standards with respect to any kind of counterterrorism activities. And I believe that we're on a good track. I think *the program* will end as we have eliminated most of the threat and continue to eliminate it.

JA 903 (emphases added). Ms. Chaudhry then asked specifically: "And there is no timeline that you envisage for *ending this strike*?" JA 903 (emphasis added). Secretary Kerry again responded directly: "Well, I do. And I think the President has a very real timeline and we hope it's going to be very, very soon." JA 903.

There should be no question that Secretary Kerry's statement acknowledged that "[t]he government conducts targeted killings in Pakistan, including through the use of drones." SPA 22. This disclosure is "as specific as" and "match[es]" the official acknowledgment at issue. *Wilson*, 586 F.3d at 186; *see also N.Y .Times I*, 756 F.3d at 120 ("A FOIA requester would have little need for undisclosed information if it had to match *precisely* information previously disclosed." (emphasis added)).

It is difficult to parse the government's redacted argument about why Secretary Kerry's statement does not amount to an official acknowledgment. However, the arguments that can be gleaned from the government's public brief or surmised from its district-court briefing are unpersuasive. For example, the

government argued below that Secretary Kerry's answer did not specifically acknowledge the use of drone strikes for targeted killing in Pakistan because he prefaced his answer with a general discussion of "counterterrorism" activities in Pakistan. *See* Gov't Corrected Reply Mem. of Law at 12, *ACLU v. DOJ*, No. 15 Civ. 1954 (Dec. 28, 2015), ECF No. 62 (arguing that Secretary Kerry's comments did not address "any particular types of counterterrorism activities").[7] But it "beggars belief," *ACLU v. CIA*, 710 F.3d at 431, that when Secretary Kerry referred to "the program," he meant anything other than the U.S. drone program in Pakistan that is the unambiguous subject of Ms. Chaudhry's question (which referred explicitly to "drones" and "these drone strikes"). Indeed, Secretary Kerry's statement made headlines around the world, as mainstream media understood him to be plainly acknowledging the program in Pakistan.[8] The government's argument that Secretary Kerry declined to "play along with the

[7] Notably, the government made this argument publicly in the district court, but it refuses to do so here.

[8] *See, e.g.*, Adam Levine & Faith Karimi, *Kerry Says Pakistan Drone Strikes to End "Very Soon,"* CNN (Aug. 2, 2013), http://cnn.it/2tZPFeK; *John Kerry Pledges Early End to Pakistan Drone Strikes*, BBC (Aug. 2, 2013), http://bbc.in/2tZUAwD; Associated Press, *John Kerry Says Pakistan Drone Strikes Could End as Bilateral Talks Resume*, Guardian (Aug. 1, 2013), https://www.theguardian.com/world/2013/aug/01/john-kerry-us-pakistan-talks-drones; Lesley Wroughton & Maria Golovina, Reuters, *John Kerry Tells Pakistan He Hopes Drone Strikes Will End 'Very Soon,'* Business Insider (Aug. 1, 2013), http://read.bi/2tZKXOp; Michael R. Gordon, *Kerry, in Pakistan, Expresses Optimism on Ending Drone Strikes Soon*, N.Y. Times (Aug. 1, 2013), http://nyti.ms/2tZCQ4i.

questioner's assumptions," such that Ms. Chaudhry's discussion of the program in Pakistan could not be ascribed to him, is wishful thinking. *See* Gov't Br. 29–30 (citing CA 25). Secretary Kerry did not, in fact, decline to "play along" with Ms. Chaudhry's question, nor did he state that he would not comment on classified operations.[9] Instead, he gave a specific response. *Cf. N.Y. Times I*, 756 F.3d at 118 ("Asked 'You killed al-Awlaki?' Panetta nodded affirmatively . . . . CIA's former director has publicly acknowledged CIA's role in the killing of al-Awlaki." (quotation marks and citation omitted)). Quite simply, Secretary Kerry was asked directly when U.S. drone strikes in Pakistan would end, and he answered.[10]

The government further suggests that Secretary Kerry's statement "cannot be treated as an official disclosure" because it was not, or at least may not have been, a "knowing and intentional decision." Gov't Br. 32. But whatever details the

[9] By contrast, when the district court explained that then–Press Secretary Jay Carney had refused to accept the premise of a question about Pakistan and drones, it specifically noted that Carney "repeatedly declined to discuss" particular facts. SPA 25. Secretary Kerry did nothing of the sort.

