REDACTED

18-2265

To Be Argued By:
SARAH S. NORMAND

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 18-2265

AMERICAN CIVIL LIBERTIES UNION,
AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs-Appellees,

—v.—

CENTRAL INTELLIGENCE AGENCY,

Defendant-Appellant,

UNITED STATES DEPARTMENT OF DEFENSE, UNITED STATES DEPARTMENT OF STATE, UNITED STATES DEPARTMENT OF JUSTICE, INCLUDING ITS COMPONENTS THE OFFICE OF LEGAL COUNSEL AND OFFICE OF INFORMATION POLICY,

Defendants.

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

BRIEF FOR DEFENDANT-APPELLANT

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(U) PRELIMINARY STATEMENT

(U) In this Freedom of Information Act ("FOIA") case, the district court erroneously ordered defendant-appellant the Central Intelligence Agency ("CIA" or the "government") to release classified and statutorily protected information contained in a draft summary of the CIA's former detention and interrogation program, as well as in the transcript of an *ex parte* proceeding at which the district court reviewed the document and made rulings on the CIA's withholdings. The information ordered released pertains to CIA intelligence activities, sources, methods, and its disclosure can reasonably be expected to harm national security. It is therefore properly classified and protected from disclosure under exemption 1 of FOIA, 5 U.S.C. § 552(b)(1) ("Exemption 1"). The information is also exempt from disclosure under FOIA exemption 3, 5 U.S.C. § 552(b)(3) ("Exemption 3"), because it relates to intelligence sources and methods protected by the National Security Act, as amended, 50 U.S.C. § 3024(i)(1).

(U) In ordering the government to release classified information in the document and the transcript pertaining to specific CIA intelligence activities, sources, and methods, the district court improperly failed to defer to the CIA's logical and plausible assessment of the potential harms to national security that can reasonably be expected to result from disclosure. Instead, the court substituted its own opinion that the information at issue is "too old," "too ordinary," or otherwise

not harmful to release. The district court further erred by failing to recognize that CIA intelligence sources and methods are independently protected under Exemption 3 and the National Security Act, regardless of any showing of harm.

(U) The district court's determination that the government must release references to public media reports that are described and cited in the document was also erroneous. Those references do not merely summarize public newspaper reports, as the district court surmised. Rather, as the CIA logically and plausibly explained, the author's selection of specific articles, his focus on particular information within the articles, and the manner in which he describes the articles would tend to confirm specific classified and statutorily protected information about the CIA's detention and interrogation program that has not been officially acknowledged. The information is therefore protected by Exemptions 1 and 3.

(U) Accordingly, this Court should reverse the district court's amended judgment to the extent it orders disclosure of classified and statutorily protected information in the document and the transcript.

(U) STATEMENT OF JURISDICTION

(U) The district court had jurisdiction over this FOIA action under 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B). The district court issued an amended final judgment on June 19, 2018. (Joint Appendix ("JA") 239-40). The government

filed a timely notice of appeal of the amended judgment on August 1, 2018. (JA 256). This Court therefore has jurisdiction under 28 U.S.C. § 1291.

(U) ISSUE PRESENTED

(U) Whether the district court erred in ordering disclosure of information pertaining to CIA intelligence sources, methods, and activities that is both classified and protected by the National Security Act.

(U) STATEMENT OF THE CASE

A. (U) Procedural History

(U) The ACLU filed this lawsuit on November 25, 2015, seeking to compel the CIA, the Department of Defense, the Department of State, and the Department of Justice to disclose specific records concerning the CIA's detention and interrogation program that were cited in the publicly released executive summary of the Senate Select Committee on Intelligence's (SSCI's) *Committee Study of the CIA's Detention and Interrogation Program*. (JA 20-54). The defendant agencies produced dozens of responsive records, in whole or in part, and withheld a handful of records in full. (JA 137, 139). The government then moved for summary judgment with regard to twenty-four documents, later narrowed to twenty documents. (JA 55-56, 139-40).

(U) After holding two *ex parte* proceedings during which the court reviewed the documents *in camera* (JA 13-14, 126-27), the district court (Alvin K.

Hellerstein, J.) issued orders on July 31, 2017, and September 27, 2017, granting in part and denying in part the government's motion for summary judgment, and ordering the government to produce additional information from five documents that had been withheld in part. (JA 126-36, 137-75); *see ACLU v. DOD*, No. 15 Civ. 9317, 2017 WL 4326524 (S.D.N.Y. Sept. 27, 2017). As relevant to this appeal, the district court ordered disclosure of an 89-page classified draft document prepared by the then-Chief of the CIA's Office of Medical Services ("OMS"), entitled "Summary and Reflections of Chief of Medical Services on OMS Participation in the RDI Program" ("Draft OMS Summary"),[1] with only limited redactions. JA 166-75 & n.4. Judgment was entered on September 28, 2017. (JA 176).

(U) The CIA timely moved to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) and to reconsider the district court's ruling as to the Draft OMS Summary. (JA 187.1). The government argued, among other things, that the district court had improperly ordered disclosure of classified and statutorily protected information in the Draft OMS Summary. The district court granted reconsideration in part, and directed the CIA to identify the specific classified information in the Draft OMS Summary and provide additional justification for its

[1] (U) This document is identified in the district court decisions as "Document 66."

Exemption 1 and 3 withholdings from that document. (JA 188-90). After the government made a supplemental classified, *ex parte* submission (JA 191-92, 193-98; Supplemental Classified Appendix ("CA") 1-109), the district court held a further *ex parte* proceeding on January 18, 2018, at which the court made rulings on each withholding (JA 206-38, CA 110-42). The district court upheld most of the CIA's withholdings, but ordered the CIA to release several discrete pieces of classified information as well as citations to and discussions of published media reports concerning the CIA's detention and interrogation program.

