No. 09-1192

In the Supreme Court of the United States

THOMAS WILNER, ET AL., PETITIONERS

v.

NATIONAL SECURITY AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the government may provide a *Glomar* response under Exemption 3 of the Freedom of Information Act (FOIA) and Section 6 of the National Security Agency Act of 1959 to a FOIA request that seeks agency records concerning whether petitioners were subject to surveillance by the National Security Agency.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases–Continued: Page

Statutes, regulations and rule:

Statutes, regulations and rule—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 592 F.3d 60. The opinions of the district court (Pet. App. 33a-49a, 50a-53a) are not published in the Federal Supplement but are available at 2008 WL 2567765 and 2008 WL 2949325.

JURISDICTION

The judgment of the court of appeals (Pet. App. 31a-32a) was entered on December 30, 2009. The petition for a writ of certiorari was filed on March 30, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the aftermath of the September 11, 2001 attacks on the United States, President Bush established

the Terrorist Surveillance Program (TSP), authorizing the National Security Agency (NSA) to intercept international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations. Pet. App. 5a. To intercept a communication under the TSP, one party to the communication had to be located outside the United States, and there had to be a reasonable basis to conclude that one party to the communication was a member of or affiliated with al Qaeda. *Id.* at 6a.

In December 2005, President Bush publicly acknowledged the TSP's existence. Pet. App. 6a. In January 2007, Attorney General Gonzales announced that any electronic surveillance that may have occurred under the TSP would now be subject to the approval of the Foreign Intelligence Surveillance Court (FISC), and that the President's authorization of the TSP had lapsed. *Ibid.* The TSP is therefore defunct and "has ceased to exist." *Ibid.*

Although the TSP is defunct and its "general existence" officially acknowledged, the operational details regarding the TSP "have not been disclosed" (Pet. App. 13a-15a), and they remain highly classified under criteria set forth in Executive Order No. 13,526, 75 Fed. Reg. 707 (2009). See C.A. App. A53-A54 (Declaration of then-NSA Associate Director for Community Integration, Policy, and Records Joseph J. Brand).[1] The unauthorized disclosure of information regarding the TSP can be expected to cause "exceptionally grave damage to the

[1] Effective June 27, 2010, Executive Order No. 13,526 replaced Executive Order No. 12,958, 3 C.F.R. 333 (1996), as amended by Executive Order No. 13,292, 3 C.F.R. 196 (2004). See Exec. Order No. 13,526 § 6.2(g), 75 Fed. Reg. at 731. The revised order makes no changes material to the Court's consideration of this case.

national security," and TSP-related information is therefore classified as Top Secret national security information. *Ibid.*; *id.* at A107-A108 (Declaration of then-Director of National Intelligence J. Michael McConnell); see Exec. Order No. 13,526 § 1.2(a)(1), 75 Fed. Reg. at 707. In addition, because the TSP-related information involves or is derived from particularly sensitive intelligence sources and methods, it has been designated as Sensitive Compartmented Information (SCI) and is subject to special access and handling procedures reserved for such information. C.A. App. A54 (Brand); *id.* at A108 (McConnell); cf. 50 U.S.C. 403-1(j) (SCI standards); Exec. Order No. 13,526 § 4.3, 75 Fed. Reg. at 722 (authorizing such special access programs).[2]

2. Petitioners are lawyers and law professors representing individuals detained at Guantanamo Bay, Cuba. Pet. App. 4a. On January 18, 2006, petitioners submitted requests under the Freedom of Information Act (FOIA), 5 U.S.C. 552, to the NSA and the Department of Justice (DOJ), seeking several categories of records. Pet. App. 6a; C.A. App. A66-A67, A132-A133. As relevant here, petitioners sought the disclosure of records pertaining to any TSP surveillance "regarding, referencing or concerning any of the plaintiffs." Pet. App. 6a-7a.

