NOT YET SCHEDULED FOR ORAL ARGUMENT
Nos. 16-5011, 16-5012

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Jihad Dhiab, Detainee, Guantanamo Bay Naval Station;
Shaker Aamer, as Next Friend of Jihad Dhiab,
Petitioners – Appellees,
v.
Barack Obama, President of the United States; Ashton B. Carter, Secretary, United States Department of Defense; Peter J. Clarke, Navy Rear Admiral, Commander, Joint Task Force-GTMO; David E. Heath, Army Colonel, Commander, Joint Detention, Operations Group, JTF-GTMO,
Respondents – Appellants/Cross-Appellees

Hearst Corporation; ABC, Inc.; Associated Press; Bloomberg L.P.; CBS Broadcasting, Inc.,; The Contently Foundation; Dow Jones & Company, Inc.; First Look Media, Inc.; Guardian US; McClatchy Company; National Public Radio Inc.; New York Times Company; Reuters America LLC; Tribune Publishing Company; USA Today; Washington Post,
Intervenors – Appellees/Cross-Appellants

On Appeal from the United States District Court for the District of Columbia

BRIEF OF *AMICI CURIAE* BRENNAN CENTER FOR JUSTICE AND ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF INTERVENORS-APPELLEES AND AFFIRMANCE

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Dated: April 6, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *amici curiae* Brennan Center for Justice and Electronic Frontier Foundation certify that:

(A) Parties and Amici

All parties, intervenors, and *amici* appearing in the proceedings below are listed in the Brief for Respondents-Appellants.

(B) Rulings Under Review

References to the rulings at issue appear in the Brief for Respondents-Appellants.

(C) Related Cases

References to the related cases appear in the Brief for Respondents-Appellants.

DISCLOSURE STATEMENT

The Brennan Center for Justice and the Electronic Frontier Foundation are non-profit, non-stock corporations organized under the laws of New York and Massachusetts, respectively. There is no parent corporation for either organization, and no publicly held company owns 10 percent or more of the stock of either organization as there is no stock.

/s/ Rachel Levinson-Waldman
Rachel Levinson-Waldman

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GLOSSARY OF ABBREVIATIONS

CIA…….…….. Central Intelligence Agency
DHS……Department of Homeland Security
EFF…….. Electronic Frontier Foundation
FOIA…… Freedom of Information Act
ISOO…….Information Security Oversight Office
LNS……...Liberty & National Security
TSA……..….. Transportation Security Administration

STATUTES AND REGULATIONS

All applicable statutes, etc., are contained in the Brief for Respondents-Appellants.

INTEREST OF AMICI AND AUTHORITY TO FILE

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute focused on fundamental issues of democracy and justice. The Center's Liberty and National Security (LNS) Program uses innovative policy recommendations, litigation, and public advocacy to advance effective national security policies that respect the rule of law and constitutional values. Reining in excessive government secrecy is one of the LNS Program's main areas of focus, and the Brennan Center has issued several reports on the need to increase the transparency of national security policies and activities. Parts of this brief are taken or adapted from the Center's 2011 report, *Reducing Overclassification Through Accountability.* This brief does not purport to convey the position of NYU School of Law.

The Electronic Frontier Foundation (EFF) is a not-for-profit membership organization with offices in San Francisco, California and Washington, D.C. EFF works to inform policymakers and the general public about civil liberties and privacy issues related to technology, and to act as a defender of those rights and liberties. As part of this mission, EFF regularly works on cases concerning classification issues, including Freedom of Information Act litigation and constitutional challenges to national security surveillance programs.

Amici filed a motion for leave to file pursuant to D.C. Circuit Rule 29(b).

STATEMENT REGARDING SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amici curiae* certifies that a separate brief is necessary. *Amici* have a particular interest and expertise in Executive Order 13526 and the classification system it establishes. This brief addresses the history of overclassification under that order, as well as the propriety in this case of classification under the order, rather than the separate issue of the public's First Amendment right of access to the courts, which *amici* understand to be the subject of other *amicus* briefs filed in this case. *Amici* have coordinated with the parties to prevent any unnecessary duplication.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

Amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Appellants urge this Court to begin and end its analysis with the executive branch's classification of the videotapes showing the government's force-feeding of Dhiab. Under Appellants' theory, the judgment of the executive branch in classifying the videotapes is dispositive. Such automatic deference to classification decisions would ignore a widely recognized pattern of unnecessary classification ("overclassification")—the inevitable result of a system in which multiple forces

push officials to classify information while few if any forces push in the other direction.

Accepting Appellants' claim that information may be classified and sealed if it could be used as anti-American "propaganda" would exacerbate the problem by eroding existing limits on classification authority. Specifically, this argument could eviscerate Executive Order 13526's prohibition on classifying information to conceal misconduct or prevent embarrassment, as information related to wrongdoing by U.S. agencies or officials can always be used as propaganda to provoke anti-American sentiment. Indeed, this justification for secrecy would be at its strongest when the government's conduct was the worst.