[10] Of course, as this Court made clear in *New York Times I*, Secretary Kerry's statement should not be analyzed in a vacuum. Instead, the context of that statement is critical to the official-acknowledgment analysis. *See* 756 F.3d at 115; *see also Florez*, 829 F.3d at 186. For example, in May 2009, then–CIA Director Leon Panetta answered a question about "remote drone strikes" in "the tribal regions" of Pakistan by saying the drone program was "the only game in town in terms of confronting and trying to disrupt the al-Qaeda leadership." JA 144. And after leaving office, Director Panetta confirmed on camera that he personally approved the targeted killing (by drone) of an al-Qaeda suspect in Pakistan. JA 949.

government provides this Court behind its redactions, that explanation does not hold up. At the time of his comments, Secretary Kerry was a sitting Cabinet Secretary conducting an official diplomatic visit to a foreign country on behalf of the U.S. government. He was discussing a deeply controversial program to which the Pakistani government has objected numerous times, in both public and private diplomatic fora. *See, e.g.*, Missy Ryan & Phil Stewart, *Pakistan Urges a 'Permanent Solution' on U.S. Drone Strikes*, Reuters (May 20, 2012), http://reut.rs/2tZZgm3; *see also infra* at 34–36 (describing 45 press releases issued by Pakistan's Ministry of Foreign Affairs condemning U.S. drone strikes in Pakistan). Surely the government should not expect this Court to endorse the notion that while the Pakistani government (and its people) had no trouble understanding the meaning of Secretary Kerry's plain words, the U.S. courts and the American public must pretend otherwise. The D.C. Circuit's explanation that courts should not "give their imprimatur to a fiction of deniability that no reasonable person would regard as plausible," *ACLU v. CIA*, 710 F.3d at 431, applies forcefully here.

The government also argues that, in certain circumstances, an unintentional error may not result in the waiver or declassification of specific information, Gov't

Br. 32, but the cases it cites have no bearing here.[11] The government apparently argues that Secretary Kerry's statement is akin to an administrative or clerical error, *see* Gov't Br. 32 (citing *Mobley v. CIA*, 806 F.3d 568, 584 (D.C. Cir. 2015); *Wilson v. McConnell*, 501 F. Supp. 2d 545, 556 n.24 (S.D.N.Y. 2007)). But the comparison is absurd, both on the facts and the law. In *Mobley*, the D.C. Circuit held that when a lower-level agency employee "mistakenly issued" a response letter to a FOIA requester describing the agency's search for records, that act did not waive the agency's right to invoke Exemption 1 to support a "Glomar" response. 806 F.3d at 584. In *Wilson*, a district court concluded that the "inadvertent disclosure" of a former CIA officer's employment status in a private letter by an administrator in a different agency did not declassify that status. 501 F. Supp. 2d at 556 n.24. And in *Al-Haramain Islamic Foundation v. Bush*, 451 F. Supp. 2d 1215 (D. Or. 2006) (quoted in the *Wilson* footnote cited by the government), a district court held that the "inadvertent disclosure" of a classified document as part of a large document production did not automatically declassify the document. *Id.* at 1228.

[11] *See, e.g.*, *United States v. Brown*, 843 F.3d 74, 81 (2d Cir. 2016) (discussing defense attorney's failure to object to sentencing enhancements); *United States v. Jaimes-Jaimes*, 406 F.3d 845, 848 (7th Cir. 2005) (same); *see also, e.g.*, *United States v. Olano*, 507 U.S. 725, 733, 737 (1993) (comparing forfeiture and waiver in a case where the district court, without objection from respondents, inappropriately permitted the alternate jurors to attend the jury deliberations).

Moreover, in all of the cases the government cites, it took timely steps to rectify its inadvertent error—which is the opposite of what the government did after Secretary Kerry's statement. *Mobley*, 806 F.3d at 584 (describing the CIA's "amended final response" issued to correct the first mistakenly issued response letter); *Wilson*, 501 F. Supp. 2d at 550 (explaining that the CIA sent the plaintiff a letter informing her that the "absence of a security stamp" on the previous letter had been an "administrative error"); *Al-Haramain*, 451 F. Supp. 2d at 1219 (describing how the FBI informed opposing counsel that a sensitive document had been "inadvertently released" and requesting the return of the document). In fact, far from retracting Secretary Kerry's comments in Pakistan, the State Department immediately elaborated upon them. Responding to a reporter's question referencing Secretary Kerry's comments in Pakistan and asking when "*the U.S. program of drone strikes* . . . may end," a State Department spokesperson explained that Secretary Kerry's comments had "reinforced the changes that we expect to take place *in the program* over time, but there is no exact timeline to provide." Daily Press Briefing by Marie Harf, Deputy Spokesperson, Dep't of State (Aug. 1, 2013), https://2009-2017.state.gov/r/pa/prs/dpb/2013/08/212625.htm (emphases added). The government's own cases make it clear that when courts have made exceptions for inadvertent disclosures, it is because of a ministerial error, timely corrected—not because a high-ranking government official

representing his government in a public setting disclosed information and the government then sought to retract his acknowledgment in litigation arising years later.