NSA and DOJ responded with what is known as a "*Glomar* response," *i.e.*, each agency declined either to confirm or to deny whether it possessed records responsive to petitioners' request. Pet. App. 7a-8a; see *id.* at

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[2] "SCI is classified information that [must] be handled exclusively within formal access control systems established by the Director of [National] Intelligence." *Guillot* v. *Garrett*, 970 F.2d 1320, 1322 n.1 (4th Cir. 1992); see 50 U.S.C. 403-1(j). Access to SCI thus requires special authorization in addition to the normal authorization required for access to information classified at, for instance, the Top Secret level.

9a (discussing the first case involving such a response, *Phillippi* v. *CIA*, 546 F.2d 1009 (D.C. Cir. 1976), which concerned a FOIA request for records concerning the Hughes Glomar Explorer, a research vessel); *Office of Capital Collateral Counsel* v. *DOJ*, 331 F.3d 799, 801 n.3 (11th Cir. 2003) (discussing *Glomar* responses). The agencies explained that the existence or non-existence of such records was statutorily exempt from mandatory disclosure under FOIA. Pet. App. 3a, 7a-8a, 16a-18a. Two FOIA exemptions were invoked: Exemption 1 and Exemption 3. *Ibid.*

Exemption 1 provides that agency records are exempt from mandatory disclosure under FOIA if they are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. 552(b)(1).

Exemption 3, as pertinent here, exempts agency records that are "specifically exempted from disclosure by statute (other than [5 U.S.C. 552b]), if that statute" either "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue" or "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. 552(b)(3) (Supp. III 2009).[3] Three such withholding statutes are relevant in this case. Pet. App. 17a-18a. First, Section 6 of the National Security Agency Act of 1959 (NSA Act), Pub. L. No. 86-36, § 6, 73 Stat. 64 (50 U.S.C. 402 note), states that, with an exception not

[3] Exemption 3 is triggered by a withholding statute enacted after the date of enactment of the OPEN FOIA Act of 2009, Pub. L. No. 111-83, § 564(b), 123 Stat. 2184, only if that statute "specifically cites to" Exemption 3. 5 U.S.C. 552(b)(3)(B) (Supp. III 2009).

relevant here, "nothing in this Act or any other law * * * shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of persons employed by such agency." Second, Section 102(A)(i)(1) of the National Security Act of 1947, as enacted by the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1011(a), 118 Stat. 3651 (50 U.S.C. 403-1(i)(1)), requires the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure." And third, Section 798 of Title 18 criminalizes the knowing and willful disclosure of any classified information "concerning the communication intelligence activities of the United States." 18 U.S.C. 798(a)(3).

3. a. In May 2007, petitioners filed this FOIA action challenging, as pertinent here, the government's *Glomar* response. Pet. App. 35a. The government moved for partial summary judgment on that *Glomar* claim. *Id.* at 8a. The government supported its motion with a comprehensive declaration by the then-Director of National Intelligence, J. Michael McConnell, C.A. App. A106-A115, and declarations from responsible officials in the NSA and Federal Bureau of Investigation (FBI). See *id.* at A49-A62 (Brand); *id.* at A116-A128 (FBI Section Chief David M. Hardy).

The government's declarations explained that confirming or denying the existence of records responsive to petitioners' FOIA request would in and of itself divulge sensitive classified information and threaten national security. C.A. App. A54-A59, A112-A114, A120, A124-A126. On that basis, the government argued that its *Glomar* response was appropriate under FOIA Ex-

emption 1. Pet. App. 3a, 8a, 38a. In addition, the declarations explained that, under FOIA Exemption 3, the three separate statutes previously discussed—Section 6 of the NSA Act, Section 102(A)(i)(1) of the National Security Act of 1947 (50 U.S.C. 403-1(i)(1)), and 18 U.S.C. 798—each independently authorized the government to withhold confirmation or denial of the existence of any responsive records. See C.A. App. A60-A62, A107, A110, A114, A126-A128.

