ORAL ARGUMENT SCHEDULED FOR FEBRUARY 21, 2013

No. 12-5136

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW
Plaintiff-Appellee,

v.

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FINAL BRIEF FOR THE APPELLANTS

TIMOTHY M. REIF
General Counsel

DAVID J. APOL
Attorney

Executive Office of the President
Office Of The United States
Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

STUART F. DELERY
Principal Deputy Assistant
Attorney General

RONALD C. MACHEN
United States Attorney

MATTHEW M. COLLETTE
H. THOMAS BYRON III
(202) 616-5367
Attorneys, Appellate Staff
Civil Division, Room 7260
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici. Appellants Office of the United States Trade Representative and Ambassador Ron Kirk, in his official capacity as the United States Trade Representative, were defendants in the district court. Appellee Center for International Environmental Law was plaintiff in the district court. There were no *amici* or intervenors in district court. In this Court, the Reporters Committee for a Free Press and 32 other media organizations (Advance Publications, Inc., Allbritton Communications Company, American Society of News Editors, Association of Alternative Newsmedia, the Association of American Publishers, Inc., Atlantic Media, Inc., Bay Area News Group, Bloomberg L.P., Cable News Network, Inc., Dow Jones & Company, Inc., the E.W. Scripps Company, First Amendment Coalition, Gannett Co., Inc., the McClatchy Company, Media General, Inc., NBCUniversal Media, LLC, the National Press Club, the National Press Photographers Association, Newspaper Association of America, the

Newsweek/Daily Beast Company LLC, the New York Times Company, North Jersey Media Group Inc., Online News Association, POLITICO LLC, Radio Television Digital News Association, Reuters America LLC, the Seattle Times Company, Society of Professional Journalists, Stephens Media LLC, Time Inc., Tribune Company, and The Washington Post) have filed a brief as amici curiae in support of plaintiff.

B. Rulings Under Review. The government appeals from the order and injunction entered February 29, 2012 by the district court (Roberts, J.). JA 94-112, reported at 845 F. Supp. 2d 252.

C. Related Cases. This case has not previously been before this Court. Counsel is not aware at this time of any other related cases within the meaning of Circuit Rule 28(a)(1)(C).

/s/ H. Thomas Byron III
H. THOMAS BYRON III
Counsel for Defendants-Appellants

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GLOSSARY

CIEL	Center for International Environmental Law
DE#	District court docket entry number
FOIA	Freedom of Information Act, 5 U.S.C. § 552
FTAA	Free Trade Agreement of the Americas
USTR	United States Trade Representative (and, collectively, the Office of the United States Trade Representative and Ambassador Ron Kirk, in his official capacity as the United States Trade Representative)

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JURISDICTIONAL STATEMENT

Plaintiff the Center for International Environmental Law (CIEL) invoked the jurisdiction of the district court under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §1331. JA 9 (complaint). On February 29, 2012, the district court entered summary judgment for CIEL, and enjoined defendants – the Office of the United States Trade Representative and Ambassador Ron Kirk, in his official capacity as the United States Trade Representative

(USTR) – from withholding the disputed document. JA 112. That order is a final judgment, disposing of all parties' claims and defenses. Defendants filed a notice of appeal on April 26, 2012. JA 113. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the district court erred in rejecting the Executive Branch's assessment of the harm to foreign relations that could reasonably be expected to result from unauthorized disclosure of a classified document describing the government's position during negotiations concerning a proposed international agreement, and on that basis holding that the document is not "properly classified" and therefore cannot be withheld by a federal agency under Exemption 1 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(1).

PERTINENT STATUTES AND REGULATIONS

This case concerns Exemption 1 of FOIA, 5 U.S.C. § 552(b)(1), which provides:

> "This section does not apply to matters that are – (1)(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."

The document at issue was classified pursuant to section 1.4(d) of Executive Order 12958, as amended by Executive Order 13292. That section reads:

> "Information shall not be considered for classification unless it concerns: * * * (d) foreign relations or foreign activities of the United States, including confidential sources[.]" 68 Fed. Reg. 15315, 15317 (Mar. 28, 2003).

