17-3399

IN THE

United States Court of Appeals

FOR THE

Second Circuit

AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,
Plaintiffs–Appellants,

– v. –

NATIONAL SECURITY AGENCY, CENTRAL INTELLIGENCE AGENCY, UNITED STATES DEPARTMENT OF DEFENSE, UNITED STATES DEPARTMENT OF JUSTICE, and UNITED STATES DEPARTMENT OF STATE,
Defendants–Appellees.

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

REPLY BRIEF FOR PLAINTIFFS–APPELLANTS

Hannah Bloch-Wehba
David Schulz
Christine D'Alessandro (law student intern)
Media Freedom and Information Access Clinic, Abrams Institute,
Yale Law School
P.O. Box 208215
New Haven, CT 06520
Phone: (212) 850-6103
hannah.bloch-wehba@yale.edu

Ashley Gorski
Patrick Toomey
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
Fax: (212) 549-2654
agorski@aclu.org

Counsel for Plaintiffs–Appellants

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Introduction

The government has refused to disclose basic information about the legal boundaries of its surveillance under Executive Order 12333 ("EO 12333"). Relying on this authority, the NSA and CIA conduct electronic surveillance that sweeps in the communications and data of countless Americans. Plaintiffs seek the seven legal memoranda at issue in order to vindicate one of FOIA's core purposes: ensuring that the law of the land is not hidden from the public. Because the law concerning EO 12333 is made almost entirely within the executive branch, it is especially critical that the public understand how the executive branch interprets the protections afforded to Americans who are subject to this surveillance.

In its brief, the government has advanced untenable and unsupported legal arguments about the scope of FOIA's exemptions. Under Exemption 5, the government cannot withhold OLC 10 because it contains "working law" and has been adopted as agency law and policy. To avoid this conclusion, the government misstates the scope of both the working law and adoption doctrines, arguing that they apply so narrowly that OLC 10 falls outside their ambit. These arguments are at odds with longstanding precedent and the extensive public record, which shows that senior executive branch officials adopted and relied upon OLC 10's controlling legal analysis when repeatedly reauthorizing the STELLAR WIND program.

The government has also improperly asserted Exemptions 1 and 3 over information in OLC 10 that it officially acknowledged through a 700-page Inspectors General report concerning STELLAR WIND. Indeed, the government concedes that it may be withholding information in OLC 10 that it has publicly disclosed. But the government maintains that, because the Joint IG Report was released in 2015—after the partial release of OLC 10 in 2014—it need not reexamine the many redactions in OLC 10. However, this Court has previously required the government to reprocess documents in response to official disclosures post-dating a FOIA response, and in the interests of judicial economy, the same approach is warranted here.

With respect to the legal memoranda in the approval packages, the government argues that it can withhold legal analysis even if it is not inextricably intertwined with classified facts or otherwise exempt material. But that is simply incorrect. Pure legal analysis is not a source or method, and its disclosure cannot result in harm where the government has properly segregated that analysis from classified facts. The government has withheld these legal memoranda in their entirety under Exemptions 1 and 3, but its prior disclosures show that pure legal analysis can be segregated and released, as FOIA requires.

For these reasons, Plaintiffs respectfully request that the Court reverse the district court's judgment, hold that Exemption 5 does not apply to the seven legal

memoranda, and order the government to reprocess them and disclose any segregable information not properly subject to Exemptions 1 and 3. At a minimum, Plaintiffs urge the Court to review the seven documents *in camera* to assess the government's claimed exemptions.[1]

I. The Government Improperly Withheld Portions of OLC 10.

A. OLC 10 Cannot Be Withheld Under Exemption 5.

The government's assertion of Exemption 5 over OLC 10 fails for three distinct reasons: it contains working law; it was adopted as agency law and policy; and the government failed to establish the privileges it asserts.

1. OLC 10 Contains Working Law.

As Plaintiffs' opening brief explained, an agency's actual acceptance and reliance on legal analysis as a basis for its operational decisions transforms that analysis into working law. *See* Pl. Br. 15–23; *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152–53 (1975) ("the reasons which did supply the basis for an agency policy . . . constitute the 'working law' of the agency"); *see also, e.g.*, *Tax Analysts v. IRS* (*Tax Analysts I*), 117 F.3d 607, 617 (D.C. Cir. 1997) (working law includes agency opinions about "what the law is" and "what is not the law and why it is not the law"). The working law analysis is a functional test, which considers how a

[1] In light of the government's reprocessing and supplemental release of the vast majority of OLC 8, *see* Gov. Br. 11, Plaintiffs are no longer seeking disclosure of that memorandum.

particular document is used and relied upon within the executive branch in practice, regardless of the government's labels. *See, e.g.*, *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 869 (D.C. Cir. 1980) (working law includes records that are "relied on" or "routinely used" as a basis for agency policy or action); *Tax Analysts I*, 117 F.3d at 617. Because the Attorney General and other senior executive branch officials accepted and relied on OLC 10 as the basis for the reauthorization of STELLAR WIND, it contains working law and cannot be withheld under Exemption 5. *See* Pl. Br. 18–23; JA 434–36, 446 (describing Attorney General's acceptance and reliance on OLC memoranda to certify STELLAR WIND "as to form and legality"); JA 284 (same); Offices of the Inspectors General, *Report on the President's Surveillance Program*, Vol. I, 37–38 (July 2009) (with Vols. II & III, "Joint IG Report"), https://nyti.ms/2GBmgL0 (describing OLC 10 under the header: "A New Legal Basis for the Program Is Adopted").

