U.S. Department of Justice

United States Attorney
Southern District of New York

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April 27, 2018

BY ECF
Catherine O'Hagan Wolfe
Clerk of the Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: *ACLU v. United States Dep't of Justice*, 17-157 (2d Cir.)

Dear Ms. Wolfe:

Defendants-appellants (the "Government") respectfully submit this supplemental letter brief in accordance with the Court's Order dated April 11, 2018 (ECF No. 79). For the reasons set forth below, this Court has jurisdiction to adjudicate the questions presented by the Government's appeal.

A. **The Court Has Jurisdiction Under 28 U.S.C. § 1291 Because the District Court's Order Compels the Public Disclosure of Classified Information That the Government Sought to Withhold Under FOIA Exemption 1**

The Court has directed the parties to address "whether the Court has jurisdiction to adjudicate the claim presented by the Appellants," given that in the Court's view "none of the parties appears to be seeking relief from any provision of the district court's judgment." The Government respectfully submits that it does seek relief from the judgment, which incorporates the district court's final order

compelling the public disclosure of classified information in its decision, information that the Government sought to withhold pursuant to Exemption 1 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(1). Brief for Defendants-Appellants ("Gov't Br.) 3-4.

In its notice of appeal, the Government appealed from the final judgment entered by the district court on November 16, 2016. (Joint Appendix ("JA") 954). The judgment granted in part and denied in part the parties' respective cross-motions for summary judgment, "in accordance with the Court's Memorandum Decision and Order dated August 8, 2016." (Special Appendix ("SPA") 192 (judgment); SPA 1-191 (district court's Memorandum Decision and Order dated July 21, 2016, and signed and filed publicly in redacted form on August 8, 2016 ("Decision and Order")). In its Decision and Order, the district court ruled that the Government had officially acknowledged certain classified information that the Government sought to withhold under FOIA Exemption 1. The district court's order describes expressly the classified information that the court held had been officially acknowledged. That classified information would be disclosed publicly as a result of being included in the district court's decision.

In its appeal, the Government challenges the district court's ruling as both substantively and procedurally erroneous. Contrary to the district court's ruling, the Government has not officially acknowledged the specific classified information at

issue. Gov't Br. 20-34. And the ruling was procedurally inappropriate because it was entirely unnecessary for the district court to decide whether the classified information at issue had been officially acknowledged in order to decide whether the records sought by plaintiff were subject to disclosure under FOIA. Gov't Br. 34-38; Reply Brief for Defendants-Appellants ("Gov't Reply") at 3-8. The district court nevertheless ruled that the classified information, which it described with particularity in the Decision and Order, had been officially acknowledged. The court then refused to remove the challenged ruling from its Decision and Order, even though it was unnecessary.[1] The district court agreed to redact the ruling from the publicly filed decision for the sole purpose of allowing the Government to appeal the ruling.[2] The Government understands that, unless this Court directs otherwise, the district court will reissue its Decision and Order with the ruling unredacted.

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[1] (*See* Supplemental Classified Appendix ("CA") 201-05, 207 (Government's request to reconsider ruling at issue or remove it from Decision and Order); CA 31-33 (district court's ruling on reconsideration); JA 939 (district court's explanation on public record that after receiving a sealed submission from the Government seeking "reargument," the court responded by "adding a few paragraphs and making a few modest changes (none of which altered the conclusions reached) to the decision")).

[2] (*See* CA 216 (Government's August 5, 2016 classified letter to the district court providing the results of its classification review, and explaining that the ruling at issue had been redacted to preserve the Government's ability to appeal it); 15 Civ. 1954 (S.D.N.Y.), ECF No. 83 (redacted Decision and Order filed on August 8, 2016), ECF No. 84 (noting that "[b]oth parties will likely wish to appeal from some portions of the district court's decision (Docket #83)").

This Court therefore has jurisdiction over this appeal because the Government is aggrieved by the district court's final judgment. In 28 U.S.C. § 1291, Congress "vested appellate jurisdiction in the courts of appeals for review of final decisions of the district courts." *Deposit Guaranty Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 333 (1980). "Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom" under 28 U.S.C. § 1291. *Id.* Although "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it," *id.*, in this case the Government plainly did not receive all the relief it sought from the district court. To the contrary, the district court has compelled the release in its Decision and Order of specific classified information that the Government sought to withhold under FOIA Exemption 1.