Moreover, government information need not relate to illegal or embarrassing conduct to generate anti-American sentiment overseas. Any controversial decision, statement, or policy choice could have that effect. Appellants' approach would thus create an almost limitless basis for classification, contrary to the intent and letter of Executive Order 13526. Any remaining limits would vanish if the government may classify information because it could be doctored to convey *different* information—an argument made by the government in this case. This Court accordingly should affirm the district court's ruling that the propaganda theory does not constitute a valid basis for the sealing of the videotapes.

ARGUMENT

I. EXCESSIVE DEFERENCE TO CLASSIFICATION DECISIONS IS UNWARRANTED IN LIGHT OF THE PREVALENCE OF OVERCLASSIFICATION

Appellants argue that the standard of review on this case should be the usual deference accorded to classification decisions (for instance, in Freedom of Information Act cases) rather than the greater scrutiny that applies under *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986). Whichever standard applies, however, the court has the right and obligation to review the classification decision at hand. Appellants do not claim otherwise, nor could they, as denying the court any power of review would allow the executive branch to subvert litigation through the improper classification of evidence.

Nonetheless, Appellants clearly equate deferential review with acquiescence, despite this Court's contrary admonition in *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998). In the government's view, considering and rejecting a posited basis for classification, as the lower court did here, is the same as "disregarding" it—a term Appellants use on multiple occasions. Br. Resp'ts-Appellants at 28, 36, 43.

The automatic and total deference urged by Appellants is not only contrary to the case law; it is unwarranted. To be sure, the executive branch has greater expertise in making predictive judgments on national security matters. There is,

however, a significant factor weighing against complete deference: the history of widespread overclassification in the federal government.

Overclassification is as old as classification itself. A 1940 executive order by President Franklin Delano Roosevelt marked the beginning of the modern classification regime. Kevin R. Kosar, Cong. Research Serv., 97-771, *Security Classification Policy and Procedure: E.O. 12958, as Amended* 3 (2009). Since then, each government study to address the issue has reported widespread overclassification. *See* Def. Dep't Comm. on Classified Info., *Report to the Secretary of Defense* 6 (1956); Comm'n on Gov't Sec., 84th Cong., *Report of the Commission on Government Security* 174–75 (1957); Special Subcomm. on Gov't Info., *Report of the Special Subcommittee on Government Information*, H.R. Rep. No. 85-1884 4 (1958); Def. Sci. Bd. Task Force on Secrecy, *Report of the Defense Science Board Task Force on Secrecy* 2 (1970); Comm'n to Review DOD Sec. Policies and Practices, *Keeping the Nation's Secrets: A Report to the Secretary of Defense* app. E 31 (1985); Joint Sec. Comm'n, *Redefining Security: A Report to the Secretary of Defense and the Director of Central Intelligence* 6 (1994) [hereinafter *Joint Security Commission Report*]; Comm'n on Protecting and Reducing Gov't Secrecy, *Report of the Commission on Protecting and Reducing Government Secrecy*, S. Doc. No. 105-2 xxi (1997) [hereinafter *Moynihan Commission Report*]; Nat'l Comm'n on Terrorist Attacks Upon the U.S., *The 9/11*

Commission Report: Final report of the National Commission on Terrorist Attacks Upon the United States 417 (2004) [hereinafter *9/11 Commission Report*].

Current and former government officials have given startling estimates of the problem's scope. Rodney B. McDaniel, National Security Council executive secretary under President Ronald Reagan, believed that only 10 percent of classification was for "legitimate protection of secrets." *Moynihan Commission Report*, *supra*, at 36 (quoting McDaniel). In 1993, Senator John Kerry, who reviewed classified documents while chairing the Senate Select Committee on POW/MIA Affairs, commented, "I do not think more than a hundred, or a couple of hundred, pages of the thousands of [classified] documents we looked at had any current classification importance." *Mark-up of Fiscal Year 1994 Foreign Relations Authorization Act: Hearing Before the Subcomm. on Terrorism, Narcotics and Int'l Operations of the S. Comm. on Foreign Relations*, 103rd Cong. 32 (1993) [hereinafter *1993 FRAA hearing*] (statement of Sen. John Kerry). A Department of Defense official in the George W. Bush administration estimated that overclassification stood at 50 percent. *Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing: Hearing Before the Subcomm. on Nat'l Sec., Emerging Threats, and Int'l Relations of the H. Comm. on Gov't Reform*, 108th Cong. 82 (2004) (testimony of Carol A. Haave, Deputy Under Sec'y of Def., Counterintelligence and Sec.).

