18-2265

To Be Argued By:
SARAH S. NORMAND

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 18-2265

AMERICAN CIVIL LIBERTIES UNION,
AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs-Appellees,

—v.—

CENTRAL INTELLIGENCE AGENCY,

Defendant-Appellant,

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

Defendants.

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

REPLY BRIEF FOR DEFENDANT-APPELLANT

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Preliminary Statement

Defendant-appellant the Central Intelligence Agency ("CIA" or "government") demonstrated in its opening brief ("Gov't Br.") that the district court erred in ordering disclosure of discrete classified and statutorily protected information contained in a draft CIA document ("Draft OMS Summary") summarizing aspects of the CIA's former detention and interrogation program. In its opposition ("ACLU Br."), plaintiffs-appellees (the "ACLU") speculate about, misunderstand, or mischaracterize the information at issue, and ultimately fail to rebut the CIA's arguments.

ARGUMENT

POINT I

The District Court Erroneously Failed to Accord Substantial Deference to the CIA's Declarations

The ACLU and *amici curiae* make much of the principle that courts conduct *de novo* review in FOIA cases. (ACLU Br. 7-9; Brief of Amici Curiae ("Amici Br.") 5-16). But they fail to appreciate the equally important principle that, in matters implicating the United States' national security, judicial review is limited by the substantial deference owed to the judgments of the intelligence community. *See Ass'n of Retired Railroad Workers, Inc. v. U.S. Railroad Retirement Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987) ("*de novo* review in FOIA cases is not everywhere

alike"). This deference extends both to the CIA's determinations as to whether disclosure of particular information would reveal protected intelligence sources and methods under the National Security Act, 50 U.S.C. § 3024(i)(1), as amended, *see CIA v. Sims*, 471 U.S. 159, 179 (1985), and to its predictive judgments regarding the potential harms that could reasonably be expected to flow from public disclosure, *see ACLU v. DoD*, 901 F.3d 125, 134 (2d Cir. 2018); *ACLU v. DOJ*, 681 F.3d 61, 70 (2d Cir. 2012); *Wilner v. NSA*, 592 F.3d 60, 76 (2d Cir. 2009).

Such deference does not equate to a "rubber stamp." (Amici Br. 19). Rather, it is based on a judicial recognition that "it is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence gathering process." *Sims*, 471 U.S. at 179; *accord ACLU v. DoD*, 901 F.3d at 136 ("Judges do not abdicate their judicial role by acknowledging their limitations and deferring to an agency's logical and plausible justification in the context of national security; they fulfill it.").

This Court has thus repeatedly emphasized the "*substantial weight*" owed to intelligence community justifications for withholdings under both Exemptions 1

and 3. *ACLU v. DOJ*, 681 F.3d at 69 (emphasis in original).[1] Yet, far from according substantial weight to the CIA's justifications for withholding the information at issue in this appeal, the district court substituted its own opinion—not grounded in any record evidence—that the withheld information is supposedly "too old," "too ordinary," or otherwise harmless to release. (Gov't Br. 22-31, 37-44).

The ACLU's suggestion that the district court must have accorded the CIA's justifications substantial weight, simply because the court upheld the majority of the agency's withholdings (ACLU Br. 13, 15-16), is not logical. It does not follow that because the district court upheld some (or even most) of the CIA's determinations that it afforded the required deference to any or all of them. Nor does the government argue 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." (ACLU Br. 16).[2] Rather, as the government demonstrated in its opening brief and as shown in the record, with regard to the

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[1] *Accord New York Times Co. v. DOJ*, 756 F.3d 100, 112 (2d Cir. 2014), *opinion amended on denial of reh'g*, 758 F.3d 436 (2d Cir. 2014), *supplemented*, 762 F.3d 233 (2d Cir. 2014); *Wilner*, 592 F.3d at 76; *Doherty v. DOJ*, 775 F.2d 49, 52 (2d Cir. 1985); *Diamond v. FBI*, 707 F.2d 75, 79 (2d Cir. 1983).

[2] That the government is not making such a blanket argument is underscored by the fact the government does not challenge all of the district court's rulings in this appeal.

specific rulings at issue in this appeal, the district court did not give substantial weight to the CIA's logical and plausible justifications, but instead substituted its own opinions of whether particular information would cause harm if disclosed. (Gov't Br. 22-31; *see, e.g.*, JA 210 ("I value your argument. I disagree. That's to be produced. It is too old and too ordinary."); JA 210 ("It's [redacted] years ago, no relationship between what was and what came after that. Redaction is denied."); JA 215 ("It's too well known. That's to be published."); JA 219 ("These are public newspaper accounts and they should be produced."); JA 224 ("It only shows you are doing the right thing. . . . I don't see a harm with that.")).