Behind its redactions, the government may also argue that Secretary Kerry's statement was not "made public through an official and documented disclosure," *Wilson*, 586 F.3d at 186. But Secretary Kerry's statement was plainly "official." As Secretary of State, Secretary Kerry was charged with "[c]onduct[ing] negotiations relating to U.S. foreign affairs" and "[i]nform[ing] the Congress and American citizens on the conduct of U.S. foreign relations." *Secretary of State*, U.S. Dep't of State, https://www.state.gov/secretary/2017/index.htm (last visited July 14, 2017). He was the quintessential person "in a position to know [the information] officially," and the public is entitled to take his comments to be the true and accurate positions of the U.S. government. *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990) (quoting *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 1975) ("It is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so.")). The public and foreign governments were not left in doubt about whether Secretary Kerry had a basis to confirm the United States' drone program in Pakistan. *See, e.g.*, *Afshar*, 702 F.2d at 1134 (explaining that official, as opposed to unofficial,

acknowledgments are "generally treated as official disclosures by foreign governments or by the public"); *Wilson*, 586 F.3d at 195 (declining to hold a fact had been officially acknowledged because there remained "lingering doubts" about whether the author of the private letter in question was informed enough to make the acknowledgment). In short, an acknowledgment from Secretary Kerry leaves no room for "lingering doubts," *id.* at 195, about the existence of the drone program in Pakistan.

Beyond the lack of authority for the government's position is the folly—and danger—of its logic. If government officials who perhaps regret their public words can later render them legally meaningless, the government would acquire a dangerous power to rewrite history through the use of official, though unjustified and implausible, secrecy. Of course, FOIA exists to facilitate, rather than frustrate, transparency, and the doctrine of official acknowledgment ensures that the government cannot hide behind the self-serving "truth" of selective disclosure. *See, e.g.*, Republican Policy Committee Statement on Freedom of Information Legislation, S.1160, 112 Cong. Rec. 13020 (1966), *reprinted in* Subcomm. on Admin. Practice & Procedure, S. Comm. on the Judiciary, 93d Cong., *Freedom of Information Act Source Book: Legislation Materials, Cases, Articles*, at 59 (1974) ("In this period of selective disclosures, managed news, half-truths, and admitted distortions, the need for this legislation is abundantly clear."). Particularly in this

context, "'[t]here comes a point where . . . Court[s] should not be ignorant as judges of what [they] know as men' and women." *ACLU v. CIA*, 710 F.3d at 431 (Garland, J.) (quoting *Watts v. Indiana*, 338 U.S. 49, 52 (1949) (Frankfurter, J.)).

B. The government's classified declaration is irrelevant to the Court's analysis of Secretary Kerry's official acknowledgment.

The government argues that the district court improperly "[d]isregard[ed]" a classified declaration addressing the purported harm to national security that could result from disclosure of the information the government maintains is secret. Gov't Br. 26–29. But for the reasons discussed below, if the district court did dismiss the relevance of the declaration, it was right to do so, because Secretary Kerry's statement was an unambiguous official acknowledgment. In addition, the government's claims of harm are not "logical or plausible." The government improperly conflates the potential harm that could flow from an official's public disclosure of a government secret with the "harm" that could flow from a court's legal determination that the official made the acknowledgment. And, in any event, although the government's specific claims of harm remain secret, public evidence also likely renders them not "logical or plausible" in fact.

First, when a government official makes an unambiguous official acknowledgment, a government declaration describing the harm that might result from that disclosure is entirely irrelevant to the official-acknowledgment question. That is because, under the official-acknowledgment doctrine, where a government

official discloses a secret, the government loses the ability to withhold information on the basis that the secret remains secret. *See N.Y. Times I*, 756 F.3d at 120. That the revelation of the secret may be, or may have been, damaging, is simply not pertinent to whether the secret has been officially disclosed. Therefore, although the government argues that the classified declaration "logically and plausibly articulated the harm to national security that reasonably could be expected to result from [REDACTED]," Gov't Br. 28, that argument is misplaced.