In arguing otherwise, the government badly misapprehends the scope of the working law doctrine. At bottom, the government's argument rests on a false dichotomy between "legal advice as to what a department or agency is permitted to do," *N.Y. Times Co. v. DOJ* (*N.Y. Times II*), 806 F.3d 682, 687 (2d Cir. 2005), and documents with the "force and effect of law," *Brennan Ctr. for Justice v. DOJ*, 697 F.3d 184, 196 (2d Cir. 2012). *See* Gov. Br. 36. But these categories are not

mutually exclusive: as longstanding precedent makes clear, when an agency specifically accepts and relies on legal analysis as a basis for action, that analysis *becomes* the working law of the agency. *See Sears*, 421 U.S. at 152–53; *Brennan Ctr.*, 697 F.3d at 199 ("If an agency's memorandum or other document *has become* its 'effective law and policy,' it will be subject to disclosure as the 'working law' of the agency." (emphasis added)). Thus, even if a legal advice memorandum is predecisional when first offered, it loses that status when its reasoning is accepted and relied on by decision-makers—as OLC 10 plainly was here. *See, e.g.*, *Coastal States*, 617 F.2d at 866. Indeed, for years, OLC 10 served as *the* operative law with respect to STELLAR WIND surveillance because the program was conducted without any legislative or judicial authorization.[2]

The government's argument that OLC 10 was merely "advisory" in nature or function is wrong as a matter of fact, and it misreads *Brennan Center*. *See* Gov. Br. 35–36. First, OLC 10 is not just a "suggestion[] or recommendation[] as to what agency policy should be," nor was it simply provided as "tentative" advice from a subordinate to a superior. *Brennan Ctr.*, 697 F.3d at 200. OLC 10 is an authoritative legal interpretation prepared by the DOJ Office of Legal Counsel, accepted by the Attorney General, and relied on by the President in authorizing the

[2] For similar reasons, OLC 10 did in fact "create or determine the extent of substantive rights" of Americans who were subject to the government's warrantless surveillance. *Afshar v. Dep't of State*, 702 F.2d 1125, 1141 (D.C. Cir. 1983); *cf.* Gov. Br. 34.

surveillance of Americans' communications. It served as the foundational legal interpretation for the STELLAR WIND program. *See* Pl. Br. 18–23. Second, the Court in *Brennan Center* did not hold that legal advice flowing upward to a superior can never be working law. To the contrary, the Court acknowledged that a subordinate's advice can be transformed into working law if it is ultimately accepted by agency decision-makers. *See Brennan Ctr.*, 697 F.3d at 199–200 & n.12; *id.* at 207 ("[O]nce an attorney's (or employee's) recommendation becomes agency law, the agency is then responsible for defending that policy." (quoting *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 360 (2d Cir. 2005))); *Coastal States*, 617 F.2d at 866.

The fact that OLC 10 did not itself "compel reauthorization" of STELLAR WIND, Gov. Br. 38, is beside the point. The working law inquiry is not limited to whether a document, on its face, commands one particular policy outcome. Rather, the question is whether the document sets out the agency's view of the legal or policy boundaries within which it may act. *See, e.g.*, *Brennan Ctr.*, 697 F.3d at 199–201; *Tax Analysts v. IRS* (*Tax Analysts II*), 294 F.3d 71, 81 (D.C. Cir. 2002). Binding legal analysis often leaves decision-makers with a range of choices, but the legal limits recognized by the agency are its working law because they constrain agency action. Thus, to qualify as working law, it is "not necessary" for a document to "reflect the final programmatic decisions" of agency personnel; it is

enough that it represents the agency's "final legal position" on the issue. *Brennan Ctr.*, 697 F.3d at 201; *see also Tax Analysts I*, 117 F.3d at 617. In practice, courts assess *how* an agency relied on a document, in order to ascertain whether it ultimately "suppl[ied] the basis for an agency policy." *Sears*, 421 U.S. at 152–53; *see Coastal States*, 617 F.2d at 869.