(U) At the district court's direction, the CIA provided a redacted version of the transcript of the January 18, 2018, *ex parte* proceeding (the "January 18 Transcript" or "Transcript"), for filing on the public docket. (JA 199). The court directed the CIA to lift sixteen sets of redactions in the Transcript, but granted the CIA an opportunity to comment on those rulings. (JA 199-200). The CIA subsequently submitted a revised redacted transcript that lifted most of the redactions as the district court had directed, but retained eight discrete and limited sets of redactions. (JA 206-38). The government also submitted a classified, *ex parte* letter objecting to public disclosure of this redacted information. (JA 201-02; *see* CA 143-45). The government explained that six sets of redactions were necessary to protect classified and statutorily protected information the court had ruled was properly withheld from the Draft OMS Summary, and the other two sets

of redactions were necessary to preserve the government's ability to appeal the court's rulings ordering release of specific classified information in the Draft OMS Summary. (CA 143-45). The district court sustained one of the government's objections in full and two objections in part, and overruled the government's remaining objections. (JA 203-04). The court ordered the government to file a redacted transcript consistent with the district court's rulings. (JA 204).

(U) An amended final judgment was entered on June 19, 2018. (JA 239-40). The district court stayed the government's disclosure obligations for sixty days, to allow the government to consider whether to appeal, but declined to grant a stay pending appeal in the event the government filed a notice of appeal. (JA 239, 251-53, 254-55). The government filed a notice of appeal on August 1, 2018 (JA 256), and promptly moved this Court for a stay of the district court's disclosure orders pending appeal (ECF No. 9). This Court granted a temporary stay pending a determination by a three-judge motions panel, and referred the motion to a motions panel. (ECF No. 15). The stay motion remains pending as of the filing of this brief.[2]

[2] (U) The stay motion has been placed on the motions calendar for November 20, 2018. (ECF No. 51).

B. (U) Statutory Background

(U) FOIA generally requires an agency to search for and make records promptly available in response to a request that reasonably describes the records sought. 5 U.S.C. § 552(a)(3)(A). But Congress recognized that "public disclosure is not always in the public interest and thus provided that agency records may be withheld from disclosure under any of the nine exemptions defined in 5 U.S.C. § 552(b)." *CIA v. Sims*, 471 U.S. 159, 166-67 (1985).

(U) FOIA Exemption 1 protects records and information that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and [ ] are in fact properly classified pursuant to such Executive Order." 5 U.S.C. § 552(b)(1). Under Executive Order 13,526, information may be classified if it "pertains to" one of several categories—including "intelligence activities (including covert action), intelligence sources or methods"—and an official with original classification authority has determined that its "unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security." Exec. Order 13,526, § 1.4, 75 Fed. Reg. 707, 709 (Dec. 29, 2009).

(U) FOIA Exemption 3 protects records and information that are "specifically exempted from disclosure by statute . . . if that statute . . . requires that the matters be withheld from the public in such a manner as to leave no

discretion on the issue" or "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). Section 102A(i)(1) of the National Security Act of 1947, as amended, requires the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure," 50 U.S.C. § 3024(i)(1), and qualifies as a withholding statute for purposes of Exemption 3, *see ACLU v. DOJ*, 681 F.3d 61, 72-73 (2d Cir. 2012).

C. (U) Factual Background

1. (U) The CIA's Exemption 1 and 3 Withholdings from the Draft OMS Summary

(U) The Draft OMS Summary is an 89-page, classified, draft document, prepared by former head of the CIA's Office of Medical Services, that purports to summarize and reflect upon OMS's participation in the CIA's detention and interrogation program. (JA 257-345; CA 21-109). It represents the subjective account of one agency official, the former OMS chief, and has not been adopted or approved by the CIA. (JA 105). The document is not limited to matters relating to OMS; the author purports to provide a detailed history of the CIA's detention and interrogation program over the course of several years. The author also discusses and comments upon specific press reports on the program and the extent to which the reporting was or was not accurate.

(U) The CIA produced to the ACLU those portions of the document that were quoted or paraphrased in the publicly released portions of the SSCI's report, but otherwise withheld the document as a privileged draft under FOIA Exemption 5, and also withheld the classified and statutorily protected information in the document under Exemptions 1 and 3. (JA 60-69, 71-72, 125). To justify the withholdings in the Draft OMS Summary, among other records, the government submitted declarations from Antoinette Shiner, the Information Review Officer for the CIA's Litigation Information Review Office, and an original classification authority. (JA 57-125).

(U) With regard to the CIA's Exemption 1 and 3 withholdings, Shiner acknowledged that "in conjunction with SSCI's study, the CIA declassified certain information related to the former detention and interrogation program." (JA 60). Shiner explained that she had "carefully considered the records at issue in this case in light of those declassifications," and determined that the Draft OMS Summary, among other records, "contains certain details that remain exempt from disclosure" pursuant to Exemptions 1 and 3. (JA 60). Shiner described several categories of still-classified information concerning the detention and interrogation program, such as "details about foreign liaison services; identities of covert personnel; current locations of covert CIA installations and former detention centers located abroad; and descriptions of specific intelligence methods and activities, including

certain counterterrorism techniques; code words and pseudonyms; and classification and dissemination control markings." (JA 61-62; *see also* JA 62-67).

(U) The category of classified "descriptions of specific intelligence methods and activities, including certain counterterrorism techniques," is not limited to the CIA's detention and interrogation program, but also includes "details that would disclose other intelligence methods and activities of the CIA." (JA 65). Shiner explained:

> Intelligence methods are the means by which the CIA accomplishes its mission. Intelligence activities refer to the actual implementation of intelligence methods in an operational context. Intelligence activities are highly sensitive because their disclosure often would reveal details regarding specific methods which, in turn, could provide adversaries with valuable insight into CIA operations that could impair the effectiveness of CIA's intelligence collection.

(JA 65). "For example, the CIA protected undisclosed details about certain intelligence gathering techniques and Agency tradecraft, which have been, and continue to be, used in [a] range of CIA operations and activities including current counterterrorism operations." (JA 65). Shiner described the harm to national security that is likely to result from disclosure of these undisclosed details about CIA intelligence methods and activities:

> Revealing this information would tend to show the breadth, capabilities, and limitations of the Agency's intelligence collection or activities. Such disclosures could provide adversaries with valuable insight into CIA operations that would damage their effectiveness. Adversaries could use this information to develop measures to detect

> and counteract the Agency's intelligence methods and the operational exercise of those methods.

(JA 65-66).