This Court has explained in the context of an invocation of Exemption 1 that the government's "justification must be 'logical' and 'plausible' 'in protecting our intelligence sources and methods from foreign discovery,'" *N.Y. Times I*, 756 F.3d at 119, but that is a requirement for the government to establish its *entitlement* to rely on the exemption. By contrast, a government official's public acknowledgment strips the information of its exemption-supplied protection, and an agency declaration has no more bearing. To accept the government's argument would subvert the basic premise of the official-acknowledgment doctrine: that the release of information that has already been publicly and officially disclosed cannot logically or plausibly pose an *additional* risk of harm to national security. *See, e.g.*, *id.* at 120 ("With the redactions and public disclosures discussed above, it is no longer either 'logical' or 'plausible' to maintain that disclosure of the legal analysis in the OLC–DOD Memorandum risks disclosing any aspect of 'military

plans, intelligence activities, sources and methods, and foreign relations.'"); *see also id.* at 118 ("Apparently not disputing that this fact has been common knowledge for some time, the Government asserts the importance of concealing any official recognition of the agency's identity [as the second agency involved in the killing of al-Aulaqi]. The argument comes too late.").

Second, the government's argument confuses cause and effect, suggesting that it is the district court's *ruling* on Secretary Kerry's official acknowledgment that may cause harm to national security, rather than the acknowledgment itself. *See, e.g.*, Gov't Br. 38 ("The district court nevertheless made such a ruling, despite the harm to national security that [REDACTED] predicted is likely to result."). Of course, the district court's agreement with the ACLU that Secretary Kerry's statement officially acknowledged the government's use of drones in Pakistan would not itself independently *confirm* that statement. Therefore, any harm in this context would flow (or already has flowed) from Secretary Kerry's statement, rather than the district court's (or this Court's) legal conclusion concerning that statement. Nevertheless, the government makes the radical argument that even if it prevails in this appeal on the merits of Secretary Kerry's official acknowledgment, this Court should order the "remov[al]" of the reversed and vacated holding from the district court's opinion. Gov't Br. 39. In other words, the government's argument is that even a reversed legal holding about the government's use of

drones in Pakistan would cause foreign partners and adversaries to react negatively—in a way that the Secretary of State's public comments did not. But one of the purposes of FOIA is to make the executive branch—which is responsible for protecting the information it deems to be sensitive or, as here, classified—accountable to the public for its actions, including its public statements. *See, e.g.*, *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."). The Court should not permit the government to shift responsibility for the actions of its highest-ranking officials to the courts instead.

Third, even if the Court were to consider the government's classified declaration, the public facts in this context would render almost any predicted harm illogical or implausible. *See, e.g.*, *N.Y. Times I*, 756 F.3d at 119; *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982) (explaining that although the courts must accord deference to agency affidavits concerning risk of harm, the government's arguments must still "survive[] the test of reasonableness, good faith, specificity, and plausibility"); *see also Florez*, 829 F.3d at 187 (citing *Gardels*, 689 F.2d at 1105). The government contends that harm from the district court's official-acknowledgment ruling would come because foreign governments cannot "so

easily cast a blind eye on official disclosures made by the [U.S. government] itself," possibly compelling the Pakistani government to "retaliate." Gov't Br. 34 (alteration in original) (quoting *Wilson*, 586 F.3d at 186). But that argument is conclusively undercut by the fact that Pakistan has not only failed to "cast a blind eye" to the U.S. drone program in Pakistan—it has already, and for years before the district court issued its opinion, publicly excoriated that program.

For example, Pakistan's Ministry of Foreign Affairs has issued press releases officially and publicly condemning U.S. drone strikes in Pakistan no fewer than four times in 2012,[12] twenty times in 2013,[13] eleven times in 2014,[14] seven times in 2015,[15] and three times in 2016.[16] In these statements, the Pakistani

[12] *See* Pakistan Ministry of Foreign Affairs Press Releases of April 29, 2012; May 5, 2012; August 23, 2012; and October 11, 2012.

[13] *See* Pakistan Ministry of Foreign Affairs Press Releases of April 15, 2013; May 29, 2013; July 3, 2013; July 15, 2013; July 29, 2013; August 31, 2013; September 6, 2013; September 22, 2013; September 28, 2013; September 29, 2013; September 30, 2013; October 31, 2013; November 1, 2013; November 2, 2013; November 21, 2013; November 22, 2013; December 3, 2013; December 9, 2013; December 19, 2013; and December 26, 2013.

[14] *See* Pakistan Ministry of Foreign Affairs Press Releases of June 12, 2014; June 18, 2014; July 11, 2014; July 19, 2014; August 7, 2014; September 24, 2014; September 28, 2014; November 11, 2014; November 26, 2014; December 4, 2014; and December 23, 2014.

[15] *See* Pakistan Ministry of Foreign Affairs Press Releases of January 5, 2015; January 15, 2015; January 19, 2015; May 18, 2015; May 19, 2015; August 7, 2015; and September 2, 2015.