N.Y. Times II is not to the contrary. *Cf.* Gov. Br. 35–36. In that case, the plaintiffs presented no evidence that the defendant agencies accepted and relied on the particular OLC opinions at issue. Rather, the Court found that the plaintiffs made the "general argument" that the legal reasoning in OLC opinions was working law. *N.Y. Times II*, 806 F.3d at 687. The Court concluded—in dictum—that the memos in that case merely offered OLC's view of what another agency was "permitted to do" and had no controlling effect on their own. *Id.* (quoting *Elec. Frontier Found. v. DOJ*, 739 F.3d 1, 10 (D.C. Cir. 2014)). In contrast, here, Plaintiffs have presented extensive evidence about how the Attorney General and President formally relied on OLC 10 as the legal basis for reauthorizing STELLAR WIND surveillance. *See* Pl. Br. 18–25.[3]

Nor did *N.Y. Times II* hold that OLC memoranda cannot constitute working law unless they are expressly adopted. *See* 806 F.3d at 687; *cf.* Gov. Br. 37. If the

[3] The brief discussion of working law in *N.Y. Times II* was dictum because the Court had already held that, "[w]hether or not 'working law,' the documents are classified and thus protected under Exemption 1." *N.Y. Times II*, 806 F.3d at 687.

government were correct that the working law inquiry collapses into the adoption inquiry, the Court in *Brennan Center* would not have undertaken a separate analysis for each. *See* 697 F.3d at 201, 203–04 (describing the working law and adoption doctrines as "two paths" to the same result); *Sears*, 421 U.S. at 153, 161 (similar). Although the Court in *N.Y. Times II* concluded that the OLC opinions there were not working law, it did not overrule—in one short paragraph—the doctrinal framework laid out by the Supreme Court and this Court in *Sears* and *Brennan Center*, respectively. In any event, the facts here are far different from those in *N.Y. Times II*, because Plaintiffs have explained in detail how OLC 10 was both relied on and expressly adopted by the Attorney General and the executive branch. *See* Pl. Br. 18–25; *see also infra* Section I.A.2.

Because the Attorney General and others accepted the reasoning and conclusions of OLC 10 as part of the formal authorization process for STELLAR WIND, OLC 10 has "the force and effect of law" and is "effectively binding" within the meaning of *Brennan Center*, 697 F.3d at 196, 203. The government is wrong to argue otherwise. *See* Gov. Br. 35. In *Brennan Center*, unlike here, the plaintiff pointed to no evidence "suggesting that the OLC's recommendation was effectively binding on the agency"—*i.e.*, that the recommendation functioned as "effective law and policy." 697 F.3d at 200, 203. Moreover, *Brennan Center* and other cases are clear that legal advice need not be formally or technically binding

in order to be working law. *See, e.g.*, *id.*; *Coastal States*, 617 F.2d at 859–60, 867 (legal advice that was not formally "binding" and that could be "referred to a higher authority within the agency" was working law); *Tax Analysts I*, 117 F.3d at 617 (memoranda that were "'routinely used' and relied upon" were working law; that they were "nominally non-binding is no reason for treating them as something other than considered statements of the agency's legal position").

OLC 10's status as working law is bolstered by two additional facts that the government fails to meaningfully address. By providing the basis for 19 Attorney General certifications as to the lawfulness of the program, OLC 10 functioned as a legal precedent. *See Coastal States*, 617 F.2d at 869 (where opinions were "retained and referred to as precedent," the agency had "promulgated a body of secret law"). Moreover, OLC 10 effectively superseded or rescinded OLC 8, which further confirms that it contains working law. *See* JA 427, JA 446; Joint IG Report, Vol. I at 37–38; *Coastal States*, 617 F.2d at 860, 869 (if documents contained "merely informal suggestions," they would not need to be "'amended' or 'rescinded'").

Searching for policy grounds in the face of the clear case law against it, the government dramatically overstates the implications of Plaintiffs' arguments about the scope of the working law doctrine. Plaintiffs' position would not "'require that every document relied upon by an agency be subject to disclosure.'" Gov. Br. 33

(quoting *Casad v. HHS*, 301 F.3d 1247, 1252 (10th Cir. 2002)). In *Casad*, the plaintiff claimed that a "summary statement"—the output from the first of several stages of assessments of potential National Institutes of Health grantees—could not be withheld under Exemption 5. 301 F.3d at 1249–50. Here, however, Plaintiffs do not contend that every document that is merely considered in a decision-making process becomes working law. Plaintiffs instead seek the disclosure of a formal legal memorandum that supplies the full, final legal rationale for a surveillance program—a memorandum that was accepted and relied on as the "statement[] of the agency's legal position." *Tax Analysts I*, 117 F.3d at 618. This is quintessential working law.[4]

To allow the government to assert Exemption 5 over OLC 10—a document that sets forth the Attorney General's and executive branch's view of "what the law is"—would effectively render the working law doctrine a nullity. *Tax Analysts I*, 117 F.3d at 617. Such a ruling would close off a crucial avenue for the public to learn about the law and policy of the executive branch. Public knowledge of the

[4] The government's reliance on *New Hampshire Right to Life v. HHS*, 778 F.3d 43 (1st Cir. 2015), is likewise misplaced. *See* Gov. Br. 33. In that case, the record provided "no factual support" for the plaintiffs' claim that the Department of Health and Human Services adopted its counsel's advice as the policy of the agency, and the court rejected the proposition that "every time an agency acts in accord with counsel's view it necessarily adopts counsel's view as 'policy of the Agency.'" 778 F.3d at 54. Here, by contrast, Plaintiffs have provided specific evidence that OLC 10 was formally accepted by both the Attorney General and the President, and do not advance such a sweeping argument about the scope of the working law or adoption doctrines.

laws is essential to the functioning of a democratic society, which is precisely why the working law doctrine exists, and why in this case it forbids the government from withholding OLC 10. Whatever the outer boundaries of the doctrine, OLC 10 falls within its heartland. Therefore, even if the memorandum were once privileged, it can no longer be withheld under Exemption 5.