The record belies the ACLU's suggestion that the CIA's justifications for its withholdings were "threadbare" or "nonspecific." (ACLU Br. 15). In addition to declarations and Vaughn indexes that described the categories of classified and statutorily protected information withheld from the Draft OMS Summary (and other responsive records) under Exemptions 1 and 3 (JA 60-69, 105, 125), the CIA submitted two detailed classified indexes addressing the specific classified and statutorily protected information withheld from the Draft OMS Summary (JA 196-97, CA 3-4 (declaration describing indexes); CA 7-19 (indexes)), and provided yet more information about the particular withholdings at issue during the *in camera* proceeding on January 18, 2018 (CA 113-37, JA 209-33 [Tr. 4-28]). The district court in several instances simply disregarded the logical and plausible justifications

for withholding offered by the CIA, and instead made its own judgments about whether information should be released to the public. This was error. (Gov't Br. 22-31); *see ACLU v. DOJ*, 681 F.3d at 71 (reversing district court disclosure order and finding that, "[a]ccording substantial weight and deference to the CIA's declarations," "it is both logical and plausible that disclosure of [the withheld] information pertaining to a CIA intelligence activity would harm national security").[3]

POINT II

The District Court Erroneously Failed to Consider That Exemption 3 Independently Protects the Withheld Information, Regardless of Any Showing of Harm

The district court also erred in failing to recognize or appreciate that, regardless of the court's own views about the purported harmlessness of the

[3] *See also Ctr. for Int'l Envtl Law v. Office of USTR*, 718 F.3d 899, 904 (D.C. Cir. 2013) (reversing district court disclosure order, finding that district court had improperly second guessed agency's evaluation that disclosure of document would harm foreign relations); *Maynard v. CIA*, 986 F.2d 547, 554-56 (1st Cir. 1993) (cited at ACLU Br. 31) (reversing district court disclosure order, finding it "at [the] very least arguable" that the withheld information could reveal intelligence sources and methods protected by the National Security Act and Exemption 3, as well as Exemption 1); *Bowers v. U.S. DOJ*, 930 F.2d 350, 357, 358 (4th Cir. 1991) (reversing district court disclosure order, and noting that "[w]hat fact or bit of information may compromise national security is best left to the intelligence experts"); *Taylor v. Dep't of the Army*, 684 F.2d 99, 109 (D.C. Cir. 1982) (according Army declarations the "utmost deference," finding Army compilation properly classified and exempt under Exemption 1, and reversing district court disclosure order).

information, the information at issue is independently protected from disclosure by Exemption 3, which does not require any showing of harm from disclosure. (Gov't Br. 31-32).

It is well settled—and the ACLU does not contest—that the CIA need not make any showing that disclosure would be harmful in order to protect intelligence sources and methods from disclosure under Exemption 3 and the National Security Act. (Gov't Br. 31); *see Elec. Privacy Info Ctr. v. NSA*, 678 F.3d 926, 931 (D.C. Cir. 2012); *Fitzgibbon v. CIA*, 911 F.2d 755, 764 (D.C. Cir. 1990); *Hayden v. NSA*, 608 F.2d 1381, 1390 (D.C. Cir. 1979). Nor can the ACLU dispute that the district court rejected the CIA's Exemption 3 withholdings on the ground that disclosure would not be harmful. (*See, e.g.*, JA 209-10 (rejecting CIA's assertion that information concerning intelligence method properly withheld under the National Security Act because the information, in the court's view, "is too old and too ordinary")).