Government statistics bear out these assessments. When a member of the public asks an agency to declassify a particular record through a process called "mandatory declassification review," the agency finds about 90 percent of the time that at least some of the information need not remain classified. Info. Sec. Oversight Office, *2010 Report to the President* 20 (2011) [hereinafter *ISOO 2010 Report*]. When one considers the sharp rise in the number of reported classification decisions since 9/11—approximately 77.5 million decisions to classify information in 2014, compared with 23 million in 2000—this percentage translates into a massive amount of unnecessarily classified information. *Compare* Info. Sec. Oversight Office, *2000 Report to the President* 17 (2001) *with* Info. Sec. Oversight Office, *2014 Report to the President* 1 (2015) [hereinafter *ISOO 2014 Report*].[1]

The prevalence of overclassification derives from an imbalance in incentives. Several forces unrelated to national security push strongly in the direction of classifying documents. There are few if any countervailing forces, virtually ensuring that overclassification will occur and will go uncorrected.

[1] Some of this increase undoubtedly is due to the expanding electronic environment, while some could be attributable to an increase in information-sharing (as each communication of classified information represents a separate classification decision). Nonetheless, given the dramatic growth of the Intelligence Community since 9/11, it seems safe to assume that a significant part of the increase is due to more secret information being produced.

A. Incentives to Overclassify

1. A Culture of Secrecy

In the words of Senator Daniel Patrick Moynihan, "a culture of secrecy took hold within American Government" during the Cold War. *Moynihan Commission Report*, *supra*, at xliv. This culture was premised on the notion that we knew who the adversary was; we knew that the adversary's spies were attempting to learn military secrets; and we knew exactly which federal officials needed to know the information we were trying to keep out of enemy hands.

As many commentators have observed, these Cold War assumptions no longer hold. Deciding who has a "need to know" is a challenging and error-prone exercise when the enemy is loosely defined and the means and targets of attack are unpredictable. Moreover, given terrorism's transnational nature and focus on civilian targets, information routinely must be shared among federal, state, local, and foreign governments, private-sector partners, and even members of the public. James B. Steinberg, et al., *Building Intelligence to Fight Terrorism***,** Brookings Institution Policy Brief, No. 125 1–2 (2003). Nonetheless, as one member of the 9/11 Commission stated, the "unconscionable culture of secrecy [that] has grown up in our Nation since the cold war" remains. *Emerging Threats: Overclassification and Pseudo-Classification: Hearing Before the Subcomm. on Nat'l Sec., Emerging Threats, and Int'l Relations of the H. Comm. on Gov't*

Reform, 109th Cong. 89 (2005) (statement of Richard Ben-Veniste, former Comm'r, Nat'l Comm'n on Terrorist Attacks upon the U.S.).

While the modern culture of secrecy may have its proximate genesis in the Cold War, its roots go much deeper—to the very nature of bureaucracies and human interaction. Francis Bacon observed in 1597 that "knowledge itself is power." Francis Bacon, *Religious Meditations, Of Heresies* (1597), *reprinted in The Works of Francis Bacon: Literary and Religious Works* pt. III, 179 (New York, Hurd & Houghton 1873). Government officials use classification to confer importance on the information they convey—and, by extension, on themselves. As one journalist stated in recounting a conversation with a retired intelligence official:

> [The official] . . . noticed that classification was used not to highlight the underlying sensitivity of a document, but to ensure that it did not get lost in the blizzard of paperwork that routinely competes for the eyes of government officials. If a document was not marked "classified," it would be moved to the bottom of the stack. . . . He observed that a security classification, by extension, also conferred importance upon the author of the document.

Ted Gup, *Nation of Secrets: The Threat to Democracy and the American Way of Life* 44 (2007).

Information control also can be a weapon for "protection of bureaucratic turf," in the words of one former national security official. *C3I: Issues of Command and Control* 68 (Thomas P. Croakley ed., 1991) (quoting Rodney

McDaniel, former Exec. Sec'y of the Nat'l Sec. Council). Former intelligence officers told *Washington Post* reporters that "the CIA reclassified some of its most sensitive information at a higher level so that National Counterterrorism Center staff . . . would not be allowed to see it." Dana Priest and William M. Arkin, *Top Secret America: A Hidden World, Growing Beyond Control*, Wash. Post, July 19, 2010, at A1.

2. Concealment of Governmental Misconduct or Incompetence

The executive order governing classification prohibits classifying information to "conceal violations of law, inefficiency, or administrative error," or to "prevent embarrassment to a person, organization, or agency." Exec. Order No. 13526 § 1.7(a)(1)–(2), 75 Fed. Reg. 707, 710 (Dec. 29, 2009). The prohibition, however, has been interpreted to focus on the classifier's intent. As long as he can posit some national security implication to disclosure, the classifier can maintain that hiding wrongdoing was not his motive. *See, e.g., ACLU v. DOD*, 584 F. Supp. 2d 19, 24 (D.D.C. 2008), *aff'd*, 628 F.3d 612 (D.C. Cir. 2011).