2. OLC 10 Was Adopted.

Under the doctrine of "express adoption" or "incorporation by reference," when a document's reasoning and conclusions have been adopted, "formally or informally," as the agency position on an issue, the document cannot be withheld under Exemption 5. *La Raza*, 411 F.3d at 356–57. Because Attorneys General John Ashcroft and Alberto Gonzales adopted OLC 10 as DOJ's position on the lawfulness of STELLAR WIND, the memo cannot be withheld under Exemption 5. Plaintiffs have pointed to several facts establishing adoption, *see* Pl. Br. 23–25, and the government's arguments to the contrary rely on an unduly narrow view of the doctrine.

First, by certifying STELLAR WIND "as to form and legality" based on the reasoning and conclusions of OLC 10, both Attorneys General adopted the memorandum. *See, e.g.*, JA 434–36, 446; *La Raza*, 411 F.3d at 357 & n.5, 360; *Brennan Ctr.*, 697 F.3d at 198–99, 203–04. Nonetheless, the government contends that these certifications do not evince adoption because they are merely "in accord

with" OLC 10 and do not reflect adoption of the memorandum's *reasoning*. Gov. Br. 39, 41, 43, 47. This is not so. Had the Attorneys General disagreed with the memorandum's reasoning, they would have had no formal basis to certify the program's lawfulness. Indeed, once OLC determined that it could no longer endorse John Yoo's legal reasoning in OLC 8 (but before it had written OLC 10), the Attorney General refused to certify the program. *See* JA 284, 427, 436.[5] It also bears emphasis that the Attorneys General did not simply circle "yes" or "no" after reviewing OLC 10. *See* Gov. Br. 39 (citing *La Raza*, 411 F.3d at 358). Instead, through a separate certification, they affirmatively and repeatedly adopted the reasoning of the memo as DOJ's own, providing the agency's stamp of approval on warrantless surveillance. *See also La Raza*, 411 F.3d at 357 n.5.

Second, in addition to adopting the memo internally as the law of DOJ, Attorney General Gonzales also adopted the memo through public statements, including a 2005 White House press briefing. *See* Press Briefing by Att'y Gen. Alberto Gonzales & Gen. Michael Hayden, Principal Deputy Director for Nat'l Intelligence (Dec. 19, 2005), https://perma.cc/L7ST-YNZ3 (describing the "legal underpinnings for what has been disclosed by the President"). The government raises two objections to this example, but both are meritless. It first argues that

[5] *See generally* U.S. Dep't of Justice, Office of the Inspector General, *A Review of the Department of Justice's Involvement with the President's Surveillance Program* 99–186 (July 2009) ("DOJ Report," which is one portion of the Joint IG Report), https://nyti.ms/2GBmgL0 (beginning at PDF page 325).

Attorney General Gonzales did not explicitly refer to "OLC memoranda." *See* Gov. Br. 43. However, an agency need not refer to "any specific document" to establish adoption. *N.Y. Times Co. v. DOJ*, 138 F. Supp. 3d 462, 474 (S.D.N.Y. 2015) (an agency need not "explicitly mention[] any specific document in a public statement, so long as its conduct, considered as a whole, manifests an express adoption of the documents"). The government next asserts that Attorney General Gonzales "did not make statements going beyond any portions of memoranda that were later released." Gov. Br. 43. But this fact is irrelevant to the adoption inquiry, which looks to evidence of an agency's adoption of a document and its reasoning—not whether an agency has disclosed all of a document's contents. *See, e.g.*, *La Raza*, 411 F.3d at 359. If it were otherwise, incorporation by *reference* would not be enough to overcome Exemption 5, because an agency would have to recite the entire contents of a document to satisfy the government's proposed test. *See Brennan Ctr.*, 697 F.3d at 198 (describing incorporation by reference).

Third, OLC 10 was adopted or incorporated by reference through the DOJ White Paper and the Joint IG Report, which explains that the White Paper contains "[m]uch of the legal reasoning" in OLC 10. Joint IG Report, Vol. I at 49–50; *see* U.S. Dep't of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006), https://perma.cc/5ENC-8QZV. Again, the government argues that because the

White Paper does not specifically cite OLC 10 or replicate it in its entirety, it cannot constitute adoption. *See* Gov. Br. 48. For the same reasons discussed above, these arguments are unavailing. *See La Raza*, 411 F.3d at 357 n.5; *N.Y. Times Co.*, 138 F. Supp. 3d at 474–75.

