April 27, 2018

Hon. Catherine O'Hagan Wolfe
Clerk of Court
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION

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Re: *ACLU v. DOJ*, No. 17-157
(Oral argument scheduled May 15, 2018)

Dear Ms. Wolfe:

Plaintiffs–Appellees the American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the "ACLU") respectfully submit this letter brief in response to the Court's April 11, 2018 order requesting "the parties' views as to whether the Court has jurisdiction to adjudicate the claim presented by the Appellants," ECF No. 79. As explained below, the ACLU's view is that this Court lacks jurisdiction over the merits of the government's appeal of the district court's *judgment*, but may have jurisdiction at a later stage over the propriety of the redactions to the district court's *opinion*.

* * *

Because the government is not aggrieved by the district court's judgment, it lacks standing to bring—and this Court lacks jurisdiction over—this appeal.

The government's appeal seeks vacatur of "information concerning [REDACTED]," which is "potentially implicated" in "two records" sought by the ACLU pursuant to the Freedom of Information Act ("FOIA"). Gov't Br. 2. But the district court determined that those two records were "exempt from disclosure in their entirety," Gov't Br. 2, and thus did not order their disclosure. As this Court has explained, "[b]ecause standing to appeal is conferred only on parties 'aggrieved' by [a] judgment, a party generally does not have standing to appeal when the judgment terminates the case in [its] favor." *Concerned Citizens of Cohocton Valley, Inc. v. N.Y. State Dep't of Envtl. Conservation*, 127 F.3d 201, 204 (2d Cir. 1997); *accord In re DES Litig.*, 7 F.3d 20, 23 (2d Cir. 1993). Because the district court held that the government could continue to withhold the two relevant documents, there is no corresponding portion of the judgment from which to appeal.

The government's vacatur request to this Court apparently implicates a secret (to the ACLU and the public) subsidiary ruling by the district court that a government official's public statement legally constitutes an "official acknowledgment" that would defeat government claims of withholding the

information based on FOIA Exemption 1 or 3.[1] The government contends that because any documents potentially relevant to the acknowledgment were also withheld in full under Exemption 5, the district court's discussion of the information was both "unnecessary and inappropriate." Gov't Br. 34–38. In other words, the government contends the district court's discussion was dicta with which it disagrees. *See* JA 939 (explaining that after the court provided the government with a copy of its opinion to review for classified information, the government "submitted, under seal, what was, in essence, a motion for reargument, couched in the form of calling to [the court's] attention material that it thought [the court] might have overlooked in connection with two rulings"—presumably those at issue here).

But a gripe with analysis in the district court's opinion is simply not the same as an appeal of the district court's judgment. Instead, it is a request that this Court rewrite the district court's opinion more to the government's liking. That, however, is not the role of this Court, and it is not enough to

[1] The Second Circuit applies a three-pronged test for official acknowledgment: (1) the information must be "as specific as the information previously released"; (2) it must "match[] the information previously disclosed"; and (3) the information must have been "made public through an official and documented disclosure." *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009) (citation omitted). This test is not applied rigidly, and this Court "do[es] not understand the 'matching' aspect of the *Wilson* test to require absolute identity." *N.Y. Times Co. v. DOJ*, 756 F.3d 100, 120 & n.19 (2d Cir. 2014).

give the government standing to appeal. *See California v. Rooney*, 483 U.S. 307, 311 (1987) (explaining that appellate courts "review[] judgments, not statements in opinions"); *Abbs v. Sullivan*, 963 F.2d 918, 924 (7th Cir. 1992) ("[A] winner cannot appeal a judgment merely because there are passages in the court's opinion that displease him—that may indeed come back to haunt him in a future case. He can appeal only if the judgment gives him less relief than he considers himself entitled to." (citations omitted)); *Picard v. Credit Sols., Inc.*, 564 F.3d 1249, 1256 (11th Cir. 2009) (explaining that a party may not appeal to correct "dicta that is unnecessary to support the district court's . . . ruling"); *accord In re Bean*, 252 F.3d 113, 118 (2d Cir. 2001).

This Court has described two narrow exceptions to the jurisdictional rule: (1) where "the prevailing party is aggrieved by the collateral estoppel effect of a district court's rulings"; or (2) "where a prevailing party can show that it is aggrieved by some aspect of the trial court's judgment or decree." *In re DES Litig.*, 7 F.3d 20, 23, 25 (2d Cir. 1993). Neither exception applies in this case.

First, the district court's official-acknowledgment ruling would not subject the government to an adverse collateral estoppel effect in future litigation. *See Concerned Citizens*, 127 F.3d at 205–06; *In re DES Litig.*, 7 F.3d at 23–25. For the collateral estoppel bar to apply, four conditions must

be met: "(1) the issues in both proceedings must be identical, (2) the issue in the prior proceeding must have been actually litigated and actually decided, (3) there must have been a full and fair opportunity for litigation in the prior proceeding, and (4) the issue previously litigated must have been necessary to support a valid and final judgment on the merits." *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986). The issue the government is contesting here—the district court's conclusion that a fact had been officially acknowledged—was not "necessary to support a valid and final judgment on the merits." *Id.* The district court has discretion to determine how best to manage complex FOIA litigation, and the court properly exercised its discretion here by making the subsidiary ruling the government contests. *See* ACLU Br. 36 & n.21. However, because the documents that may have contained the officially acknowledged fact were ultimately withheld on other grounds, the government cannot claim that it will be collaterally estopped from making the same argument in future litigation.