Section 1.2(a)(3) of the Executive Order specifies the standard for classification of national security information as "Confidential":

> "Information may be classified at one of the following three levels: * * * (3) ''Confidential'' shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe." 68 Fed. Reg. 15315-15316.

Section 6.1(l) of the Executive Order defines the term ''[d]amage to the national security'' to mean:

> "harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, taking into consideration such aspects of the information as the

> sensitivity, value, utility, and provenance of that information." 68 Fed. Reg. 15331.

STATEMENT OF THE CASE

This case concerns CIEL's request under FOIA for documents relating to intergovernmental negotiations concerning the Free Trade Agreement of the Americas (FTAA) – a proposed multilateral trade agreement under negotiation among the governments of 34 nations, including the United States. Only one document remains in dispute between the parties: a single-page white paper (referred to in district court as "Document 1") entitled: "Commentary: 'In Like Circumstances.'" The text of the white paper is classified national security information and has been marked "Confidential," pursuant to Executive Order 12958, as amended by Executive Order 13292. See 68 Fed. Reg. 15315 (Mar. 28, 2003).

Notwithstanding the court's acknowledgment that disclosure would breach an agreement between the United States and the other participating foreign governments protecting the white paper from disclosure, and despite multiple declarations from government officials explaining how disclosure would be likely to harm the foreign relations of the United

States, the district court ordered the federal government to disclose it. The government appeals that decision.

STATEMENT OF FACTS

A. The Free Trade Agreement Of The Americas And The Classified White Paper. [1]

During the 1990s and early 2000s, the United States negotiated with other governments in an effort to reach agreement on the Free Trade Agreement of the Americas, a proposed agreement to create a free-trade area encompassing 34 nations in the Western Hemisphere. Although no final agreement was reached, the negotiations have not been formally terminated. As part of the FTAA negotiations, the United States sought to extend investor protection rules to cover virtually all of the governments in

[1] The government provided details about the FTAA negotiations and the white paper in declarations of Regina Vargo, the Assistant United States Trade Representative for the Americas (JA 25-28), Karen M. Lezny, the Deputy Assistant United States Trade Representative for the Free Trade Agreement of the Americas (JA 48-50), and Julia Christine Bliss, the Assistant United States Trade Representative for Services and Investment (JA 51-54, 84-93). Ms. Vargo and Ms. Lezny were respectively the chief and primary staff-level negotiators for the United States in FTAA negotiations at the time. JA 25, 48. Ms. Bliss oversaw all bilateral, regional, and multilateral negotiations on investment. JA 51.

the Western Hemisphere. That effort reflected a key element of the foreign economic policy of the United States over several decades: the protection of U.S. investors and investments abroad. Consistent with that policy, the United States has concluded over 30 bilateral investment treaties and other agreements with nations around the world to ensure that foreign governments treat U.S. investors, businesses, and holdings in a fair and even-handed fashion. JA 27 (Vargo).

As part of the process of negotiating the Free Trade Agreement of the Americas, the United States and its foreign-government partners agreed not to disclose restricted negotiating documents unless all 34 governments consent to disclosure. All documents circulated to the negotiating parties, other than Ministerial Declarations, are deemed restricted and are thus subject to the confidentiality requirement. That confidentiality understanding covers a government's own documents, as well as those of the other 33 governments that were part of the negotiations. In 2008, faced with the likely end of FTAA negotiations, the 34 governments decided that previously restricted documents would become derestricted – and thus

available for public release – on December 31, 2013, unless the government that produced a particular document objects to its disclosure. JA 49-50, 52-53, 92 (Lezny, Bliss, Third Bliss).[2]

That promise of confidentiality among the negotiating governments is consistent with longstanding practice in both bilateral and multiparty trade negotiations. And the fundamental principle of consensus reflected in that promise (requiring the consent of all before any restricted document may be released) is consistent with the consensus-based principle of decision-making observed throughout the FTAA negotiations, as well as negotiations of other international trade agreements. As of 2007, an official with the FTAA Administrative Secretariat, which (until it closed in 2008) was responsible for maintaining the official records of the negotiations, confirmed that none of the 34 participating governments had released a restricted document to the public. JA 49-50, 52-53 (Lezny, Bliss).

