17-3399

To Be Argued By:
JEAN-DAVID BARNEA

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 17-3399

AMERICAN CIVIL LIBERTIES UNION,
AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs-Appellants,

—v.—

NATIONAL SECURITY AGENCY, CENTRAL INTELLIGENCE AGENCY, UNITED STATES DEPARTMENT OF DEFENSE, UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES DEPARTMENT OF STATE,

Defendants-Appellees.

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

BRIEF FOR DEFENDANTS-APPELLEES

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BRIEF FOR DEFENDANTS-APPELLEES

Preliminary Statement

On appeal in this action under the Freedom of Information Act, the ACLU seeks to compel the government to release eight records relating to government electronic surveillance under Executive Order 12,333: six documents from the National Security Agency ("NSA") and the Department of Justice's National Security Division ("NSD") consisting of recommendation

memoranda regarding classified electronic surveillance programs and procedures, as well as documents reflecting the agencies' decisions after considering the recommendations; and two legal advice memoranda by the Office of Legal Counsel ("OLC") concerning the government's electronic surveillance programs.

The district court properly upheld the withholding of these documents. It correctly held that the six NSA and NSD documents were properly withheld in full under FOIA Exemptions 1 and 3, as they consist of classified national security information and are protected by statute. Although the ACLU contends that legal analysis contained in these records must be disclosed, this Court and others have repeatedly held that legal analysis regarding a classified government program can be classified when its disclosure would enable a reader to understand aspects of the underlying program or when it is intertwined with classified facts. And, as the district court correctly held, no portion of the withheld documents is reasonably segregable under Exemptions 1 and 3.

The district court also correctly held that the withheld portions of the two OLC legal advice memoranda were privileged, and thus protected under FOIA Exemption 5. The court properly rejected plaintiffs' argument that those documents lost the protection of Exemption 5 simply because they provided a legal analysis of proposed conduct that a relevant government decisionmaker later decided to undertake. The plaintiffs' interpretation of the "working law" and "express adoption" doctrines is flatly at odds with this Court's governing precedent, and would discourage government

policymakers from seeking legal advice before making policy decisions.

In this case, the government previously released substantial amounts of information, and has recently voluntarily reprocessed one of the OLC memoranda the ACLU is now seeking (although the law does not require such reprocessing mid-litigation) and has released substantial additional portions of the document to the ACLU. But the district court properly denied the rest of the ACLU's demands, and its judgment should be affirmed.

Jurisdictional Statement

The district court had jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B). The court entered final judgment in the government's favor on August 22, 2017. (SPA 58).[1] The ACLU timely filed a notice of appeal on October 20, 2017. (JA 488). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

Issues Presented for Review

1. Whether FOIA Exemptions 1 and 3 protect from disclosure NSA and NSD documents addressing non-public government electronic surveillance programs or activities, because they are classified and protected from disclosure by statute.

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[1] This brief cites the Special Appendix as "SPA," the Joint Appendix as "JA," and ACLU's opening brief as "Br."

2. Whether FOIA Exemption 5 protects from disclosure privileged OLC legal advice.

3. Whether the agencies' withholdings in the OLC memoranda should be reviewed as of the time the FOIA requests were processed, rather than requiring reprocessing of the documents based on later disclosures by the government.

Statement of the Case

A. Procedural History

The American Civil Liberties Union and American Civil Liberties Union Foundation (together, "ACLU") filed a complaint under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") against NSA, the Department of Justice ("DOJ"), the Central Intelligence Agency ("CIA"), the Defense Intelligence Agency ("DIA"), the Federal Bureau of Investigation ("FBI"), and the Department of State ("State") on December 30, 2013, seeking the production of records relating to government electronic surveillance under Executive Order 12,333. (JA 4). On February 26, 2016, the agencies moved for partial summary judgment (JA 10), and the ACLU cross-moved on April 20, 2016 (JA 11). On March 27, 2017, the district court (Kimba M. Wood, J.) granted the agencies' motion in part, denied the ACLU's motion in full, and requested that the agencies provide further information regarding certain documents. (SPA 1). The agencies provided the requested information and again moved for partial summary judgment on June 14, 2017 (JA 14), and the ACLU cross-moved on July 14, 2017 (JA 15). On August 17, 2017, the district court granted the agencies' motion in

full and denied the ACLU's motion. (SPA 48). The court entered judgment in the agencies' favor on August 22, 2017. (SPA 58).

B. Executive Order 12,333

Executive Order 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981), as amended,[2] governs and restricts the conduct of certain intelligence activities of the U.S. government. (SPA 2). The Order is lengthy and complex, but in brief, it constitutes formal presidential recognition that "[t]imely, accurate, and insightful information about the activities, capabilities, plans, and intentions of foreign powers, organizations, and persons, and their agents, is essential to informed decisionmaking in the areas of national security, national defense, and foreign relations," and identifies the "[c]ollection of such information" as a "priority objective" that "will be pursued in a vigorous, innovative, and responsible manner that is consistent with the Constitution and applicable law and respectful of the principles upon which the United States was founded." Exec. Order No. 12,333, § 2.1.

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[2] Executive Order 12,333 has been amended several times. *See* Exec. Order No. 13,284, 68 Fed. Reg. 4077 (Jan. 23, 2003), Exec. Order No. 13,355, 69 Fed. Reg. 53,593 (Aug. 27, 2004), and Exec. Order No. 13,470, 73 Fed. Reg. 45,328 (July 30, 2008). The current version is available at https://www.dni.gov/index.php/ic-legal-reference-book/executive-order-12333.

To that end, the Order directs that "[t]he United States intelligence effort shall provide the President, the National Security Council, and the Homeland Security Council with the necessary information on which to base decisions concerning the development and conduct of foreign, defense, and economic policies, and the protection of United States national interests from foreign security threats." *Id.* § 1.1. The Order further requires that "[a]ll means, consistent with applicable Federal law and this order, and with full consideration of the rights of United States persons, shall be used to obtain reliable intelligence information to protect the United States and its interests." *Id.* § 1.1(a). It includes restrictions on the collection, retention, and dissemination of information pertaining to U.S. persons, *e.g.*, *id.* §§ 2.3, 2.4, including that "no foreign intelligence collection . . . may be undertaken for the purpose of acquiring information concerning the domestic activities of United States persons." *Id.* § 2.3(b).

C. The ACLU's FOIA Requests

On May 13, 2013, the ACLU submitted FOIA requests to CIA, DIA, FBI, NSA, State, NSD, and OLC. (JA 28, 37-64; JA 31, 128 (second request directed to NSD on July 29, 2014)). The requests covered many types of documents and aspects of the agencies' activities under Executive Order 12,333, including in particular "minimization procedures" aimed at limiting government acquisition or review of communications involving U.S. persons. (*E.g.*, JA 28).

After discussions aimed at achieving a more manageable search protocol that focused on the ACLU's

priority interests, the parties entered into a detailed stipulation narrowing each agency's search to specified types of records that relate to electronic surveillance and "implicate United States Persons"—including formal regulations or policies, authorizations, legal opinions concerning agency authority, training or reference materials, and certain reports. (JA 17-20; SPA 3-4). The parties reached a similar agreement with respect to NSD once the ACLU submitted a revised FOIA request and an amended complaint. (SPA 5).

Following thorough searches, the agencies processed hundreds of documents comprising thousands of pages, a substantial number of which were produced in full or with redactions. (Dist. Ct. ECF No. 59, at 11-23, 34-35). The parties agreed that the ACLU would challenge the agencies' searches and their withholdings of or from a subset of these documents in the first instance, leaving the remainder for resolution if the district court upheld any of the ACLU's challenges. (Dist. Ct. ECF No. 52, at 2; No. 53). The ACLU ultimately challenged several agencies' searches and the partial or full withholding of 150 documents under various FOIA exemptions, principally Exemption 1, which protects classified information; Exemption 3, which protects records the disclosure of which is prohibited by statute; and Exemption 5, which protects privileged documents, 5 U.S.C. § 552(b)(1), (3), (5). (Dist. Ct. ECF Nos. 52, 59, 70; SPA 1, 48).

The agencies then moved for partial summary judgment, and the ACLU made a cross-motion. (JA 10-11).

On March 27, 2017, as described more fully below regarding each class of documents, the district court granted the agencies' motion in part, and denied the ACLU's motion in full. (SPA 1). The court upheld most of the agencies' searches and withholdings, but sought further information from the government relating to the remaining issues. (SPA 1). The court declined to inspect *in camera* any withheld documents sought by the ACLU, noting that "[i]n FOIA cases, a court should conduct *in camera* review only as a last resort." (SPA 46).

