No. 14-658

In the Supreme Court of the United States

CENTER FOR CONSTITUTIONAL RIGHTS,
Petitioner,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

RULES

OTHER AUTHORITIES

INTEREST OF AMICUS[1]

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*.

SUMMARY OF ARGUMENT

Petitioner's brief shows that the lower courts' unquestioning deference to the government's affidavits in this case is contrary to the Freedom of Information Act (FOIA). This *amicus* brief shows that such deference also ignores a widely recognized pattern of unnecessary classification ("overclassification") – the inevitable result of a system in which multiple forces

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. This brief does not purport to convey the position of NYU School of Law. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief and have consented in writing to its filing.

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

Accepting the government's claim that information may be classified 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. The government's approach would thus create an almost limitless basis for classification and for withholding information from the American public under the FOIA. 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 and accepted by the lower courts in this case.

ARGUMENT

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

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 of the multiple government studies 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 80 million decisions to classify information in 2013, 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, *2013 Report to the President* 3, 5 (2014) [hereinafter *ISOO 2013 Report*].[2]

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.

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[2] Some of this increase is undoubtedly 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 challenging 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 Executive Secretary of the National Security 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 used for the improper 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.

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 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, however, classified its individual risk assessments—many of which 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.

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?comments=all&sort=OLDEST_CREATE_DT. It is not surprising, then, that government officials feel

pressure to err—and to err liberally—on the side of classification.

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.

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 ISOO. 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.

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 68 formal challenges in fiscal year 2013—a period in which there were more than 80 million decisions to classify information. *ISOO 2013 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 fully effectuate its duty under the FOIA to determine whether information is "properly classified."

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

Given the prevalence of overclassification, courts must examine closely any efforts by the government to expand the permissible justifications for classifying information. This is such a case, and the expansion the government seeks here should be rejected as incompatible with both the Executive Order governing classification and the central purpose of the FOIA.

The government has argued in a handful of post-9/11 cases that information may be classified if terrorist groups could use it as "propaganda" to recruit members or raise money. *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,[3] and differs in kind

[3] In *Schlesinger v. CIA*, the CIA invoked Exemption 1 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.

from the common justifications for classification in Exemption 1 cases involving military operations, intelligence activities, or foreign relations (the categories cited in this case). These have centered around the obvious 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 be expected 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. 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).

It appears that, before the instant case, only two courts—both district courts, ruling within the past three years—have expressly endorsed the "propaganda" justification for classification. *See 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). By contrast, on the two occasions it was presented with this unusual claim, the U.S. Court of Appeals for the D.C. Circuit expressly

refrained from addressing it, upholding the Exemption 1 claim on other grounds.[4]

The D.C. Circuit 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

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[4] In *ACLU v. Department of Defense*, the government cited five reasons why releasing unredacted copies of Combatant Status Review Tribunal proceedings for Guantánamo detainees would harm national security, one of which was "providing al Qaeda with material for propaganda." 628 F.3d at 624. The D.C. Circuit concluded that "[w]e need not decide the issues raised by this argument" and relied on the other four justifications instead. *Id.* In *Judicial Watch v. Department of Defense,* the district court upheld an Exemption 1 claim for post-mortem images of Osama bin Laden, accepting the government's argument that releasing the records 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, the D.C. Circuit once again 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 ("[B]ecause the CIA's predictions of the violence that could accompany disclosure of the images provide an adequate basis for classification, we do not rely upon or reach the agency's alternative argument that . . . disclosure would facilitate anti-American propaganda.").

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.[5] *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.[6]

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

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[5] This interpretation is problematic and should not be adopted by this Court. The Executive Order instead should be read to prohibit any classification that would have the purpose *or* effect of concealing misconduct or preventing embarrassment. Under that reading, the government's "propaganda" theory would be defective on other grounds – namely, it would permit the classification of information that is merely controversial, as discussed *infra*.

[6] This would not be the case for the narrower rationale relied on by the D.C. Circuit in *Judicial Watch*. While evidence of U.S. misconduct can always be used to "increase anti-American sentiment," App. to Pet. Cert. 9, it is presumably a rare circumstance in which releasing information could reasonably be expected to directly trigger violence.

effective sources of "propaganda." 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 FOIA itself.

The Second Circuit attempted to dodge this problem by noting that the photos and videos at issue "do not depict al-Qahtani being tortured." App. to Pet. Cert. 16 n.12. As a threshold matter, this does not change the fact that accepting the "propaganda" argument 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. While the Second Circuit correctly observed that courts must rule based on the facts before them, *id.* at 14-15, this principle does not give courts license to 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).