Since its inception, the classification system has been misused for the purpose of concealing government misconduct. In 1947, an Atomic Energy Commission official issued a memo on nuclear radiation experiments that the government conducted on human beings. The memo instructed, "No document [shall] be released which refers to experiments with humans and might have [an]

adverse effect on public opinion or result in legal suits. Documents covering such work . . . should be classified 'secret.'" Memorandum from O. G. Haywood Jr., Col., Corps of Engineers, to Dr. [Harold] Fidler, Atomic Energy Comm'n, Medical Experiments on Humans (Apr. 17, 1947), *available at* http://www.fas.org/sgp/othergov/doe/aec1947.pdf. In the 1950s, the government, after receiving funds from Congress for heavy-duty military cargo planes, classified pictures showing that the aircraft "were converted to plush passenger planes." H.R. Rep. No. 85-1884, at 4.

A more recent example is the Central Intelligence Agency's (CIA) misuse of classification concerning its detention and interrogation program, as documented in a report by the Senate Select Committee on Intelligence. The report reveals that, at a time when the fact of the program's existence remained highly classified, CIA officials coordinated the release of classified information to the media to shape public opinion on the program. *Report of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, S. Rep. No. 113-288, at 401-08 (2014). These deliberate releases confirmed the program's existence, demonstrating that there was no national security interest in keeping its existence classified. As one senior CIA attorney noted, referring to the agency's practice of issuing "Glomar" responses to FOIA requests about the program (i.e., refusing to admit or deny whether

responsive records existed), "[o]ur Glomar figleaf is getting pretty thin." *Id.* at 405. Rather, classification allowed the CIA to conceal those aspects and details of the program that would prove highly embarrassing and that went beyond the conduct described to, and deemed legal by, the Justice Department's Office of Legal Counsel. *Id.* at 409-436.

More recently still, in January 2015, the Inspector General of the Department of Homeland Security accused Transportation Security Administration (TSA) officials of classifying information in order to "conceal negative information" within a report on security controls at New York's John F. Kennedy International Airport. Press Release, Office of Inspector General, DHS, IG Protests TSA's Edits of Audit Report (Jan. 23, 2015), *available at* http://www.oig.dhs.gov/assets/pr/2015/oigpr_012315.pdf. The report found a variety of problems that could compromise the integrity and confidentiality of TSA's networks. The Inspector General noted that previous reports had contained similar material to that which TSA now claimed was classified and that the "new report posed no threat to transportation security." *Id.*

Some insiders have opined that mitigating political damage is classifiers' primary goal. Former solicitor general Erwin Griswold wrote, "It quickly becomes apparent to any person who has considerable experience with classified material" that "the principal concern of the classifiers is not with national security, but rather

with governmental embarrassment of one sort or another." Erwin N. Griswold, Op-Ed, *Secrets Not Worth Keeping: The Courts and Classified Information,* Wash. Post, Feb 15, 1989, at A25. In describing the classified documents he reviewed on the Select Committee on POW/MIA Affairs, Senator Kerry stated that "more often than not" documents were classified "to hide negative political information, not secrets." *1993 FRAA Hearing*, *supra.*

3. Facilitation of Policy Implementation

Secrecy enables executive officials to act quickly and easily, unencumbered by the slow workings and uncertain outcomes of the democratic process. Even within the executive branch, initiatives may be implemented more smoothly when fewer people are involved. In the words of one former CIA official: "One of the tried-and-true tactical moves is if you are running an operation and all of a sudden someone is a critic and tries to put roadblocks . . . you classify it and put it in a channel that that person doesn't have access to." Gup, *supra*, at 28–29 (quoting former covert CIA operative Melissa Mahle).

Classification also can be used to influence Congress. In the 1980s, President Reagan sought congressional support for military aid to the government of El Salvador, which was fighting left-wing rebels. Some members of Congress, however, were concerned about the Salvadoran government's potential connections with right-wing "death squads." In response to a Freedom of

Information Act (FOIA) request, the administration released portions of a CIA report stating that Salvadoran officers had pledged to punish human rights offenders—but classified the report's conclusion that the Salvadoran government was "incapable of undertaking a real crackdown on the death squads." *See* Jeffrey Richelson et al., eds., *Dubious Secrets*, 90 Nat'l Sec. Archive Elec. Briefing Room (May 21, 2003), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB90/index.htm. This selective classification strengthened the administration's case before Congress.

Classification similarly can be a tool to shape public opinion. After 9/11, the detention without charge of alleged "enemy combatants" at Guantánamo Bay became the subject of fierce public debate. Administration officials defended the practice, characterizing the prisoners as "the worst of the worst." *See, e.g.*, Katharine Q. Seelye, *Threats and Responses: The Detainees*, N.Y. Times, Oct. 23, 2002, at A14. The government classified its individual risk assessments, however. Many of these assessments, it later emerged, revealed only that there was "no reason recorded" for the detainee's transfer to Guantánamo. BBC, *WikiLeaks: Many at Guantanamo 'Not Dangerous,'* BBC News (Apr. 25, 2011), http://www.bbc.co.uk/news/world-us-canada-13184845. Disclosing these documents would not have exposed intelligence sources or methods—there were none to expose—but it would have weakened the administration's public case for

indefinite detention.

