18-2265

IN THE
United States Court of Appeals
FOR THE
Second Circuit

AMERICAN CIVIL LIBERTIES UNION and 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 THE OFFICE OF INFORMATION POLICY,
Defendants.

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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ISSUE PRESENTED FOR REVIEW

Whether the district court erred in finding that the government failed to meet its burden of providing logical and plausible justifications for certain exemptions it claimed from the requirements of the Freedom of Information Act.

STATEMENT OF THE CASE

This appeal concerns discrete redactions to an 89-page account of the role of medical professionals in the Central Intelligence Agency's ("CIA") former torture program, entitled "Summary and Reflections of Chief of Medical Services on OMS Participation in the RDI Program." On August 14, 2015, following public release of the executive summary of the Senate Select Committee on Intelligence's *Committee Study of the CIA's Detention and Interrogation Program* and the government's accompanying broad declassification of related facts, Plaintiffs submitted a Freedom of Information Act ("FOIA") request for certain documents cited in the summary. Included among those documents was a retrospective account by the then-Chief of the CIA's Office of Medical Services ("OMS"), known as the Draft OMS Summary.

Plaintiffs filed this lawsuit on November 25, 2015, seeking to compel the CIA and other agencies to abide by FOIA's disclosure requirements. On October 14, 2016, the government moved for summary judgment, submitting both a public and an *ex parte* declaration in support of its motion. JA 55–95. On January 6, 2017, the government filed a supplemental declaration along with its reply brief. JA 96–125. The district court also granted the government an *ex parte* hearing on

March 29, 2017. JA 126.[1] None of the government's submissions in support of summary judgment specifically addressed the discrete information or arguments at issue in this appeal.

On September 27, 2017, the district court ordered the release of the Draft OMS Summary, but permitted the agency to redact information concerning "foreign liaison services," "locations of covert CIA installations and former detention centers," "classified code words and pseudonyms," and "classification and dissemination control markings." The court held that, except for these categories (which Plaintiffs did not challenge), the government had "made no effort" to establish the applicability of FOIA Exemptions 1 and 3 to the Draft OMS Summary. JA 174–75.

The government moved for reconsideration, requesting permission to file an *ex parte* submission identifying the specific information in the Draft OMS Summary that it contended was protected from disclosure under Exemptions 1 and 3, and explaining its justifications. JA 188–189. Although the district court found that the government had not made the showing required for reconsideration, the court nonetheless granted the government's motion to ensure that the government had the opportunity to make "full and proper arguments to support its position."

[1] The district court held a second *ex parte* hearing on the government's motion for summary judgment on July 27, 2017, but this second hearing did not address the Draft OMS Summary. JA 126–127.

JA 189. The district court afforded the government both the opportunity to submit another *ex parte* submission as well as an additional *ex parte*, *in camera* hearing. JA 190.

On January 18, 2018, during the *in camera* hearing, the district court made rulings on each of the government's claimed withholdings in the Draft OMS Summary. JA 206–38, CA 110–42. The district court "upheld the majority of the CIA's withholdings under Exemptions 1 and 3," Gov. Br. 14, while rejecting several discrete withholdings.

In particular, the district court held that while the agency could redact any information related to "the accuracy or inaccuracy" of press reports, mere references to the public press reports in the Draft OMS Summary were not themselves properly exempt from FOIA under Exemptions 1 and 3. *See* Gov. Br. 40 (the court "permitted the CIA to redact" those words "which characterize the accuracy or inaccuracy of specific assertions"); Gov. Br. at 17–18 (district court "permit[ted] the government to withhold only words or phrases that characterize the accuracy or inaccuracy of aspects of those reports"). The district court also held that the agency had failed to carry its burden with respect to two withholdings that the government describes as "the name of a city and a war in which OMS provided temporary medical coverage," Gov. Br. 22, "information concerning the CIA's construction of detention facilities," Gov. Br. 26, as well as additional

information that the government has completely redacted from the public filings in this appeal. The district court further ordered the release of related information in the public transcript of the January 18, 2018 hearing. JA 203–04.

SUMMARY OF ARGUMENT

In accordance with Congress's explicit mandate, the district court engaged in an independent, *de novo* evaluation of the Central Intelligence Agency's claims that information in the Draft OMS Summary was exempt from the disclosure obligations of the Freedom of Information Act. The court granted the agency numerous opportunities to meet the burden that Congress imposed upon it to establish the FOIA exemptions at issue, including allowing numerous supplemental and amended declarations, and holding two *in camera* hearings. The court also afforded the agency's submissions substantial weight, ultimately upholding the majority of the withholdings sought by the agency. Contrary to the government's vehement arguments, the fact that the district court rejected several discrete redactions sought by the government cannot and does not suggest that the court improperly failed to defer to the agency's judgments.