It is indisputable, moreover, that al-Qahtani's mistreatment was a significant factor in the decision

not to release the photos and videos. The district court's opinion included a detailed account of this mistreatment. App. to Pet. Cert. 25-26. The court concluded that it was "particularly plausible" that extremists would use the images to incite anti-American sentiment because the material "involves a high-profile detainee, the treatment of whom the Convening Authority for Military Commissions Susan J. Crawford determined met the legal definition of torture." App. to Pet. Cert. 45 (internal quotation marks and citation omitted). The Second Circuit, in emphasizing the limited nature of its holding, noted: "The record makes clear that al-Qahtani is not just any detainee . . . . Apart from his notable profile, al-Qahtani is unusual because a significant government official has publicly opined that the interrogation methods used on him met the legal definition of torture." App. to Pet. Cert. 15-16.

Regardless of whether the photos and videos themselves reveal torture, it is plainly inconsistent with the intent of Executive Order 13526 to rely on the government's wrongdoing as a justification for classifying information. To hold otherwise—to allow the government to cite its own illegal or unethical activity as a basis for classification, as long as the classified information itself does not document that activity—is to elevate form over substance and flout the prohibition's central purpose. *See C.I.R. v. Brown*, 380 U.S. 563, 571 (1965) ("Unquestionably the courts, in interpreting a statute, have some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results or would thwart the obvious purpose

of the statute.") (internal quotation marks and citation omitted).

Moreover, the government's national security concern turns on the assumption that releasing al-Qahtani's images could spur potential terrorist recruits to remember and reflect on his mistreatment at U.S. hands. Presumably, then, releasing these images could prompt a similar process (albeit with a very different result) on the part of the American public. Just as "*images* of al-Qahtani . . . may prove more effective as propaganda than previously released written records that disclose the same—or even more controversial—information about al-Qahtani's detention," App. to Pet. Cert. 17 (emphasis in original), they also may prove more effective in bringing new focus to al-Qahtani's mistreatment here at home.[7] In that sense, classifying and withholding the images in question quite directly implicates the Executive Order's prohibition on classifying information to conceal wrongdoing or prevent embarrassment.

If the holding of the lower courts in this case does not turn on the government's misconduct—if the argument is that even information reflecting *legitimate* government activity may be classified if disclosure would promote anti-U.S. sentiment—then it is flawed for another reason. Such a holding would abrogate, not

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[7] For this reason, the Second Circuit erred in its conclusion that "the Government has already publicly disclosed the alleged wrongdoing and cannot, here, be accused of withholding that information." App. to Pet. Cert. 16 n.12. The principle that pictures are more powerful than words cannot be applied selectively. If images reveal more to potential terrorists than previous written disclosures, they also reveal more to FOIA requesters.

merely the prohibition against classifying information to conceal misconduct or prevent embarrassment, but *any* meaningful limits on classification, as well as the central purpose of the FOIA. 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—accepted by the lower courts—that the images of al-Qahtani may be classified and withheld in part because they could be doctored, manipulated, or used "out of context." App. to Pet. Cert. 40. This claim was summarized by the district court as follows:

> [Government declarant] General Horst states that extremist groups could 'pixelate[]' disclosed images of al-Qahtani 'to show signs of mistreatment, such as bruising or bleeding,' overlay 'staged audio' on released video segments to 'falsely indicate the[] mistreatment' of al-Qahtani where no mistreatment occurred, and/or 'splice released footage' of al-Qahtani 'to change the chronology or combination of events.'

App. to Pet. Cert. 40 (internal citations omitted); *see also id.* at 9 (noting government declarant's assessment that the images could be used to increase anti-American sentiment "particularly because the images could be manipulated to show greater mistreatment than actually occurred, or change the chronology of actual events.").

This possibility is not a valid basis for classification. 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 images of al-Qahtani in the government's possession could not themselves be used as anti-U.S. propaganda, it is irrelevant that entirely different images, 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* image or document could harm national security. This is not hyperbole: just as a photograph 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.

The Second Circuit briefly acknowledged the potential broader consequences of the "propaganda" theory, and addressed them as follows:

> It is of course true that, if invoked reflexively by the government, and accepted unquestioningly by reviewing courts, the 'propaganda' justification could shield a broad range of documents of significant public interest, in

> contravention of the FOIA's central purpose. The possibility that a particular justification might be abused, however, does not render it meritless in all circumstances. . . . Whether the government's justifications for withholding information in the name of national security go too far is a question that must be evaluated in the context of the particular circumstances presented by each case.

App. to Pet. Cert. 14-15.

The Second Circuit's response misses the mark. The problem is not that the "propaganda" argument could be "abused" or that its application could go "too far." Rather, the argument articulated by the government and accepted by the lower courts in this case, *if applied consistently and faithfully in subsequent cases*, would authorize the withholding of almost any controversial information. This threat is no "mere shadow," as the Second Circuit implied. App. to Pet. Cert. 14 n.11 (quoting *Sch. Dist. Of Abington Twp. v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring)). To the contrary, there is no apparent principled basis on which courts could selectively extend Exemption 1 protections to some information about U.S. actions that could provoke a strong negative reaction overseas, but not other information. The Second Circuit's holding thus represents the bottom of the slippery slope, not the top.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for certiorari and reverse the Second Circuit's decision.

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