Similarly, for over a decade, the government kept classified or substantially redacted the National Intelligence Estimate relating to Iraq's supposed "weapons of mass destruction" program. Crucial conclusions of the estimate, such as the fact that intelligence agencies lacked specific evidence on many aspects of the program, were withheld from the public. In particular, the then-classified estimate described intelligence officials' belief that the aluminum tubes procured by Saddam Hussein were likely intended for small conventional weapons; publicly, however, the administration claimed they were part of an attempt to reconstitute Iraq's nuclear weapons program. *See* Report of Liz Jackson, *Spinning the Tubes*, Four Corners (2003), *available at* http://www.abc.net.au/4corners/content/2003/transcripts/s976015.htm. The estimate also concluded, contrary to public suggestions by administration officials, that there were no relevant ties between the Iraqi government and Al Qaeda. *See* Jason Leopold, *The CIA Just Declassified the Document That Supposedly Justified the Iraq Invasion*, VICE News (Mar. 19, 2015), https://news.vice.com/article/the-cia-just-declassified-the-document-that-supposedly-justified-the-iraq-invasion. Selective classification thus allowed the government to present a distorted (or, at the least, oversimplified) picture of the threat posed to Americans and thereby gain support for military action.

4. Fear of Repercussions for Failing to Protect Sensitive Information

Classifiers who fail to protect sensitive national security information face serious repercussions. The 9/11 Commission pointed to the possibility of "criminal, civil, and internal administrative sanctions," *9/11 Commission Report*, *supra*, at 417, while a former intelligence official observed that "revealing 'too much' generally has been considered career-threatening." M. E. Bowman, *Dysfunctional Information Restrictions*, 15 Intelligencer: J. of U.S. Intelligence Stud. 29, 34 (2007).

Official sanctions aside, there is a natural tendency among government officials to be risk-averse when it comes to classification decisions. After all, in matters of national security, the perceived stakes are generally high, and perceived governmental failures are not looked upon kindly by the public. *See, e.g.*, Jonah Goldberg, op-ed, *Fort Hood Killings: FBI Asleep on the Job*, Sun Sentinel (Fort Lauderdale), Nov. 17, 2009, at A21; David M. Herszenhorn, *Lawmakers Fault Pre-Marathon Bombing Efforts*, Boston Globe (June 3, 2013), http://www.bostonglobe.com/news/world/2013/06/02/lawmakers-say-greater-russian-cooperation-could-have-averted-boston-attack/AwTESm78MCYWD8hsjmfSuL/story.html.; *New Questions on Whether San Bernadino Shooting Could Have Been Prevented*, ABC News (Dec. 13, 2015), http://abcnews.go.com/WNT/video/questions-san-bernardino-shooting-prevented-

35747476. It is not surprising, then, that government officials feel pressure to err—and to err liberally—on the side of classification. During one audit, the Office of the Inspector General found that when DOJ personnel were uncertain about when to classify or mark documents, they represented that "they were more likely to err on the side of caution and mark the information as classified." Office of the Inspector General, Dep't of Justice, Audit Report 13-40, *Audit of the Department of Justice's Implementation of and Compliance with Certain Classification Requirements*, 39 (Sept. 2013), *available at* http://www.justice.gov/oig/reports/2013/a1340.pdf.

5. The Press of Business

Deciding whether information meets the criteria for classification can be difficult and time-consuming (although the actual process of classifying documents is relatively easy, as discussed below). Original classifiers must assess whether disclosure reasonably could be expected to harm national security. This may require them to consider a range of hypothetical scenarios and to assess the likelihood of each unfolding.

Although this analysis is essential to the integrity of the classification system, busy national security officials may feel that they do not have the luxury of engaging in it, and they are likely to default to classification. This phenomenon was noted by the Project on National Security Reform, an independent

organization that contracted with the Department of Defense to study the national security interagency system:

> To decide not to classify a document entails a time-consuming review to evaluate if that document contains sensitive information. Former officials within the Office of the Secretary of Defense, for example, who often work under enormous pressure and tight time constraints, admit to erring on the side of caution by classifying virtually all of their pre-decisional products.

Project on Nat'l Sec. Reform, *Forging a New Shield* 304 (2008).

B. Lack of Incentives to Refrain from or Challenge Overclassification

1. Ease of Classifying Documents

The procedural rules for classification do not encourage careful consideration. For instance, although the executive order governing classification requires an original classifier to be "*able to* identify and describe the damage" to national security that could result from unauthorized disclosure, Exec. Order No. 13526 § 1.1(a)(4), 75 Fed. Reg. at 707 (emphasis added), current guidelines do not require the classifier to provide any such description. 32 C.F.R. § 2001.10 (2014).

Similarly, although the executive order states that only specified categories of information (such as "intelligence sources or methods") are subject to classification, classifiers need only "cite[] the applicable classification categor[y]"; they need not demonstrate its applicability. Exec. Order No. 13526 §§ 1.4(c), 1.6(a)(5), 75 Fed. Reg. at 707. The Moynihan Commission concluded that merely citing a category "does little to lessen the tendency to classify by rote." *Moynihan*

Commission Report, *supra*, at 30.