b. The district court granted partial summary judgment to the government, Pet. App. 33a-49a, and certified its decision as a final judgment under Fed. R. Civ. P. 54(b), Pet. App. 50a-53a. After noting that the government needed only to "proffer one legitimate basis for invoking the Glomar Response," Pet. App. 40a, the district court granted the government partial summary judgment on FOIA Exemption 3 and Section 6 of the NSA Act. *Id.* at 40a-49a. The court explained that confirming or denying the existence of records responsive to petitioners' FOIA request would reveal information with respect to NSA's functions and activities, and thus was exempt from disclosure under Section 6. *Ibid.* Having found Section 6 dispositive, the court did not decide whether Exemption 1 or the other Exemption 3 statutes invoked by the government would independently support the *Glomar* response. Cf. *id.* at 38a-40a (noting the alternative bases for withholding).

c. The court of appeals affirmed. Pet. App. 1a-30a. The court of appeals explained that "[t]he *Glomar* doctrine and government use of the *Glomar* response is firmly established in other Circuits" and noted that "[petitioners] do not object to" the doctrine. *Id.* at 9a-10a. The court joined its "sister Circuits in holding that 'an agency may refuse to confirm or deny the existence

of records where to answer the FOIA inquiry would cause harm cognizable under a [] FOIA exception.'" *Id.* at 10a (citation omitted; brackets in original); see *id.* at 9a-11a.

Turning to the specifics of this case, the court of appeals reasoned that confirming or denying whether the government possesses records responsive to petitioners' FOIA request would disclose information with respect to the NSA's activities that Congress, through Section 6 of the NSA Act, protected from disclosure. Pet. App. 16a, 24a; see *id.* at 20a-25a. More specifically, the court concluded that the government's unrebutted "affidavits demonstrate that the documents sought [here] relate to 'the organization or any function of the National Security Agency' and seek 'information with respect to the activities thereof.'" *Id.* at 23a (quoting NSA Act § 6). And because the court found it "quite clear" that Section 6 qualifies an Exemption 3 statute—a proposition that "[petitioners] do not dispute"—the court held that the government's *Glomar* response was appropriate under Exemption 3. *Id.* at 19a, 29a.

The court of appeals rejected petitioners' argument "that the NSA inappropriately provided a *Glomar* response in this case because the TSP is no longer a secret program in light of the government's public acknowledgment of its existence." Pet. App. 13a. The court explained that "[t]he record is clear that, although the general existence of the TSP has been officially acknowledged, the specific methods used, targets of surveillance, and information obtained through the program have not been disclosed." *Ibid.* The court emphasized that the government has never disclosed "details of the program's operations and scope," including information on whether "particular persons were targeted or subject

to surveillance," and that those details were the very "subject of [petitioner's] FOIA request." *Id.* at 14a-15a. Accordingly, the court concluded that "those aspects of the program" that the government has not "officially and publicly disclosed" were properly the subject of the *Glomar* response in this case. *Id.* at 15a.

The court of appeals also rejected petitioners' assertion that the government did not properly invoke the *Glomar* doctrine because such an invocation would "conceal illegal or unconstitutional activities." Pet. App. 28a. The court concluded that "[w]e do not find any evidence that even arguably suggests bad faith on the part of the NSA, or that the NSA provided a *Glomar* response to plaintiffs' requests for the purpose of concealing illegal or unconstitutional actions." *Id.* at 25a; see *id.* at 28a. The court explained that petitioners "conceded at oral argument" that "the legality of the TSP is a separate matter from" this FOIA action, and it "agree[d] with counsel for all parties that we need not reach the legality of the underlying Terrorist Surveillance Program because that question is beyond the scope of this FOIA action." *Id.* at 28a-29a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. An agency's decision neither to confirm nor to deny the existence of records responsive to a FOIA request is "called a '*Glomar* response,' taking its name from the *Hughes Glomar Explorer*, a ship built (we now know) to recover a sunken Soviet submarine, but disguised as a private vessel for mining manganese nodules from the ocean floor." *Bassiouni* v. *CIA*, 392 F.3d 244,