Fourth, it is plain that OLC 10 was adopted because the Joint IG Report says it was, describing this memo in a section titled "A New Legal Basis for the Program Is Adopted." Joint IG Report, Vol. I at 37–38; *see also* DOJ Report at 99–186. The government asserts, incorrectly, that because the header is part of a multi-agency report and is not a statement by the relevant decision-makers, it is "'of limited relevance.'" Gov. Br. 47 (quoting *Brennan Ctr.*, 697 F.3d at 204 n.16); *id.* at 37–38. However, the footnote the government points to in *Brennan Center* involved a far different factual context: the Court was addressing a letter from OLC to a member of Congress, which explained that OLC had provided "tentative advice" to USAID and HHS. 697 F.3d at 204 n.16. That letter said nothing about how USAID and HHS had treated OLC's advice. *See id.* In contrast, the evidence here—a description of OLC 10's role as the legal basis for STELLAR WIND, written by the Office of Inspectors General in the definitive executive branch report on this program—is far more probative of agency adoption. *See also* JA 434–35 (listing 19 subsequent reauthorizations of the program).

Finally, Attorney General Gonzales's congressional testimony provides further evidence of the executive branch's adoption of OLC 10. *See Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006), *available at* 2006 WL 270364 (testimony of Alberto Gonzales, Att'y Gen. of the United States). When Attorney General Gonzales testified before Congress in both January 2005 and again in February 2006, the operative DOJ legal analysis was contained in OLC 10. *Id.* The testimony gives no reason to believe that he was referring solely to the analysis in OLC 8, as the government suggests. *See* Gov. Br. 44 n.7. Instead, the Attorney General's testimony specifically referred to the "legal analysis in the [DOJ] white paper"—which replicated the legal analysis in OLC 10. *See* Joint IG Report, Vol. I at 49–50.

As this Court recognized in *La Raza*, Attorney General Gonzales need not have used "specific, explicit language" to adopt the reasoning and conclusions of the memo. 411 F.3d at 357 n.5. Instead, this Court must look to Attorney General Gonzales's references in context. *Id.* at 358. That the government "publicly and repeatedly depended on the Memorandum as the primary legal authority justifying and driving" its policy, "and the legal basis therefor," is sufficient to establish that OLC 10 was adopted. *Id.*; *see also id.* at 360 (rejecting the government's view that

it may "adopt a legal position while shielding from public view the analysis that yielded that position" as "offensive to FOIA").[6]

3. In Any Event, OLC 10 Is Not Privileged.

To properly invoke the deliberative process privilege, the government must establish that the withheld material is both "predecisional" and "deliberative." *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999). A document is "predecisional" if it was "prepared in order to assist an agency decisionmaker in arriving at his decision," and "deliberative" if it is "actually . . . related to the process by which policies are formulated." *La Raza*, 411 F.3d at 356 (citation omitted).

The government's assertions that OLC 10 is protected by the deliberative process privilege simply restate the relevant legal standard and lack the factual specificity necessary to justify the privilege. *See* Gov. Br. 30–31; Pl. Br. 28–33. To

[6] In support of their adoption argument, Plaintiffs have cited certain public statements and materials that were not included in their briefing before the district court. *See* Gov. Br. 42. These citations do not advance a new "issue" or "argument," *Tannerite Sports, LLC v. NBCUniversal News Grp.*, 864 F.3d 236, 252–53 (2d Cir. 2017), but instead provide additional support for a claim made throughout the proceedings. It is well-established that "appeals courts may entertain additional support that a party provides for a proposition presented below." *Eastman Kodak Co. v. STWB, Inc.*, 452 F.3d 215, 221 (2d Cir. 2006) (considering a regulation cited by appellant for the first time on appeal in support of an argument made below); *see also Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *In re Air Cargo Shipping Servs. Antitrust Litig.*, 697 F.3d 154, 161 n.3 (2d Cir. 2012). Moreover, judicial notice of these factual sources is appropriate. *Garb v. Rep. of Poland*, 440 F.3d 579, 594 n.18 (2d Cir. 2006); Fed. R. Evid. 201(f).

the extent the government provides any basis whatsoever for invoking the privilege, it recites OLC's general duties and obligations, asserting that OLC's "principal function" is to provide advice to the executive branch, without providing any context or rationale for invoking the privilege with respect to this document. *See, e.g.*, *Senate of P.R v. DOJ*, 823 F.2d 574, 585–86 (D.C. Cir. 1987) (agency must establish what deliberate process is involved, and the role played by the documents in that process).

Moreover, for the reasons stated above, OLC 10 was accepted and publicly relied upon as the legal basis for the implementation of President Bush's warrantless wiretapping program. *See supra* Sections I.A.1 & 2. As a result, even if OLC 10 were at one point predecisional, it is "no longer considered predecisional[,] for [it] now support[s] and explain[s] the agency's position in the same manner a postdecisional document explains an agency decision." *Brennan Ctr.*, 697 F.3d at 200 n.12 (citation omitted).