The few basic procedural steps that classifiers are expected to take are often ignored. For example, a 2013 report on overclassification by the Inspector General of the Department of Defense found that 70% of the documents reviewed for the report contained "classification discrepancies." Inspector General, Dep't of Defense, *DoD Evaluation of Over-Classification of National Security Information* 46 (Sept. 30, 2013), *available at* fas.org/sgp/othergov/dod/dod-roca.pdf. Of the reviewed documents, 52% lacked information about the origin of the classification (information that, when absent, renders a successful challenge to the classification determination "problematic"); other documents relied on incorrect or outdated classification authorities; and *100%* of emails "contained errors in marking or classification." *Id*.

2. Lack of Accountability for Improper Classification

Government officials have little to lose when they classify documents unnecessarily. The 9/11 Commission observed, "No one has to pay the long-term costs of over-classifying information, though these costs—even in literal financial terms—are substantial. There are no punishments for *not* sharing information." *9/11 Commission Report*, *supra*, at 417.

The executive order governing classification allows agencies to penalize officials who classify information improperly. However, there is no system in

place to identify offenders. In 1994, a joint Defense Department-CIA commission proposed that each agency appoint an overclassification ombudsman who would "routinely review a representative sample of the agency's classified material" to enable "real-time identification of the individuals responsible for classification errors," with an eye toward "attach[ing] penalties to what too often can be characterized as classification by rote." *Joint Security Commission Report*, *supra*, at 25. This recommendation was not implemented.

The executive order does require the relevant agencies to maintain self-inspection programs, including a review and assessment of the agencies' classified product. Exec. Order No. 13526 § 5.4(d)(4), 75 Fed. Reg. at 725–26. Many agencies, however, do not adhere to this requirement. *See, e.g.*, Info. Sec. Oversight Office, *2005 Report to the President* 26 (2006).

3. Inadequate Training

Agencies routinely have violated the classification training obligations established by the Information Security Oversight Office (ISOO)—the executive office responsible for overseeing classification policy. For example, many agencies have failed to provide any refresher training whatsoever, despite ISOO's directive that such training be provided annually. *See, e.g.*, Info. Sec. Oversight Office, *2008 Report to the President* 23 (2009) [hereinafter *ISOO 2009 Report*]. Moreover, when training is provided, government officials report that it emphasizes the

protection of classified information, with little or no focus on the limits of classification authority. *See* Brennan Center for Justice, *Reducing Overclassification Through Accountability* 31 & n.239 (2011).

4. No Rewards for Challenges to Improper Classification Decisions

The executive order on classification provides that authorized holders of information who believe it should not be classified "are encouraged and expected to challenge the [information's] classification status." It directs agencies to establish procedures for bringing such challenges and prohibits retaliation against participating employees. Exec. Order No. 13526 § 1.8, 75 Fed. Reg. at 711. Agencies do not encourage challenges, however. In some cases, ISOO has found that agencies had no procedures in place for employees to bring challenges. *ISOO 2010 Report*, *supra*, at 13; *ISOO 2009 Report*, *supra*, at 9. The Department of Defense's Inspector General noted that departmental instructions for those who wish to bring challenges are "not consistent with the intent of E.O. 13526," and that "[c]urrent policy does not require language that encourages challenges and provides appropriate citations to assist in the challenge process." Inspector General, Dep't of Defense, *supra*, at 6.

Moreover, employees are required to "present [classification] challenges to an original classification authority with jurisdiction over the information." 32 C.F.R. § 2001.14(a) (2014). In some instances, this may be the very person who

made the decision that the employee wishes to challenge. Given the culture of secrecy within many of the relevant agencies, it is unsurprising that employees brought only 813 formal challenges in fiscal year 2014—a period in which there were more than 77.5 million decisions to classify information. *ISOO 2014 Report*, *supra*, at 5.

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In short, the classification system rests on an incentive structure that renders overclassification inevitable. For this reason, a court that extends virtually automatic deference to the government's classification decisions cannot effectuate its duty to ensure that the sealing of evidence is justified.

II. THE GOVERNMENT'S "PROPAGANDA" ARGUMENT WOULD IMPROPERLY AND DANGEROUSLY EXPAND CLASSIFICATION AUTHORITY

Appellees and *amici* ACLU et al. compellingly demonstrate that Appellants' "propaganda" argument—the claim that information may be classified and sealed if our enemies could use it as propaganda "to increase anti-American sentiment and inflame Muslim sensitivities overseas," Br. Resp'ts-Appellants 56—cannot justify infringing the public's First Amendment right of access to the courts. We write separately to note that, even setting aside the First Amendment right of access, classifying information because its release could provoke animosity overseas is improper under the Executive Order governing classification.