2. (U) The District Court's Initial Ruling on the CIA's Exemption 1 and 3 Withholdings

(U) In its September 27, 2017 Opinion and Order, the district court largely rejected the CIA's assertion of Exemptions 1 and 3 to protect classified and statutorily protected information contained in the Draft OMS Summary. (JA 171-75).[3] The district court permitted the CIA to withhold limited categories of classified information that the ACLU did not seek, concerning foreign liaison services, locations of covert CIA installations and former detention centers, classified code words and pseudonyms, and classification and dissemination control markings, as well as the names of CIA personnel. (JA 173 n.4, 175). However, the court rejected the CIA's assertion of Exemptions 1 and 3 to protect additional classified information in the Draft OMS Summary pertaining to

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[3] (U) The district court also rejected the CIA's argument that the Draft OMS Summary was privileged and protected from disclosure under FOIA exemption 5, 5 U.S.C § 552(b)(5) ("Exemption 5"). (JA 167-71). The government does not appeal the district court's Exemption 5 ruling, and the CIA has produced to the ACLU a version of the Draft OMS Summary with redactions only of information that the district court ruled could be withheld or that is the subject of this appeal. (JA 257-345).

intelligence sources and methods, CIA intelligence activities, and counterterrorism techniques. (JA 173).

(U) The district court reasoned that the government had not identified precisely which information in the Draft OMS Summary the CIA sought to withhold as classified or sufficiently described the harm to national security that could be expected to result from disclosure. (JA 173-74). Rather than ordering the government to supplement the record with additional information, however, the district court ordered disclosure, speculating that "[i]n light of the extensive declassification of many aspects of the CIA's detention and interrogation program, the Government's sparse submission on this point suggests an effort to claim an exemption without hope of success." (JA 174).

3. (U) The Government's Motion for Reconsideration and Supplemental Classified Submission

(U) In its motion to amend the judgment and for reconsideration, the government noted that in ordering disclosure of classified information in the Draft OMS Summary based on the supposed declassification of the withheld information, the district court appeared to have overlooked evidence in the record demonstrating otherwise. The government pointed to the statements in Shiner's declaration that many details of the program remain classified, and her explanation that their disclosure would be harmful to national security. (JA 60-62). The

government further argued that to the extent the district court considered the CIA's showing insufficiently detailed, it should permit the CIA to make a supplemental submission rather than ordering disclosure of classified information and risking harm to national security.

(U) After the district court granted reconsideration, the government filed an *ex parte* classified submission, further explicating the bases for the CIA's Exemption 1 and 3 withholdings from the Draft OMS Summary. (CA 1-109). Included in this submission was a supplemental declaration from Antoinette Shiner (JA 194-98, CA 1-5), which attached a version of the Draft OMS Summary that identified, in shaded text, the specific classified and statutorily protected information that the CIA proposed to redact (JA 191; *see* CA 21-109). The supplemental Shiner declaration also attached two classified indexes. One index addressed the specific classified and statutorily protected information in the Draft OMS Summary that the government understood the district court had permitted the CIA to redact from the document—namely, foreign liaison information, identities of covert personnel, locations of covert CIA installations and former detention centers, code words and pseudonyms, and classification and dissemination markings. (JA 191; *see* CA 7-11). The other index identified, and provided further justification for withholding, the additional classified and statutorily protected information in the document

pertaining to CIA methods and activities that the CIA sought to withhold under Exemptions 1 and 3. (JA 191; *see* CA 13-19).

4. (U) The District Court's Rulings on Reconsideration

(U) At the *ex parte, in camera* session on January 18, 2018, the district court reviewed the Draft OMS Summary and made oral rulings on each proposed redaction. (JA 206-38; CA 110-42). The court upheld the majority of the CIA's withholdings under Exemptions 1 and 3. However, the district court rejected several of the CIA's withholdings and ordered disclosure of the information in either the Draft OMS Summary, the January 18 Transcript, or both.

( ) First, the district court ordered the CIA to release references in the Draft OMS Summary to the fact that , holding that this information was "too old and too ordinary" to be protected.[4] The court also ordered release of the CIA's explanation in the Transcript that this information

[4] ( ) *See* JA 209-10, CA 113-14 [Tr. 4-5] (ordering disclosure of the words on page 2 of the Draft OMS Summary, JA 259, CA 23). Citations to "[Tr. __]" identify the page number of the January 18 Transcript, which is reprinted in redacted form at JA 206-38, and in unredacted form at CA 110-42.

would reveal a protected intelligence method, namely, [redacted] [redacted].[5]

([redacted]) Next, the district court ruled that the CIA must disclose [redacted] [redacted] [redacted], in both the Draft OMS Summary and the Transcript.[6] The court reasoned that the information was from "[redacted] years ago," and in the court's view, there is "no relationship between what was and what came after that." (JA 210, CA 114 [Tr. 5]).

([redacted]) The court additionally ordered disclosure of the fact that [redacted] [redacted] [redacted]

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[5] ([redacted]) *See* JA 210 (ordering disclosure of text on page 5 of the Transcript, JA 210, CA 114, lines 2-4 [redacted] [redacted]) and line 6 [redacted])).

[6] ([redacted]) *See* JA 210, CA 114 [Tr. 5] (ordering disclosure of footnote 2 on page 2 of Draft OMS Summary, JA 259, CA 23); JA 199-203 (ordering disclosure of page 5, lines 12-13, of the Transcript, JA 210, CA 114, which reveals that the information in footnote 2 concerns [redacted] [redacted] and also suggests that [redacted] [redacted] [redacted]).

,[7] finding that information "too well known" to be protected. (JA 215, CA 119 [Tr. 10]). The court also ordered disclosure of specific details regarding the CIA's construction of detention facilities.[8] In the court's view, this information "only shows you're doing the right thing," and "I don't see a harm with that." (JA 224, CA 128 [Tr. 19]).

( ) In two places, the district court ordered release of classified information in the January 18 Transcript that the court held was properly redacted from the Draft OMS Summary. The court permitted the government to redact from the Draft OMS Summary that local crises around the world after September 11, 2001,

[7] ( ) *See* JA 215, CA 119 [Tr. 10] (ordering disclosure of the words in the following sentence on page 6 of the Draft OMS Summary, JA 263, CA 27: "He agreed to drive directly back and to recruit anesthetist.").