246 (7th Cir. 2004), cert. denied, 545 U.S. 1129 (2005). "Every appellate court to address the issue has held that the FOIA permits the [government] to make a '*Glomar* response'" where, as here, confirming or denying whether responsive records exist would itself cause the very harms that FOIA's provisions aim to prevent. *Ibid.* (*Glomar* response appropriate where "inferences" from a substantive response or "selective disclosure could reveal classified sources or methods of obtaining foreign intelligence."); accord *Minier* v. *CIA*, 88 F.3d 796, 800 (9th Cir. 1996); *Gardels* v. *CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982).

That conclusion properly reflects Congress's intent to give FOIA's exemptions "meaningful reach and application." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989). Congress established in FOIA a "basic policy" favoring disclosure, but it simultaneously recognized that "important interests [are] served by the exemptions." *FBI* v. *Abramson*, 456 U.S. 615, 630-631 (1982). Those exemptions embody Congress's commonsense determination that "public disclosure is not always in the public interest." *CIA* v. *Sims*, 471 U.S. 159, 166-167 (1985). For that reason, this "Court consistently has taken a practical approach" in interpreting FOIA's exemptions, in order to strike a "workable balance" between the public's general interest in disclosure and "the needs of the Government to protect certain kinds of information from disclosure." *John Doe Agency*, 493 U.S. at 157; *Weinberger* v. *Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 144 (1981) (Congress "balance[d] the public's need for access to official information with the Government's need for confidentiality."). Where, as here, confirming or denying the existence of responsive records would itself cause the very

harms that Exemption 3 and Section 6 of NSA Act are designed to prevent, a *Glomar* response is fully authorized by FOIA. The court of appeals holding comports with the decisions of other courts of appeals, Pet. App. 9a-10a, and petitioners do not purport to identify any decision of any court of appeals holding otherwise. Compare Pet. 14-15 (discussing cases) with Pet. App. 46a (explaining that even the district court decisions that petitioners cite have not "resolved the question in [petitioners'] favor").

2. Petitioners emphasize (Pet. 21) the "narrowness of the question" presented, assert that "the government has publicly disclosed the existence of, and many of the details of" the TSP, and claim that the "*only* additional information sought by petitioners is whether the government has illegally intercepted *their* communications." But petitioners' own contentions underscore their error. First, as both the district court and the unanimous court of appeals correctly determined, the government has *not* disclosed "details of the program's operations and scope," such as information on whether "particular persons were targeted or subject to surveillance." Pet. App. 14a-15a, 48a-49a. The record amply supports that conclusion.[4] Petitioners identify nothing to contradict

[4] The Director of National Intelligence, for instance, explained that "[a]lthough the existence of the TSP is now publicly acknowledged, and some general facts about the TSP have been officially disclosed, * * * sensitive information about the nature, scope, operation, and effectiveness of the TSP and other communications intelligence activities remains classified and cannot be disclosed without causing exceptionally grave harm to U.S. national security." C.A. App. A112; see *id.* at A53-A54. The unauthorized disclosure of information confirming or denying whether particular persons have been subjected to intelligence collection likewise "can be expected to cause exceptionally grave damage to the national security." *Id.* at A54; see *id.* at A118.

the fact-bound determinations of both courts below, and, in any event, this Court's review would be unwarranted to revisit that factual determination.

Second, petitioners' focus on their own particular interest in surveillance information contradicts well-settled FOIA principles. The "identity of the requesting party," and the "purposes for which the request for information is made," have "no bearing" on whether such information must be disclosed under FOIA. *DoD* v. *FLRA*, 510 U.S. 487, 496 (1994) (quoting *DOJ* v. *Reporters Comm. for Freedom of Press*, 489 U.S. 749, 771 (1989)); accord *NARA* v. *Favish*, 541 U.S. 157, 170 (2004); *Bibles* v. *Oregon Natural Desert Ass'n*, 519 U.S. 355, 356 (1997) (per curiam); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). If FOIA permits petitioners to obtain confirmation or denial of whether they were subject to NSA surveillance, persons with less benign intentions may do the same.