[2] The United States intends to notify the other participating governments that the white paper at issue in this case should remain restricted, and thus should not be disclosed, even after 2013.

The document at issue in this case – a one-page white paper entitled "Commentary: 'In Like Circumstances'" – discusses the views of the United States government concerning how the phrase "in like circumstances" might be interpreted if it were to be included in a national-treatment or most-favored-nation provision in the proposed treaty. JA 53-54, 87 (Bliss, Second Bliss); see also JA 45 (*Vaughn* index). In 2000, the United States submitted the white paper, among other documents, to its negotiating partners. The white paper was created solely for the purpose of the FTAA negotiations, and the United States intended and expected that it would be kept confidential, as the negotiating partners had agreed. JA 85 (Second Bliss). The white paper has not been disclosed by any of the FTAA negotiating governments. JA 50, 85-86 (Lezny, Second Bliss).

B. Plaintiff's FOIA Request And This Suit.

CIEL submitted a FOIA request to USTR in July 2000, seeking documents relating to the FTAA negotiations. In particular, CIEL requested any documents circulated or tabled by the United States during sessions of the FTAA Negotiating Group on Investment held in February

and May 2000. CIEL specifically sought any text or commentary related to the phrase "in like circumstances." JA 10 (complaint); JA 20 (Harrison).[3]

After searching its records, USTR identified 46 responsive documents and withheld all of them in full as exempt from disclosure under FOIA. JA 20-21 (Harrison). Unsatisfied with that response, CIEL sued USTR in federal district court in 2001.

During the initial stages of this litigation, the parties clarified their positions and narrowed their dispute. USTR identified 41 documents as protected by Exemption 5, 5 U.S.C. § 552(b)(5), and CIEL abandoned its request for those documents. USTR provided one document to CIEL, and invoked Exemption 1 as the basis for withholding the remaining four documents (including the white paper at issue in this appeal), which became the focus of the litigation. JA 31-32 (2007 opinion) (citing JA 23 (Harrison)).

[3] The declaration of Sybia Harrison, the FOIA Officer for USTR, explained the processing of CIEL's FOIA request. JA 19-24.

C. The Government's 2001 Summary Judgment Motion.

1. USTR moved for summary judgment in 2001. The government's summary judgment motion was supported by declarations of USTR officials (pursuant to *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973)), explaining that the withheld documents had been classified as "Confidential" by an original classification authority, based on the determination that unauthorized disclosure could be expected to result in damage to the national security. JA 16-18, 25-28 (Davidson, Vargo); see also JA 19-24 (Harrison, describing response to CIEL's FOIA request generally).[4]

The General Counsel of USTR explained the basis for classification of the four withheld documents, noting that, "[u]nder the operating rules of the FTAA negotiations, Western Hemisphere countries participating in this broad negotiation submit their negotiating positions in confidence and are expected to maintain each other's proposals in confidence." JA 17

[4] Peter B. Davidson, USTR General Counsel at the time, described the classification of the four documents withheld under FOIA Exemption 1. JA 16-18.

(Davidson). He observed that "disclosure of the documents would create policy obstacles for our hemispheric trading partners which would seriously affect their ability to conclude a free trade agreement." *Ibid.* On that basis, the documents were classified at the "confidential" level. *Ibid.*

The chief staff-level FTAA negotiator for the United States offered a detailed explanation of those policy obstacles: Foreign government negotiating partners need "latitude to negotiate," and if the classified information were disclosed, "our FTAA partners may have sharply reduced flexibility in the negotiations." JA 27 (Vargo). Those governments would find it "difficult * * * to accept some or all of the rules and principles that the United States is seeking through the FTAA investment negotiations" if it were to become known that a particular proposal had been advanced by the United States. *Ibid.* ("If the U.S. negotiating proposal were made public, it would become an immediate target for pressure on certain national governments from internal groups that would not want the U.S. proposals to be adopted," even "where – from an objective viewpoint – the U.S. proposal was fair and balanced for all parties."). That situation

"could cause FTAA governments to resist or reject U.S. proposals that might otherwise serve as the basis for negotiation or adoption, leading to possible deadlock or lengthy delay in a critical area of the FTAA negotiations." JA 28. The consequences would include immediate harm to our "relations with foreign governments and foreign activities," as well as harm "to the longer-range national interest in obtaining an agreement that serves the economic and diplomatic interests of the United States." *Ibid.*

2. On September 5, 2007 (nearly five and one-half years after summary judgment briefing had been completed), the district court denied the government' summary judgment motion. The court concluded that the record failed to demonstrate to the court's satisfaction that the withheld documents were properly classified under the governing Executive Order. JA 44 (2007 opinion).