Although the district court did not order the Government to disclose any records under FOIA as a result of the ruling at issue, that ruling is the functional equivalent of a disclosure order. The Government had asserted FOIA Exemption 1 to protect certain classified information, and the district court rejected that assertion, ruling (erroneously) that the information had been officially acknowledged and therefore was no longer protected by FOIA's exemptions. The district court's ruling, which describes with particularity the classified information that the district court ruled had been officially acknowledged, effectively orders disclosure of classified

information over which the Government has claimed an exemption. Whether exempt information is contained in a document ordered released or is instead released in the district court's Decision and Order, the practical effect is the same.

The principle that "[o]rdinarily, a prevailing party cannot appeal from a district court judgment in its favor," *In re DES Litig.*, 7 F.3d 20, 23 (2d Cir. 1983), therefore does not apply here. The district court's judgment was not in the Government's favor because it did not "grant the ultimate relief" the Government had requested—namely, protection from public disclosure of the documents *and information* that the Government claimed was exempt under FOIA. *See Concerned Citizens of Cohocton Valley, Inc. v. N.Y. Dep't of Envtl. Conservation* ("*CCCV*"), 127 F.3d 201, 204 (2d Cir. 1997) ("a party generally does not have standing to appeal when the judgment terminates the case in his favor" and "grants the ultimate relief a party requested"). Nor can it be said that the judgment "caused [the Government] no injury." *Picard v. Credit Solutions, Inc.*, 564 F.3d 1249, 1256 (11th Cir. 2009) ("Ordinarily, the prevailing party does not have standing to appeal because it is assumed that the judgment has caused that party no injury." (citation and quotation marks omitted)). The district court has compelled disclosure of classified information in its Decision and Order that the Government sought to withhold as exempt under FOIA. If the district court's ruling stands and the classified information in the decision is published, that disclosure will cause serious harm to

the national security, as the Government demonstrated below. (Gov't Br. 26-29; Gov't Reply 9 n.2). The Government cannot fairly be considered the "prevailing party" or "winner" in the district court. *In re DES Litig.*, 7 F.3d at 23; *Abbs v. Sullivan*, 963 F.2d 918, 924 (7th Cir. 1992).

This appeal is materially different from the cases cited in the Court's April 11, 2018, Order. The Government's appeal does not seek review of an interlocutory ruling, but rather the district court's final Decision and Order, incorporated into the judgment, which compels the disclosure of classified information. *See In re DES Litig.*, 7 F.3d at 23-25 (where appellant pharmaceutical company successfully moved for dismissal of complaint at trial for lack of prosecution, appellant lacked standing to appeal interlocutory rulings on personal jurisdiction and choice of law). Nor does the Government merely challenge dictum, or statements apart from the actual relief accorded, in the district court's Decision and Order. *See Picard*, 564 F.3d at 1256 (prevailing party not aggrieved by, and therefore could not appeal, dicta in district court's decision); *Abbs*, 963 F.2d at 924 ("a winner cannot appeal a judgment merely because there are passages in the court's opinion that displease him"); *see generally Camreta v. Greene*, 563 U.S. 692, 704 (2011) (appellate courts review "judgments, not statements in opinions" (quotation marks omitted)). The district court's inclusion of the ruling in the Decision and Order will itself cause harm to national security, and the issuance of the Decision and Order with the ruling

unredacted would grant partial relief to plaintiffs-appellees. (Gov't Br. 26-29; Gov't Reply at 9 n.2).

Indeed, if the district court had ordered the Government to disclose documents containing the classified information at issue, there would be no question that this Court would have jurisdiction to review that disclosure order, even if it were interlocutory. *See Ferguson v. FBI*, 957 F.2d 1059, 1063 (2d Cir. 1992) (noting that "[i]t is well established that partial disclosure orders in FOIA cases are appealable," and reviewing interlocutory orders compelling disclosure of records under FOIA). "To hold otherwise would be to force the government to let the cat out of the bag, without any effective way of recapturing it if the district court's directive was ultimately found to be erroneous." *Id.* (quoting *Irons v. FBI*, 811 F.2d 681, 683–84 (1st Cir. 1987) (quotation marks and alteration omitted)). The result should not be different here simply because the district court has compelled disclosure of classified information in its opinion rather than directing the Government to disclose it.