The agencies provided the requested information and the parties again submitted cross-motions for summary judgment. (JA 14-15). On August 17, 2017, the district court granted the agencies' motion in full and denied the ACLU's motion. (SPA 48). The order indicated that it "resolves all remaining issues" in the case, unless any party indicated its disagreement by letter within thirty days. (SPA 57). No such letter was filed.

The court entered judgment in the agencies' favor on August 22, 2017. (SPA 58). This appeal followed. (JA 488).

D. The NSA and NSD Documents

1. The Records

The six NSA and NSD documents remaining at issue, identified as NSA 11 and NSD 12, 13, 14, 33, and 49, were all withheld in their entirety. The documents were withheld in full under Exemptions 1 and 3, and

in part under Exemption 5. (JA 154, 189). NSD's declarant informed the district court that these documents "contain memoranda from NSD attorneys to other Government attorneys, and they provide advice with respect to one or more NSA programs or other intelligence activities." (JA 189). They "were sought by decision-makers for the Government to obtain legal advice [and] reflect such advice." (JA 189).

NSA submitted a declaration explaining that all of the documents other than NSD 49 "concern[ ] particular intelligence sources, and related methods used to collect and process foreign communications." (JA 154). They "contain myriad details regarding the types of communication data NSA is able to collect and how that data is collected," the disclosure of which "would reveal core NSA foreign intelligence activities, sources, and methods, including technical tradecraft, to the benefit of [the United States'] adversaries." (JA 154). Because the very existence of programs and activities to which these documents relate are classified, NSA filed a classified declaration in the district court further detailing these documents and the reasons no portion of them can be released. (JA 154; JA 447 (notice of filing classified declaration)).

NSD 49, which was discussed in CIA's declaration to the district court (JA 189), similarly "tends to identify the targets of intelligence-gathering efforts, reveal the specific collection techniques and methods employed, and contain details concerning the locations and timing of that collection." (Dist. Ct. ECF No. 60, at 15). CIA offered to provide additional detail *in camera* should the district court request it. (*Id.* at 13).

2. The District Court's Disposition

In its first summary judgment decision, the district court upheld the withholding of the NSA and NSD documents in full under Exemptions 1 and 3. (SPA 31-36). The court rejected the ACLU's argument that "pure" legal analysis in legal memoranda cannot be withheld under these exemptions, ruling that legal analysis may "pertain[]" to classified programs within the meaning of the Executive Order governing classification and also that revealing legal analysis relating to classified programs could divulge classified information about the nature of the programs. (SPA 34-36).

With respect to the agencies' invocation of Exemption 5 for parts of the NSA and NSD documents, the district court requested a more specific explanation of the statement in the NSD declaration that only the "vast majority" of each of these documents was privileged. (SPA 23-25, 29-30). As part of the agencies' submission for the second motion, NSD explained that each of these documents "consist[s] of a number of sub-documents: privileged and deliberative memoranda from an Executive Branch official to another Department of Justice official recommending that s/he take a particular course of action; and non-privileged, non-deliberative documents reflecting the governmental action decisions that occurred after consideration of those recommendations." (JA 486). NSD's supplemental declaration specified how many pages within each document were privileged advisory sub-documents, and how many were not. (JA 486-87).

In ruling on the second summary judgment motion, the district court reaffirmed its decision that the NSA

and NSD documents had been properly withheld in full under Exemptions 1 and 3, and therefore decided that it "need not reach the parties' arguments regarding Exemption 5." (SPA 55-57).

E. The OLC Memoranda

1. The Records

The two OLC memoranda at issue, identified as OLC 8 and 10, were produced in redacted form. OLC 8 is a memorandum dated November 2, 2001, by John C. Yoo, then a Deputy Assistant Attorney General, to the Attorney General. (JA 259). The memorandum provides legal advice regarding the government's authority to conduct electronic surveillance under Executive Order 12,333 (JA 259); it was produced with heavy redactions (JA 262-75). After the ACLU's brief was filed in this case, the government voluntarily released a substantially less-redacted copy of OLC 8.

OLC 10 is a 108-page memorandum dated May 6, 2004, from then-Assistant Attorney General Jack L. Goldsmith, III, to the Attorney General regarding the electronic surveillance program known as "Stellar Wind"; substantial portions of the memorandum were produced unredacted. (JA 259; 276-351). The legal advice in the memorandum concerns whether this surveillance program is "constitutionally permissible." (JA 280). The memorandum first reviews the background and timeline of the program, including previous legal advice regarding the program, and then analyzes the program's permissibility, including under the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1801 *et seq.*, and the Fourth Amendment.

(JA 276-77). One of the mostly redacted sections of the memorandum concerns the collection of telephone metadata, and another section is entirely redacted, including its title. (JA 277). The memorandum explains that the Stellar Wind program at one time authorized U.S. intelligence agencies to intercept certain international communications relating to terrorist groups, and gave agencies two additional authorities that are redacted. (JA 289-90).

The redacted portions of the OLC memoranda were withheld in their entirety under Exemption 5, and in part under Exemptions 1 and 3; however, no segregability review was conducted on OLC 8 to determine exactly which portions of the memoranda withheld under Exemption 5 were also protected by Exemptions 1 and 3. (JA 172-73, 175 n.15, 254-55).

OLC's declaration explained that OLC 8 and 10 conveyed legal advice to the Attorney General concerning, among other things, issues pertaining to surveillance under Executive Order 12,333. (JA 259). More generally, it noted that OLC's legal advice is typically sought as "part of a larger deliberative process" of government policy-making. (JA 244). Indeed, OLC's declarant elaborated that the memoranda were prepared in advance of Executive Branch decisionmaking and "consist of advice to Executive Branch officials in connection with that decisionmaking." (JA 254). These memoranda "were written in response to confidential communications from one or more executive branch clients soliciting legal advice from OLC attorneys," and "contain confidential client communications for the purpose of seeking legal advice and predecisional

legal advice . . . as part of government deliberative processes." (JA 251).

OLC's declarant further noted that OLC 8 and 10 had been previously processed for a FOIA case in the District of Columbia. (JA 251-52 (citing *Elec. Privacy Info. Ctr. v. DOJ*, Nos. 06-096, 06-214, 2014 WL 1279280 (D.D.C. Mar. 31, 2014))). The government had undertaken two separate months-long voluntary reviews of these and a handful of other documents, which resulted in further releases in 2011 and 2014. (JA 252). The voluntary 2014 supplemental release took place several months after the D.C. district court had concluded, following *in camera* review, that the agency's prior set of redactions were proper. (JA 252 (citing *Elec. Privacy Info. Ctr.*, 2014 WL 1279280, at *1)). Thus, based on the instruction in the classification Executive Order that documents need not be rereviewed for declassification if they have undergone such review in the past two years, the agency had responded (in late 2014) to the ACLU's FOIA request by releasing the documents based on the 2014 declassification review. (JA 253 (citing Exec. Order No. 13,526, § 3.5(d), 75 Fed. Reg. 707, 718 (Dec. 29, 2009) ("If an agency has reviewed the requested information for declassification within the past 2 years, the agency need not conduct another review and may instead inform the requester of this fact and the prior review decision . . . .")).

With respect to the portions of the information redacted in OLC 8 and 10 that were withheld under Exemptions 1 and 3 in addition to Exemption 5, NSA's declarant explained that this information "concerns

the identities of NSA surveillance targets and the scope of NSA collection, including specific types of communications the NSA can and cannot collect under particular surveillance programs." (JA 172-73). This information "pertains to intelligence activities, intelligence sources or methods, or cryptology, or the vulnerabilities or capabilities of systems or projects relating to the national security." (JA 173).

2. The District Court's Disposition

The district court's first summary judgment decision upheld the redactions in the OLC memoranda. With respect to OLC's assertion of Exemption 5, the court held that OLC's declarations sufficiently established that the withheld portions of the documents were protected by the deliberative process and attorney-client privileges. (SPA 21). It further rejected the ACLU's contentions that the OLC memoranda at issue constituted "working law" or had been expressly adopted by the government, specifically criticizing the ACLU's "overly broad view of what constitutes working law, particularly with respect to legal memoranda." (SPA 19, 22). The court emphasized that "there is no indication that [the OLC memoranda] were 'adopted, formally or informally, as the agency position on an issue' or 'used by the agency in its dealings with the public,'" and also that "OLC's legal advice and analysis may inform the decisionmaking of Executive Branch officials on matters of policy, but . . . is not itself dispositive as to any policy adopted." (SPA 22).

The district court found it unnecessary to decide whether any information in OLC 8 and 10 that was protected by Exemptions 1 and 3 could be segregated from non-exempt information, reasoning that a segregability analysis was unnecessary since those documents were also being withheld in full under Exemption 5. (SPA 36 n.3).