The district court concluded that "neither of [the government's declarations] demonstrates a strong nexus between the release of the documents and harm to United States foreign policy." JA 39. The court acknowledged the declarations' explanation that "disclosure would

hamper the United States' and its trade partners' ability to engage in fruitful negotiations regarding a free trade agreement." *Ibid.* But the district court rejected the declarants' assessment that such "reduced negotiation flexibility" could reasonably be expected to cause harm to the foreign relations of the United States. *Ibid.* The district court also criticized the declaration of Regina Vargo, the chief staff-level FTAA negotiator, on the ground that it "contains sweeping conclusory statements of the harm USTR expects will result but fails to provide the basis of that conclusion." JA 40 (footnote omitted); but see JA 27-28 (Vargo, quoted above, at 11-12, detailing how disclosure would reduce latitude of negotiating partners). On that basis, the district court denied summary judgment, and ordered the government "to produce additional declarations addressing how disclosure will threaten United States' foreign relations and national security and the nature of any confidentiality agreement among the FTAA negotiating parties." JA 44 (2007 opinion).

D. The Government's 2007 Renewed Motion For Summary Judgment.

1. The government promptly renewed its motion for summary judgment, and supplemented it with additional declarations further explaining the harm to foreign relations that could be expected to result from disclosure of the classified information at issue. Those declarations explained in detail the understanding reached among the 34 governments to keep confidential the FTAA negotiating documents they exchanged with each other. JA 49-50, 52 (Lezny, Bliss). The government also made clear that "unilateral public release by the United States of any restricted FTAA negotiating documents would damage the trust that U.S. negotiating partners have in the United States to protect negotiating documents exchanged with an expectation of confidentiality." JA 52 (Bliss). That loss of trust "would undermine the ability of the United States to negotiate and conclude the FTAA and other trade and investment agreements on terms favorable to U.S. economic and security interests." *Ibid.*

The government's second round of declarations also offered more detail concerning the effect of disclosure on the prospects for compromise:

The willingness of foreign governments "to engage in the give-and-take of negotiations * * * necessary to conclude trade and investment agreements" depends on their ability to "rely on assurances from the United States that * * * documents that it provides to or receives from its negotiating partners in the course of negotiations will be protected from public disclosure." JA 52-53. A "breach of the reciprocal confidentiality arrangements * * * would undermine trust * * * in the willingness or ability of the United States to keep their and our negotiating positions confidential." JA 53.

The lack of such trust is likely to lead our negotiating partners to "adopt and maintain rigid negotiating positions unfavorable to U.S. economic and security interests, significantly reducing the prospects for compromise and eventual agreement on terms favorable to the United States." *Ibid.* Those concerns are "particularly true with respect to matters pertaining to investment," because of the pressure on foreign governments to protect local economic interests from perceived threats identified with U.S. firms. *Ibid.* An inability to rely on the United States to protect the confidentiality of negotiating papers will "reduce [foreign governments']

room to negotiate." *Ibid.* Moreover, unilateral release of a government's own negotiating documents could be seen as "an unfair effort" to influence public opinion and "entrench its positions," leading other countries to adopt similarly rigid positions and reducing the prospects for agreement. *Ibid.*

In addition to those general concerns about breaching the confidentiality agreement, which applied to all four classified documents, the government explained that the white paper (Document 1) raised additional, content-specific risks of harm to foreign relations: The United States "has routinely avoided making public U.S. interpretations of this type concerning 'in like circumstances' or other specific language included in U.S. investment agreements," in order to preserve flexibility in negotiating and interpreting different agreements in other contexts. *Ibid.*; see also JA 53-54 (explaining "the wide variety of factual circumstances that could characterize investment relationships" and the possible need for the United States to "assert a broader or narrower view of the meaning and applicability of the 'in like circumstances' doctrine" than suggested by the

white paper). Relatedly, the white paper's interpretive statement could be used against the United States by foreign governments seeking to show a violation by the United States of its investment commitments in other international agreements, potentially resulting in "trade or investment retaliation." JA 54.