For the same reason, it is immaterial that the ruling would not have collateral estoppel effect in future litigation. *Compare CCCV*, 127 F.3d at 206 (where developer sought to challenge subsidiary determination that it feared would have adverse collateral estoppel effect, appeal dismissed because "the judgment now sought to be appealed will not prevent appellant from asserting whatever defenses it might have" in future litigation); *In re DES Litig.*, 7 F.3d at 23-24 (appeal dismissed

where interlocutory personal jurisdiction and choice of law rulings would not have collateral estoppel effect). While the Government would not be estopped from challenging the correctness of the district court's official acknowledgment ruling in future cases, absent relief from this Court, the Government will be immediately and irreparably harmed by the publication of classified information in the Decision and Order. *Compare Ferguson*, 957 F.2d at 1063-64 (finding no jurisdiction over interlocutory orders that directed the government to conduct research and additional searches, but did not compel disclosure of documents or information, as "there [wa]s no irreparable harm asserted"). Once the classified information in the Decision and Order is published, the damage will have been done. (Gov't Br. 26-29; Gov't Reply at 9 n.2); *In re Copley Press*, Inc., 518 F.3d 1022, 1025 (9th Cir. 2008) ("Once information is published, it cannot be made secret again."); *accord Ferguson*, 957 F.2d at 1063. Thus, although the ruling is not entitled to any legally preclusive effect, it will be preclusive as a practical matter. That is sufficient to demonstrate that the Government is aggrieved by the district court's judgment, and the Government therefore has standing to appeal under 28 U.S.C. § 1291.

B. Even if the Government Can Be Considered a Prevailing Party, the Court Has Jurisdiction Under 28 U.S.C. § 1291 to Correct the District Court's Adverse Ruling on Official Acknowledgment

Even if the Court were to consider the Government a prevailing party below, the Court may still exercise jurisdiction over the Government's appeal to correct the district court's error in making a ruling on official acknowledgment of classified information that was not necessary to resolve the status of any records sought under FOIA.

While a prevailing party "[o]rdinarily" cannot appeal from a district court judgment in its favor, *In re DES Litig.*, 7 F.3d at 23, that is a general rule of federal appellate practice, not an inflexible constitutional limitation. *Deposit Guaranty*, 445 U.S. at 333. "In an appropriate case, appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III." *Id.* at 334, *quoted in Trust for Certificate Holders of Merrill Lynch Mortgage Investors, Inc. Mortgage Pass-Through Certificates*, 496 F.3d 171, 173 (2d Cir. 2007); *accord Camreta*, 563 U.S. at 702.

For example, in *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939), the plaintiffs sued for infringement of a patent. In its decree, the district court adjudged the patent valid but dismissed the complaint for failure to prove infringement. *Id.* at 242; *Deposit Guaranty*, 445 U.S. at 334. The defendants

appealed from that portion of the judgment that adjudged the patent valid, and this Court dismissed the appeal on the ground that the defendants "had been awarded all the relief to which they were entitled, the litigation having finally terminated in their favor." *Electrical Fittings*, 307 U.S. at 242. The Supreme Court reversed, holding that there was jurisdiction "to entertain the appeal, not for the purpose of passing on the merits, but to direct reformation of the decree." *Id.* "The rationale of the decision was that the defendant was entitled to have [the finding of patent validity] out because, although it was not an estoppel, it might create some presumptive prejudice against him." *Harries v. Air King Products Co.*, 183 F.2d 158, 161 (2d Cir. 1950).

The Supreme Court has explained that appellate review was available in *Electrical Fittings* to correct the district court's error in "decid[ing] a hypothetical controversy" when it decided the question of patent validity after ruling that there had been no infringement. *Deposit Guaranty*, 445 U.S. at 335 n.7. The defendants in *Electrical Fittings* "could take the appeal to correct this error because there had been an adverse decision on a litigated issue, they continued to assert an interest in the outcome of that issue, and for policy reasons th[e] Court considered the procedural question of sufficient importance to allow an appeal." *Id.*

Relying on *Electrical Fittings*, the Supreme Court has also held that the denial of class certification is an "example of a procedural ruling, collateral to the merits of a litigation, that is appealable after the entry of final judgment." *Deposit Guaranty*,

445 U.S. at 336. In *Deposit Guaranty*, the named plaintiffs in a class action sought to appeal the denial of class certification following the entry of judgment in their favor based upon a tender from the defendant bank that was accepted by the district court over plaintiffs' objection. *Id.* at 329-31. The court of appeals had jurisdiction to entertain the appeal to review the asserted error in denying class certification, as that issue had been litigated and adjudicated, and plaintiffs-appellants retained a continuing individual interest in the outcome of the appeal based on their desire to shift part of the costs of litigation to those who would benefit if the class was certified and ultimately prevailed. *Id.* at 336.