Specifically, the district court properly rejected the government's claim that references to public reports in the Draft OMS Summary, shorn of any characterizations of accuracy, would plausibly reveal protected information. The government's argument to the contrary does not match the justification quoted in

the public brief, is implausible on its own terms, and is inconsistent with the disclosures already made in the Draft OMS Summary. As to the remaining challenged redactions, Plaintiffs have seen neither the substance of the government's argument nor the court's decision. From the public record, however, it does not appear that the district court erred in finding that the government failed to show that the appealed withholdings would plausibly reveal protected information or cause harm. Finally, the government has not shown that information in the Draft OMS Summary that could not plausibly be classified under Exemption 1 would nonetheless reveal sources and methods protected under Exemption 3.

STANDARD OF REVIEW

This Court reviews a district court's ruling on a motion for summary judgment in a FOIA case *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. Dep't of Justice*, 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)). "Whether 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 DISTRICT COURT PROPERLY ENGAGED IN THE *DE NOVO* REVIEW FOIA MANDATES.

a. FOIA Requires Courts to Conduct *De Novo* Review of Agency Secrecy Claims.

FOIA "adopts as its most basic premise a policy strongly favoring public disclosure of information in the possession of federal agencies." *Halpern*, 181 F.3d at 286. Courts thus enforce a "strong presumption in favor of disclosure," *Associated Press v. U.S. Dep't of Defense*, 554 F.3d 274, 283 (2d Cir. 2009), and exemptions are given "a narrow compass," *Milner v. Dep't of Navy*, 562 U.S. 562, 571 (2011). In order to ensure that FOIA's objectives are realized, the Act expressly provides that a district court has "jurisdiction to enjoin an agency from withholding agency records and to order the production of any records improperly withheld;" the Act also makes clear that when reviewing the non-disclosure determination, "the court shall determine the matter de novo." 5 U.S.C. § 552(a)(4)(B). This robust judicial review is a critical aspect of FOIA.

In 1974, Congress overrode the Supreme Court's decision in *EPA v. Mink*, 410 U.S. 73 (1973), to ensure that federal judges are empowered to review national security withholdings *de novo*. *Ray v. Turner*, 587 F.2d 1187, 1190–91 (D.C. Cir. 1978). Congress noted that "a government affidavit certifying the classification of material pursuant to an executive order will no longer bring the curtain down on an applicant's effort to bring such material to public light." S. Judiciary Comm. Report, *Amending the Freedom of Information Act*, S. 2543, 93rd Cong. (May 16, 1974), *reprinted in* H. Subcomm. on Gov't Info. & Individual Rights, H. Comm. on Gov't Operations, 94th Cong., Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and Other Documents, at 182 (Mar. 1975) ("Source Book"). "That Congress felt strongly about [applying *de novo* review to classified materials] is shown by the fact that although the legislation was initially vetoed by President Ford, Congress overrode the President's veto by supermajorities of 371 to 31 in the House and 65 to 27 in the Senate." *Halpern*, 181 F.3d at 291.

Congressional lawmakers, in authorizing *de novo* review, "stressed the need for an objective, independent judicial determination, and insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security." *Ray*, 587 F.2d at 1194. The *de novo* standard of review ensures that judicial review is meaningful rather than

perfunctory; it is "essential to prevent courts reviewing agency action from issuing a meaningless judicial imprimatur on agency discretion." *A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 141 (2d Cir. 1994) (citing S. Rep. No. 89-813, at 8 (1965)). "[B]lind deference is precisely what Congress rejected when it amended FOIA in 1974." *Halpern*, 181 F.3d at 293.

Congress's decision to strengthen FOIA's judicial review provisions in the context of national security claims was expressly based upon the "extensive abuses of the classification system that [had] come to light in recent years." Source Book at 181. Without meaningful judicial review, Congress determined, there is no assurance that the classification system is not "cynical, myopic or even corrupt." *Id.*; *see also Lamont v. Dep't of Justice*, 475 F. Supp. 761, 768 n.22 (S.D.N.Y. 1979) (noting that the Senate Report urged that "'the courts will at least be vested with the authority to review secret classification' of documents to prevent the Executive Department's overuse of the classification system," and that this sentiment was strongly voiced by members of both Houses of Congress during FOIA's 1974 debates).[2]

[2] In the decades since FOIA was amended in 1974, the overclassification that Congress sought to curtail has only increased. For example, then-Deputy Secretary of Defense for Counterintelligence and Security Carol A. Haave conceded that approximately 50 percent of classification decisions are over-classifications. *Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing: Hearing Before the Subcomm. on Nat'l Sec., Emerging Threats & Int'l Relations of the H. Comm. on Gov't Reform*, 108th Cong. (2004) (testimony of Carol A.

b. The District Court Provided the Agency with Numerous Opportunities to Justify its Claims.