Finally, the court rejected the ACLU's request that the OLC memoranda be reprocessed in light of allegedly official acknowledgments contained in two documents that were publicly released in redacted form after the FOIA requests at issue here were processed in 2014: the first was a multiagency inspector general report regarding the Stellar Wind program (the "Joint IG Report")[3] that was declassified in part in 2015 (JA 252-53), and the second was OLC 9 (JA 393-416), a previously classified letter from OLC to the Foreign Intelligence Surveillance Court that was released in

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[3] *See* Offices of Inspectors General of the Dep't of Defense, Dep't of Justice, Central Intelligence Agency, Nat'l Security Agency, Office of the Dir. of Nat'l Intelligence, *Report on the President's Surveillance Program* (July 10, 2009), *available at* https://oig.justice.gov/reports/2015/PSP-09-18-15-full.pdf (individual volumes of the three-volume, 700-page report are at https://oig.justice.gov/reports/2016/PSP-01-08-16-vol-1.pdf, https://oig.justice.gov/reports/2016/PSP-01-08-16-vol-2.pdf, and https://oig.justice.gov/reports/2016/PSP-01-08-16-vol-3.pdf). Portions of volume 3 of this report were provided to the district court. (JA 417-46).

part in 2016 (JA 253-54). (SPA 46). The district court reasoned that, "'[a]s a general rule, a FOIA decision is evaluated as of the time it was made and not at the time of a court's review,'" and declined to require reprocessing because these additional documents were declassified and publicly released in part only after OLC had processed the relevant documents for the ACLU in this case. (SPA 46 (quoting *N.Y. Times Co. v. DOJ* (*N.Y. Times I*), 756 F.3d 100, 111 n.8 (2d Cir. 2014))).

Summary of Argument

The Court should affirm the district court's judgment. First, the agencies' declarations establish that the NSA and NSD documents at issue are properly withheld in their entirety because disclosing any portions of these documents would reveal sensitive and classified national security information, such as intelligence sources and methods. These documents therefore are exempt from disclosure under Exemptions 1 and 3. *See infra* Point I.A. That parts of the records at issue contain legal analysis does not alter that conclusion. As this Court has previously held, legal analysis pertaining to classified government programs can be withheld under Exemptions 1 and 3 when, as here, disclosing such analysis would risk disclosing classified and statutorily protected information about the nature of the underlying program. *See infra* Point I.B.

Separately, the district court correctly concluded that the withheld portions of OLC 8 and 10 are privileged, and are therefore exempt from disclosure under Exemption 5. The agencies' declarations demonstrated

that the requirements for the deliberative process and attorney-client privileges had been met by describing OLC's advisory role in government decisionmaking generally and with respect to these memoranda specifically. *See infra* Point II.A-B. The OLC memoranda do not lose their privileged status under the "working law" doctrine, moreover, because the withheld legal analyses are not final agency policies. To be "working law," a document must be a binding statement with the force and effect of law. Mere legal opinions do not qualify, even if an agency relies on them, and to apply the doctrine to those records would vastly reduce the government's ability to seek legal advice, contrary to FOIA and the public interest. *See infra* Point II.C. Nor has the government expressly adopted these memoranda simply by taking actions consistent with the legal analysis. *See infra* Point II.D.

Finally, the district court did not err in upholding the redactions in the OLC memoranda based on the record before the agency, and in not requiring reprocessing of the memoranda in light of public disclosures made after the releases to the ACLU in this case. An agency's FOIA release is properly evaluated as of the time it is made, and not in light of post-release disclosures. *See infra* Point III.

Accordingly, the district court's judgment should be affirmed.

ARGUMENT

Standard of Review

This Court reviews a district court's summary judgment decision in a FOIA case *de novo*. *N.Y. Times I*, 756 F.3d at 112. Although an agency has the burden to establish the applicability of asserted FOIA exemptions, "[a]ffidavits or declarations . . . giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden." *Wilner v. NSA*, 592 F.3d 60, 69 (2d Cir. 2012) (quotation marks omitted). Agency declarations are entitled to a presumption of good faith, *id.*, and where the claimed exemptions implicate classified national security information, the reviewing court "must give *substantial weight* to an agency's affidavit concerning the details of the classified status of the disputed record," *N.Y. Times I*, 756 F.3d at 112 (emphasis in original; quotation marks omitted). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Id.* at 119 (quotation marks omitted).

POINT I

The District Court Correctly Held the NSA and NSD Documents Are Protected by FOIA Exemptions 1 and 3

The district court correctly held that the six NSA and NSD documents that the ACLU seeks on appeal are both classified and statutorily protected from disclosure, and accordingly were properly withheld under FOIA Exemptions 1 and 3. *See infra* Point I.A. And,

contrary to the ACLU's argument that "pure" legal analysis cannot be properly classified or protected, legal analysis that pertains to classified government programs is classified if its disclosure would tend to reveal the nature of those programs or other legally protected aspects of them, as is true for these documents. *See infra* Point I.B.

A. The Agencies Justified Their Withholdings Under Exemptions 1 and 3

FOIA Exemption 1 "exempts from disclosure records that are 'specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy,' and 'are in fact properly classified pursuant to such Executive order.'" *Florez v. CIA*, 829 F.3d 178, 182 (2d Cir. 2016) (quoting 5 U.S.C. § 552(b)(1); quotation marks omitted). The current standard for classification is set forth in Executive Order 13,526, which provides that a document is properly classified when (1) an "original classification authority" has classified the information; (2) the information is "owned by, produced by or for, or is under the control of the United States Government"; (3) the information falls within a protected category of information, including "intelligence activities . . . sources, or methods"; and (4) the original classification authority "determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and is "able to identify or describe the damage." Exec. Order No. 13,526, §§ 1.1(a), 1.4(c).

FOIA Exemption 3 applies to records "'specifically exempted from disclosure by statute.'" *Wilner*, 592 F.3d at 71 (quoting 5 U.S.C. § 552(b)(3)). Unlike other exemptions, Exemption 3's application "depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." *Id.* at 72 (quotation marks omitted); *accord Krikorian v. Dep't of State*, 984 F.2d 461, 465 (D.C. Cir. 1993) (court should not "closely scrutinize" documents, but should "determine only whether there is a relevant statute and whether the document falls within that statute"). Moreover, to support its assertion of Exemption 3, the government need not show that there would be harm to national security from disclosure, only that the withheld information logically or plausibly falls within the purview of the exemption statute. *Wilner*, 592 F.3d at 73; *accord Larson v. Dep't of State*, 565 F.3d 857, 861-62, 870 (D.C. Cir. 2009). The principal exemption statute at issue here is a provision of the National Security Act, 50 U.S.C. § 3024(i)(1), which requires that "[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." (JA 152).[4] This statute unquestionably is an exemption statute under Exemption 3. *CIA v. Sims*, 471 U.S.

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[4] Before 2013, this provision was codified at 50 U.S.C. § 403-1. The other Exemption 3 statutes protecting the information at issue are 50 U.S.C. § 3605, 18 U.S.C. § 798 (JA 152-53), and for NSD 49, 50 U.S.C. § 3507 (Dist. Ct. ECF No. 60, at 17-18). These provisions protect information relating to the organization

159, 167-68 (1985); *Wilner*, 592 F.3d at 73 (citing *Larson*, 565 F.3d at 865).

NSA's declarant explained that all of the NSA and NSD documents at issue other than NSD 49 "concern[ ] particular intelligence sources, and related methods used to collect and process foreign communications." (JA 154). They "contain myriad details regarding the types of communication data NSA is able to collect and how that data is collected," the disclosure of which "would reveal core NSA foreign intelligence activities, sources, and methods, including technical tradecraft, to the benefit of [the United States'] adversaries." (JA 154). Such disclosures, for example, "would demonstrate the capabilities and limitations of the U.S. [signals intelligence] system, and the success (or lack of success) in acquiring certain types of communications." (JA 154). Because the very existence of programs and activities to which these documents relate

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and functions of NSA (§ 3605, previously codified at 50 U.S.C. § 402 note) and CIA (§ 3507, previously 50 U.S.C. § 403g) or relating to certain communications intelligence activities (18 U.S.C. § 798). These statutes have all been recognized as withholding statutes under Exemption 3. *See Wilner*, 592 F.3d at 71-72 (50 U.S.C. § 3605, 18 U.S.C. § 798); *N.Y. Times I*, 756 F.3d at 104 (50 U.S.C. § 3507). The ACLU does not here, nor did it in the district court, argue that any of these statutes are not Exemption 3 statutes or that they do not protect the documents at issue, except insofar as the documents contain so-called "pure" legal analysis, as discussed *infra* Point I.B.

are classified, NSA filed a classified declaration in the district court further detailing these documents and the reasons no portion of them can be released. (JA 154; JA 447 (notice of filing classified declaration)).[5]

The declarant, who is an original classification authority, confirmed that the documents were owned by the government and met the criteria for classification, and were thus properly classified at the Top Secret level because their release "could reasonably be expected to cause exceptionally grave damage to the national security," by "[d]isclos[ing] information regarding the technical means by which NSA effects collection of the communications of valid foreign intelligence targets." (JA 155). He further confirmed that the documents were protected by Exemption 3 because they relate to "intelligence sources and methods," NSA functions, and classified communications intelligence activities. (JA 156).