Electrical Fittings and *Deposit Guaranty* demonstrate that the Court has jurisdiction to review the district court's error here, even if the Government is considered a prevailing party. The district court's official acknowledgment finding "stands as an adjudication of one of the issues litigated" below, and the Government has an obvious and compelling "continuing stake in the outcome of the appeal" that easily satisfies the requirements of Article III. *Id.*; *see also Camreta*, 563 U.S. at 702-03. Disclosure of the classified information at issue would cause actual, concrete, and immediate injury to the United States and the national security, and that injury is redressable by a decision from this Court directing the district court to remove the erroneous and inappropriate finding and the description of the withheld

information from its decision. *See Hollingsworth v. Perry*, 570 U.S. 693, 704-05 (2013) (discussing requirements for standing to pursue appeal).[3]

Moreover, the disclosure of classified information in a district court decision raises a "question of sufficient importance to allow an appeal." *Deposit Guaranty*, 445 U.S. at 335 n.7 (noting that in *Electrical Fittings*, 307 U.S. at 242, "for policy reasons this Court considered the procedural question of sufficient importance to allow an appeal"). The district court made an erroneous finding that the Government had officially acknowledged certain classified information—even though the finding was unnecessary to determine whether the records sought by plaintiffs were subject to disclosure under FOIA, and was therefore "a hypothetical controversy." *Id.* at 335 n.7. The district court refused the Government's request to delete the unnecessary finding from its decision. Thus, absent intervention by this Court, classified information will be revealed in the published decision—which, even if

[3] Because the public disclosure of classified information in the Decision and Order would itself cause harm, it is immaterial that the district court's ruling "do[es] not appear on the face of the judgment." *In re DES Litig.*, 7 F.3d at 25. So long as the appellant is aggrieved by the ruling and retains a stake in the appeal sufficient to satisfy Article III, it is not necessary that the ruling appear on the face of the judgment for this Court to have jurisdiction. *See Deposit Guaranty Corp.*, 445 U.S. at 334-36 (permitting appeal of district court ruling denying class certification); *see also id.* at 333 ("Ordinarily, only a party aggrieved by a judgment *or order* of a district court may exercise the statutory right to appeal therefrom." (emphasis added)), *quoted in St. Paul Fire & Marine Ins. Co. v. Universal Builders Supply*, 409 F.3d 73, 83 (2d Cir. 2005), *and Trust for Certificate Holders*, 496 F.3d at 173.

"not an estoppel," will cause manifest "prejudice" to the United States. *Harries*, 183 F.2d at 161.

These policy considerations are at least as weighty as those that prompted the Supreme Court to permit appeal notwithstanding the entry of judgment in favor of the appellants in prior cases. *See Deposit Guaranty*, 445 U.S. at 335, 336 (denial of class certification); *Electrical Fittings*, 307 U.S. at 242 (validity of patent). This Court has been careful to ensure that classified information is not revealed in judicial opinions—including in prior appeals in the related FOIA cases brought by the ACLU and The New York Times seeking disclosure under FOIA of classified records concerning the United States' use of targeted lethal force against terrorists. *See N.Y. Times Co. v. U.S. DOJ*, 756 F.3d 100 (2d Cir. 2014) ("*NYT I*"); *N.Y. Times Co. v. U.S. DOJ*, 806 F.3d 682 (2d Cir. 2015) ("*NYT II*"); *ACLU v. U.S. DOJ*, 844 F.3d 126 (2d Cir. 2016).