To ensure that its *de novo* review took account of all the agency's justifications for secrecy, the district court allowed the government to try and try again to meet the burden that Congress imposed. The government initially failed to provide virtually any specific justification for its claimed Exemption 1 and 3 withholdings in the Draft OMS Summary, despite submitting both *ex parte* and public declarations. JA 55–69, 95. The public filings provided only categorical and nonspecific claims about the information the government claimed as exempt in that particular document, and its *ex parte* declaration did not address the document at all. After Plaintiffs' opposition brief pointed out that the government had failed to provide any detail as to the claimed withholdings in the document, the government submitted—and the district court considered—a supplemental declaration that included a single sentence about specific withholdings under Exemptions 1 and 3 in the Draft OMS Summary. JA 105 ¶ 22. This was still insufficient, but the district court afforded the government yet another opportunity

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Haave), http://www.fas.org/sgp/congress/2004/082404transcript.pdf. Then-CIA Director Porter Goss told the 9/11 Commission, "we overclassify very badly. There's a lot of gratuitous classification going on, and there are a variety of reasons for them." *9/11 Commission Hearing* (2003) (statement of Porter Goss), *http://www.9-11commission.gov/archive/hearing2/9-11Commission_Hearing_2003-05-22.htm#panel_two.*

to specifically justify its claimed withholdings as to the Draft OMS Summary in an *in camera* session held on March 29, 2017. JA 126.

In its September 27, 2017 Order, the district court held that the government's meager efforts were insufficient to show that the CIA had successfully borne the burden that FOIA imposes on agencies seeking to keep information from the public. The government had offered only "conclusions without reasons," with no "specific reference to information contained in" the Draft OMS Summary. JA 174. Moreover, as the district court explained, "the Government ha[d] made no effort—despite its decision to bolster its initial submission with an Amended Vaughn Index and a supplemental declaration—to show that the redacted information in [the Draft OMS Summary] was in fact 'properly classified.'" JA 174–75. Thus, applying this Court's guidance in *Halpern*, 181 F.3d at 290, and *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009), the district court held that the government's initial and supplemented submissions had failed to carry its burden. JA 174.

The government moved for reconsideration, requesting that the district court permit it to make another sealed submission, specifying the information in the Draft OMS Summary that the agency claimed was subject to Exemptions 1 and 3, and providing further explanation for withholding. JA 188–89. Although the district court found that the government had not made the showing required for

reconsideration under the test set forth by this Court in *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust*, 729 F.3d 99, 104 (2d Cir. 2013), the court still granted the government yet another opportunity to justify its claimed withholdings. JA 189. The district court explained that while "Defendant has not made a sufficient showing to warrant reconsideration under well-settled case-law . . . [i]ssues of national security are involved" and the government would be provided additional opportunities to make "full and proper arguments to support its position." JA 189. The district court afforded the government both an additional *ex parte* submission as well as another *in camera* hearing, held on January 18, 2018. JA 190, 199.

All told, the district court permitted the government to support its claimed Exemption 1 and 3 withholdings with an initial declaration, a supplemental declaration, and an amended supplemental classified declaration. The district court further granted the government two *ex parte*, *in camera* hearings, spaced ten months apart, during which it could attempt to justify its withholdings to the court. Finally, the court provided the government multiple opportunities to propose and justify redactions to the transcript of the January 18 *in camera* hearing. After finding that the CIA's proposed transcript redactions were overbroad, the district court "granted the CIA an opportunity to comment on those rulings." Gov. Br. 5.

The district then considered a further *ex parte* submission by the government in support of its claims of secrecy. JA 201–202.

c. The District Court Gave Substantial Weight to the Agency's Submissions, Upholding the Majority of the Claimed Withholdings Under Exemptions 1 and 3.

As the government acknowledges, once it supplemented its initial submissions through an additional *ex parte* declaration and hearing, the district court "upheld the majority of the CIA's withholdings under Exemptions 1 and 3." Gov. Br. 14. In addition to the large number of redactions that the district court upheld solely on the basis of the *ex parte* submissions, *see, e.g.*, JA 216, 234 (upholding redactions), the transcript shows that the district court afforded substantial weight to the agency's further *in camera* justifications, *see, e.g.*, JA 212–13, 216–217, JA 226–7 (questioning but upholding redactions once government supplied justifications during hearing).

The district court's rulings on the transcript redactions likewise show that it gave substantial weight to the agency's submissions. After the CIA proposed an overbroad set of redactions, the district court approved numerous redactions, "directed the CIA to lift sixteen sets of redactions in the Transcript, but granted the CIA an opportunity to comment on those rulings." Gov Br. 5. The government effectively concedes that many of its original redactions were unnecessary, as the agency subsequently "lifted most of the redactions as the district court had

directed." Gov. Br. 5. The district court then considered another classified, *ex parte* submission from the government, after which it "sustained one of the government's objections in full and two objections in part." Gov. Br. 6.