[8] ( ) Specifically, the district court ordered the CIA to release the following sentences on page 53 of the Draft OMS Summary, JA 310, CA 74, with the exception of the information in brackets (which the court permitted the CIA to redact): (JA 223-25, CA 127-30 [Tr. 18-21]).

but ordered release of virtually identical text in the January 18 Transcript,[9] thus revealing that . The court also ordered disclosure of information in the transcript regarding , although it ruled that similar information could be redacted from the Draft OMS Summary.[10]

( ) In several places, the district court also ordered the government to release citations to and discussions of newspaper articles and other press reports about the CIA's detention and interrogation program, permitting the government to

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[9] ( ) *Compare* JA 211, CA 115 [Tr. 6] (upholding redaction, in middle of page 3 of Draft OMS Summary, JA 260, CA 24, that crises) *with* JA 203 (ordering release of the text on page 6, lines 20-21, of Transcript, JA 211, CA 115).

[10] ( ) *Compare* JA 217-18, CA 121-22 [Tr. 12-13] (upholding redactions, in second paragraph of page 20 of Draft OMS Summary, JA 277, CA 41, regarding the) *with* JA 199-200, 203-04 (ordering release of text in the Transcript, JA 217-18, CA 121-22, on page 12, lines 10-11,), page 12, line 16), and page 12, lines 23-25, and page 13, lines 1-4 .

withhold only words or phrases that characterize the accuracy or inaccuracy of aspects of those reports.[11] The court rejected the government's argument that identifying the specific articles identified by the author as pertinent, and the particular information from those articles that he chose to include in the Draft OMS Summary, would tend to corroborate any classified and statutorily protected information that may be contained in the reports. (JA 218-19, CA 122-23 [Tr. 13-14]). In particular, many of the press reports described in the Draft OMS Summary [redacted]

[redacted]. (JA 218-19, CA 122-23 [Tr. 13-14]). The district

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[11] (U) Specifically, the government challenges the district court's rulings requiring release of the following discussions of, and citations to, press reports in the Draft OMS Summary:

- page 22, first paragraph & footnotes 43-44 (JA 218-20, CA 122-24 [Tr. 13-15]; *see* JA 279, CA 43),
- page 35, first full paragraph and footnotes 71-72 (JA 221-22, CA 125-26 [Tr. 16-17]; *see* JA 292, CA 56),
- page 43, footnote 87, last sentence (JA 222, CA 126 [Tr. 17]; *see* JA 300, CA 64),
- page 54, footnotes 114-15 (JA 227, CA 131 [Tr. 22]; *see* JA 311, CA 75),
- pages 65-66 and footnotes 125 and 127-32 (JA 228-31, CA 132-35 [Tr. 23-26]; *see* JA 322-23, CA 86-87), and
- pages 68-69 and footnotes 135, 138-40 (JA 231-33, CA 135-37 [Tr. 26-28]; *see* JA 325-26, CA 89-90).

The district court ordered release of additional material on pages 35 n.70, 54 n.113, 62 n.123, and 63 n.124 of the Draft OMS Summary that the government does not challenge in this appeal, and has since released to the ACLU (JA 292, 311, 319-20).

court rejected this rationale, finding that "[t]hese are public newspaper accounts and they should be produced." (JA 219, CA 123 [Tr. 14]). The court also ordered disclosure of corresponding information in the January 18 Transcript, disclosure of which would [12]

(U) This appeal followed.

(U) SUMMARY OF ARGUMENT

(U) The district court erroneously ordered disclosure of classified and statutorily protected information in the Draft OMS Summary and the January 18 Transcript regarding specific CIA intelligence activities, sources, and methods. Rather than according substantial deference to the CIA's logical and plausible justifications for withholding this information under Exemption 1, as the district court was required to do, the court improperly substituted its own uninformed judgment in evaluating the harm that is reasonably likely to flow from disclosure of the information. *See infra* Point I.A. The district court further erred by failing

[12] ( ) *See* JA 200, 204 (ordering disclosure of text in the Transcript, JA 218-19, 222, CA 122-23, 126, on page 13, lines 24-25, and page 14, line 1), page 14, line 2), page 14, line 5), and page 17, lines 2-4 (permitting redaction of statement by CIA counsel, but ordering disclosure of court's response, that)).

to recognize that the information is independently protected by Exemption 3, regardless of any showing of harm, because its disclosure would reveal information relating to intelligence sources and methods protected from disclosure by the National Security Act. *See infra* Point I.B.

(U) The district court also erred by ordering the government to disclose references in the Draft OMS Summary to published media reports and related statements in the January 18 Transcript. Contrary to the district court's conclusion, those references do not merely summarize public news accounts. Rather, the author's selection of particular articles, his focus on specific information within the articles, and the way he presents the information in the Draft OMS Summary tends to confirm classified and statutorily protected information that the CIA has not officially acknowledged. The withheld information is therefore protected by Exemptions 1 and 3. *See infra* Point II.

(U) ARGUMENT

(U) STANDARD OF REVIEW

(U) This Court reviews *de novo* the district court's determination of whether the government properly invoked FOIA exemptions over responsive records. *Wilner v. NSA*, 592 F.3d 60, 69, 73 (2d Cir. 2009). Although an agency has the burden to establish the applicability of the asserted FOIA exemptions, "[a]ffidavits or declarations . . . giving reasonably detailed explanations why any withheld

documents fall within an exemption are sufficient to sustain the agency's burden." *Id.* at 69 (quotation marks and citation omitted). The agency's declarations are entitled to a presumption of good faith, *id.*, and where the claimed exemptions implicate national security, the reviewing court "must accord *substantial weight* to an agency's affidavit concerning the details of the classified status of the disputed record." *ACLU v. DOJ*, 681 F.3d at 69 (quotation marks and citation omitted; emphasis in original). Ultimately, "the agency's justification is sufficient if it appears logical and plausible." *ACLU v. DOD*, 901 F.3d 125, 133 (2d Cir. 2018).

(U) POINT I

(U) The District Court Erroneously Ordered Disclosure of Classified and Statutorily Protected Information Pertaining to Specific CIA Intelligence Activities, Sources, and Methods

(U) The district court improperly ordered disclosure of classified and statutorily protected information in the Draft OMS Summary and January 18 Transcript pertaining to specific CIA activities, sources, and methods. In doing so, the court committed two separate errors, each of which provides an independent basis for reversal. The district court disregarded the CIA's logical and plausible justifications for withholding the information under FOIA's Exemption 1 because its disclosure can reasonably be expected to harm national security. And the court failed to recognize that the information is independently protected under Exemption 3 and the National Security Act, regardless of any showing of harm.