In those cases, the district court and this Court reviewed the classified records sought under FOIA (or a subset thereof), as well as classified declarations and briefing from the Government, *ex parte* and *in camera*. The district court's decisions, and one of this Court's opinions, contained classified information that was not filed on the public docket. *See ACLU v. U.S. DOJ*, 12 Civ. 794 (S.D.N.Y.), ECF No. 56 (referring on page 3 to classified appendix), ECF No. 90 (redacted opinion), ECF No. 128 (redacted opinion); *NYT I*, 756 F.3d at 117, 123 (classified information

redacted). This Court afforded the Government multiple opportunities to review the Court's initial opinions in the first and second appeals, and made alterations to certain language and/or redactions as a result of the Government's submissions following classification review. *See NYT I*, 756 F.3d at 144 n.23 (revised opinion); *NYT II*, 806 F.3d at 690.

This Court has also reviewed an earlier district court ruling—disputed by the Government—that certain information contained in the district court's decision did not implicate classified information and could be made public. In *NYT II*, the district court determined that three paragraphs in its decision should be made public notwithstanding the Government's contention that those paragraphs could be understood to imply a classified fact, namely, the nationality of a potential target of a drone strike. 806 F.3d at 688. The district court permitted this information to be redacted from its decision pending appeal to this Court. Upon review of the district court's ruling, this Court disagreed with the Government's reading of the three paragraphs at issue, but nevertheless ordered the redaction of certain words, at the Government's request, to "guard against even the remote possibility that a reader might conceivably infer the nationality of the potential target from the three paragraphs at issue." *Id.* at 689; *see id.* at 690.

Here, as in *NYT II*, the district court has included in its Decision and Order specific information that the Government has determined to be classified, but has

redacted that information from the public version of its decision pending appeal to this Court. Absent review by this Court, the information will be disclosed in the district court's published decision, resulting in harm to national security and the Government's interests in defending this case. Although the district court's ruling does not require disclosure of specific documents, it accomplishes the same result by compelling the disclosure of classified information the Government sought to withhold under FOIA. The Court should therefore permit appeal, at least for the limited purpose of directing the district court to remove the ruling and a description of the classified information from its Decision and Order. *See Electrical Fittings*, 307 U.S. at 242 (court of appeals had jurisdiction "to entertain the appeal, not for the purpose of passing on the merits, but to direct the reformation of the decree"); *Deposit Guaranty*, 445 U.S. at 336 (court of appeals "had jurisdiction to entertain the appeal only to review the asserted procedural error, not for the purpose of passing on the merits of the substantive controversy").

C. If the Court Concludes It Lacks Jurisdiction Under 28 U.S.C. § 1291, the Court Would Have Mandamus Jurisdiction to Review the District Court's Ruling Compelling Disclosure of Classified Information

Because the Court has jurisdiction to review the district court's final judgment and Decision and Order under 28 U.S.C. § 1291, there is no need to resort to the "extraordinary remedy" of mandamus. *In re City of New York*, 607 F.3d 923, 932 (2d Cir. 2010). If the Court were to determine that it lacked jurisdiction under

§ 1291, however, it would have mandamus jurisdiction to review the district court's ruling compelling disclosure of classified information in the Decision and Order. (Gov't Br. 4 n.2); *see Islamic Shura Council of Southern California v. FBI*, 635 F.3d 1160, 1164-69 (9th Cir. 2011) (granting writ of mandamus in FOIA case, vacating district court decision directing unsealing of interlocutory order, and directing district court to remove national security and sensitive law enforcement information from order).

First, if this Court were to hold that there is no jurisdiction under § 1291, the Government would have "no other adequate means to attain the relief it desires." *In re City of New York*, 607 F.3d at 932, *quoting Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380-81 (2004) (quotation marks and alteration omitted); *see Islamic Shura Council*, 635 F.3d at 1165 (finding this factor satisfied where district court order containing exempt information was not appealable, and unsealing the order as the district court had directed would "make the information permanently public in a way that is not correctable on later appeal").