Indeed, Congress recognized the "extreme security measures" needed to protect the "unique and sensitive activities of the [NSA]," *Hayden* v. *NSA*, 608 F.2d 1381, 1390 (D.C. Cir. 1979) (quoting legislative history) (citations omitted), cert denied, 446 U.S. 937 (1980), and it therefore protected such intelligence information by specifying in Section 6 of the NSA Act that no "function of the National Security Agency" nor "any information with respect to the activities thereof" shall be subject to disclosure. NSA Act § 6. That protection, "by its very terms, [is] absolute." *Linder* v. *NSA*, 94 F.3d 693, 698 (D.C. Cir. 1996); see *Larson* v. *Department of State*, 565 F.3d 857, 868 (D.C. Cir. 2009). And the "unchallenged affidavits" of high-ranking Executive Branch officials charged with protecting such information demonstrate that "confirming or denying" the existence of NSA sur-

veillance here "would reveal information about the NSA's capabilities and activities," contrary to Congress's mandate in Section 6. Pet. App. 48a-49a; *id.* at 23a-24a, 42a-43a. As such, the information is exempt from mandatory disclosure under FOIA Exemption 3.[5]

3. Petitioners contend (Pet. 15) that "Exemptions 1 and 3 may not be invoked to hide illegal conduct" and argue in the margin (Pet. 16 n.18) that "Section 6 directs non-disclosure only of information relating" to functions and duties of the NSA that are "authorized" by the NSA Act. Petitioners are incorrect, and they cite no decisions creating a division of authority that might warrant this Court's review.

The court of appeals correctly "agree[d] with counsel for all parties that [it] need not reach the legality of the underlying Terrorist Surveillance Program because that question is beyond the scope of this FOIA action." Pet. App. 29a. Although petitioners assert that surveillance under the now-defunct TSP was unlawful, that assertion "cannot be used * * * to evade the unequivocal language of Section 6," which "prohibits the disclosure of information relating to the NSA's functions and activities." *Id.* at 47a (quoting *People for the Am. Way Found.* v. *NSA*, 462 F. Supp. 2d 21, 31 (D.D.C. 2006)); see *Founding Church of Scientology* v. *NSA*, 610 F.2d 824, 830 n.49 (D.C. Cir. 1979) (noting that the NSA "may properly withhold records gathered illegally if divulgence would reveal currently viable information channels, albeit ones that were abused in the past"); cf.

[5] It is well-established that Section 6 of the NSA Act "is a statute qualifying under Exemption 3," *Founding Church of Scientology* v. *NSA*, 610 F.2d 824, 828 (D.C. Cir. 1979); accord *Larson*, 565 F.3d at 868; *Hayden*, 608 F.2d at 1389, and petitioners do not appear to contend otherwise. See Pet. App. 19a.

Hayden, 608 F.2d at 1389 (stating that Section 6 "[c]ertainly" applies where requested records concern an NSA function or activity "authorized by statute and not otherwise unlawful," but not limiting Section 6 to that context). Nothing in the statute supports petitioners' extratexual construction, and for good reason. Petitioners, who have no knowledge of the TSP's operational details, surmise that the now-defunct Program was unlawful and, based on their assertion, claim an entitlement to any and all records of surveillance that may concern them. The far-reaching implications of that position, which may be asserted by any FOIA requester (see p. 11, *supra*), illustrate why petitioners cite no holding—precedential or otherwise—that adopts their interpretation of Section 6.

4. Petitioners assert (Pet. 15) that national security information like that at issue here cannot properly be classified and withheld under FOIA Exemption 1 "to hide illegal conduct." That contention is unavailing. Even if petitioners were correct, the court of appeals based its judgment on Exemption 3, not Exemption 1. Pet. App. 25a-30a. Moreover, petitioners are incorrect. Exemption 1 therefore provides an alternative grounds for affirming the judgment below, reinforcing the conclusion that no further review is warranted.