A. (U) The District Court Disregarded the CIA's Logical and Plausible Predictions That Release of Particular Information Would Harm National Security

(U) This Court has repeatedly instructed that, "given 'relative competencies of the executive and judiciary . . . it is bad law and bad policy to second-guess the predictive judgments made by the government's intelligence agencies' " regarding whether disclosure of particular information would pose a threat to national security. *ACLU v. DOD*, 901 F.3d at 134 (quoting *ACLU v. DOJ*, 681 F.3d at 70; quotation marks omitted); *accord Wilner*, 592 F.3d at 76. Yet the district court did just that. In ordering disclosure of information in the Draft OMS Summary and the January 18 Transcript pertaining to specific CIA intelligence activities, sources, and methods, the district court disregarded the logical and plausible justifications proffered by the CIA, and relied instead on its own unsupported suppositions regarding whether disclosure was likely to harm national security.

( ) *First*, the district court improperly ordered the CIA to disclose the name of a city and a war in which OMS provided temporary medical coverage, as well as the CIA's explanation during the *ex parte* proceeding that this information would reveal an intelligence method by disclosing that

. (JA 209-10, CA 113-14 [Tr. 4-5] (ordering disclosure of information at top of page 2 of Draft OMS Report, JA 259,

CA 23); JA 199, 203 (ordering disclosure of redacted information on page 5, lines 2-4 and 6, of Transcript, JA 211, CA 114)). The information also would reveal

. (CA 13). Release of the information would also associate the CIA with specific activities and individuals at a particular time and place, and thus the information pertains to intelligence activities as well. (CA 13, 114).

( ) The district court rejected the CIA's argument that release of this information could reasonably be expected to harm national security, instead finding the information "so old now, there is no harm that could flow from this." (JA 209, CA 113 [Tr. 4]; *see also* JA 210, CA 114 [Tr. 5] (ordering disclosure because the information "is too old and too ordinary")). But as the government noted, the CIA recently reviewed the information in response to the ACLU's FOIA request and determined that its release could still cause harm. (JA 210, CA 114 [Tr. 5]; *see* CA 4, 13). That determination is entirely logical and plausible, given that the information concerns an intelligence method

, and disclosure would impair its effectiveness. In addition, disclosure of the information could still associate the CIA with specific activities and individuals at a particular time and place,

. (CA 13, 113-14). The district court erred in second-guessing the CIA's reasoned determination. *See ACLU v. DOJ*, 681 F.3d at 71

("[a]ccording substantial weight and deference to the CIA's declarations," concluding that "it is both logical and plausible that the disclosure of . . . information pertaining to a CIA intelligence activity would harm national security," and reversing district court disclosure order).

( ) *Second*, the district court erroneously ordered the CIA to disclose , in both the Draft OMS Report and the January 18 Transcript. (JA 210, CA 114 [Tr. 5] (ordering disclosure of footnote 2 on page 2 of Draft OMS Summary, JA 259, CA 23); JA 199, 203 (ordering disclosure of redacted information on page 5, lines 12-13 and 22, of Transcript, JA 210, CA 114)). Public disclosure of the fact that , would associate the CIA with specific individuals and activities , and thus the information pertains to CIA intelligence activities, sources, and methods. (CA 7). For example,

( ) The district court nevertheless disregarded the CIA's assertion that release of this information would still cause harm, and substituted its own unfounded view that the information was too old and there was "no relationship

between what was and what came after that." (JA 210, CA 114 [Tr. 5]). That is simply incorrect. As the CIA explained, (CA 7). The court should have deferred to this logical and plausible explanation. *See ACLU v. DOJ*, 681 F.3d at 71.

( ) *Third*, the district court erred in ordering disclosure of the classified fact that . (JA 215, CA 119 [Tr. 10] (ordering disclosure of information in second sentence of third paragraph on page 6 of Draft OMS Summary, JA 263, CA 27)). The court rejected the CIA's argument that it is important to protect the fact that , positing that the information is "too well known." (JA 215, CA 119 [Tr. 10]). But the court cited no support for its supposition that the CIA's use of this method, at this particular time and place, had been disclosed at all—let alone that it is "well known." In fact, the CIA has demonstrated that releasing information about "would give adversaries valuable insight into the CIA's tradecraft and (CA 14). For example,

disclosing this information could [redacted]. It could also tend to reveal [redacted].[13] The district court had no basis to reject the CIA's informed judgment on this point. As this Court has repeatedly recognized, even if a particular piece of information "seems innocuous in the context of what is already known by the public, 'minor details of intelligence information may reveal more information than their apparent insignificance suggests because, much like a piece of jigsaw puzzle, each detail may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself.'" *ACLU v. DOJ*, 681 F.3d at 71 (quoting *Wilner*, 592 F.3d at 73).

([redacted]) *Fourth*, the district court improperly ordered the CIA to disclose specific information concerning the CIA's construction of detention facilities,

[13] ([redacted]) That the district court permitted the CIA to redact [redacted] (JA 215, CA 119 [Tr. 10]) does not eliminate the potential harm from disclosure. [redacted]

including specific details like [redacted]

[redacted]

[redacted]

[redacted]. (JA 223-26, CA 127-30 [Tr. 18-21] (ordering disclosure of first paragraph on page 53 of Draft OMS Summary, JA 310, CA 74, with the exception of a place name, code names, and a date)).[14] This information pertains to CIA intelligence methods and activities—namely, the CIA's construction of facilities to house detainees for interrogation—and its disclosure could cause harm to national security by revealing precisely how the CIA conducted these activities. (JA 224, CA 128 [Tr. 19]).