The ACLU's attempts to support the district court's conclusion miss the mark. The ACLU begins by noting the unremarkable proposition that "'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.'" (ACLU Br. 27 (quoting *Sims*, 471 U.S. at 168; alteration omitted)). What the ACLU fails to recognize, however, is that the Supreme Court

in *Sims* made clear that the scope of the statute's protection is extremely broad, and encompasses any information that "fall[s] within the Agency's mandate to conduct foreign intelligence." 471 U.S. at 169; *see ACLU v. DOJ*, 681 F.3d at 73 (describing relevant inquiry as "whether the withheld material *relates to* an intelligence [source or] method" (emphasis added)). Under *Sims*, therefore, it is immaterial whether the information is "old," "ordinary," or only shows that the CIA was "doing the right thing." *See Sims*, 471 U.S. at 178 ("the [CIA] Director, in exercising his authority under [a predecessor section of the National Security Act], has power to withhold superficially innocuous information on the ground that it might enable an observer to discover the identity of an intelligence source"); *Fitzgibbon*, 911 F.2d at 758, 762-764 (*Sims* "invalidated" arguments that purportedly "nonsensitive," "basic," "innocent," "generally known," or old information about sources or methods not worthy of protection under National Security Act and Exemption 3).

The CIA easily satisfied its burden to show that the withheld information falls within the CIA's mandate to conduct foreign intelligence, *Sims*, 471 U.S. at 169, and relates to intelligence sources and methods, *ACLU v. DOJ*, 681 F.3d at 73, and the district court did not disagree. The court simply concluded that the information did not warrant protection. *Sims* dictates, however, that "it is not the

province of the judiciary . . . to determine whether a source or method should be . . . disclosed. *Fitzgibbon*, 911 F.2d at 762 (citing *Sims*, 471 U.S. at 179).

The ACLU next speculates that, "[t]o the extent that the district court found information had been officially acknowledged" (ACLU Br. 30), there would be little if any distinction between Exemptions 1 and 3. (*See also* ACLU Br. 31 (quoting *Public Citizen v. Dep't of State*, 11 F.3d 198, 202 n.4 (D.C. Cir. 1993) (finding criteria for official acknowledgment set forth in *Afshar v. Dep't of State*, 702 F.2d 1125 (D.C. Cir. 1983), "equally applicable to both exemptions")). But the district court did not base any of its rulings on a finding that specific information had been officially acknowledged. Rather, the court made its rulings in the context of deciding whether the information at issue was properly classified and statutorily protected at all.

Moreover, the factual record in this case belies the ACLU's suggestion that the information at issue may have been officially acknowledged in light of prior disclosures of other information about the CIA's former detention and interrogation program. The CIA's declarant, an original classification authority, specifically averred that she had "carefully considered the records at issue in this case in light of" the CIA's declassification of "certain information relating to the former detention interrogation program," and determined that the specific details withheld from the Draft OMS Summary and other records "remain exempt from

disclosure." (JA 60; *see also* JA 197, CA 4 (withholdings from Draft OMS Summary "include classified and statutorily protected information concerning operations unrelated to the former detention and interrogation program, as well as certain details about the former detention and interrogation program that remain classified and statutorily protected notwithstanding the declassification and release of other information about that program")). The ACLU's reliance on the doctrine of official acknowledgment is therefore misplaced.[4]

Finally, the ACLU misreads the case law in arguing that, "in the context of intelligence sources and methods, there is little functional difference between Exemption 1 and Exemption 3." (ACLU Br. 31). While it is certainly true that the two exemptions provide "overlapping protection" (ACLU Br. 31 (citing *Military Audit Project v. Casey*, 656 F.2d 724, 736-37 n.39 (D.C. Cir. 1981)), it is beyond dispute that "[t]he factual showing required . . . to satisfy Exemption 3 is by nature less than for Exemption 1," as there is no need to make a "specific showing of potential harm to national security" under Exemption 3. *Hayden*, 608 F.2d at 1390. The district court nevertheless rejected the CIA's Exemption 3 withholdings on the grounds that the information, in the court's view, was too "old," too "ordinary," or otherwise harmless to release. That was error. *See Sims*, 471 U.S.

[4] As discussed *infra* at 15-19, the ACLU also materially misstates the doctrine of official acknowledgment.

at 174-77, 181 (reversing circuit court judgment that improperly narrowed the intelligence sources and methods protected by the National Security Act).

POINT III

The ACLU's Arguments Regarding Specific Withholdings Are Without Merit

The ACLU specifically addresses two of the district court's rulings on information withheld from the Draft OMS Report, and offers only speculation about the others.[5] In both cases, the ACLU's arguments are unpersuasive.

A. The ACLU Fails to Rebut the Agency's Determination That Disclosure of References to Specific Press Reports About the CIA Program Would Tend to Reveal Classified and Statutorily Protected Information

The district court ordered disclosure of citations to, and discussions of, specific press reports in the Draft OMS Summary, reasoning that "[t]hese are public newspaper accounts" and "just summaries of what's in the newspaper article[s]." (JA 219-20). In its opening brief, the government demonstrated that the court's premise is incorrect. In the context of the Draft OMS Summary, the withheld references to press reports reveal far more than "just summaries." (Gov't Br. 37-44). The ACLU makes two arguments in response, neither of which has merit.