As noted in NSD's declaration (JA 189), the withholding under Exemptions 1 and 3 of the remaining document (NSD 49) was defended by CIA, which offered a similar explanation. (Dist. Ct. ECF No. 60, at 12-18). CIA explained that the document, like others it withheld, "tends to identify the targets of intelligence-gathering efforts, reveal the specific collection techniques and methods employed, and contain details concerning the locations and timing of that collection."

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[5] This classified declaration is available to this Court through the Classified Information Security Officer.

(*Id.* at 15). If this information were revealed, CIA's declarant, also an original classification authority, opined that "adversaries could alter their behavior to avoid detection or use countermeasures to undermine U.S. intelligence capabilities and render collection efforts ineffective." (*Id.* at 2, 16).

The agencies thus fully justified their invocations of Exemptions 1 and 3 with respect to the NSA and NSD documents.

B. Legal Analysis of Classified Government Programs Is Protected by Exemptions 1 and 3

To the extent the six NSA and NSD documents contain "pure legal analysis," the ACLU is wrong in arguing that such information cannot be withheld under Exemptions 1 or 3. (Br. 38-40). As this Court has held, "in some circumstances the very fact that legal analysis was given concerning a planned operation would risk disclosure of the likelihood of that operation. . . . [I]n [other] circumstances legal analysis could be so intertwined with facts entitled to protection that disclosure of the analysis would disclose such facts." *N.Y. Times I*, 756 F.3d at 119. While legal analysis is not itself an intelligence source or method, *see id.*, the relevant question for classification purposes is whether the legal analysis "pertains to" protected information, such as intelligence activities, and its disclosure would damage national security (SPA 34 (quoting Exec. Order No. 13,526, § 1.4)). And as the D.C. Circuit has observed, "pertains is not a very demanding verb." *Judicial Watch, Inc. v. Dep't of Defense*, 715 F.3d 937, 941 (D.C. Cir. 2013) (quotation marks omitted).

Thus, agencies may withhold legal analysis when its disclosure would tend to reveal the underlying classified information, as this Court and others have repeatedly held. For example, this Court concluded that the government could withhold in full several OLC memoranda where "[i]t would be difficult to redact any arguably disclosable lines of legal analysis" without disclosing protected information. *N.Y. Times Co. v. DOJ* (*N.Y. Times III*), 806 F.3d 682, 687 (2d Cir. 2015). With respect to a different OLC legal memorandum, a district court explained: "it is unlikely that each and every word in the Memorandum is classified. But . . . [i]f sufficient context was disclosed to make the non-exempt material meaningful, the circumstances warranting the classification of the Memorandum would be revealed. FOIA does not require redactions and disclosure to this extent." *ACLU v. DOJ*, 229 F. Supp. 3d 259, 267 (S.D.N.Y. 2017); *accord ACLU v. DOJ*, No. 15 Civ. 1954, 2016 WL 8259331, at *7 (S.D.N.Y. Aug. 8, 2016) ("The idea that legal advice can, in the ordinary course, be shorn of the particular facts that impel a client to [seek] it is ludicrous."). Another district court concluded that the government was not required to segregate any information from Foreign Intelligence Surveillance Court orders (surely including legal analysis) where no "information about the nature or substance of the orders can be provided without revealing classified information." *ACLU v. FBI*, No. 11 Civ. 7562, 2015 WL 1566775, at *4 (S.D.N.Y. Mar. 31, 2015) (alterations omitted).

The same is true here, as the agencies' submissions demonstrated. NSA's declarant explained that "[t]he mere subject matter of these memoranda and opinions

pertains to classified NSA operations and activities that have not been publicly acknowledged." (JA 450). As a result, "[t]he release of even the basic factual or legal background in these memoranda could reasonably be expected to cause harm to the national security or an interest protected by statute, as the formulation of the legal analysis itself could enable Plaintiffs and the public to discern classified or protected facts about the program or activity being discussed." (JA 450). Indeed, this risk extends to "even the title and subject matter of these documents." (JA 450).

The ACLU's response is both conclusory and immaterial: it merely observes that some of the advisory portions of NSA and NSD documents "are quite lengthy," and speculates that it is thus "probable that they contain pure legal analysis devoid of operational details." (Br. 42 (citing JA 486-87)). But whether or not each paragraph of legal analysis in the NSA and NSD recommendations discusses "operational details" is as irrelevant as the documents' length to the question of whether FOIA disclosure is required. Where the very "title and subject matter of these documents would tend to reveal classified and protected information," it is not at all surprising that the legal analysis in the documents would do the same, as the agency declarant attested. (JA 450). It is certainly "logical and plausible" that the legal analysis in such memoranda "could enable . . . the public to discern classified or protected facts about the program or activity being discussed." (JA 450). After all, such legal analysis, even if divorced from specific operational details, would be focused on the legal questions arising from the particular program or activity being discussed, and providing this

analysis would reveal or facilitate inferences about certain aspects of that program or activity. *See N.Y. Times I*, 756 F.3d at 119 ("[I]n some circumstances the very fact that legal analysis was given concerning a planned operation would risk disclosure of the likelihood of that operation."). The district court's conclusion that Exemptions 1 and 3 apply to the NSA and NSD documents was therefore correct, and its judgment regarding those documents should be affirmed.[6]

POINT II

The OLC Memoranda Are Protected by FOIA Exemption 5

The district court correctly concluded that the withheld portions of the two OLC legal advice memoranda were protected by Exemption 5. The ACLU overstates what showing is required and fails to recognize that any party asserting privilege has flexibility in how it meets its burden, particularly when the records contain classified information.

FOIA's Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the

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[6] The government also established in the district court that portions of the NSA and NSD documents at issue on appeal were properly withheld under Exemption 5. The district court did not reach this issue, however (SPA 57), and this Court also need not reach it given that the documents were properly withheld in their entirety under Exemptions 1 and 3.

agency." 5 U.S.C. § 552(b)(5). This language was "intended to incorporate into the FOIA all the normal civil discovery privileges." *Hopkins v. HUD*, 929 F.2d 81, 84 (2d Cir. 1991). Thus, "agency documents which would not be obtainable by a private litigant in an action against the agency under normal discovery rules (*e.g.*, attorney-client, work-product, executive privilege) are protected from disclosure under Exemption 5." *Tigue v. DOJ*, 312 F.3d 70, 76 (2d Cir. 2002) (quotation marks omitted). Here, OLC has adequately shown that its two legal advice memoranda are protected by the deliberative process and attorney-client privileges. *See infra* Points II.A-B.

Nor have OLC 8 and 10 lost these privileges by becoming "working law," *see infra* Point II.C, or by having their reasoning "expressly adopted" by relevant decisionmakers, *see infra* Point II.D. The ACLU's overbroad construction of these limited exceptions to the Exemption 5 privileges conflicts with decisions of this Court and others and would eviscerate the privileges whenever an agency decisionmaker considers legal analysis in making a policy decision.

A. The OLC Memoranda Are Protected by the Deliberative Process Privilege

In enacting Exemption 5, "[o]ne privilege that Congress specifically had in mind was the 'deliberative process' or 'executive' privilege." *Hopkins*, 929 F.2d at 84. An agency record must satisfy two criteria to qualify for the deliberative process privilege: it "must be both 'predecisional' and 'deliberative.'" *Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir.

1999) (quoting *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975); *accord Tigue*, 312 F.3d at 76-77. A document is "predecisional" when it is "'prepared in order to assist an agency decisionmaker in arriving at his decision.'" *Grand Central*, 166 F.3d at 482 (quoting *Grumman*, 421 U.S. at 184 (quotation marks omitted)); *accord Tigue*, 312 F.3d at 80. The government need not "identify a specific decision" made by the agency to establish the predecisional nature of a particular record. *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 151 n.18 (1975); *accord Tigue*, 312 F.3d at 80. Rather, so long as the document "was prepared to assist [agency] decisionmaking on a specific issue," it is predecisional. *Tigue*, 312 F.3d at 80.