Although the district court did not agree with every single secrecy claim made by the agency, this hardly means that the district court "failed to give any deference to the CIA's views," Gov. Br. 43, nor that it "disregarded the logical and plausible justifications proffered by the CIA," Gov. Br. 22. Instead, the record shows that the district court deferred to the agency's views and justifications, and that the court's *de novo* review revealed that some—a minority—of the claimed withholdings failed the requirement of being logical and plausible. That the district court rejected certain, specific agency claims does not, however, indicate legal error; the government has effectively conceded that the court properly rejected several of its proposed redactions under Exemptions 1 and 3. Gov. Br. 18 n.11 (acknowledging that "[t]he 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)"). The government's concession as to the CIA's overbroad secrecy claims extends to the transcript as well. By its own account, the CIA initially claimed that the January 18 Transcript required numerous redactions to protect national security. But after the Court rejected numerous of its proposed

redactions, the CIA "lifted most of the redactions as the district court had ordered." Gov. Br. 5.[3]

In short, the district court followed both the letter and the spirit of FOIA. As Congress intended, the court provided an "objective, independent judicial determination," in line with Congress's insistence that "judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security." *Ray*, 587 F.2d at 1194; *see* S. Rep. No. 93-854 (1974), *reprinted in* Source Book at 183 ("The judgments involved may often be delicate and difficult ones, but someone other than interested parties—officials with power to classify and conceal information—must be empowered to make them."). When the agency submitted only threadbare, nonspecific justifications, the district court properly rejected them. *See Halpern*, 181 F.3d at 293 (rejecting as insufficient a declaration that "read[s] more like a policy justification for § 1.3(a)(4) of Executive Order 12,356, while barely pretending to apply the terms of that section to the specific facts of the documents at hand"). But the court afforded the agency numerous opportunities to meet the burden that FOIA imposes. And when the government finally proffered specific justifications, the district court

[3] The government further concedes that it "mistakenly advised the district court that the existence of a former CIA facility at Guantanamo remains classified," and attempted to withhold information on this basis. The government now admits this was an impermissible basis for withholding. Gov. Br. 27 n.14.

afforded them substantial weight, ultimately upholding the majority of the agency's withholdings.

In sum, it is simply not correct that, because the district court did not uphold each and every one of the agency's claims, it showed an improper lack of deference to the agency determinations, as the government claims. To the contrary, as the law provides, and as the government effectively concedes with regard to at least some redactions, the district court was entirely correct to reject a discrete set of the government's withholdings and to order the limited disclosure that followed, consistent with FOIA.

II. THE DISTRICT COURT CORRECTLY FOUND THAT THE AGENCY FAILED TO JUSTIFY THE DISCRETE EXEMPTIONS AT ISSUE HERE.

a. The Agency Failed to Establish that References to Published Media Reports in the Draft OMS Summary, Stripped of Claims of Accuracy, are Logically or Plausibly Exempt from FOIA.

The government argues that the district court improperly disregarded the agency's asserted justification and ordered the disclosure of citations to, and summaries of, publicly available press reports. Gov. Br. 37. But rather than disagreeing with the agency's asserted justification, the district court's ruling, which permitted redaction of those portions of the Draft OMS Summary that characterized the accuracy or inaccuracy of the reports, was entirely consistent

with it. In any event, the government has provided no plausible justification for redacting bare citations to published media reports.

Contrary to the government's claim that the district court failed to give substantial weight to the agency's justifications regarding press reports, the district court's ruling in fact comports with the agency's asserted rationale. The agency's justification for redacting certain information related to published media reports—at least as quoted in the public brief—was that harm would be caused by "[r]eleasing information about which press reports were correct or incorrect with regard to details of the RDI Program." Gov. Br. 38 (quoting CA 16–19). According to the agency, the Draft OMS Summary's assessments of "which press reports were correct or incorrect . . . would authenticate information that cannot be confirmed or denied without revealing classified and statutorily protected information." *Id.* But the district court did not disregard this explanation. Instead, as the government acknowledges, the court "permitted the CIA to redact" those words "which characterize the accuracy or inaccuracy of specific assertions." Gov. Br. 40; *see also* Gov. Br. 17–18 (district court "permit[ted] the government to withhold only words or phrases that characterize the accuracy or inaccuracy of aspects of those reports"). The district court's order thus addresses precisely the agency concerns quoted in the government's public brief.

Nor, at least in the public filings, did the agency's declarant ever proffer the extraordinary claim that bare references to press reports would themselves independently reveal protected information. Instead, the agency's declarant apparently referred to "press reports that are either confirmed or debunked by the author," and claimed only that "information about which press reports were correct or incorrect" could authenticate protected information. Gov. Br. 38 (quoting CA 16–19). Nor do the unredacted statements of the CIA personnel at the *ex parte* hearing support this argument. *See* JA 219 (statement of CIA Associate General Counsel that "where we have news reports in the agency, and *if we do confirm their veracity*, then we are confirming some of the classified information that may be in them") (emphasis added).