With respect to both the deliberative process and attorney-client privileges, the government has effected a waiver through its official acknowledgments and public statements. *See* Pl. Br. 34–35; Gov. Br. 48 (conceding that the DOJ White Paper "could . . . effect a waiver of privileges for the disclosed information"). These acknowledgments waive the confidentiality required to maintain the privileges. *See N.Y. Times Co. v. DOJ* (*N.Y. Times I*), 756 F.3d 100, 114–17 (2d

Cir. 2014) (holding that the government waived the secrecy and confidentiality of an OLC memorandum through disclosures of information).

The government is simply incorrect that subsequent disclosures of "information" (as opposed to "communications") cannot undermine its Exemption 5 withholdings. *See* Gov. Br. 52–53. *N.Y. Times I* recognized that "the attorney-client and deliberative privileges, in the context of Exemption 5, may be lost by disclosure"—without requiring that the disclosure be of a *communication*. *See N.Y. Times I*, 756 F.3d at 114–17. In that case, the Court's analysis of Exemption 5 involved canvassing an array of public statements by senior government officials discussing the lawfulness of targeting killing. *See id.* (describing speeches by, among others, then-Attorney General Eric Holder, on matters closely related to the substance of the withheld document). If the Court in *N.Y. Times I* had accepted the narrow rule that the government now seeks to advance, that analysis would have been entirely superfluous, as Attorney General Holder's speeches were not disclosures of communications. *See also N.Y. Times II*, 806 F.3d at 686 (recognizing that "a Government official's public statement made after preparation of a legal opinion" can "result in waiver of protection for that opinion" under Exemption 5). In sum, the government's official acknowledgments concerning

STELLAR WIND and its purported legal basis overcome any Exemption 5 privileges that may have once applied.[7]

B. OLC 10 Cannot Be Withheld Under Exemptions 1 and 3.

The government's official acknowledgments also defeat its assertions of Exemptions 1 and 3 to withhold OLC 10. *See* Pl. Br. 42–47. It is axiomatic that the government cannot withhold information that it has already disclosed to the public. *N.Y. Times I*, 756 F.3d at 114, 119–20; *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007) ("[W]hen information has been 'officially acknowledged,' its disclosure may be compelled even over an agency's otherwise valid exemption claim." (internal citation omitted)).

The government itself concedes that it is "possible" that material officially disclosed in the Joint IG Report appears in portions of OLC 10 that have been withheld. JA 252–53. In fact, as Plaintiffs have explained, it is virtually certain that material officially disclosed in the DOJ Report and other parts of the Joint IG Report is still being withheld in OLC 10. *See* Pl. Br. 46. As a result, the government's invocation of Exemptions 1 and 3 in support of its broad withholdings is neither "logical" nor "plausible." *N.Y. Times I*, 756 F.3d at 119; *see*

[7] The government asserts that "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." Gov. Br. 48. However, it is a near-certainty that the government continues to improperly assert privileges over material in OLC 10 that was disclosed in the Joint IG Report. *See* Pl. Br. 43–47.

also ACLU v. CIA, 710 F.3d 422, 429–30 (D.C. Cir. 2013) (holding that the CIA's assertion of harm to national security was neither logical nor plausible because it had made official acknowledgments that fatally undermined that claim).

Although the government contends that reprocessing "would have been pointless," Gov. Br. 51, this is not so. FOIA requires that agencies disclose all reasonably segregable non-exempt material, *see* 5 U.S.C. § 552(b), and Plaintiffs are seeking to hold the government to its statutory obligation. The release of this information in OLC 10 would provide critical context to already-disclosed material, furnish a more complete and accurate historical record, and further "open agency action to the light of public scrutiny"—one of the core purposes of FOIA. *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976).

The government also argues that reprocessing would impose "a significant burden on the government," Gov. Br. 51, but it fails to consider the alternatives. Plaintiffs, or any other FOIA requester, are legally entitled to file a new FOIA request at any time that seeks the release of the same information from OLC 10. *See* 5 U.S.C. § 552(a). Surely it is no more burdensome for the government to fulfill its FOIA obligations in the context of the current case than to do so in response to successive FOIA requests. What Plaintiffs seek is precisely what the Court granted in *N.Y. Times I*: the reprocessing of a document in response to official government disclosures post-dating a FOIA request. 756 F.3d at 110 n.8,

124. The government's "post-request disclosures 'go[] to the heart of the contested issue,'" *id.* at 110 n.8 (quoting *Powell v. U.S. Bureau of Prisons*, 927 F.2d 1239, 1243 (D.C. Cir. 1991)), and requiring it to reprocess OLC 10 is "the most sensible approach to ongoing disclosures by the Government made in the midst of FOIA litigation," *id.*