[16] *See* Pakistan Ministry of Foreign Affairs Press Releases of May 23, 2016; June 2, 2016; and June 10, 2016.

government specifically condemns the U.S. targeted killings as a violation of Pakistan's territorial sovereignty and international law. *See, e.g.*, Press Release, Ministry of Foreign Affairs, Gov't of Pakistan, US Ambassador Conveyed Concerns over Drone Strikes (Nov. 2, 2013), http://mofa.gov.pk/pr-details.php?mm=MTUxOA. Echoing the sentiments expressed by Ms. Chaudhry in her questions to Secretary Kerry, these official Pakistani statements emphasize the human and political costs of U.S. drone strikes, stating that they result in civilian casualties and "generate distrust among the local populace." *See, e.g.*, Press Release, Ministry of Foreign Affairs, Gov't of Pakistan, Pakistan Condemns US Drone Strike (May 19, 2015), http://mofa.gov.pk/pr-details.php?mm=Mjc5Nw. Time and again, the Pakistani government has "reiterate[d] [its] call for cessation of such strikes." *See, e.g.*, *id.*

Additionally, the Pakistani government has raised—and then publicly memorialized—its dissatisfaction with U.S. targeted killings in Pakistan as part of its diplomatic relations with the United States and in international fora. For example, during (and then in readouts describing) meetings with President Obama, then–Secretary of Defense Chuck Hagel, the U.S. Ambassador to Pakistan, and other senior U.S. leaders, the Pakistani government specifically addressed its desire

to see an end to U.S. drone strikes in Pakistan.[17] Similarly, the Prime Minister condemned these strikes in a 2013 speech before the U.N. General Assembly, noting the deaths of civilians and calling the U.S. strikes a "violation of [Pakistan's] territorial integrity."[18] The Prime Minister informed the General Assembly that he had "urged the United States of America to cease these strikes, so that [they] could avert further casualties and suffering."[19] In addition, Pakistan sponsored a resolution on the use of armed drones, which was adopted by the United Nations Human Rights Council in March 2014.[20]

Given Pakistan's repeated public condemnations of the U.S. targeted-killing program in Pakistan, lodged through high-level meetings with U.S. officials,

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[17] Press Release, Ministry of Foreign Affairs, Gov't of Pakistan, US Ambassador Conveyed Concerns over Drone Strikes (Nov. 2, 2013), http://mofa.gov.pk/pr-details.php?mm=MTUxOA ("The Government of Pakistan has been raising its concern over the drone strikes with the US Administration and at the United Nations. The Prime Minister during his recent visit to the US had raised the issue with President Obama and other senior US leaders."); Press Release, Ministry of Foreign Affairs, Gov't of Pakistan, US Secretary of Defence Chuck Hagel Calls on Prime Minister Nawaz Sharif (Dec. 9, 2013), http://mofa.gov.pk/pr-details.php?mm=MTU4OQ (conveying "Pakistan's deep concern over continuing US drone strikes" to U.S. Secretary of Defense Chuck Hagel).

[18] Press Release, Ministry of Foreign Affairs, Gov't of Pakistan, Transcript of the Prime Minister's Address in the UN General Assembly (Sept. 28, 2013), http://mofa.gov.pk/pr-details.php?mm=MTQ4MQ.

[19] *Id.*

[20] Press Release, Ministry of Foreign Affairs, Gov't of Pakistan, United Nation's Human Rights Council Adopts Pakistan Sponsored Resolution on Armed Drones (Mar. 28, 2014), http://mofa.gov.pk/pr-details.php?mm=MTg1OA.

speeches at the United Nations, and at least forty-five press releases, it clearly has not "ignored" U.S. strikes. Instead, it has reacted to the reality of the U.S. drone program. When the government of Pakistan has recognized that U.S. targeted killings using drones are carried out on its soil, the alternative fiction of an official "secret" that the government seeks to perpetuate would apply only with respect to U.S. courts and the American public. This Court should reject the government's extraordinary appeal and affirm the district court's official-acknowledgment ruling.

II. The district court's ruling was appropriate under FOIA.

The government also contends that the district court's ruling should be vacated for an independent reason: that it is "unnecessary and inappropriate" under FOIA for the court to assess first the validity of official acknowledgment as applicable to one or more of the government's exemption claims if a specific document may be withheld on alternative grounds. Gov't Br. 34–38. In making that argument, the government asserts that this Court should not even consider whether the ruling was correct as a matter of law. Gov't Br. 35 n.9. The government's argument is extreme, would subvert the purposes of FOIA, and would waste judicial resources. District courts often assess the validity of all of the government's cross-cutting claims of FOIA exemptions, even if not all of the rulings ultimately prove to be "necessary" to the outcome of the case. That approach reflects common sense because it is consistent with the purposes and

structure of FOIA and it can be the most efficient use of the district court's resources. This Court should reject the government's argument.