2. On April 12, 2011 (more than three years after the government's renewed motion for summary judgment), the court again denied summary judgment, holding that the government's explanations were still inadequate to show that the white paper was properly classified. JA 83 (2011 opinion).[5] The district court recognized that information provided by foreign governments is typically protected from disclosure under Exemption 1, and acknowledged that disclosure of the white paper would

[5] By the time of the district court's 2011 decision, the white paper was the only remaining document in dispute. While the renewed summary judgment motion was pending, the government sought and obtained the consent of the other governments to disclosure of the other three documents previously withheld, then declassified and disclosed those documents. JA 68 n.2. In light of the particular concerns raised by the content of the white paper, the United States has not asked its negotiating partners to consent to disclosure of that document.

breach the understanding among the FTAA negotiating governments to protect restricted documents. JA 77-78. But the court minimized those concerns based on its assessment that the harm would be diminished because disclosure of the white paper would reveal only the position of the United States, not that of any other country. JA 78 ("USTR, therefore, has not shown it likely that disclosing document 1 would discourage foreign officials from providing information to the United States in the future because those officials would have no basis for concluding that the United States would dishonor its commitments to keep foreign information confidential."). The district court also rejected the government's reliance on the need for flexibility concerning statements about the meaning and applicability of the term "in like circumstances" as it may appear in different contexts. In the district court's view, that flexibility would be categorically inconsistent with the importance of maintaining international trust. JA 80-81. Finally, the district court also gave no weight to the government's explanation that foreign governments expect each negotiating partner to maintain its own negotiating positions in confidence,

because disclosure of a government's own position could be seen as an unfair effort to entrench that position by creating domestic pressure to resist giving ground, leading other negotiating governments to adopt similar tactics and diminishing the prospect of compromise. JA 82; see also JA 53 (Bliss).

E. The Government's 2011 Second Renewed Motion For Summary Judgment.

1. Following the district court's order, the government again renewed its motion for summary judgment, and again updated the factual material offered in support. JA 84-93 (Second and Third Bliss). The government's declarations provided yet more detail, explaining how the breach of trust and the release of the specific content of the white paper could both be expected to cause harm to the foreign relations of the United States. The senior official responsible for negotiation of investment treaties explained that "unilateral disclosure by the United States *** would breach the reciprocal confidentiality arrangements that the FTAA governments have adopted," and would undermine the trust that" foreign governments "have in the willingness and ability of the United States to

keep U.S. and foreign government negotiating positions confidential." JA 86 (Second Bliss). The loss of trust would not be lessened by a court order requiring release of the white paper under FOIA. JA 86-87. That "loss of trust would substantially impede on-going and future U.S. trade and investment negotiations." JA 87.

The government also reiterated that release of the white paper would likely lead to the loss of future negotiation flexibility concerning the meaning of the term "in like circumstances." In an effort to negotiate a trade agreement in the future, the United States might not want to begin with the position set forth in the white paper, but might prefer either to "negotiate up" to that position from a different starting point, or to agree with a substantially similar position proposed by another government. JA 88. Those techniques "are very common, and very useful, in conducting trade negotiations." *Ibid.* Disclosure of the white paper would restrict the ability of U.S. negotiators to take these steps, thereby "damag[ing] [the] ability of the United States to conclude future trade agreements on favorable terms." *Ibid.*

In addition to the loss of trust and the reduced negotiation flexibility, disclosure of the white paper could allow third parties to use the government's FTAA negotiating position against U.S. interests in other contexts, including the possibility that it would be invoked to support adverse findings in arbitration proceedings under other international agreements. JA 87-88. The confidential treatment of FTAA negotiating documents was designed to ensure they would not be used in other circumstances. JA 88. Moreover, the position in the white paper is not binding, and it would not be inconsistent for the United States to insist on a different meaning in another context. *Ibid.*