(U) The district court brushed this explanation aside, stating, "I don't see a harm with that," and "[i]t only shows you're doing the right thing." (JA 224, CA 128 [Tr. 19]). Contrary to the district court's conclusion, however, it is logical and plausible that revealing specific details about the construction of CIA detention and

[14] ([redacted]) The district court permitted the CIA to redact similar information in the following two paragraphs on page 53 of the Draft OMS Summary, regarding detention facilities at the Guantanamo Bay Naval Base and [redacted] [redacted]. (JA 226, CA 130 [Tr. 21]; *see* JA 310, CA 74). Although the government mistakenly advised the district court that the existence of a former CIA facility at Guantanamo remains classified (CA 130), the specific details of the CIA facilities described on page 53 (JA 310, CA 74) have not been disclosed and remain classified and statutorily protected for the same reasons as the information ordered released.

interrogation facilities could cause harm. Disclosing the specifications of CIA detention facilities (including the use of specific hardware) could give adversaries insight into the CIA's detention and interrogation methods, and thereby facilitate efforts to circumvent those methods. Disclosure could also tend to disclose that a particular detention facility was associated with the CIA, which could impair the CIA's relationship with its liaison partners in the locations where detention facilities were located. (JA 64 ("releasing information about the location of former facilities could harm relationships with foreign countries that housed those installations," and thus "the CIA has consistently refused to confirm or deny the location of these facilities," and "these details were redacted from the [publicly released portions of the SSCI's report] because of this sensitivity")). The district court should have deferred to the CIA's informed judgment that release of this information could reasonably be expected to cause harm. *See ACLU v. DOJ*, 681 F.3d at 71 (rejecting "district court's suggestion that certain portions of the redacted information are so general in relation to previously disclosed activities of the CIA that their disclosure would not compromise national security," as it was "both logical and plausible that disclosure of the redacted information would jeopardize the CIA's ability to conduct its intelligence operations and work with foreign intelligence liaison partners").

( ) *Fifth*, the district court inexplicably ordered the release of information in the January 18 Transcript that describes classified information in the Draft OMS Summary that the district court held was properly withheld under Exemptions 1 and 3. The court ordered disclosure of information in the January 18 Transcript describing [redacted], even though the court permitted redaction of the corresponding information in the Draft OMS Summary. (*Compare* JA 203 (ordering release of redacted information on page 6, lines 20-21, of Transcript, JA 211, CA 115) *with* JA 211, CA 115 [Tr. 6] (upholding redaction in middle of page 3 of Draft OMS Summary, JA 260, CA 24)). The court also ordered disclosure of information in the Transcript describing the [redacted], despite having upheld the redaction of the corresponding information in the Draft OMS Report. (*Compare* JA 199-200, 203-04 (ordering release of redacted information on page 12, lines 10-11, 16-19, and 23-25, and page 13, line 1, of Transcript, JA 217-18, CA 121-22) *with* JA 217-18, CA 121-22 [Tr. 12-13] (upholding redactions in second paragraph of page 20 of Draft OMS Summary, JA 277, CA 41)).

(██) Release of this information in the Transcript would reveal the very classified information that the court ruled was exempt from disclosure in the Draft OMS Summary. And it is logical and plausible that disclosure of the Transcript information could reasonably be expected to harm national security, just as disclosure of the same information in the OMS Summary Report would be harmful. Disclosure of the fact that ██████ would undermine the effectiveness of this method. (CA 24, 115). Disclosure of ██████ would give adversaries valuable information about CIA's capabilities and intelligence interests, which in turn could thwart the effectiveness of ██████. (CA 15, 121-22). That is why the district court permitted the CIA to withhold the information in the Draft OMS Summary—and yet the court ordered its release, without explanation, in the Transcript.

(U) There is no practical difference between classified information contained in a document requested under FOIA and classified information provided to a court *in camera* to justify withholding. It was error for the district court to order disclosure in the Transcript of information that, as the court itself recognized, is protected from disclosure under Exemptions 1 and 3. *See Islamic Shura Council of S. Cal. v. FBI*, 635 F.3d 1160, 1169 (9th Cir. 2011) (granting writ of mandamus to

correct clearly erroneous ruling compelling disclosure in court order of national security and sensitive law enforcement information that had been provided to district court *in camera* in support of FBI's withholdings under FOIA).

B. (U) The District Court Disregarded the Independent Protection Afforded by the National Security Act and Exemption 3

(U) The district court committed a further error by failing to recognize that, in addition to Exemption 1, all of the information ordered released is independently protected by Exemption 3 and the National Security Act, because its disclosure would reveal information relating to intelligence sources and methods. (JA 68-69); *Sims*, 471 U.S. at 168; *ACLU v. DOJ*, 681 F.3d at 73. Unlike under Exemption 1, the government "need not make a specific showing of potential harm to national security in order to justify withholding information" under an Exemption 3 statute; "Congress has already, in enacting the statute, decided that disclosure of [the information] is potentially harmful." *Elec. Privacy Info. Ctr. v. NSA*, 678 F.3d 926, 931 (D.C. Cir. 2012) (quotation marks and citation omitted). "[T]he sole issue for decision" under Exemption 3 "is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." *Wilner*, 592 F.3d at 72 (quotation marks and citation omitted).

(U) It is well settled that section 102(A)(i)(1) of the National Security Act is a withholding statute under Exemption 3. *See, e.g.*, *ACLU v. DOJ*, 681 F.3d at 73

(citing cases); *see also Sims*, 471 U.S. at 168 (addressing predecessor of section 102A(i)(1)).[15] Thus, the "only remaining inquiry is whether the withheld material relates to an intelligence [source or] method." *ACLU v. DOJ*, 681 F.3d at 73. The CIA clearly demonstrated that it does. Indeed, the district court did not appear to question that the information it ordered released relates to intelligence sources and methods.

( ) For example, the court did not take issue with the CIA's assertions that disclosure of the fact that the CIA , or the fact that the CIA , would reveal intelligence methods and activities.[16] (JA 209-10, CA 113-14 [Tr. 4-5]). The court also did not

[15] (U) Unlike the earlier version of the statute at issue in *Sims*, which "made the Director of Central Intelligence 'responsible for protecting intelligence sources and methods from unauthorized disclosure,'" 471 U.S. at 167 (quoting 50 U.S.C. 403(d)(3)), the amended statute provides that "[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure," 50 U.S.C. § 3024(i)(1). However, the CIA Director may still exercise this authority pursuant to delegation and guidance from the DNI. *DiBacco v. U.S. Army*, 795 F.3d 178, 197-99 (D.C. Cir. 2015). Indeed, in another case involving a CIA assertion of Exemption 3 and the National Security Act, this Court observed that "[t]he statutory provision at issue in *Sims* was a materially identical precursor to section 102A(i)(1)." *ACLU v. DOJ*, 681 F.3d at 73 n.13.