In the district court's natural course of considering whether the government properly withheld a vast number of responsive records, the court sensibly first considered an overarching issue—waiver through official acknowledgment, which can cut across claimed FOIA exemptions, *see infra* at 42–43—and then methodically considered whether specific records could nevertheless be withheld under Exemptions 1, 3, or 5. The court's approach was appropriate under FOIA, and, as discussed below, reflects common practice among the district courts.

This case shows, in fact, why the government's position is itself unnecessary and inappropriate. The government's appellate brief makes clear—for the first time—that the ruling it appeals implicates two documents containing the officially acknowledged fact. *See* Gov't Br. 2, 36, 38. If the ACLU had appealed the withholding of those documents, the district court's official-acknowledgment ruling would possibly have been relevant to the arguments made on appeal. Under the government's approach, this Court would then have been deprived of the benefit of the district court's lengthy analysis of the official-acknowledgment question. The government appears to suggest that because the ACLU did not appeal the district court's withholding of the two documents, this hypothetical is irrelevant. *See* Gov't Br. 38. But that does not follow, because the ACLU was

entirely unaware that the officially acknowledged fact was contained in two responsive documents until the government revealed that information in its brief on appeal. Indeed, notice at an earlier stage may have affected the ACLU's decision regarding whether to appeal, given that it won a partial victory concerning those records. Therefore, it is clear from this case alone that requiring district courts to approach FOIA cases as the government proposes would have wide-ranging effects, significantly decreasing the efficiency and discretion of the courts in their own administration of FOIA cases.[21]

Nevertheless, the government attempts to cast the district court's official-acknowledgment ruling as a departure from practice because it is "not tethered to the disclosure of any agency record." Gov't Br. 36. The government sets up its argument as if the ACLU had sought to use FOIA as a question-and-answer mechanism, divorced from the release of any documents. *See, e.g.*, *id.* at 35 ("The Freedom of Information Act only gives a right of access to agency records in existence."). Indeed, the government even notes that "FOIA does not require

[21] As the district court explained, it has "been around this racetrack before." SPA 4; *see, e.g.*, Revised Decision on Remand with Respect to Issue (3), *N.Y. Times Co. v. DOJ*, No. 12 Civ. 794 (S.D.N.Y. May 23, 2016), ECF No. 139; *ACLU v. DOJ*, No. 12 Civ. 794, 2015 WL 4470192 (S.D.N.Y. July 16, 2015); Decision on Remand with Respect to Issue (3), *N.Y. Times Co. v. DOJ*, No. 12 Civ. 794 (S.D.N.Y. Oct. 31, 2014), ECF No. 90; *N.Y. Times Co. v. DOJ*, 915 F. Supp. 2d 508 (S.D.N.Y. 2013). That is likely why it structured its opinion as it did, first addressing the ACLU's official-acknowledgment arguments and then applying them in "document-by-document ruling[s] on the items that appear on the Vaughn Indices of the Defendant Agencies." SPA 40.

agencies to 'produce or create explanatory material.'" *Id.* But these arguments are inapposite because the district court's analysis *was* tethered to agency records. As the government itself points out, the district court "identified two responsive documents potentially containing information regarding" the official acknowledgment in question. *Id.* at 36. The government invoked various FOIA exemptions, and the ACLU countered that the information in question had been officially acknowledged such that the government could not rely on that information to justify those exemptions. The district court proceeded exactly as the statute contemplates: Under the statute, when the parties disagree about the government's justifications for withholding a responsive record, the district court reviews the dispute *de novo* to determine whether the claimed exemptions apply. *See* 5 U.S.C. § 552(a)(4)(B). In evaluating the merits of the ACLU's official-acknowledgment argument, the district court acted entirely in line with its mandate.

Moreover, the district court's ruling on official acknowledgment was consistent with the purposes underlying FOIA, while the government's extraordinary vacatur remedy would pervert those purposes. "[T]he focus in the FOIA is information, not documents," and the government must justify the withholding of any information it wishes to keep secret under one of the narrow exemptions outlined in the statute. *Krikorian v. DOS*, 984 F.2d 461, 466–67 (D.C.