The government has raised a similar "propaganda" argument in a handful of post-9/11 FOIA cases. *See, e.g.*, *Judicial Watch, Inc. v. DOD*, 715 F.3d 937, 943 (D.C. Cir. 2013); *ACLU v. DOD*, 628 F.3d 612, 624 (D.C. Cir. 2011); *Int'l Counsel Bureau v. DOD*, 906 F. Supp. 2d 1, 5 (D.D.C. 2012). The argument has scant precedent,[2] and differs in kind from the common justifications for classification in cases involving military operations, intelligence activities, systems vulnerabilities, or foreign relations (the categories cited or alluded to by Appellants in this case). These have centered around the dangers of releasing the details of military capabilities or operations, *see, e.g.*, *Taylor v. Dep't of the Army*, 684 F.2d 99, 106-09 (D.C. Cir. 1982); the potential for intelligence sources or methods to be compromised if they are revealed, *see, e.g.*, *Schrecker v. Dep't of Justice*, 254 F.3d 162, 165-66 (D.C. Cir. 2001); and the harm to foreign relations that may occur from revealing information foreign governments provided in confidence, cooperation they provided in secret, our own acts of espionage, or diplomatically sensitive information about other governments, *see, e.g.*, *Peltier v. FBI*, 218 F.

[2] In *Schlesinger v. CIA*, the CIA invoked Exemption 1 of the FOIA to withhold documents relating to the agency's involvement in the 1954 coup in Guatemala. The CIA posited that releasing the documents could damage national security in three ways, including by "providing significant foreign relations and propaganda advantage to hostile foreign governments." 591 F. Supp. 60, 62 (D.D.C. 1984). The district court did not address the three harms separately, but found generally that disclosure "could have harmful effects of precisely the sort enumerated in the [CIA's] affidavit." *Id.* at 68.

App'x 30, 32 (2d Cir. 2007); *Miller v. Dep't of Justice*, 562 F. Supp. 2d 82, 104, 107 (D.D.C. 2008); *Wolf v. CIA*, 357 F. Supp. 2d 112, 116 (D.D.C. 2004), *aff'd in pertinent part and remanded on other grounds*, 473 F.3d 370, 377-80 (D.C. Cir. 2007); *Schoeman v. FBI*, 575 F. Supp. 2d 136, 153 (D.D.C. 2008).

In three recent FOIA cases, courts endorsed the "propaganda" justification for classification. *See Center for Constitutional Rights v. CIA*, 765 F.3d 161, 167-69 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1530 (2015); *Int'l Counsel Bureau*, 906 F. Supp. 2d at 7; *Judicial Watch, Inc. v. DOD*, 857 F. Supp. 2d 44, 62-63 (D.D.C. 2012). However, on the two occasions this Court was presented with "propaganda" arguments in FOIA cases, it expressly refrained from addressing them, upholding the Exemption 1 claims on other grounds. *See ACLU v. DOD*, 628 F.3d at 624; *Judicial Watch*, 715 F.3d at 943.

Judicial Watch v. Department of Defense is particularly instructive. In that case, the district court accepted the government's argument that post-mortem images of Osama bin Laden were exempt from disclosure under the FOIA because their release could "encourage propaganda by various terrorist groups or other entities hostile to the United States." *Judicial Watch*, 857 F. Supp. 2d at 61. On appeal, however, this Court took care to avoid this reasoning, relying on the narrower ground that releasing the images could reasonably be expected to incite violence given bin Laden's uniquely central status in the conflict against Al Qaeda.

See Judicial Watch, 715 F.3d at 943.

Appellants attempt to leverage this distinction in their favor, asserting that they do not oppose release of the videotapes "simply because release may spur terrorist propaganda," but because "they are likely to be used by terrorist groups to expand their ranks and to encourage attacks on U.S. personnel." Br. Resp'ts-Appellants 60. This observation misses the mark. In no case has the government argued that propaganda is harmful in itself; the claim has always been that propaganda helps the enemy to raise money, recruit members, and spur anti-American sentiment, which may ultimately lead to acts of violence. That is very different from the potential to directly and immediately incite violence which this Court found present in *Judicial Watch*.

This Court has acted circumspectly in declining to endorse the "propaganda" theory, as it threatens to erode Executive Order 13526's limitations on classification authority. One limitation that is in particular jeopardy is the prohibition on classifying information "in order to . . . conceal violations of law, inefficiency, or administrative error," or to "prevent embarrassment to a person, organization, or agency." Exec. Order No. 13526 § 1.7(a)(1)–(2), 75 Fed. Reg. 707, 710 (Dec. 29, 2009). Some courts have suggested that this prohibition turns on the purpose of classification rather than the effect; in other words, officials may classify evidence of illegal or embarrassing activity as long as they have a valid

national security purpose for doing so. *See* Part I.A.2, *supra*. Almost by definition, however, evidence of misconduct or incompetence on the part of the U.S. government may be used by hostile governments or other enemies to portray the U.S. in a negative light—i.e., as anti-U.S. "propaganda." Accordingly, if the purpose-based interpretation holds sway, endorsing the government's rationale in this case would effectively override the prohibition on classifying information to hide wrongdoing.