Due to the passage of more than a decade since the lawsuit was filed, the government also updated the district court on the status of negotiations and how the 34 participating governments planned to handle restricted documents as the negotiating process wound down. Following the closure of the FTAA Secretariat, which previously stored official FTAA documents, each country would be responsible for the documents it had circulated to the other participants. JA 92 (Third Bliss). Although the negotiating

governments had not previously set an end-date for the confidential treatment of restricted documents, these discussions also resulted in clarification of how those documents should be treated, establishing that previously restricted documents would be available for public release after December 31, 2013, unless the government that originated a document specifies that it should continue to be kept confidential. *Ibid.*

2. The court ruled against the government for the third time on February 29, 2012, holding that – despite the multiple, detailed declarations in the record – in the court's view, "USTR has not provided a plausible or logical explanation for why disclosure of the document would harm the United States' foreign relations." JA 94 (2012 opinion). The district court reiterated its distinction between disclosure of information provided by a foreign government and of documents provided by the United States: "While a breach of the confidentiality agreement will occur in either case, the resulting affect [sic] on the United States' foreign relations – the key factor for assessing whether the document is properly classified – is not identical." JA 103. The court criticized the government's justifications as

offering inadequate detail concerning the reasons that foreign governments would want to maintain the secrecy of a document concerning the position of the United States. JA 104 ("USTR's arguments regarding loss of trust are at a high level of generality"). The court also asserted that the government's interests in maintaining its international commitments were diminished because FTAA negotiations are not ongoing, and because the court concluded there was no indication that foreign governments would object to disclosure if the United States were to seek their consent. JA 104-106.

The district court rejected the government's views that its negotiating flexibility might be limited if other countries knew the position urged by the government in the FTAA talks. In the court's view, the non-binding nature of the position expressed in the white paper would ensure the government's "ability not to open with Document 1's interpretation in the future, or to accept it from a negotiating partner." JA 109. The court also pointed to the government's own assertion (in a different context) that changing its position in different circumstances would not risk eroding the

trust of negotiating partners. *Ibid.* The court also rejected the concern that third parties could use the white paper against the United States in other forums. The district court concluded, without pointing to any evidence in the record, that "arbitrators, like trade negotiators, are generally aware of the non-binding, preliminary nature of the interpretive position articulated in Document 1." *Ibid.*

On that basis, the court held that the government had "fail[ed] to provide a plausible or logical explanation of why disclosure of Document 1 reasonably could be expected to damage United States' foreign relations," and ordered the government to disclose the white paper. JA 110; see also JA 112 (order).

SUMMARY OF ARGUMENT

The Executive has concluded, in the exercise of its authority to protect classified national security information from unauthorized disclosure, that release of the white paper reasonably could be expected to cause harm to the foreign relations of the United States. That conclusion is fully supported by detailed declarations that identify and describe the

anticipated harm to foreign relations from disclosure. Those declarations clearly show that the white paper is protected by FOIA Exemption 1.

Indeed, three times over the course of more than a decade the government explained to the district court in detail the basis for the Executive's assessment of the harm to foreign relations. Those explanations are plausible, logical, and clearly articulated – indeed, they are compelling and based on serious and readily understandable considerations about the effect of disclosure on specific scenarios of international diplomacy. The government's declarations far surpass the minimal standard set forth in this Court's case law to justify withholding under FOIA Exemption 1.

Disclosure of the white paper would breach the reciprocal confidentiality arrangement established among the governments negotiating the Free Trade Agreement of the Americas. That breach of trust by itself would have negative consequences for the United States in its ongoing and future negotiations over other trade agreements. If other governments believe the United States cannot be trusted to keep

negotiating documents confidential when it has agreed to do so, foreign negotiators will be less likely to trust our government and less willing to engage in the give-and-take of negotiations that are necessary to reach a compromise on trade and investment matters.