Cir. 1993). Underlying any court's assessment of the government's reliance on FOIA exemptions is "the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). Conversely, the government's argument directly conflicts with the statute's purposes. The district court correctly concluded that this information had been officially acknowledged by the government and was no longer secret. In spite of this, the government argues that whether or not the fact warrants secrecy, this Court should order the district court to withhold that fact from the opinion because no documents were ultimately released in connection with the relevant ruling. This outcome turns FOIA on its head, runs contrary to the public interest more generally, and is antithetical to the principles of openness and transparency that undergird the judiciary. *See, e.g.*, *Afshar*, 702 F.2d at 1130 (describing "the 'sunshine' purposes of FOIA[, which] would be thwarted if information remained classified after it had been 'specifically revealed to the public'" (quoting *Lamont v. DOJ*, 475 F. Supp. 761, 722 (S.D.N.Y. 1979))); *Robbins Tire & Rubber Co.*, 437 U.S. at 242; *see also, e.g.*, *United States v. Aref*, 533 F.3d 72, 83 (2d Cir. 2008) ("Transparency is pivotal to public perception of the judiciary's legitimacy and independence."); *Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) (Easterbrook, J.) ("The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial

process from public view makes the ensuing decision look more like fiat, which requires compelling justification.").[22]

Finally, the government's request for vacatur and removal of the district court's ruling would have broader negative consequences if its arguments prevail. In FOIA cases, when the government invokes multiple exemptions to withhold a single document, district courts frequently choose to rule on the validity of each of the asserted exemptions regardless of whether it ultimately determines the case. *See, e.g.*, *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 517 (S.D.N.Y. 2010) (concluding that although certain documents could not be withheld under Exemption 5, they could nonetheless be withheld under Exemptions 1 and 3); *N.Y. Times Co. v. DOJ*, 872 F. Supp. 2d 309, 316–17 (S.D.N.Y. 2012) (first concluding that a disputed record was withholdable under Exemption 1, and then separately concluding that the record was also withholdable under Exemption 3); *ACLU v. DOJ*, No. 15 Civ. 9002, 2017 WL 213812, *3 (S.D.N.Y. Jan. 18, 2017) (same); *N.Y. Times Co. v. DOJ*, No. 14 Civ. 3777, 2017 WL 713560, *11 (S.D.N.Y. Feb. 21, 2017) (determining that "FOIA Exemption 3 provides an alternative basis [to Exemption 1] for granting summary judgment to the Government").

[22] In its section arguing for vacatur without consideration of the merits, the government again asserts that harm to national security is likely to result from the district court's ruling. Gov't Br. 38. However, for the reasons given above, the requested relief is unnecessary to protect this interest. *See supra* 30–37.

Although courts are not required to rule on each of the asserted exemptions if a FOIA case may be resolved without doing so, *see Wilner v. NSA*, 592 F.3d 60, 72 (2d Cir. 2009), that practice makes good sense. As this Court has remarked, judicial analysis of each of the government's exemption claims is often interrelated and overlapping. *See, e.g.*, *N.Y. Times I*, 756 F.3d at 119 ("Much of the above discussion concerning loss of Exemption 5 is applicable to loss of Exemption 1."). Critically, consideration of all claimed exemptions may facilitate the district court's analysis of FOIA's segregability mandate because "even if an agency establishes an exemption, it must nonetheless disclose all reasonably segregable, nonexempt portions of the requested record(s)." *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 58 (D.C. Cir. 2003). It is a better use of judicial time and resources for the district court to consider and rule on these claims of exemption together. That efficiency is only underscored where a district court must spend hundreds of hours reviewing classified material in a secure facility in order to draft its opinion, as the one here has done in related litigation. *See* Order with Respect to the Government's Submission of July 1, 2015 at 2, *ACLU v. DOJ*, No. 12 Civ. 794 (S.D.N.Y. July 16, 2015) (McMahon, J.), ECF No. 129.

Relatedly, it would be grossly inefficient for the purposes of appellate litigation and review if district courts were required to cabin their opinions as the government proposes. The government would apparently have district courts cease

(or go back to eliminate) their analysis of particular or overarching legal issues after concluding that the government could withhold a document under an enumerated exemption. However, if the plaintiff appealed, the court of appeals would be left to review only one explained legal ruling. If the court of appeals disagreed with that legal ruling, it would likely remand for the district court's consideration in the first instance of any other exemption that the government had invoked. This process has the potential to add years of litigation to even straightforward FOIA cases.

Given the good sense in the course the district court pursued here, and the practice of courts in FOIA cases more generally, it is unsurprising that the government has provided no examples of cases in which a court of appeals vacated a district court ruling as to any particular FOIA dispute solely because the ruling was not "necessary" to the outcome of the case. The only case the government cites to support its proposition is *ACLU v. DOJ*, 844 F.3d 126 (2d Cir. 2016); *see* Gov't Br. at 35 n.9, which was in an entirely different posture, and which actually serves to highlight that the government's request is contrary to Second Circuit practice.