"A document is "'deliberative' when it is actually . . . related to the process by which policies are formulated." *Grand Central*, 166 F.3d at 482 (quotation marks omitted; alteration in original). In determining whether a document is deliberative, courts ask whether it "formed an important, if not essential, link in [the agency's] consultative process," and whether it reflects the opinions of the author rather than the policy of the agency. *Id.* at 483; *Hopkins*, 929 F.2d at 85. Predecisional deliberative documents include "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Tigue*, 312 F.3d at 80 (quotation marks omitted); *Grand Central*, 166 F.3d at 482; *see Hopkins*, 929 F.2d at 84-85 (privilege applies to "documents 'reflecting advisory opinions, recommendations and de-

liberations comprising part of a process by which governmental decisions and policies are formulated'" (quoting *Sears*, 421 U.S. at 150)). Legal advice, no less than other types of advice, "fits exactly within the deliberative process rationale for Exemption 5." *Brinton v. Dep't of State*, 636 F.2d 600, 604 (D.C. Cir. 1980); *accord National Council of La Raza v. DOJ*, 411 F.3d 350, 356-57 (2d Cir. 2005).

The government may justify its assertion of privilege through any means, as long as it gives the courts a reasonable basis to evaluate the claim of privilege. *ACLU v. CIA*, 710 F.3d 422, 432 (D.C. Cir. 2013); *accord Senate of the Commonwealth of Puerto Rico v. DOJ*, 823 F.2d 574, 586 (D.C. Cir. 1987). Moreover, a court has "considerable latitude to determine [the] requisite form and detail in a particular case" of the government's submissions. *ACLU v. CIA*, 710 F.3d at 432. Rather than focus on formalities or artificial requirements, courts "focus on the functions of the *Vaughn* index, not the length of the document descriptions," and indeed "[a]ny measure will adequately aid a court if it provide[s] a relatively detailed justification, specifically identif[ies] the reasons why a particular exemption is relevant and correlate[s] those claims with the particular part of a withheld document to which they apply." *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 146 (D.C. Cir. 2006) (quotation marks omitted). Thus, agencies' submissions are sufficient where they provide "reasonably detailed explanations why any withheld documents fall within an exemption." *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). And "especially where," as here, "the agency has disclosed and withheld a large number of documents, categorization and

repetition provide efficient vehicles by which a court can review withholdings that implicate the same exemption for similar reasons." *Judicial Watch*, 449 F.3d at 147.

Moreover, there is no requirement that all withholdings must be justified in a public declaration if doing so would disclose the very information sought to be protected. *ACLU v. CIA*, 710 F.3d at 432-33 ("a *Vaughn* index may also contain brief or categorical descriptions when necessary to prevent the litigation process from revealing the very information the agency hopes to protect"); *Hayden v. NSA*, 608 F.2d 1383, 1384-85 (D.C. Cir. 1979) (agency declarations need not contain "'factual descriptions that if made public would compromise the secret nature of the information'" (quoting *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973))); *see N.Y. Times Co. v. DOJ* (*N.Y. Times II*), 758 F.3d 436, 440 (2d Cir. 2014) (requiring government to disclose certain entries on classified index, "unless those materials themselves reveal sensitive information"). The ACLU tacitly acknowledges this, noting only that the government must submit "as detailed a public explanation of its withholdings as possible." (Br. 31 n.7 (citing *John Doe Corp. v. John Doe Agency*, 850 F.2d 105, 110 (2d Cir. 1988), and *Judicial Watch*, 449 F.3d at 146)).

The government's explanations here were easily sufficient, especially given the limitations on what can be said publicly about the documents at issue. First, OLC explained that OLC 8 and 10 each conveyed legal advice to the Attorney General concerning, among other things, issues pertaining to surveillance under

Executive Order 12,333. (JA 259). More generally, OLC's legal advice is generally sought as "part of a larger deliberative process" of government policy-making. (JA 244). Indeed, OLC's declarant elaborated that the memoranda were prepared in advance of Executive Branch decisionmaking, and were thus predecisional, and also were deliberative in that they "consist of advice to Executive Branch officials in connection with that decisionmaking." (JA 254). And, contrary to the ACLU's criticism that the OLC declaration provided nothing more than a recitation of the elements of the privilege (Br. 31), OLC's declarant also explained that the OLC memoranda "were written in response to confidential communications from one or more executive branch clients soliciting legal advice from OLC attorneys," and "contain confidential client communications for the purpose of seeking legal advice and predecisional legal advice . . . as part of government deliberative processes." (JA 251). Further, these memoranda were prepared in keeping with OLC's "principal function" of assisting government officials by providing advice to "inform the decisionmaking of Executive Branch officials on matters of policy," as OLC "does not purport to make policy decisions" and its advice "is not itself dispositive as to any policy adopted." (JA 244).

This explanation more than establishes that the deliberative process privilege applies to the withheld portions of the OLC memoranda, exactly as this Court has repeatedly held in other FOIA cases involving OLC legal advice. *See, e.g.*, *N.Y. Times III*, 806 F.3d at 685-87; *Brennan Center for Justice v. DOJ*, 697 F.3d

184, 202-03 (2d Cir. 2012); *accord Electronic Frontier Foundation v. DOJ*, 739 F.3d 1, 10 (D.C. Cir. 2014).

B. The OLC Memoranda Are Protected by the Attorney-Client Privilege

The government also met its burden to support its assertion of the attorney-client privilege. That privilege "protects confidential communications between client and counsel made for the purpose of obtaining or providing legal assistance. Its purpose is to encourage attorneys and their clients to communicate fully and frankly and thereby to promote 'broader public interests in the observance of law and administration of justice.'" *In re County of Erie*, 473 F.3d 413, 418 (2d Cir. 2007) (quoting *Upjohn v. United States*, 449 U.S. 383, 389 (1981); citation omitted). The privilege operates in the government context as it does between private attorneys and their clients, "protect[ing] most confidential communications between government counsel and their clients that are made for the purpose of obtaining or providing legal assistance." *Id.* To invoke the attorney-client privilege, a party must demonstrate that there was "(1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice." *Id.* at 419; *accord Brennan Center*, 697 F.3d at 207.

The ACLU appears not to challenge whether the OLC memoranda meet these requirements. (Br. 34-35). In fact, the records are privileged because they were sent by specified OLC attorneys to specified Executive Branch recipients, and each was a "legal advice

memorandum" that constituted non-public attorney-client communications reflecting requests for and provision of legal advice. (JA 254-55, 259).

C. The OLC Memoranda Do Not Contain "Working Law"

The ACLU maintains that these privileges have been overcome because the OLC memoranda constitute "working law"—an argument based on an illogically broad reading of this narrow exception to Exemption 5. (Br. 15-23, 25-27). But as the district court correctly concluded, the government has shown the withheld information retains its privileged status because it does not meet the recognized definition of "working law." The OLC legal advice memoranda are not the internal "working law" of an agency, but rather legal opinions as to what the government may do.

Adoption of the ACLU's extreme position "would require that every document relied upon by an agency in reaching a decision be subject to disclosure," an argument that "turns [FOIA] exemption five on its head." *Casad v. HHS*, 301 F.3d 1247, 1252 (10th Cir. 2002). The results would be extraordinarily harmful to Executive Branch functioning, and would eviscerate many of the privileges on which the government relies in its policy-making. That is not the law, nor should it be. *See N.H. Right to Life v. HHS*, 778 F.3d 43, 55 (1st Cir. 2015) ("It is a good thing that Government officials on appropriate occasion confirm with legal counsel that what the officials wish to do is legal. To hold that the Government must turn over its communications with

counsel whenever it acts in this manner could well reduce the likelihood that advice will be sought. Nothing in the FOIA compels such a result."); *see also In re Grand Jury Investigation*, 399 F.3d 527, 534 (2d Cir. 2005) ("[T]he traditional rationale for the [attorney-client] privilege applies with special force in the government context. It is crucial that government officials . . . be encouraged to seek out and receive fully informed legal advice.").

This Court discussed the working law doctrine in detail in *Brennan Center*, 697 F.3d at 199-203. This doctrine requires disclosure of otherwise privileged documents only if they have become an agency's "effective law and policy"—that is, a record that has an effect, indeed "'the force and effect of law.'" *Id.* at 196 (quoting *Sears*, 421 U.S. at 153). A mere discussion or description of law or policy is not sufficient; the document must "create or determine the extent of the substantive rights and liabilities of a person." *Afshar v. Dep't of State*, 702 F.2d 1125, 1141 (D.C. Cir. 1983) (quotation marks omitted). In short, as the *Brennan Center* Court put it, the record must be "effectively binding on the agency." 697 F.3d at 203.