[5] The ACLU does not specifically address any of the district court's rulings ordering disclosure of portions of the January 18, 2018 transcript ("January 18 Transcript").

The ACLU first contends that the district court fully accommodated the government's concerns about disclosure by "permitt[ing] redaction of those portions of the Draft OMS Summary that characterized the accuracy or inaccuracy of the [press] reports." (ACLU Br. 16; *see also id.* 5 ("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")). As the government explained in its opening brief, however, the limited redactions permitted by the district court do not remove all characterizations of the accuracy of particular reports. Although the district court in some instances permitted the government to redact words or phrases that commented on accuracy, those redactions are not sufficient to remove all of the author's commentary. (Gov't Br. 39-43).

Moreover, the author's selection of specific press reports to discuss, his focus on particular aspects of those reports, and the manner in which he describes them would tend to reveal facts about the program that remain classified and statutorily protected. (Gov't Br. 38-43; CA 16-19; JA 218-22, CA 122-26 [Tr. 13-17).[6] Thus, even with certain words or phrases redacted, the citations to and

[6] Contrary to the ACLU's claim (ACLU Br. 18), the CIA argued before the district court, as it does on appeal, that in the context of the Draft OMS Summary, even the author's selection of particular press reports would tend to reveal classified and statutorily protected information (CA 123). This is not an "extraordinary claim," as the ACLU contends. (ACLU Br. 18); *see Bassiouni v. CIA*, 392 F.3d 244, 245

discussions of press reports in the Draft OMS Summary cannot be fully "stripped" or "shorn" of any "characterizations of accuracy as to specific protected information." (ACLU Br. 5, 16, 20).

The ACLU next argues that the CIA's withholding of discussions of press reporting throughout the Draft OMS Summary is implausible because the CIA released references to media reports in two places in the Draft OMS Summary. (ACLU Br. 19-22 (referring to JA 292 & n.70 and JA 320 n.124)). But the ACLU offers no support for the proposition that simply because the CIA releases information in one place, it must release similar information anywhere else it appears. Indeed, the law is to the contrary. *See Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007) ("Prior disclosure of similar information does not suffice; instead the specific information sought by the plaintiff must already be in the public domain by official disclosure.").

The ACLU does not even attempt to demonstrate that the limited references to media reports released by the CIA meet the "strict test" for official disclosure, such the CIA could no longer assert Exemptions 1 and 3 to protect other

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(7th Cir. 2004) (upholding CIA's assertion of Exemption 1 to protect United Nations reports and newspaper clippings, among other records, and noting that disclosing such documents in the CIA's possession could reveal "intelligence-gathering methods . . . independently of the information in materials the CIA collects"); *Elec. Privacy Info. Ctr. v. DOJ*, 296 F. Supp. 3d 109, 128 (D.D.C. 2017) ("unclassified materials may nevertheless be deemed classified depending on the context in which they are retrieved").

discussions of press reporting in the Draft OMS Summary. That test requires the ACLU to show that the withheld information is "as specific as" and "matches" information previously "made public through an official and documented disclosure." *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009); *see Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy*, 891 F.2d 414, 421 (2d Cir. 1989) (Exemptions 1 and 3 "may not be invoked to prevent public disclosure when the government has *officially* disclosed the *specific* information being sought" (emphasis in original)). The limited disclosures identified by the ACLU are not "as specific as" nor do they "match" the references to press reports withheld elsewhere in the Draft OMS Summary. They therefore do not cast doubt on the CIA's withholdings.

B. The ACLU Fails to Counter the Agency's Showing That the Withheld Information Concerning the CIA's Construction of Detention and Interrogation Facilities Is Properly Classified and Statutorily Protected

The district court ordered disclosure of specific information on page 53 of the Draft OMS Summary concerning the CIA's construction of detention and interrogation facilities, ruling that this information "only shows you're doing the right thing" and there is no "harm with that." (JA 224). The CIA has logically and plausibly explained why revealing specific details of the construction of CIA detention and interrogation facilities both would disclose information relating to intelligence methods and could reasonably be expected to cause harm. (Gov't Br.