In *ACLU v. DOJ*, the district court ruled that six particular facts concerning the U.S. targeted-killing program had been officially acknowledged. It declined to rule on one additional fact, leaving that determination to this Court. *ACLU v. DOJ*,

2015 WL 4470192, at *5–6. On appeal, this Court declined to rule whether the additional fact had been officially acknowledged—but more telling is the Court's approach to the other six facts that the district court ruled *had been* officially acknowledged. After holding that no documents should be ordered released, the Court did not go back and vacate the district court's rulings as to the six officially acknowledged facts or otherwise strip them from the district court opinion. Instead, the Court explained that it agreed with the district court's ruling on segregability and remarked that "[n]o further consideration of these six facts is needed." *ACLU v. DOJ*, 844 F.3d at 132; *cf. Assassination Archives & Research Ctr.*, 334 F.3d at 56 & n.1 (affirming the district court ruling on the basis of Exemption 3 and declining to rule on the Exemption 1 claim, even though the district court had concluded that the document was withholdable under both Exemptions 1 and 3).

In sum, the district court's approach and ruling were consistent with standard court practice, efficient, and in accord with the purposes and design of FOIA. The government has not come close to justifying the extraordinary remedy it seeks, and its request should be denied.

III. The Court should order additional briefing if it would be useful.

The ACLU has endeavored to respond to the government's arguments as comprehensively as possible. However, almost 60% of the publicly filed version of the government's opening brief is redacted, and the government has eliminated

every reference to the district court ruling that it challenges from its brief and the opinion itself.[23] It is therefore possible that the ACLU misconstrued or failed to identify some of the government's arguments.

Extraordinary and extensive redactions like those in this case undermine the adversarial process, prejudicing the ACLU, and in turn hampering this Court's decision-making process. *See Penson v. Ohio*, 488 U.S. 75, 84 (1988) ("The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question." (quotation marks and citation omitted)); *Vaughn v. Rosen*, 484 F.2d 820, 824 (D.C. Cir. 1973) ("This lack of knowledge by the party [seeking] disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution."). As this Court has held, "[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Coalition on W. Valley Nuclear Wastes v. Chu*, 592 F.3d 306, 314 (2d Cir. 2009).

[23] By the ACLU's count, 3134 words appear in the publicly filed version of the government's brief—just 41% of the total that the government certifies as the full count of its brief. *See* Gov't Br. 40.

The ACLU seeks to litigate this case fairly, and to be as helpful as possible to the Court in adjudicating it. To that end, the ACLU asked the government to review again the redactions in the district court's opinion before the government filed its appellate brief so that the parties could meaningfully address the relevant issues on appeal. In response, the government asserted that no further information could be provided. Therefore, if the ACLU did not address a particular issue the Court deems important to the resolution of this case, the ACLU would welcome the opportunity to submit supplemental briefing, with the benefit of the Court's (rather than solely the government's) views about what can and cannot be said in open court.

CONCLUSION

The Court should not disturb the ruling of the district court as to the officially acknowledged fact at issue in this appeal, and it should remand for the district court to remove any unjustified redactions from its opinion.

Dated: July 14, 2017

By: /s/ Hina Shamsi

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

I hereby certify that this brief complies with Fed. R. App. P. 32(a)(7)(B) because it contains 10,720 words, excluding the portions of the brief exempted by Rule 32(f), according to the count of Microsoft Word.

I further certify that this brief complies with the typeface and type-style requirements of Rule 32(a)(5)-(6) because it is printed in a proportionally spaced 14-point font, Times New Roman.

/s/ Hina Shamsi
Hina Shamsi
Counsel for Plaintiffs–Appellees

ADDENDUM

Excerpt from the Government's Brief, ECF No. 33, at 7–9

B. [redacted] The District Court's Ruling That the United States Officially Acknowledged [redacted]

1. (U) The District Court's Initial Ruling

[redacted] The district court's initial ruling was based [redacted]

[redacted]

[redacted] On the basis of [redacted], the district court made the following ruling:

[redacted]

[redacted]

[redacted] The district court found, however, that [redacted]

[redacted]

[redacted] Based upon this reasoning, the district court found that the United States had officially acknowledged [redacted]

CERTIFICATE OF SERVICE

On July 14, 2017, I filed and served the forgoing BRIEF FOR PLAINTIFFS–APPELLEES via this Court's electronic-filing system.

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/s/ Hina Shamsi
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