The government's attempts to stretch the narrow justification for withholding "authenticating" information are neither plausible nor logical. *See Milner*, 562 U.S. at 571 (FOIA's exemptions must be "given a narrow compass"). The government argues that even stripped of any characterization of accuracy or inaccuracy, bare citation or summarization of public articles will somehow reveal classified information—despite the fact that any language that could "authenticate" the classified information would be redacted. The government's effort to expand this justification to cover any citation or summary of public information is too tenuous and unreasoned to carry the government's burden, and the district court

was correct to reject it. *Cf. Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999) ("'[T]he logic of FOIA' mandates that where information requested 'is truly public, then enforcement of an exemption cannot fulfill its purposes.'" (quoting *Niagara Mohawk Power Corp. v. U.S. Dep't of Energy*, 169 F.3d 16, 19 (D.C.Cir.1999))). Given that the subject matter of the Draft OMS Summary is already disclosed, as is the author's interest in citing both purportedly accurate and inaccurate articles relating to the CIA program, it is not plausible that the mere fact of citation to a public article would reveal information properly classified under Exemption 1 or protected from disclosure under Exemption 3.

The implausibility of the government's position in this appeal is demonstrated by the information it has already disclosed in accordance with the district court's order. For example, although the government previously argued that footnote 70 should be withheld, it now concedes that this footnote, which cites a March 2003 *New York Times* article, must be released. Gov. Br. 18 n.11. And along with the citation of the article, the agency has disclosed both the author's characterization of the article as "error-filled," and his or her decision to focus on and summarize that article's specific description of a CIA "interrogation at Bagram Air Base" in Afghanistan. JA 292. According to the government's logic, these references to the article on JA 292 should have been protected because of their purported "tendency" (no matter how remote) to reveal the existence or

nonexistence of a CIA interrogation facility in Afghanistan—information that the CIA maintains it has not officially acknowledged. *See* JA 64 (asserting that "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 Senate Select Committee on Intelligence's report] because of this sensitivity")). But given the information that the government has revealed on JA 292, the release of which does not in any way "authenticate" the existence or nonexistence of a CIA interrogation facility in Afghanistan, the government's position with regard to the other references to the public articles makes little sense. That is, the agency cannot have it both ways, asserting on the one hand that "the CIA has consistently refused to confirm or deny" facility locations and complaining that references to press reports would authenticate this information, while on the other hand maintaining that precisely such disclosures on JA 292 do not authenticate anything.

Simply put, references to (and summaries) of press reports do not plausibly tend to reveal protected information. Shorn of characterizations of accuracy as to specific protected information (*e.g.*, "The article incorrectly suggested the CIA facility was at Bagram"), mere references to public press reports do nothing to

authenticate information otherwise redacted in the Draft OMS Summary and are accordingly not exempt from disclosure.[4]

In any event, even if there were some plausible justification for withholding the summaries and discussions of press reports—the author's "focus on particular aspects of the reports, and the manner in which he describes them," Gov. Br. 38—the district court was correct to at least order the release of bare citations to press reports in the document. The citations do not themselves reveal any focus on particular information contained somewhere in a report, nor do they tend to authenticate or deny any specific information. For example, the article cited in footnote 70 reports that CIA captives "were initially taken to a secret C.I.A. installation in Thailand." Raymond Bonner, Don Van Natta, Jr., & Amy Waldman, *THREATS AND RESPONSES: INTERROGATIONS; Questioning Terror Suspects in a Dark and Surreal World*, N.Y. Times (Mar. 9, 2003), https://nyti.ms/2zYmKZU. In another article that the government concedes can be revealed without jeopardizing national security, it is reported that a former CIA detainee, Khaled al-Masri, stated that he was "kidnapped by the Macedonian authorities at the border," "interrogated the first night in Macedonia," and then

[4] The author of the Draft OMS Summary refers to the article in footnote 70 as "error-filled" but there are no public indications of whether the author believes the errors apply to the location of CIA facilities, *i.e.*, to information the agency believes is protected from disclosure. In any event, the district court's order expressly permitted the government to withhold characterizations of press reports as to accuracy or inaccuracy.