Thus, for example, when an agency's legal department issued memoranda to the agency's regional offices that "'were routinely used by agency staff as guidance in conducting their audits, and were retained and referred to as precedent,'" the memoranda are the agency's working law. *Id.* at 200 (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 869 (D.C. Cir. 1980)). Similarly, "precedential" Office of

Management and Budget documents instructing agencies whether they had to submit their budgets to OMB or could submit them directly to Congress are working law, *id.* at 201 (citing *Public Citizen, Inc. v. OMB*, 598 F.3d 865, 867-68 (D.C. Cir. 2010)), as are documents that provide "the position of the Treasury Department" as to "whether certain tax exemptions applied to specific taxpayers," *id.* (quoting *Tax Analysts v. IRS*, 294 F.3d 71, 80-81 (D.C. Cir. 2002)). On the other hand, "suggestions or recommendations as to what agency policy should be," "advice to a superior," or "suggested dispositions of a case" are not working law. *Id.* at 200 (quoting *Coastal States*, 617 F.2d at 868).

In the case of an OLC memorandum that served an advisory function like that of OLC 8 and 10, *Brennan Center* concluded that it was not agency working law. *Id.* at 202-03. The "decision being made" in that case by the agencies that had requested OLC guidance "was whether they were constitutionally bound to disregard a duly enacted statute's command." *Id.* at 202. But "[n]o one at the OLC made the decision" that the statute would not be followed, and indeed OLC "lack[ed] authority[] to make policy decisions." *Id.* (quotation marks omitted). The OLC memorandum was not "effectively binding on the agency, as in *Coastal States*," and did not "le[ave] it with no decision to make, as in *Sears*"; it thus did "not constitute working law, or the agency's effective law and policy." *Id.* (quotation marks omitted). Similarly, as this Court later explained, OLC memoranda "provide . . . legal advice as to what a department or agency 'is *permitted* to do,'" but OLC does "not have the authority to establish the working law of the agency." *N.Y. Times III*, 806 F.3d at 687 (quoting

Elec. Frontier Found., 739 F.3d at 8, 10 (quotation marks and alterations omitted; emphasis in original)). To the contrary, OLC's "advice 'is not the law of an agency unless the agency adopts it.'" *Id.* (quoting *Elec. Frontier Found.*, 739 F.3d at 8).

The memoranda at issue here are similarly not working law. OLC 10 is a memorandum for the Attorney General regarding whether certain intelligence-gathering activities are lawful. (JA 259, 279-346). Its advisory nature is described in OLC's supporting declaration (JA 243-59), and disclosed portions of the document itself reveal that it does not instruct any agencies to engage in those activities, and expresses no view as to whether they ought to do so; instead, it sets forth analysis and concludes that such intelligence gathering is "constitutionally permissible." (JA 279). The privileged portions of this document relate to non-public aspects of the relevant program. (*E.g.*, JA 289-90). As for OLC 8, it too is an advisory memorandum to the Attorney General, who was contemplating a final agency decision, and the memorandum is not, itself, a final decision or an operationally binding document. (JA 249-51, 254-55, 259).

They are precisely the types of documents that are not working law: "legal advice as to what a department or agency is *permitted* to do," *N.Y. Times III*, 806 F.3d at 687 (quotation marks and alterations omitted; emphasis in original), rather than a document with the "force and effect of law," *Brennan Center*, 697 F.3d at 196 (quotation marks omitted).

The ACLU misstates the requirements for a record to be "working law," seeking to broaden that doctrine

far beyond what the case law permits. It contends that a document becomes working law whenever an agency "accepts or relies on the memos as a basis for agency action." (Br. 23). But that view is not consistent with *Brennan Center* or other case law and would eviscerate the applicable privileges.

The ACLU relies on, but misreads, *Coastal States* for the proposition that "legal opinions that are 'routinely used' and 'relied on' as a basis for agency action are working law." (Br. 22). But that decision is fully consistent with this Court's narrower view of the working law doctrine. In *Coastal States*, the legal opinions themselves were the precedential "documents . . . intended to guide and direct [agency personnel] in analogous cases," that were "intended to have effect upon actions of others." 617 F.2d at 867. Those documents thus had the force and effect of law. *Id.* at 867-68. The *Coastal States* court distinguished such documents from "suggestions or recommendations as to what agency policy should be" and "advice to a superior," which are not working law. *Id.* at 868.

With respect to OLC opinions specifically, this Court has held that the legal analysis they contain "is not the law of an agency unless the agency adopts it." *N.Y. Times III*, 806 F.3d at 687. The Court thus referred to the express adoption doctrine (discussed below), which requires far more than an agency's mere reliance on or reference to a legal opinion for it to become adopted as the agency's working law.

The ACLU thus cannot establish that the OLC 10 constitutes working law merely because it is described in an interagency Joint IG Report (discussed in more

detail *infra* Point II.D) as a "new legal basis" for the Stellar Wind program, and because this program was repeatedly reauthorized after the memorandum came out. (Br. 21-22). Similarly, OLC 8 is not working law simply because the Joint IG Report stated that the Attorney General had earlier reauthorized the Stellar Wind program "[b]ased on that advice." (Br. 19-20). The vague references by a separate, investigative component of the government—not the decisionmaker capable of actually adopting a policy or establishing working law—to the program's "legal basis" or to an action being taken "based on" certain legal advice does not show that any agency adopted the OLC memorandum; indeed, that language is entirely consistent with an agency's routine reliance on or acceptance of legal advice. Nor do reauthorizations of the program transform OLC memoranda into working law; even if relevant decisionmakers wanted to receive legal opinions as to the constitutionality of the program they were being asked to reauthorize, those opinions did not compel reauthorization, and the program's subsequent reauthorizations do not make the legal opinions themselves working law. *See Brennan Center*, 697 F.3d at 202 (OLC memorandum not working law because it was not "effectively binding on the agency," and did not "le[ave] it with no decision to make"). That advice therefore is not working law, and remains privileged.

D. The Legal Analysis in the OLC Memoranda Has Not Been "Expressly Adopted" by the Agencies

The ACLU is also incorrect in arguing that OLC 8 and 10 lose their privileged status because the agencies have expressly adopted them. The express adoption exception to Exemption 5 is narrow, and applies only "if an agency chooses *expressly* to adopt or incorporate by reference" an otherwise-exempt document. *Sears*, 421 U.S. at 161 (emphasis in original). Moreover, the agency must expressly adopt both the conclusions and the reasoning of a document. *Grumman*, 421 U.S. at 184-86; *La Raza*, 411 F.3d at 358-59; *Wood v. FBI*, 432 F.3d 78, 84 (2d Cir. 2005); *Casad*, 301 F.3d at 1252-53. Thus, where an agency "simply adopt[s] only the conclusions of [an] OLC Memorandum," the analysis in the memorandum has not been adopted because "[m]ere reliance on a document's conclusions does not necessarily involve reliance on a document's analysis; both will ordinarily be needed before a court may properly find adoption or incorporation by reference." *La Raza*, 411 F.3d at 358. Indeed, "where an agency, having reviewed a subordinate's non-binding recommendation, makes a 'yes or no' determination without providing any reasoning at all, a court may not infer that the agency is relying on the reasoning contained in the subordinate's report." *Id.* at 359 (collecting cases); *accord Abtew v. DHS*, 808 F.3d 895, 899 (D.C. Cir. 2015).

Moreover, there is no adoption "where an agency has only casually referred to a document, because a

casual reference to a privileged document does not necessarily imply that an agency agrees with the reasoning contained in those documents." *La Raza*, 411 F.3d at 358; *accord Tigue*, 312 F.3d at 75; *Access Reports v. DOJ*, 926 F.2d 1192, 1197 (D.C. Cir. 1991). "Rather, there must be evidence that an agency has *actually* adopted or incorporated by reference the document at issue," and "mere speculation will not suffice." *La Raza*, 411 F.3d at 358 (emphasis in original). Thus, this Court has found no express adoption where a public report "cit[ed] to and publi[shed] an excerpt" of a privileged memorandum, due to the "distin[ction] between reference to a report's conclusions [and] adoption of its reasoning." *Tigue*, 312 F.3d at 81; *accord Common Cause v. IRS*, 646 F.2d 656, 660 (D.C. Cir. 1981) (allusion in post-decisional document to subject matter discussed in predecisional, intra-agency memoranda is not express adoption or incorporation that would override Exemption 5 protection).