II. The Approval Packages Cannot Be Withheld.

A. Pure Legal Analysis Cannot Be Withheld Under Exemptions 1 and 3.

The relevant question with respect to the approval packages is whether all of the legal analysis in them is "inextricably intertwined" with exempt information. *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1116 (D.C. Cir. 2007); *see N.Y. Times I*, 756 F.3d at 119–20. The answer to that question is almost certainly no. Each package includes a legal memorandum concerning surveillance activities, and it is highly likely that these memoranda contain legal analysis that is segregable from properly exempt material. Given the length of the legal memos—most of which are more than 30 pages—and the fact that similar government memos authorizing surveillance contain "pure" legal analysis, it is neither "logical" nor "plausible" that the memos must be withheld in their entirety to protect intelligence sources and methods. *N.Y. Times I*, 756 F.3d at 119; Pl. Br. 38–40, 42–43; JA 486–87.

FOIA requires the government to produce "[a]ny reasonably segregable portion of a record . . . after deletion of the portions which are exempt." 5 U.S.C. § 552(b). While the approval packages undoubtedly contain some information that is properly exempt, "pure legal analysis" —*i.e.*, constitutional and statutory interpretation, discussions of precedent, and legal conclusions that can be segregated from properly classified or otherwise exempt facts—cannot be withheld under Exemptions 1 or 3. *See N.Y. Times I*, 756 F.3d at 119–20 (segregating "pure legal analysis" in an OLC memorandum from facts describing "intelligence gathering activities").

The government maintains that it may withhold pure legal analysis under Exemption 1 because it "pertains to" protected information, and its disclosure would damage national security. *See* Gov. Br. 23. But it is neither logical nor plausible that the disclosure of pure legal analysis would harm national security. The government's theory elides the critical distinction between legal analysis and facts, and it flies in the face of the Court's ruling in *N.Y. Times I*, which recognized that where legal analysis can be segregated from facts describing intelligence gathering activities, it must be disclosed. 756 F.3d at 119–20. As this Court explained, pure legal analysis is "not an intelligence source or method," *id.*, and accordingly, its disclosure cannot "reasonably . . . be expected to result in damage

to the national security," as required by Executive Order 13526 § 1.1(a)(4), 75 Fed. Reg. 707 (Dec. 29, 2009).

Judicial Watch is not to the contrary. *See* Gov. Br. 23 (citing *Judicial Watch, Inc. v. DOD*, 715 F.3d 937, 941 (D.C. Cir. 2013)). There, the plaintiffs sought access to classified images that directly documented a classified operation. In that context, the court upheld the withholding of images that "pertained" to classified material. *Id. Judicial Watch* does not, however, permit the withholding of legal analysis that can, and should, be segregated from classified facts. Unlike a photograph, which *documents* and *describes* facts, legal opinions can be meaningfully redacted to release the analytical reasoning without jeopardizing the facts themselves. That a legal opinion "pertains" to classified information does not, without more, indicate that disclosure of segregated analysis would result in harm to national security. *See* EO 13526 § 1.1(a)(4).

The government's argument in support of its blanket Exemption 3 withholdings fares no better. It asserts that Exemption 3 applies because the legal memoranda "relate to 'intelligence sources and methods,' NSA functions, and classified communications intelligence activities." Gov. Br. 22. However, for an agency to invoke Exemption 3, FOIA requires that the matter be "*specifically* exempted from disclosure by [a] statute" other than FOIA. 5 U.S.C. § 552(b)(3) (emphasis added). None of the statutes cited by the government specifically

exempt pure legal analysis from disclosure. *See* Gov. Br. 20 & n.4; Pl. Br. 39–40.[8] That the memos merely *relate* to intelligence sources and methods is insufficient to establish that Exemption 3 applies. If it were otherwise, intelligence agencies would effectively be exempt from FOIA's reach—the opposite of Congress's intent in enacting the statute. *See, e.g.*, Karen A. Winchester & James W. Zirkle, *Freedom of Information and the CIA Information Act*, 21 U. Rich. L. Rev. 231, 256 (1987) (detailing congressional rejection of the CIA's plea to "exclude totally the CIA . . . from the requirements of FOIA").

The newly reprocessed version of OLC 8 illustrates how legal memoranda concerning the scope of the government's surveillance authority contain pure legal analysis.[9] Several passages in OLC 8 contain legal analysis that is segregable from classified or otherwise exempt facts. For example:

> An executive order is only the expression of the President's exercise of his inherent constitutional powers. Thus, an executive order cannot limit a President, just as one President cannot legally bind future Presidents in areas of the executive's Article II authority. Further, there is no constitutional requirement that a President issue a new

[8] These statutes instead criminalize the dissemination of classified information, *see* 18 U.S.C. § 798; direct the Director of National Intelligence to "protect intelligence sources and methods," 50 U.S.C. § 3024(i)(1); protect from mandatory disclosure "information with respect to the activities" of the NSA, 50 U.S.C. § 3605; and exempt the CIA from disclosure of the "organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency," 50 U.S.C. § 3507.

[9] *Available at* https://www.aclu.org/sites/default/files/field_document/olc_8_redacted_with_codesocr.pdf.