flown "to a prison in Afghanistan." Don Van Natta, Jr. & Souad Mekhennet, *German's Claim of Kidnapping Brings Investigation of U.S. Link*, N.Y. Times (Jan. 9, 2005), https://nyti.ms/2zSUOXB; *see* JA 320, n.124. That the government did not redact these citations demonstrates that mere citations to articles do not themselves tend to confirm or deny anything. That is, the mere fact that the author of the Draft OMS Summary cited articles that themselves, at some point, refer to secret CIA prisons in Thailand and Afghanistan, and detention in Macedonia, does not plausibly "tend to reveal classified and statutorily protected information" contained in the articles themselves. *See, e.g.*, *N.Y. Times Co.*, 756 F.3d at 120 (finding that "[w]ith the redactions and public disclosures discussed above, it is no longer either 'logical' or 'plausible' to maintain that disclosure" of document "risks disclosing any aspect of 'military plans, intelligence activities, sources and methods, and foreign relations'"). Consequently, such citations may not be withheld.

b. The Agency Does Not Appear to Have Established that the District Court Erred in Rejecting the Other Challenged Withholdings.

The government has provided little public justification for the reasons it believes the district court erred in rejecting the remaining withholdings at issue in this appeal. Plaintiffs therefore operate at a distinct disadvantage: they know neither the nature of much of what the government seeks to withhold, the bases for

the government's claims of secrecy, nor the district court's full reasons for rejecting those claims. However, the record reflects both that the district court performed the independent review mandated by Congress and that the government's claims of secrecy were, at least in part, implausible and overbroad. Plaintiffs therefore have no reason to assume that the district court improperly disregarded the government's justifications when it rejected several specific and discrete claims. *See Halpern*, 181 F.3d at 293 ("[B]lind deference is precisely what Congress rejected when it amended FOIA in 1974.").

Among the only arguments the government makes with any specificity is that information redacted from the first paragraph of page 53 of the OMS Summary, JA 310, CA 74, pertains to "construction of facilities to house detainees for interrogation." Gov. Br. 27. Because the CIA never made this argument publicly in the district court, Plaintiffs did not have an opportunity to address it below and so confront it here for the first time.

Plaintiffs respectfully submit that in weighing whether the government has provided a logical and plausible justification for withholding information pertaining to "construction of facilities to house detainees for interrogation," the Court should consider that the government years ago declassified the details that:

- "CIA also keeps detainees' cells illuminated 24-hours-a-day" with "two 17-watt T-8 fluorescent tube light bulbs";

- as a way to cope with the constant illumination, "some detainees are provided eyeshades" as a reward, while others are permitted to use blankets to block the light;
- OMS advised that white noise played in CIA facilities would not cause hearing loss if played at "82 dB or lower," and noise in the walkways was "played at all times below 79 dB";
- CIA used "closed-circuit surveillance" in the detention facilities;
- CIA used "goggles or other eye coverings" to "prevent the detainee from learning his location or the layout of the detention facility"; and
- "covert facilities in which the CIA houses those detainees were not designed as ordinary prisons, much less as high-security detention centers."

Memorandum from Steven G. Bradbury, Acting Assistant Attorney Gen., to John A. Rizzo, Acting Gen. Counsel, Cent. Intelligence Agency, *Re: Application of the Detainee Treatment Act to Conditions of Confinement at Central Intelligence Agency Detention Facilities* (Aug. 31, 2006), https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-rizzo2006.pdf.

In addition, in 2014, as part of the public release of the executive summary of the Senate Select Committee on Intelligence's report, the CIA declassified hundreds of new facts about its torture program. Among these facts were numerous additional details about the construction of CIA prisons, including that:

- An overseas CIA facility under construction in 2003 and opened in 2004 was constructed to "incorporate heating/air conditioning, conventional plumbing, appropriate lighting, shower, and laundry facilities";
- In spite of the availability of plumbing, "detainees undergoing interrogation were kept in smaller cells, with waste buckets rather than toilet facilities";
- An inspector general audit found that CIA facilities were "not equipped to provide medical treatment to detainees who have or develop serious physical or mental disorders"; and

- Following the audit, an OMS representative stated that a CIA facility "should not be activated without a clear, committed plan for medical provider coverage."

Senate Select Comm. on Intelligence, Committee Study of the CIA's Detention and Interrogation Program: Executive Summary at 62–63, 155 (Dec. 3, 2014), http://www.intelligence.senate.gov/study 2014/executive-summary.pdf.

As the government has already declassified numerous details about the CIA's construction of detention facilities, under this Court's guidance the relevant question is whether, in light of all the information the government has already released, "additional" disclosure of similar information "adds [anything] to the risk" of harm. *N.Y. Times Co.*, 756 F.3d at 120; *see also Cottone v. Reno*, 193 F.3d at 554 ("[M]aterials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record."). Importantly, in addressing this issue, this Court has not limited its inquiry to whether the government has disclosed information identical to the information sought by a FOIA requester. *See N.Y. Times Co.*, 756 F.3d at 120 n.19 (rejecting "rigid application" of disclosure matching requirement). Here, based on the extensive disclosures already made about CIA prison facilities, it appears entirely likely that whatever information the district court ordered disclosed from the first paragraph of page 53 of the OMS Summary (JA 310, CA 74) should be released.