This Court's leading cases illustrate how narrow the express adoption exception is. *La Raza* concluded that an agency expressly adopted an OLC memorandum when "the Attorney General and his high-ranking advisors" referred repeatedly and publicly to the memorandum in "assur[ing] third parties as to the legality of the actions the third parties were being urged to take," because these references "demonstrate[d] that [DOJ] regarded the Memorandum as the exclusive statement of, and justification for, its new policy." 411 F.3d at 357. *Brennan Center* concluded that one document had been adopted because an agency's public statements made "explicit reference" to both the document and its rationale. 697 F.3d at 204-06. But, with

respect to two OLC memoranda, the *Brennan Center* Court found no adoption because there had been no "specific reference to" the documents or their reasoning by the relevant agencies, and the mere fact that those agencies acted in keeping with the memoranda's recommendations did not "establish that the agencies adopted their reasoning." *Id.* at 206. The Court rejected an argument that generalized reference to DOJ guidance sufficed to indicate that the agencies had "adopted the reasoning" of the OLC memoranda, particularly because there was no evidence that they had "expressly adopted or incorporated by reference" their reasoning. *Id.*; *accord Wood*, 432 F.3d at 84 (no express adoption where no evidence "that DOJ adopted the reasoning of [a criminal prosecution] Memo").

Other courts of appeals have also applied the express adoption doctrine narrowly. For instance, the First Circuit has cautioned that courts should not "presume[] that every time an agency acts in accord with counsel's view it necessarily adopts counsel's view as policy of the [a]gency, . . . especially where counsel's legal advice is simply that there is no impediment to the agency doing what it wants to do." *N.H. Right to Life*, 778 F.3d at 54. And the D.C. Circuit has ruled that there is no express adoption where an agency never "publicly invoked or relied upon the contents of [an] OLC Opinion," and an official's "response to inquiries from members of Congress" did not "establish that the [agency] adopted the OLC Opinion's reasoning." *Elec. Frontier Found.*, 739 F.3d at 11; *see Judicial Watch, Inc. v. Dep't of Defense*, 847 F.3d 735, 738-39 (D.C. Cir. 2017) (when agency official wrote "cover memo" to Secretary of Defense setting forth his "recommendation,"

and drafted "eight letters to members of Congress" for the Secretary's signature to notify them of the determination, the Secretary did not expressly adopt the "cover memo" simply because he signed the letters to Congress).

Making arguments it never raised before the district court, the ACLU maintains that certain government documents and official public statements demonstrate that the government has adopted the OLC memoranda by reference. (Br. 24-25 (citing a press briefing, congressional hearing, and DOJ white paper, none of which it cited in the district court, as well as portions of the Joint IG Report that it did not cite to the district court); *cf.* JA 417-46 (different portion of Joint IG Report in the district court record)). This Court should decline to consider these belated arguments, at least in part because the government had no opportunity to respond to them in the district court, by providing agency declarations or otherwise. *See Tannerite Sports, LLC v. NBCUniversal News Group*, 864 F.3d 236, 252-53 (2d Cir. 2017) (as "general rule," an "appellate court will not consider an issue raised for the first time on appeal" (quotation marks omitted)). Indeed, these documents were all publicly available during the district court proceedings, a fact that further weighs against considering this late-raised argument. *See id.* at 253 ("the circumstances normally do not militate in favor of" exercising discretion to hear late-raised arguments where "arguments were available" in the district court and litigants proffer "no reason for their failure to raise the arguments below" (quotation marks and alterations omitted)).

Even if this Court were to consider the ACLU's late-raised arguments, however, they do not show that the redacted portions of the OLC memoranda were expressly adopted. As discussed above, the ACLU's argument—that the periodic reauthorization of the Stellar Wind program after the OLC memoranda were written indicates that the government expressly adopted these memoranda (Br. 19-22)—is not consistent with the case law. *See supra* at 39-41 (discussing case law holding that agency actions in accord with recommendation do not establish express adoption of a document's reasoning).

The ACLU first cites a 2005 White House press briefing, at which then-Attorney General Alberto Gonzales broadly discussed "the legal underpinnings" of the then-newly declassified Stellar Wind program, but did not even refer to any OLC memoranda, and did not make statements going beyond any portions of memoranda that were later released. *See* White House, *Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence* (Dec. 19, 2005), https://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051219-1.html. Indeed, during the press conference, the Attorney General cautioned that "there are many operational aspects of the program that have still not been disclosed," as the program "remains highly classified." *Id.* When asked by a reporter whether DOJ would release "the declassified versions of the legal rationale for this [program] from OLC," the Attorney General responded that he would "make the appropriate evaluation at the appropriate time as to

whether or not additional information needs to be provided to the Congress or the American people," but refused to "confirm[ ] the existence of opinions or the non-existence of opinions." *Id.* This is far from express adoption of any OLC opinion.

As for the Attorney General's Senate Judiciary Committee testimony the following year, also invoked by the ACLU, the relevant exchange again fails to show express adoption, especially with regard to OLC 10, as the discussion concerned consultations that occurred before that memorandum was even finalized:[7]

> FEINGOLD: . . . At the time you testified in January of '05, you were fully aware of the NSA program, were you not?
>
> GONZALES: Yes, sir.

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[7] The exchange concerned the circumstance in March 2004, before OLC 10 was issued in May 2004, when Gonzales "signed off" on the program in his (then) capacity as White House Counsel by personally certifying the form and legality of the authorization documents. *Compare* Joint IG Report, vol. 3, at 144 (White House Counsel Gonzales certified the form and legality of the authorization on March 11, 2004), *with id.* at 181-82 ("Unlike the March 11 Authorization and . . . two modifications . . . , the May 5 [2004] Authorization was certified as to form and legality by Attorney General Ashcroft."); *see also* JA 276-351 (OLC 10 memorandum dated May 6, 2004)).

FEINGOLD: You were also fully aware at the time you testified that the Justice Department had issued a legal justification for the program, isn't that right?

GONZALES: Yes, there had been legal analysis performed by the Department of Justice.

FEINGOLD: And you, as White House counsel, agreed with that legal analysis, didn't you?

GONZALES: I agreed with the legal analysis, yes.

FEINGOLD: And you had signed off on the program, right?

GONZALES: Yes, I did believe at the time the president had the authority to authorize these kinds of . . . .

FEINGOLD: And you had signed off on that legal opinion. And yet when I specifically asked you at the January 2005 hearing whether, in your opinion, the president can authorize warrantless surveillance notwithstanding the foreign intelligence statutes of this country, you didn't tell us yes. Why not?

GONZALES: Sir, I believe your question, the hypothetical you pose—and I do consider it a hypothetical—which is whether or not, had the president authorized specific electronic surveillance in violation of

> the laws—and I've tried to make clear today that, in the legal analysis in the white paper, the position of the administration is that the president has authorized electronic surveillance in a manner that is totally consistent—not in violation, not overwriting provisions of FISA but totally consistent with FISA.

Transcript, *U.S. Senate Judiciary Committee Holds a Hearing on Wartime Executive Power and the National Security Agency's Surveillance Authority* (Feb. 6. 2006), *available at* 2006 WL 270364. While the Attorney General acknowledged generally in this exchange that DOJ had performed legal analysis with respect to the Stellar Wind program and that when he was White House Counsel he had agreed with that legal analysis, he crucially identified the President as the relevant decisionmaker, and did not say that the President expressly adopted the contents of that legal analysis as his rationale for reauthorizing the program.

With respect to OLC 10 specifically, the ACLU relies on the fact that the Joint IG Report describes it "under the header: 'A New Legal Basis for the Program Is Adopted,' " and also notes "19 subsequent reauthorizations of the program" after OLC 10 was written. (Br. 21-22 (citing Joint IG Report, vol. 1, at 37-38, and vol. 3, at 14-15 (JA 434-35))). The use of the word "adopted" in this header in an investigatory body's narrative, however, does not establish an agency's "express adoption" of the entirety of the privileged document. First of all, none of the text following the header states or even suggests that the government has ever

expressly adopted the reasoning of OLC 10—much less the reasoning in the redacted sections of the memorandum—as the basis for conducting electronic surveillance. *See* Joint IG Report, vol. 1, at 37-39. Instead, the section summarizes the circumstances leading to the writing of OLC 10, but does not discuss government officials' reactions to the memorandum. *See id.*

Moreover, the header is part of a multi-agency inspector general report concerning government decisionmaking regarding the Stellar Wind program, rather than a document issued by any of the relevant agencies. An inspector general is not empowered to speak for the agency. It is therefore not a statement by the relevant decisionmakers who authorized the program that they expressly adopted the reasoning of OLC 10 as the agency's own reasoning and justification for its chosen policy. As this Court has noted, a statement by someone other than the decisionmaker is "of limited relevance" to the express adoption inquiry. *Brennan Center*, 697 F.3d at 204 n.16 (DOJ letter to a member of Congress concerning OLC advice to two agencies should not be considered in deciding whether advice was expressly adopted by the agencies that requested the advice). Neither, again, does the bare fact that the Stellar Wind program was reauthorized after OLC 10 was written justify a conclusion of express adoption. *See id.* at 206 ("[T]he fact that the agencies acted in conformity with the [OLC] memoranda [does not] establish that the agencies adopted their reasoning.").