26-28, 33-34). The ACLU does not challenge this showing, apart from arguing that the government has previously declassified other information about the CIA's detention facilities. (ACLU Br. 23-25 (citing information released in a 2006 Office of Legal Counsel ("OLC") memorandum, later publicly released in redacted form, and the redacted executive summary of the Senate Select Committee on Intelligence's report on the CIA program, publicly released in 2014)).

Again, however, none of the declassified information identified by the ACLU is "as specific as" or "matches" the information on page 53 of the Draft OMS Summary that the district court ordered released. *See Wilson*, 586 F.3d at 186. To the contrary, the information the CIA withheld on page 53 would reveal additional details that remain classified and protected from disclosure by statute. (*Compare* information cited in bullet points in ACLU Br. 23-25 with information withheld on page 53 of Draft OMS Summary (CA 74), described in Gov't Br. 16 & n.8, 26-28; *see also* JA 60, 197 (averments by CIA's declarant that details withheld under Exemptions 1 and 3 remain classified and statutorily protected notwithstanding declassification of other information regarding CIA program)). The prior disclosure of other information about CIA detention facilities therefore provides no support for the district court's ruling. Indeed, even the district court did not rely on any prior disclosures in ordering disclosure of the information on page 53; the court based its ruling on the (erroneous) grounds that the information

would not cause harm if released and "only shows [the CIA was] doing the right thing." (JA 224).

In arguing that the information on page 53 should be released because of prior disclosures about CIA detention facilities, the ACLU materially misstates the test for official disclosure. In this circuit, the test for official disclosure is set forth in *Wilson v. CIA*, 586 F.3d at 186; *see New York Times*, 756 F.3d at 120 & n.19 (2d Cir. 2014). Yet the ACLU does not acknowledge the *Wilson* test or even cite *Wilson* in its brief. Rather than contending with *Wilson*, the ACLU cherry-picks language out of context from *New York Times*, and argues that "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." (ACLU Br. 25 (alteration in ACLU brief), 26 (arguing that "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")). That is flatly wrong.

New York Times provides no basis for courts to undertake a freewheeling inquiry into whether information about intelligence sources and methods that the CIA has determined to be classified and statutorily protected should nevertheless be publicly disclosed because it is "similar" to other public information and disclosure, in the courts' view, would "add nothing to the risk." Indeed, such an

inquiry is precluded by this Court's precedent, which recognizes that courts are ill-equipped to undertake such an inquiry. *See supra* at 1-3 & n.1.

In *New York Times*, the Court reiterated that the applicable test for official disclosure remains the *Wilson* matching test. 756 F.3d at 119-20. The *New York Times* Court applied *Wilson* to require an exact match between information previously disclosed and classified facts in an OLC memorandum that the government sought to withhold before it would order release of such information. Thus, the only classified facts that the Court ordered disclosed from the memorandum—the identity of the country in which a particular drone strike had taken place and the fact that the CIA had an unspecified operational role in the strike—were specific in nature and matched information previously disclosed in various public statements by senior government officials. *Id.* at 117-19. Notably, the Court upheld the claim of Exemption 1 for other classified facts found within the OLC memorandum that did not match information that had been previously been disclosed. *Id.* at 117, 119 (permitting redaction of entire factual sections of OLC memorandum).

The Court drew a distinction between classified "facts" regarding intelligence operations, sources, and methods, and "pure legal analysis," which, although it may be classified in some circumstances,[7] is not itself a protectable intelligence source or method. *Id.* at 119. The Court noted that the only substantial difference between the legal analyses in the OLC memorandum and a previously disclosed white paper was that the legal analysis section of the former contained a discussion of one additional statute. *Id.* As for the facts entitled to protection in the OLC memorandum, they either had already been disclosed (and thus satisfied the *Wilson* test) or remained entitled to protection and their redaction was therefore upheld by the Court. *Id.* at 119-20. In light of those prior disclosures and redactions, the Court held it was no longer logical or plausible that legal analysis concerning the operation at issue would reveal information protected by Exemption 1. *Id.* at 119-20. The Court's statement that the discussion of an additional statute in the OLC memorandum "adds nothing to the risk," *id.* at 120, must be understood in that context—that is, in a case where the classified facts contained in the legal analysis were no longer at issue or were redacted, and the remaining legal analysis was identical in all but one small way.

[7] *See, e.g.*, *New York Times*, 756 F.3d at 119 ("We recognize that in some circumstances the very fact that legal analysis was given concerning a planned operation would risk disclosure of the likelihood of that operation . . . .").