That said, due to the paucity of the public justifications offered by the agency, Plaintiffs cannot assist the Court by offering specific arguments about the remainder of the redactions that the government appeals. *See Halpern*, 181 F.3d at 295 (noting that in the absence of "a sufficiently specific explanation from an agency . . . the adversary process envisioned in FOIA litigation cannot function"). The government asserts that the district court erred in finding information to be "too well known" or too harmless to withhold. Based on the limited information available to Plaintiffs, the record suggests that the district court may have been considering information to be "too well known" to withhold on the basis of the voluminous official acknowledgments that already exist with respect to the CIA's torture program. *See, e.g.*, *ACLU v. CIA*, 710 F.3d 422, 430 (D.C. Cir. 2013) (rejecting CIA argument under Exemptions 1 and 3 because "the Agency's declaration that 'no authorized CIA or Executive Branch official has disclosed whether or not the CIA . . . has an interest in drone strikes,' is at this point neither logical nor plausible" (citation omitted)). Likewise, the district court's assessments of harm could not have been erroneous if in light of all the information the government has already released, "additional" disclosure of similar information "adds nothing to the risk" of harm the agency claimed. *N.Y. Times Co.*, 756 F.3d at 120.[5]

[5] Under these circumstances, *in camera* review of the contested redactions in

c. The District Court Did Not Improperly Fail to Consider the Agency's Exemption 3 Claims.

The government argues that the district court erred in "failing to recognize" that the information it seeks to withhold is protected by Exemption 3 and the National Security Act, and that its disclosure "would reveal information relating to intelligence sources and methods." Gov. Br. 31. According to the government, "the district court did not appear to question that the information it ordered released relates to intelligence sources and methods," and is thereby exempt from disclosure under Exemption 3. Gov. Br. 32. But Exemption 3 requires that the agency provide a specific justification that a given disclosure would reasonably lead to revelation of a protected source or method, and it appears that the district court found the government's Exemption 3 arguments implausible for the same reason as its Exemption 1 claims failed.

Under Exemption 3, "agency records are protected under [the National Security Act] only to the extent they contain 'intelligence sources and methods' or if disclosure would reveal otherwise protected information." *CIA v. Sims*, 471 U.S. 159, 168 (1985). Of course, any document related to the CIA inherently bears some relationship to intelligence activities, sources, or methods, however remotely,

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the Draft OMS Summary is appropriate. *See Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 n.2 (2d Cir. 1999) ("[I]t is the well settled practice of this Court to conduct in camera review of contested documents in a FOIA dispute.").

because intelligence is what the Central Intelligence Agency engages in. *Cf. ACLU v. CIA*, 710 F.3d at 430 ("The defendant is, after all, the Central *Intelligence* Agency."). Exemption 3 thus requires a showing that disclosure of a CIA document could reasonably be expected to reveal a secret source or method. *See Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982) ("The proper standard to determine whether [the National Security Act] applies to such a situation is whether the CIA demonstrates that an answer to the query 'can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods.'" (quoting *Halperin v. Central Intelligence Agency*, 629 F.2d 144, 147 (D.C. Cir. 1980))). Otherwise, the CIA would effectively be exempt from FOIA's reach—the opposite of what Congress intended. *See, e.g.*, Karen A. Winchester & James W. Zirkle, *Freedom of Information and the CIA Information Act*, 21 U. Rich. L. Rev. 231, 256 (1987) (detailing congressional rejection of the CIA's plea to "exclude totally the CIA . . . from the requirements of FOIA"); *Phillippi v. CIA*, 546 F.2d 1009, 1015 n.14 (D.C. Cir. 1976) (rejecting reading of the National Security Act that "would accord the Agency a complete exemption from the FOIA" and permit CIA "to refuse to provide any information at all about anything it does"). As the D.C. Circuit explained with respect to Exemption 3, "the issue is whether on the whole record the agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign

intelligence in which the CIA is expert and given by Congress a special role." *Gardels*, 689 F.2d at 1105. Thus, while courts afford substantial weight to the agency's declarations, review under Exemption 3 must still, Congress has made clear, include *de novo* consideration of the CIA's claim that release of particular information would reasonably lead to the disclosure of an intelligence source or method.