Nor is the ACLU aided by a 2006 DOJ "White Paper," which the Joint IG Report describes as having

"publicly released" "much of the legal reasoning" in OLC 10. *See* Joint IG Report, vol. 1, at 49-50 (citing White Paper, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006), https://www.justice.gov/archive/opa/docs/whitepaperonnsalegalauthorities.pdf). The most that this disclosure could do is effect a waiver of privileges for the disclosed information. It cannot constitute adoption or create working law for the remainder of a document that it does not mention or cite. This 42-page White Paper indeed parallels portions of the 108-page-long OLC 10—but the portions of OLC 10 that contain analysis similar to the White Paper, and thus might be subject to a waiver, have already been released.[8]

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[8] *Compare generally* White Paper at 3-6 (background on 9/11 attacks and origin of Stellar Wind program), 6-10 (discussion of the President's inherent authority), 10-17 (discussion of the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001)), 17-36 (discussion of whether program is compatible with FISA, including because of AUMF and constitutional avoidance doctrine), 36-41 (discussion of constitutionality under the Fourth Amendment), *with* JA 280-84 (background and origin of program), JA 299-305 (AUMF), JA 305-06 (constitutional avoidance doctrine), JA 314-19 (President's inherent authority), JA 321-39 (whether program is compatible with FISA), JA 343-51 (Fourth Amendment analysis).

To the extent the Court considers the ACLU's belated arguments concerning adoption, and should the Court conclude that the record is insufficient to demonstrate that the OLC memoranda were not expressly adopted, it should remand to permit the government to submit additional evidence and arguments to the district court in the first instance.

In sum, the OLC memoranda are privileged, and they are not working law nor have they been expressly adopted. They therefore need not be disclosed under Exemption 5.[9]

POINT III

The District Court Did Not Err in Reviewing the Withholdings from the OLC Memoranda as of When the FOIA Requests Were Processed and Not Requiring Reprocessing Based on Subsequent Public Disclosures

Finally, the ACLU argues that the redacted portions of the OLC memoranda lost their FOIA protections as a result of the subsequent declassification of the Joint IG Report and OLC 9 (a letter from OLC to

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[9] This Court, like the district court, does not need to reach the question of whether portions of the privileged material redacted from the OLC memoranda are also protected under Exemptions 1 and 3. (SPA 36 n.3). Should the Court decide to reach this issue, the government respectfully requests that it remand to the district court to permit the creation of a complete record.

the Foreign Intelligence Surveillance Court). (Br. 43-47). For Exemptions 1 and 3, the relevant legal doctrine is that of "official disclosure." *See generally Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009) ("Classified information that a party seeks to obtain or publish is deemed to have been officially disclosed only if it (1) is as specific as the information previously released, (2) matches the information previously disclosed, and (3) was made public through an official and documented disclosure." (quotation marks and alterations omitted)); *cf. N.Y. Times I*, 756 F.3d at 120 & n.19 (noting questions about the scope of the "matching" requirement). For Exemption 5, the question is whether the government has waived the applicable privileges through public disclosure or otherwise. *See N.Y. Times I*, 756 F.3d at 114-19.

The principal question litigated in the district court was whether FOIA requires the OLC memoranda to be reprocessed based on government disclosures made after the agencies' productions in this case. (Dist. Ct. ECF No. 70, at 49-50; No. 75, at 44-47; No. 82, at 35-36). In particular, the ACLU argued that the memoranda must be reprocessed due to the government's partial declassification and release of the Joint IG Report in September 2015 and of OLC 9 in 2016. (JA 252-53). But, as the district court held, that is not required. (SPA 46).

OLC's declarant explained that the OLC memoranda were initially processed for a prior FOIA case in the District of Columbia, in which the ACLU was a plaintiff. (JA 251-52 (citing *Elec. Privacy Info. Ctr.*, 2014 WL 1279280)). The government had undertaken

two separate months-long voluntary reviews of these and a handful of other documents, which resulted in further releases in 2011 and 2014. (JA 252). The 2014 supplemental release took place several months after the D.C. district court had concluded, following *in camera* review, that the agency's prior set of redactions were proper. (JA 252 (citing *Elec. Privacy Info. Ctr.*, 2014 WL 1279280, at *1)). Thus, based on the instruction in the classification Executive Order that documents need not be re-reviewed for declassification if they have undergone such review in the past two years, the agency responded (in late 2014) to the current FOIA request by releasing the documents to the ACLU based on the 2014 declassification. (JA 253 (citing Exec. Order No. 13,526, § 3.5(d) ("If an agency has reviewed the requested information for declassification within the past 2 years, the agency need not conduct another review and may instead inform the requester of this fact and the prior review decision . . . .")).

The district court did not err in declining to consider these later-in-time disclosures, and the ACLU's arguments based on them, in considering the agency's withholdings as of the time they were made. Even if some of the information later disclosed in the Joint IG Report and OLC 9 may appear in the OLC memoranda —as OLC's declarant suggested was possible with regard to the Joint IG Report (JA 253)—requiring yet another round of reprocessing would impose a significant burden on the government, and is not required by the law. Indeed, a laborious reprocessing would have been pointless, given that any new information was al-

ready released in the newly released documents themselves. The district court correctly held that "'[a]s a general rule, a FOIA decision is evaluated as of the time it was made and not at the time of a court's review,'" and that "'[t]o require an agency to adjust or modify its FOIA response based on post-response occurrences could create an endless cycle of judicially mandated reprocessing each time some circumstance changes.'" (SPA 46 (quoting *N.Y. Times I*, 756 F.3d at 111 n.8, and *Florez*, 829 F.3d at 188 (quotation marks omitted))).

On appeal, the ACLU renews its conjectures that the Joint IG Report and OLC 9 contain information that matches redacted portions of the OLC memoranda. (Br. 44-47). Yet the ACLU identifies no legal error in the district court's conclusion that agencies should not be required to reprocess documents in light of post-release disclosures. To the contrary, the district court's unchallenged holding was correct in following this Court's precedents.

Moreover, the ACLU's argument that subsequent disclosures undermine the redactions in the OLC memoranda is erroneous, most fundamentally because the protection afforded by Exemption 5 to deliberative documents or attorney-client communications is not lost simply because similar information in another document is publicly disclosed. The attorney-client privilege, for example, is not "lost by the mere fact that the information communicated [between attorney and client] is otherwise available to the public." *United States v. Cunningham*, 672 F.2d 1064, 1073 n.8 (2d Cir. 1982); *accord United States v. Murra*, 879 F.3d

669, 682 (5th Cir. 2018) ("Public disclosure of facts does not destroy the attorney-client privilege with respect to confidential communications about those facts."). The privilege attaches to communications, not information. *Cunningham*, 672 F.2d at 1073 n.8; *Upjohn*, 449 U.S. at 395-96. Similarly, the applicability of the deliberative process privilege does not turn on whether the privileged communication includes publicly available information. Rather, it is the author's advice and recommendations, and the selection of particular facts or information to be provided to the decisionmaker, that are protected. *See Grand Central*, 166 F.3d at 482; *National Security Archive v. CIA*, 752 F.3d 460, 465 (D.C. Cir. 2014). And because the withholdings from the OLC memoranda were proper under Exemption 5, it is unnecessary to decide whether any protection that those documents had under Exemptions 1 and 3 were abrogated by public disclosure of similar information.

Thus, even if this Court were to evaluate the OLC memoranda in light of the post-release disclosures of the Joint IG Report and OLC 9, no reprocessing of the document would be required.[10]

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[10] Because the government has adequately justified all of its withholdings, no *in camera* document review is appropriate. (*Contra* Br. 47-48). Such review is "the exception, not the rule." *Halpern v. FBI*, 181 F.3d 279, 295 (2d Cir. 1999); *see also id.* at 292 ("[W]here the [agency] affidavit is sufficiently detailed to place the documents within the claimed exemptions, and where the government's assertions are not challenged

CONCLUSION

The judgment of the district court should be affirmed.

Dated: New York, New York
May 4, 2018

Respectfully submitted,

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by contrary evidence or a showing of agency bad faith," a "court should restrain its discretion to order *in camera* review."). This is especially true as to classified and other information that raises national security concerns. *See Wilner*, 592 F.3d at 75-76.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 12,747 words in this brief.

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