Thus, the *New York Times* decision did not pronounce a broader alteration of the exacting standards established by precedent for official disclosure of classified information. Nor could it, as a panel of the Court is "bound by the decisions of prior panels." *Johnson v. United States*, 779 F.3d 125, 128 (2d Cir. 2015). The *New York Times* Court itself recognized as much, specifically affirming *Wilson* as "the law of this Circuit," 756 F.3d at 120 & n.19, and applying the *Wilson* test as previously laid out to affirm the district court's holding that "operational details" about the program at issue contained in other sections of the OLC memorandum had not been officially acknowledged and remained properly classified in their entirety, *id*. at 113.[8]

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[8] The ACLU cites a footnote in the *New York Times* opinion (ACLU Br. 25) that questioned in dicta whether "a rigid application" of *Wilson*'s matching test was "warranted" in light of its "questionable provenance." *New York Times*, 756 F.3d at 120 n.19. This criticism of *Wilson*, and the official disclosure doctrine generally, is misplaced. The footnote traces the origins of the matching test to the D.C. Circuit's decision in *Afshar v. Department of State*, 702 F.2d 1125 (D.C. Cir. 1983), and then claims that *Afshar* "does not mention a requirement that the information sought 'match[es] the information previously disclosed.'" *Id.* That is incorrect. *Afshar* held that "a plaintiff asserting a claim of prior disclosure must bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld." 702 F.2d at 1130. That *Afshar* uses the word "duplicate" rather than "match" is of no moment, as the D.C. Circuit has used those words interchangeably in its official acknowledgement cases. *See, e.g.*, *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 60 (D.C. Cir. 2003) ("*Afshar* requires a FOIA plaintiff to show that an agency's previous disclosure 'appears to duplicate' the material sought, . . . i.e., that the disclosure is 'as specific as' and 'match[es]' the sought material" (citations omitted)); *Public Citizen*, 11 F.3d at 202 (cited at ACLU Br. 31) (noting three-part test for official disclosure,

The need for a "strict" application of the official disclosure test, *Wilson*, 586 F.3d at 186, is consistent with the principle that the primary constitutional responsibility for safeguarding information bearing on the national security resides in the Executive Branch. *Dep't of the Navy v. Egan*, 484 U.S. 518, 526-27 (1988) ("[t]he authority to protect" national security information rests with Executive Branch and "flows primarily from th[e] constitutional investment of power in the President"); *Sims*, 471 U.S. at 180; *Wilner*, 592 F.3d at 76 (noting Court's "deferential posture in FOIA cases regarding the uniquely executive purview of national security" (quotation marks omitted)). The ACLU invites this Court to disregard this well-settled precedent and undertake its own evaluation of whether information that does not satisfy the *Wilson* test should nevertheless be released because its disclosure, in the Court's view, would not present a risk of harm to national security. The Court should decline that invitation.

C. The ACLU's Speculation Regarding the District Court's Other Rulings Is Incorrect

Without any citation to the record, the ACLU asserts that "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

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including matching requirement, and citing *Afshar*); *Fitzgibbon*, 911 F.2d at 765 (cited at ACLU Br. 30-31) (same).

that already exist with regard to the CIA's . . . program." (ACLU Br. 26). Again, the ACLU's speculation is demonstrably incorrect. The information at issue, which appears on page 6 of the Draft OMS Summary (CA 27), pertains to a specific intelligence method and the CIA's use of that method at a particular time and place. (Gov't Br. 25). There is no evidence in the record that this information has been officially disclosed, let alone that it is "well known," as the district court found. (Gov't Br. 25; JA 215, CA 119 [Tr. 10]). To the contrary, the record shows otherwise. (JA 65 (CIA withheld "undisclosed details about certain intelligence gathering techniques and Agency tradecraft, which have been, and continue to be, used in [a] range of CIA operations and activities including current counterterrorism operations"); CA 14 (index entry explaining withholdings on page 6); CA 119 [Tr. 10] (describing intelligence method at issue)).

CONCLUSION

For the foregoing reasons and the reasons stated in the government's opening brief, the district court's amended judgment should be reversed to the extent it orders disclosure of classified and statutorily protected information in the Draft OMS Summary and the January 18 Transcript.

Dated: New York, NY
March 8, 2019

Respectfully submitted,

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

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

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4877 words, according to the count of Microsoft word.

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