Moreover, as this Court has suggested, "a prevailing party should not be entitled to appeal to avoid the preclusive effect of a subsidiary ruling, since the fear of preclusion is unfounded." *Concerned Citizens*, 127 F.3d at 205 (citing *Gelb*, 798 F.2d at 44, in which the Court ruled that "inability to obtain appellate review . . . does prevent preclusion"); *see Chase Manhattan*

Mortg. Corp. v. Moore, 446 F.3d 725, 727 (7th Cir. 2006); *Balcom v. Lynn Ladder & Scaffolding Co.*, 806 F.2d 1127, 1127–28 (1st Cir. 1986). That reasoning applies to the government's appeal here.

Second, the government cannot show that it is "aggrieved by some aspect of the trial court's judgment or decree." *In re DES Litig.*, 7 F.3d at 25; *see Concerned Citizens*, 127 F.3d at 204–05. The government's "appellate brief does not ask [this Court] to vacate any portion of the judgment"—i.e., the district court's ruling that the government could lawfully withhold the potentially relevant documents. *In re DES Litig.*, 7 F.3d at 25 (discussing *Elec. Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939)); *accord Concerned Citizens*, 127 F.3d at 205 n.3. And the government "does not want to abandon the outcome that dismisses the plaintiffs' claim with prejudice"—i.e., again, with respect to the two documents at issue. *In re DES Litig.*, 7 F.3d at 25. "[M]ore importantly," the district court's apparent ruling as to the potentially officially acknowledged information "do[es] not appear on the face of the judgment." *Id.*; *see* SPA 192. In short, as explained above, the government's complaint to this Court is not that it is aggrieved by the district court's judgment, but that it is unhappy with a portion of the district court's discussion. This Court's cases make clear that the latter

complaint is not sufficient to confer standing on the government standing to submit—or jurisdiction to this Court to decide—this appeal.

At this time, then, the Court of Appeals does not have jurisdiction over the government's challenge to the district court's official-acknowledgment ruling. However, the Court may have jurisdiction at a later stage over whether certain redactions to the district court's opinion are proper. As far as the ACLU can tell, the district court has not yet had occasion to review or identify for this Court which redactions in its 191-page opinion will continue to be necessary to protect properly withheld information, as opposed to redactions the government made simply to preserve its arguments for appeal (whether they were, in the end, appealable or not). Especially given the length of the district court's heavily redacted opinion, it would make little sense for this Court to engage in an exercise to identify the passages of the opinion that would reveal information that remains properly protected, as opposed to information that may now be publicly disclosed.

This Court should remand that task for the district court to complete in the first instance. *Cf., e.g.*, *United States v. Pickard*, 733 F.3d 1297, 1300 (10th Cir. 2013) ("Once a court orders documents before it sealed, the court continues to have authority to enforce its order sealing those documents, as

well as authority to loosen or eliminate any restrictions on the sealed documents." (citing *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 141 (2d Cir. 2004))); *Rocky Mountain Bank v. Google, Inc.*, 428 F. App'x 690, 692 n.4 (9th Cir. 2011) ("We leave the application of the usual standards for deciding redaction and sealing issues to the district court in the first instance."). If, at the completion of that effort, one or both of the parties believes that the redactions Judge McMahon makes to her final public opinion are improper or insufficient, the aggrieved party or parties can seek review in this Court by presenting a concrete appeal as to the presence (or absence) of particular information from the final public opinion.[2]

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[2] To be sure, in *New York Times Co. v. Department of Justice*, 806 F.3d 682 (2d Cir. 2015), this Court did review whether particular redactions to the district court opinion continued to be proper in the same proceeding in which it resolved FOIA claims. *See id.* at 688. But the propriety of the redactions to Judge McMahon's opinion was specifically presented to this Court for review on appeal. *See id.* at 684; *see* Br. for N.Y. Times at 2, *N.Y. Times Co. v. DOJ*, No. 14-4432 (2d Cir. Feb. 3, 2015), ECF No. 39. Moreover, Judge McMahon herself had flagged the propriety of continued redactions to her opinion for this Court's review. *See* 806 F.3d at 687–88.

In this case, however, Judge McMahon appears to have had just a few days to review the government's final proposed redactions pending appeal before publishing her public opinion, and nothing in the public record indicates that she engaged in the same type of process this time around. *See* Gov't Br. 3 n.1 ("The district court permitted the Government to redact the relevant passages of its decision to preserve the Government's ability to protect this information from public disclosure pending appellate review."). For those reasons, the ACLU does not believe that the issue is ripe before

Respectfully,

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this Court at this time.

If, however, this Court determines that it does have jurisdiction to consider the propriety of redactions, the ACLU respectfully requests the opportunity to submit an additional brief explaining what—as far as it can tell—should no longer be protected by redactions.