[16] (U) As the CIA explained, "[i]ntelligence activities refer to the actual implementation of intelligence methods in the operational context." (JA 65). Consequently, the disclosure of intelligence activities will almost invariably risk exposing intelligence methods.

dispute that disclosure of the CIA's [redacted] would reveal intelligence methods and activities. (JA 215, CA 119 [Tr. 10]). The court nevertheless ordered disclosure on the ground that the information, in the court's opinion, is supposedly "too old and too ordinary" (JA 210, CA 114 [Tr. 5]; *id.* (same for information from "years ago")), or "too well known" (JA 215, CA 119 [Tr. 10]). This was erroneous—there is no time limit on the National Security Act's protection of intelligence sources and methods, nor is there an exception for methods that a court may perceive as "ordinary" or "well known." *See Fitzgibbon v. CIA*, 911 F.2d 755, 762-64 (D.C. Cir. 1990) (rejecting arguments that CIA information regarding intelligence sources and methods was not protected by National Security Act because it was "nonsensitive," "basic and innocent," "generally known," or "old").

([redacted]) The district court likewise erred in ordering disclosure of specific details relating to the CIA's construction of detention and interrogation facilities, which was part of the CIA's methods and activities at the time. The district court opined that "[i]t only shows you're doing the right thing" (JA 224, CA 128 [Tr. 19]), but in fact those details reveal far more. The information would reveal specifics about how the CIA went about detaining individuals for interrogation for intelligence purposes. It is therefore protected by the National Security Act and Exemption 3, whether or not it shows that the CIA was "doing the right thing."

That the district court did not perceive any harm from disclosure (JA 224, CA 128 [Tr. 19] ("I don't see a harm with that.")), is also irrelevant under Exemption 3. In enacting the National Security Act, Congress made the determination that the unauthorized disclosure of intelligence sources and methods would be harmful. *See Sims*, 471 U.S. at 170-73; *Elec. Privacy Info. Ctr.*, 678 F.3d at 931; *Fitzgibbon*, 911 F.2d at 762.

(U) The Supreme Court has specifically rejected efforts by courts to narrow the definition of "intelligence sources and methods" protected by the National Security Act. In *Sims*, the court of appeals had refused to accept the CIA's assertion that disclosing researchers' names would reveal intelligence sources protected under the National Security Act and Exemption 3; the court narrowly construed the statute to protect "only those 'intelligence sources' who supplied the Agency with information unattainable without guaranteeing confidentiality." 471 U.S. at 174. The Supreme Court rejected this "crabbed reading" of the Act's protection. *Id.* The plain meaning of "intelligence sources and methods," the Court concluded, "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; *see also id.* at 170, 173 (legislative history "also makes clear that Congress intended to give the Director of Central Intelligence broad power to protect the secrecy and integrity of the intelligence

process," and "gave the Agency broad power to control the disclosure of intelligence sources").

(U) "Given the Supreme Court's sweeping language in *Sims*," and the fact that the National Security Act was "congressionally designed to shield processes at the very core of the intelligence agencies--intelligence-collection and intelligence-source evaluation," the D.C. Circuit has recognized that Exemption 3 and the National Security Act afford broader protection than Exemption 1. *See Fitzgibbon*, 911 F.2d at 764 (rejecting "the importation of [Exemption 1] standards into the [E]xemption 3 analysis"). The plaintiff in *Fitzgibbon* argued that certain CIA information regarding Jesus de Galindez, a Basque exile and critic of the Trujillo regime in the Dominican Republic who was last seen in New York City in 1956, was not worthy of protection under Exemption 3 and the National Security Act. *Id.* at 757, 762-64. Although the district court initially found some of the information to be "nonsensitive," or even "so basic and innocent that its release could not harm the national security or betray a CIA method," following the Supreme Court's decision in *Sims*, the district court upheld the CIA's assertion of Exemption 3 and the National Security Act to protect the information. *Id.* at 758. The D.C. Circuit agreed, emphasizing that under *Sims*, "[i]t is not the province of the judiciary. . . to determine whether a source or method should be . . . disclosed." *Id.* at 762 (quoting *Sims*, 471 U.S. at 179 ("[I]t is the responsibility of the Director

of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence gathering process.")).

(U) Likewise, the D.C. Circuit rejected the plaintiff's argument that "methods that might be generally known--such as physical surveillance, or interviewing, or examination of airline manifests--must be disclosed." *Id.* at 763. The court noted that "protection of the fact of CIA use of even the simplest methods in certain situations keeps this Nation's adversaries guessing as to the goals of United States intelligence activities and the means of carrying them out." *Id.* Finally, the D.C. Circuit rejected the plaintiff's contention that the district court should have considered "the effect of the passage of time on materials withheld under [E]xemption 3." *Id.* at 764. All of these arguments, the D.C. Circuit held, were "invalidate[d]" by *Sims*. *Id.* at 762.

(U) By contrast here, the district court disregarded *Sims* and improperly applied its own "limiting definition" of the intelligence methods protected under the National Security Act. *Sims*, 471 U.S. at 169. The district court effectively excluded from the Act's protection information that the court—in its own, uninformed opinion—found "too old," "too ordinary," "too well known," or otherwise harmless to disclose. That is exactly what *Sims* instructed courts must

not do, as the D.C. Circuit recognized in *Fitzgibbon*. Such "judicial narrowing" of the CIA's authority to protect intelligence sources and methods under the National Security Act "not only contravenes the express intention of Congress, but also overlooks the practical necessities of modern intelligence gathering—the very reason Congress entrusted this Agency with sweeping power to protect its 'intelligence sources and methods.'" *ACLU v. DOJ*, 681 F.3d at 73 (quoting *Sims*, 471 U.S. at 169; quotation marks omitted); *Fitzgibbon*, 911 F.2d at 763 ("the Supreme Court in *Sims* made it clear that Congress intended intelligence sources and methods to be protected, and that the Director of Central Intelligence is charged with that function"). All of the information ordered released by the district court "fall[s] within the Agency's mandate to conduct foreign intelligence." *Sims*, 471 U.S. at 169; (JA 68-69). It is therefore protected by Exemption 3 and the National Security Act.