> executive order whenever he wishes to depart from the terms of a previous executive order. . . . Rather than "violate" an executive order, the President in authorizing a departure from an executive order has instead modified or waived it.

OLC 8 at 6–7. This paragraph, like all pure legal analysis, does not "tend to reveal the underlying classified information." Gov. Br. 24. At the same time, even without factual context, the paragraph provides a meaningful window into OLC's view of the President's authority and the operative law of the executive branch.

Although the district court did not review any of the approval packages, it nevertheless held that "case citations and quotations standing in a vacuum would be meaningless," and that "if sufficient context was disclosed to make the non-exempt material meaningful, the circumstances warranting the classification of the [document] would be revealed." SPA 54; *see also* Gov. Br. 24 (citing district court cases applying the same reasoning). This approach is completely at odds with *N.Y. Times I*, which made clear that legal analysis is not inherently intertwined with or revealing of classified facts. *See N.Y. Times I*, 756 F.3d at 119. Contrary to the government's suggestion, there is nothing "ludicrous" about the proposition that "legal advice can, in the ordinary course, be shorn of the particular facts that impel a client to [seek] it," Gov. Br. 24 (quoting *ACLU v. DOJ*, No. 15-cv-1954, 2016 WL 8259331, at *7 (S.D.N.Y. Aug. 8, 2016)).

The government's bald assertion that it would be impossible to release any portion of the documents without revealing classified information, Gov. Br. 24–25,

is simply not credible, and serves instead to illustrate the sweeping nature of its arguments. It is neither "logical" nor "plausible" that withholding each memo in full is necessary to protect "intelligence sources and methods." *N.Y. Times I*, 756 F.3d at 119. To the extent that legal analysis is inextricably intertwined with exempt information, the government must describe what proportion of the document is non-exempt, and how that material is dispersed throughout the document, rather than resting on blanket assertions. *See Mead Data Cent., Inc. v. Dep't of Air Force*, 566 F.2d 242, 260–61 (D.C. Cir. 1977). This it has failed to do. *See* JA 154, 450; Gov. Br. 9.

B. The Approval Packages Cannot Be Withheld Under Exemption 5.

The government's withholding of the approval packages under Exemption 5 is also improper. Though the government failed to address this point in its brief, the Court may of course reach it. As with OLC 10, the approval packages are not shielded by Exemption 5 because they contain working law and have been adopted, and because the government has failed to justify the privileges it asserts. *See* Pl. Br. 25–34; *supra* Section I.

III. This Court Should Review the Seven Documents *In Camera*.

For the reasons explained above, Plaintiffs respectfully ask the Court to hold that the government failed to establish the exemptions it asserts over OLC 10 and the surveillance approval packages; to order the government to reprocess the

documents; and to order the release of any information not properly subject to Exemptions 1 and 3. In the alternative, Plaintiffs request that the Court conduct an *in camera* review of the documents (or a representative sample) to assess the government's claimed exemptions against the reality of their contents. *See* Pl. Br. 47–48; *see also, e.g.*, *ACLU v. DOJ*, No. 12-cv-7412 (WHP), 2014 WL 956303, at *3 (S.D.N.Y. Mar. 11, 2014) (*in camera* review is particularly appropriate where "the number of records involved is relatively small" (citation omitted)).

The government cites *Halpern v. FBI*, 181 F.3d 279, 292, 295 (2d Cir. 1999), for the proposition that "where the [agency] affidavit is sufficiently detailed to place the documents within the claimed exemptions, and where the government's assertions are not challenged by contrary evidence," "a court should restrain its discretion to order *in camera* review." Gov. Br. 53 n.10. Here, Plaintiffs have explained why the government's declarations lacked the detail necessary to carry its burden under Exemptions 1, 3, and 5, and have also presented contrary evidence establishing that the government's withholdings are improper. *See supra*. Accordingly, *in camera* review is appropriate.

Conclusion

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

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Respectfully submitted,

/s/ Ashley Gorski

Ashley Gorski
Patrick Toomey
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
Fax: (212) 549-2654
agorski@aclu.org

Hannah Bloch-Wehba
David Schulz
Christine D'Alessandro (law student intern)
Media Freedom and Information Access Clinic, Abrams Institute, Yale Law School
P.O. Box 208215
New Haven, CT 06520
Phone: (212) 850-6103
hannah.bloch-wehba@yale.edu

Counsel for Plaintiffs–Appellants

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of L.R. 32.1(a)(4)(B) because it contains 6,777 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: June 15, 2018

/s/ Ashley Gorski
Ashley Gorski

Counsel for Plaintiffs–Appellants

CERTIFICATE OF SERVICE

On June 15, 2018, I filed and served the foregoing REPLY BRIEF FOR PLAINTIFFS–APPELLANTS via this Court's electronic-filing system.

Dated: June 15, 2018

/s/ Ashley Gorski
Ashley Gorski

Counsel for Plaintiffs–Appellants