Indeed, under the "propaganda" argument, the government's argument for classification and withholding would become stronger as the conduct reflected in the documents became more extreme. Evidence of war crimes or human rights violations against foreign nationals, for instance, would be particularly likely to spur outrage on the part of allies as well as enemies, and thus could be considered highly effective sources of "propaganda." Revealingly, the examples on which Appellants rely to demonstrate that disclosing videos of detainees' force-feeding may lead to violence against U.S. personnel—the cases that prove the need for secrecy, in Appellants' view—are cases in which U.S. personnel were engaged in shameful misconduct, including the burning of Korans and urinating on corpses. The notion that withholding information from the American public is most justified when the government's conduct deviates the furthest from legal and moral norms is antithetical to the principles of accountability enshrined in both the Executive

Order's limitations on classification authority and the United States Constitution.

Appellants seek to dodge this problem by stating that the contested videotapes depict merely "the lawful, humane, and appropriate interaction between guards and detainees." Br. Resp'ts-Appellants 57, citing App. 215. As a threshold matter, this does not change the fact that interpreting Executive Order 13526 to permit classification of information that could be used as "propaganda" would have the natural and unavoidable consequence, when combined with a purpose-based interpretation of the Executive Order's substantive limitations, of eviscerating the prohibition on classifying information to hide wrongdoing. Courts may not interpret particular provisions of a law in ways that would nullify other provisions. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (noting the "cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant") (internal quotation marks and citation omitted); *United States v. Menasche*, 348 U.S. 528, 538–539 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (internal quotation marks and citation omitted).

In any event, there is a strong case to be made that the videotapes do depict misconduct. The district court found it "perfectly clear" that force-feeding "is a painful, humiliating, and degrading process." Order Den. Mot. for Prelim. Inj. at 3,

Dkt. No. 183 (D.D.C. No. 05-1457) (July 8, 2013). In their brief, *amici* ACLU et al. explain convincingly why such degrading treatment violates international law, including treaties to which the U.S. is a party. Indeed, it strains credulity to argue, as Appellants do, that people who would otherwise stay outside the fray are likely to take up arms against the most powerful nation in the world based on images of conduct that is "lawful, humane, and appropriate."

If Appellants have correctly characterized the videotapes' contents—if their argument is that even information reflecting wholly *legitimate* government activity may be classified if disclosure would promote anti-U.S. sentiment—then it is flawed for another reason. Such a rule would abrogate, not merely the prohibition against classifying information to conceal misconduct or prevent embarrassment, but *any* meaningful limits on classification. The reasons why people choose to align themselves against the United States—or any other country—are nearly as numerous and varied as the people themselves. Our support for certain countries may be considered a basis for enmity by others. May the government classify the aid we provide to other nations? May it classify our trade policies on the ground that they may breed resentment among the populations of some countries, laying the groundwork for future hostile relations? May it classify our history of involvement in armed conflicts across the globe because that history may function as "anti-American propaganda" in some quarters?

To the extent any boundaries on classification authority would remain, they would disappear under the government's argument that the videos of Dhiab may be classified and withheld in part because they could be doctored, manipulated, or otherwise "falsif[ied]." Decl. Rear Admiral Richard W. Butler 8, App. 137. This claim was set out by Rear Admiral Butler as follows:

> The videos could also be easily manipulated so to be used as recruiting material . . . . Extremist groups could splice released footage to change the chronology or combination of events, splicing these videos . . . with different footage[;] . . . falsify the released videos by other means to develop completely new videos; . . . overlay staged audio that falsely indicates the mistreatment of the detainees when none has occurred; . . . pixelate[] [the video] to alter the images of the detainees face or person to falsely show physical signs of mistreatment, such as bruising or bleeding[.]

Decl. Rear Admiral Richard W. Butler 8-9.

This possibility is not a valid basis for classifying and sealing documents. The Executive Order permits classification of information where disclosure *of that information* could damage the national security. Exec. Order No. 13526 § 1.2, 75 Fed. Reg. at 707. If the videos of Dhiab in the government's possession could not themselves be used as anti-U.S. propaganda, it is irrelevant that entirely different videos or media, created by our enemies with the aid of technology, could be so used. Indeed, the government's position would allow it to claim that the release of *any* media or document could harm national security. This is not hyperbole: just as a video of a detainee could be manipulated, a pdf image of a government

memorandum or other written document easily could be altered to make its apparent content entirely different (and highly inflammatory). There is simply no limiting principle to this justification for classification and withholding.

CONCLUSION

For the reasons set forth above, the Court should uphold the District Court's decision to order the release of the videotapes.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,644 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman font size 14.

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Dated: April 6, 2016

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2016 I caused the foregoing "Brief of Amici Curiae Brennan Center for Justice and Electronic Frontier Foundation in Support of Intervenors-Appellees and Affirmance" to be electronically filed using the Court's CM/ECF system, which served a copy of the document on all counsel of record in the case:

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