Petitioners fundamentally misunderstand the Executive Order governing classification of national security information. That order specifies that information shall not be classified "in order to"—that is, for the purpose of—"conceal[ing] violations of law." Exec. Order No. 13,526 § 1.7(a)(1), 75 Fed. Reg. at 710. Had the President intended petitioners' construction, he would have prohibited classification "if" it would conceal unlawful conduct. Where, as here, the unauthorized disclosure of

classified information reasonably could be expected to result in "damage to the national security" and the information is classified on that ground, *id.* §§ 1.1(a)(4) and 1.2(a), 75 Fed. Reg. at 707, the information is not classified in order "to conceal violations of law." See *Navasky* v. *CIA*, 499 F. Supp. 269, 275 (S.D.N.Y. 1980).[6] Here, the court of appeals expressly found no "evidence that even arguably suggests bad faith on the part of the NSA, or that the NSA provided a *Glomar* response to plaintiffs' requests for the purpose of concealing illegal or unconstitutional actions." Pet. App. 25a. That fact-bound determination warrants no further review. Cf. *People for the Am. Way Found.*, 462 F. Supp. 2d at 33 ("Even if the TSP were ultimately determined to be illegal, it does not follow that the NSA's decision regarding the classification of materials relating to the TSP was made 'in order to . . . conceal violations of law.' Because of the deference due to the NSA in matters of national security, and in the absence of any evidence to the contrary, the Court must accept defendant's reasonable explanation that the materials were classified in order to prevent damage to the national security.").

5. Insofar as petitioners express concern that any prospect of surveillance of their communications would

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[6] See also *United States* v. *Abu Marzook*, 412 F. Supp. 2d 913, 923 (N.D. Ill. 2006) (explaining that a plaintiff must present evidence that the "materials [were] classified merely to prevent embarrassment to Israel" in order to show that they were improperly classified to conceal Israel's use of unlawful interrogation methods); *Billington* v. *DOJ*, 11 F. Supp. 2d 45, 58 (D.D.C. 1998) (requiring plaintiff to provide "proof of the FBI's motives in classifying the information"), aff'd in part, vacated in part, 233 F.3d 581 (D.C. Cir. 2000); *Canning* v. *DOJ*, 848 F. Supp. 1037, 1047 (D.D.C. 1994) (rejecting plaintiff's argument upon finding "no credible evidence that the agency's motives for its withholding decisions were improper").

undermine the representation of their clients (see Pet. 19), the district courts considering the Guantanamo detainees' habeas corpus petitions have issued a number of rulings addressing questions of attorney-client confidentiality. See, *e.g.*, *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174, 174-192 (D.D.C. 2004). To the extent petitioners seek to raise questions pertaining to the adequate representation of those habeas petitioners, the proper forum for pursuing such matters is in the habeas proceedings themselves, and not this collateral FOIA action seeking *unrestricted* public disclosure of protected information. Cf. *Sears, Roebuck & Co.*, 421 U.S. at 149 (FOIA gives "any member of the public as much right to disclosure as one with a special interest therein").

Litigation touching more generally upon the alleged unlawfulness of the TSP currently remains pending in other courts. See generally *In re NSA Telecomm. Records Litig.*, MDL No. 06-1791 (N.D. Cal.) (consolidating TSP-related cases). It is that litigation, and not this FOIA action, that provides a potential forum for any such challenges. See *Hrones* v. *CIA*, 685 F.2d 13, 19 (1st Cir. 1982) ("[Appellant] has chosen the wrong procedure for review of the legality of the operations of the agency. Such an investigation is not within the scope of court review of the denial of a FOIA request."); see also *Halpern* v. *FBI*, 181 F.3d 279, 296 (2d Cir. 1999); *Lesar* v. *DOJ*, 636 F.2d 472, 483 (D.C. Cir. 1980).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Acting Solicitor General is recused in this case.