(U) POINT II

(U) The District Court Improperly Ordered Disclosure of References to Published Media Reports That Tend to Confirm Classified and Statutorily Protected Information

(U) The district court further erred by ordering disclosure of several passages of the Draft OMS Summary that discuss, and provide citations to, specific press reports on various aspects of the CIA's detention and interrogation program. The premise of the district court's ruling—that "[t]hese are public newspaper accounts

and they should be produced" (JA 219, CA 123 [Tr. 14])—is faulty. The author of the Draft OMS Summary does not merely summarize newspaper articles, as the district court surmised. Rather, the author's selection of specific press reports to discuss, his focus on particular aspects of the reports, and the manner in which he describes them—all tend to reveal classified and statutorily protected information that the CIA has not officially acknowledged. The CIA's explanation for withholding this information is logical and plausible, and the district court was wrong to reject it.

( ) As the CIA explained,

> Throughout [the Draft OMS Summary], there are press reports that are either confirmed or debunked by the author. Releasing information about which press reports were correct or incorrect with regard to details of the RDI Program would authenticate information that cannot be confirmed or denied without revealing classified and statutorily protected information.

(CA 16-19). In particular, many of the press reports

(CA 16; *see also* CA 17-19). To confirm reporting that individuals were detained by the CIA

( ) The CIA provided the district court with concrete examples of this during the January 18 *in camera* proceeding. (JA 218-19, 221-22, CA 122-23, 125-26 [Tr. 13-14, 16-17]). On page 22 of the Draft OMS Summary (JA 279, CA 43), the author observed that

(JA 279, CA 43 (footnotes omitted)).

( ) The district court permitted the CIA to redact the bracketed words, which characterize the accuracy or inaccuracy of specific assertions. (JA 220, CA 124 [Tr. 15]). However, the remaining text, which was ordered disclosed by the district court, (CA 43). The passages ordered disclosed by the court are not "just summaries of what's in the newspaper article," as the court suggested. (JA 219-20, CA 123-24 [Tr. 14-15]). Nor is it possible to redact the author's discussion to remove references to , as a reader could easily determine what had been redacted merely by consulting the cited newspaper reports.

( ) Similarly, on page 35 of the Draft OMS Summary, the author discussed press reports about the death of Gul Rahman, a detainee held

(JA, 292, CA 56 (footnotes omitted)). Contrary to the district court's interpretation that the author was "just summarizing" what was in the cited articles (JA 222, CA 126 [Tr. 17]), release of this passage would tend to confirm [redacted] This information remains classified. (CA 17).[17] Indeed, in the Draft OMS Summary itself, the district court permitted the CIA to withhold similar information concerning [redacted]. (*See, e.g.*, JA 290, CA 54 (discussion of Gul Rahman's detention, with references to [redacted] redacted)). The result should not be different simply because the information is presented in the form of a discussion of press reporting on the CIA's program; in both instances,

[17] ([redacted]) Among the documents produced by the CIA in this case was an Office of Inspector General Report of Investigation on the death of Gul Rahman, which redacted all references to [redacted]. *See* 15 Civ. 9317 (SDNY), ECF No. 53-7. The ACLU did not challenge those redactions.

the way the author presents the information would tend to reveal classified facts about the program.

( ) The other passages discussing press reports that the district court ordered disclosed likewise tend to confirm . (JA 300, CA 64 (footnote 87 on page 43 of the Draft OMS Summary, noting that); JA 311, CA 75 (footnotes 114-115 on page 54 of the Draft OMS Summary, citing articles describing); JA 322-23, CA 86-87 (pages 65-66 and footnotes 125 and 127-32 of the Draft OMS Summary, discussing and citing articles reporting that , and noting that one article);[18] JA 325-

[18] ( ) The district court permitted the CIA to redact the words (JA 230, CA 134 [Tr. 25]), but the text ordered released on page 65 of the Draft OMS Summary would still (JA 322, CA 86). The details of have not been publicly released, remain classified, and were withheld throughout the Draft OMS Summary. (CA 14-18).

26, CA 89-90 (pages 68-69 and footnotes 135 and 138-40 of the Draft OMS Summary, discussing and citing reports that provided [redacted] [redacted] and [redacted])).

(U) The CIA provided a logical and plausible justification for withholding these passages pursuant to Exemptions 1 and 3 (CA 16-19; JA 218-22, CA 122-26 [Tr. 13-17]), and the CIA's judgment is entitled to substantial deference. Yet the district court failed to give any deference to the CIA's views, and instead ordered disclosure based on the mistaken premise that the author was merely summarizing public newspaper accounts. That is not the case. By identifying specific press reports, focusing on particular aspects of the reports, and describing the reports in the way that he does, the author does more than simply summarize information that is already in the public domain. Release of these passages would tend to reveal classified and statutorily protected information that is protected under Exemptions 1 and 3, and the district court erred in ordering their disclosure.

([redacted]) Finally, the district court erroneously ordered release of information in the January 18 Transcript that would reveal classified information provided to the court *ex parte* and *in camera*. In explaining the CIA's justification for withholding the discussions of press reporting in the Draft OMS Summary, the government stated that "[m]any of those reports include information [redacted] [redacted] (JA 218, CA 122 [Tr. 13,

lines 23-25]; *see also* JA 218-19, CA 122-23 [Tr. 13, line 25, and Tr. 14, lines 1-2 and 5] (noting that the articles cited in footnotes 43 and 44 on page 22 of Draft OMS Summary, JA 279, CA 43, are); JA 222, CA 126 [Tr. 17, lines 2-4] (same for articles cited in footnotes 71 and 72 on page 35 of Draft OMS Summary, JA 292, CA 56; court ordered disclosure of statement, in response to statement by CIA counsel). In other words, in the context of the *ex parte* proceeding, the government . The court nevertheless ordered release of these statements in the Transcript. (JA 200, 204 (ordering disclosure of page 13, lines 24-25, page 14, lines 1, 2, and 5, and page 17, line 4, of Transcript, JA 122-23, 126, CA 129-30, 133); CA 144 (noting government's objection to release of these statements)). Because these statements reveal classified and statutorily protected information provided to the district court *in camera* in support of the CIA's withholdings under Exemptions 1 and 3, the district court erred in ordering their release in the Transcript. *See Islamic Shura Council*, 635 F.3d at 1169.

(U) CONCLUSION

(U) The amended judgment of the district court should be reversed to the extent it orders disclosure of classified and statutorily protected information in the Draft OMS Summary and the January 18 Transcript.

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

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

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