Newspaper articles are simply not intelligence sources or methods. *Cf. N.Y. Times Co.*, 756 F.3d at 119 (approving of district court's "astute[]" observation that "legal analysis is not an 'intelligence source or method'"). Thus, under the Supreme Court's guidance in *Sims*, descriptions of, and citations to, newspaper articles may not be withheld "unless disclosure would reveal otherwise protected information." *Sims*, 471 U.S. at 168. It is, of course, true that virtually any newspaper article about the CIA "relates" in some way to an aspect of the agency's activities. But it does not follow that disclosure of a citation to a newspaper article would "reveal" anything about a protected intelligence activity, source, or method, and courts are empowered to judge whether the agency has plausibly made a showing that they would. Here, the agency explained how characterizations of accuracy as to aspects of the reports could reveal protected information, and the district court ordered redactions in accordance with that justification. But the district court did not err in refusing to accept the implausible argument that, once

redacted of any characterization as to accuracy, bare references to press reports in the Draft OMS Summary still revealed protected information. *See supra* Section II.A.

As to the remaining redactions, the government appears to argue that its burden under Exemption 3 is significantly lighter than under Exemption 1, and that the district court erred in failing to recognize this distinction. *See* Gov. Br. 31–35. The government relies on the fact that while both Exemptions 1 and 3 protect the disclosure of "intelligence activities (including covert action)," and "intelligence sources or methods," Exemption 1 alone requires a showing that "unauthorized disclosure could reasonably be expected to cause identifiable and describable damage to the national security." Exec. Order 13526 §§ 1.1(a)(3)–(4), 1.4(c)–(d), 75 Fed. Reg. 708, 709 (Dec. 29, 2009). The government further argues that the D.C. Circuit in *Fitzgibbon v. CIA*, 911 F.2d 755, 764 (D.C. Cir. 1990), held that "Exemption 3 and the National Security Act afford broader protection than Exemption 1." Gov. Br. 35.

To the extent that the district court found information had been officially acknowledged, and was therefore "too well known" to be withheld, the government overstates the distinctions between Exemptions 1 and 3. *Fitzgibbon* itself contrasted the analysis under Exemption 3 with that under Exemption 1 only "insofar as the latter analysis could be read to require the court to consider the

effect of the passage of time on materials," while no such requirement could be read into Exemption 3. *Fitzgibbon*, 911 F.2d at 764. When it comes to the official acknowledgments doctrine, by contrast, the D.C. Circuit has indicated that *Fitzgibbon* creates no distinction between Exemptions 1 and 3. In *Public Citizen v. Department of State*, the D.C. Circuit explained:

> Although *Fitzgibbon* concerns exemption 3 rather than exemption 1, this fact in no way affects its relevance to the instant appeal. In *Afshar* [*v. Department of State*, 702 F.2d 1125 (D.C. Cir. 1983),] we considered simultaneously claims that exemptions 1 and 3 had been waived, making no attempt to separate our analyses of the two exemptions and no suggestion that there was any need to do so. In cases in which exemption 3 is asserted in an effort to protect intelligence methods and sources, as it was in *Fitzgibbon* and *Afshar*, exemptions 1 and 3 have essentially identical aims: to preserve the Executive's freedom to refuse to disclose information that might compromise national security or foreign policy. In such cases, the *Afshar* criteria are equally applicable to both exemptions.

11 F.3d 198, 202 n.4 (D.C. Cir. 1993).

Other courts agree that, in the context of intelligence sources and methods, there is little functional difference between Exemption 1 and Exemption 3. *See, e.g.*, *Maynard v. CIA*, 986 F.2d 547, 555 (1st Cir. 1993) (finding review is essentially the same when "Exemptions 1 and 3 are claimed on the basis of potential disclosure of intelligence sources or methods"); *Military Audit Project v. Casey*, 656 F.2d 724, 736–37 n.39 (D.C. Cir. 1981) (noting that Exemption 3 provides overlapping protection with Exemption 1 where disclosure of classified information would reveal intelligence sources and methods); *Phillippi*, 546 F.2d at

1015 n.14 (noting where information properly classified to prevent disclosure of intelligence sources and methods "inquiries into the applicability of the two Exemptions [1 and 3] may tend to merge"); *Johnson v. CIA*, 309 F. Supp. 3d 33, 36 n.2 (S.D.N.Y. 2018) (noting that "[t]he same arguments and analysis that apply to the invocation of Exemption 3 in this circumstance also apply to the invocation of Exemption 1").

Accordingly, many of the government's Exemption 3 arguments fail for the same reason as did its Exemption 1 claims. The disclosure of public newspaper citations in the Draft OMS Summary, shorn of any characterizations of accuracy, does not plausibly reveal classified or statutorily protected information—as amply demonstrated by the numerous citations already disclosed in the document. *See supra* Section II.A. And to the extent the district court rejected the agency's claimed Exemption 1 withholdings as implausible based on official disclosures, *see supra* Section II.B, the analysis under Exemption 3 is identical and is similarly correct.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's judgment.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7,321 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: December 14, 2018

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CERTIFICATE OF SERVICE

On December 14, 2018, I filed and served the foregoing BRIEF FOR PLAINTIFFS–APPELLEES via this Court's electronic-filing system.

Dated: December 14, 2018

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