Second, if appeal is not available under § 1291, issuance of a writ of mandamus would be "appropriate under the circumstances." *In re City of New York*, 607 F.3d at 932. In the context of a discovery ruling—which, like this case, involves a district court order that compels disclosure of protected information—the Court "look[s] primarily for the presence of a novel and significant question of law and the

presence of a legal issue whose resolution will aid the administration of justice." *Id.* at 939 (quotation marks and alterations omitted). This case presents the novel and significant legal question of whether a district court may make findings of official acknowledgment of classified information, and in the process disclose classified information, if those findings are not necessary to decide whether specific requested records are subject to disclosure under FOIA. Resolution of this issue will aid the administration of justice. This Court has refused to affirm similar rulings by the district court in the related litigation, *see ACLU*, 844 F.3d at 132 (declining to consider seven "facts" that district court found to be officially acknowledged after concluding that six alleged facts could not reasonably be segregated from documents and no disclosure would be ordered even if seventh alleged fact had been officially acknowledged), and resolution of the issue will provide guidance to this and other district courts. *Cf. Islamic Shura Council*, 635 F.3d at 1165 (mandamus relief justified where, among other factors, petition raised "new and important problems relating to a sanction in a FOIA case").

Moreover, "the presence of a novel question of law is not an absolute prerequisite" to mandamus relief. *See Linde v. Arab Bank, PLC*, 706 F.3d 92, 108 (2d Cir. 2013); *accord In re City of New York*, 607 F.3d at 932 n.17. "[D]etermining whether it is appropriate in [this Court's] discretion to issue the writ in a particular circumstance will hinge on different factors in different cases." *Linde*, 706 F.3d at

108. "A writ of mandamus may . . . be available if there is an extreme need for reversal of the district court's mandate," or where a district court order raises serious separation-of-powers or federalism concerns. *In re City of New York*, 607 F.3d at 939 n.16 (noting that "the Supreme Court has granted the writ to restrain a lower court when its actions would threaten the separation of powers by embarrassing the executive arm of the Government or result in the intrusion by the federal judiciary on a delicate area of federal-state relations" (citations, internal quotation marks and alteration omitted)).

Here, the district court has erroneously and unnecessarily compelled public disclosure of classified information that the executive branch has determined would harm national security if revealed. This Court has repeatedly affirmed the judiciary's "deferential posture in FOIA cases regarding the uniquely executive purview of national security." *Wilner v. NSA*, 592 F.3d 60, 76 (2d Cir. 2009); *see also ACLU v. DOJ*, 681 F.3d 61, 69 (2d Cir. 2012). Yet the district court completely disregarded the Government's concerns about disclosure and included the classified information in its Decision and Order. (Gov't Br. 26-29). This extraordinary circumstance, together with the "the particularly serious harms preventable only through issuance of a writ of mandamus," *In re Roman Catholic Diocese of Albany, New York, Inc.*, 745 F.3d 30, 37 (2d Cir. 2014), would make mandamus relief "appropriate under the circumstances" if the Court were to find no jurisdiction under

§ 1291. *Cf. Al Odah v. United States*, 559 F.3d 539, 544 (D.C. Cir. 2009) (invoking collateral order doctrine to exercise jurisdiction over appeal of interlocutory order compelling government to share classified information with petitioners' counsel, for "[o]nce the information is disclosed, the 'cat is out of the bag' and appellate review is futile"), *quoted in United States v. HSBC USA N.A.*, 863 F.3d 125, 134 (2d Cir. 2017).

Finally, the Government has demonstrated that in the absence of an appeal under § 1291, its right to a writ of mandamus is "clear and indisputable." *In re City of New York*, 607 F.3d at 932. For the reasons set forth in the Government's brief, the district court was wrong in ruling that the classified information at issue has been officially acknowledged. (Gov't Br. 20-34). Compounding this error, the district court's ruling was wholly unnecessary to decide whether the specific documents sought by the ACLU were subject to disclosure under FOIA. (Gov't Br. 34-38; Gov't Reply at 3-8). Absent review by this Court, properly classified information will be publicly disclosed in the Decision and Order, to the detriment of national security. (Gov't Br. 26-29; Gov't Reply at 9 n.2). And once the ruling is published on the docket, the disclosure "cannot be reversed." *Islamic Shura Council*, 635 F.3d at 1164. Accordingly, if an appeal is unavailable, mandamus relief is necessary to correct the district court's clearly erroneous ruling that would reveal on the public record classified information that the Government sought to withhold under FOIA

Exemption 1. *See id.* at 1169 (granting mandamus to correct clearly erroneous ruling directing disclosure in court order of national security and law enforcement information withheld under FOIA and provided to district court *in camera*).

We thank the Court for its consideration of this matter.

Respectfully,

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