In addition to the general – and obvious – harms arising out of a breach of the confidentiality agreement here, the content of the white paper raises additional foreign policy concerns specific to the meaning of the phrase "in like circumstances." The non-discrimination rules in which that phrase has been (and likely will again be) included – known as national-treatment or most-favored-nation-treatment provisions – are particularly controversial among some foreign governments and their local constituencies. Disclosing publicly the position that the United States has taken concerning the possible meaning and applicability of that phrase in the context of the FTAA negotiations would limit the negotiating flexibility of both the United States and our negotiating partners when considering other trade and investment treaties. Disclosure could also lead to trade or investment retaliation by other countries that may seek to argue that the

United States has breached its obligations under other international agreements.

In rejecting the government's detailed explanations concerning harm to foreign relations, the district court – on the basis of the court's own speculation as to the likelihood and extent of any harm – inappropriately second-guessed the Executive's expertise in the uniquely sensitive area of foreign relations. The court's refusal to accept the judgment of trade negotiators concerning the harm to future negotiations failed to give deference where it was due, and overstepped the bounds of the judicial role in resolving FOIA cases. This Court should reverse the order requiring disclosure of sensitive classified national security information.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment, including the affidavits containing the agency's justifications for invoking a FOIA exemption, *de novo*. *Larson* v. *Department of State*, 565 F.3d 857, 862 (D.C. Cir. 2009). In an Exemption 1 case, that "*de novo* review in the context of national security concerns *** must accord *substantial weight* to an

agency's affidavit concerning the details of the classified status of the disputed record." *Wolf* v. *CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (internal quotation marks omitted).

ARGUMENT

I. THE GOVERNMENT DEMONSTRATED THAT THE WHITE PAPER CONTAINS PROPERLY CLASSIFIED NATIONAL SECURITY INFORMATION.

Exemption 1 protects properly classified information from FOIA's disclosure obligations. The applicable Executive Order establishes that information is properly classified as "confidential" where its disclosure reasonably could be expected to cause damage to the national security, including harm to the foreign relations of the United States. The record in this case demonstrates that the white paper was properly classified under those criteria. The district court was wrong to second-guess the judgment of the Executive and to order disclosure of classified national security information.

A. Governing Precedent Requires Deference To Executive Branch Assessments Of Harm To Foreign Relations.

Supreme Court case law makes clear that "national security [is] a uniquely executive purview." *Center for Nat'l Sec. Studies* v. *DOJ*, 331 F.3d

918, 926-927 (D.C. Cir. 2003) (*CNSS*) (citing *Zadvydas* v. *Davis*, 533 U.S. 678, 696 (2001); *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988)), cert. denied, 540 U.S. 1104 (2004). Thus, this Court has long recognized the significant role of the Executive in protecting national security information, and has "consistently deferred to executive affidavits predicting harm to the national security." *CNSS*, 331 F.3d at 927, quoted in *Larson*, 565 F.3d at 865; see also, *e.g.*, *Krikorian* v. *Department of State*, 984 F.2d 461, 464 (D.C. Cir. 1993) (noting deference to expertise of agencies engaged in national security and foreign policy).

A reviewing court must "accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record because the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [*sic*] might occur as a result of a particular classified record." *Larson*, 565 F.3d at 865 (bracketed text in original) (quoting *CNSS*, 331 F.3d at 927, in turn quoting *McGehee* v. *Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983)). The agency's affidavits must provide adequate and plausible information

sufficient to identify the articulated damage to national security (including harm to foreign relations), but a court should not unduly scrutinize or question the Executive's assessment of the risk of such damage:

> "If an agency's statements supporting exemption contain reasonable specificity of detail as to demonstrate that the withheld information logically falls within the claimed exemption and evidence in the record does not suggest otherwise, as is the case here, the court should not conduct a more detailed inquiry to test the agency's judgment and expertise or to evaluate whether the court agrees with the agency's opinions." *Larson*, 565 F.3d at 865.

Indeed, the Court in *Larson* cautioned that it had "found it unwise to undertake searching judicial review" of the Executive's assessment of national security risks, and specifically "reaffirm[ed] our deferential posture in FOIA cases regarding the 'uniquely executive purview' of national security." *Ibid.* (quoting *CNSS*, 331 F.3d at 927).

In a FOIA Exemption 1 case, a district court's review should accordingly be limited to determining whether the agency affidavits "describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in

the record nor by evidence of agency bad faith." *Miller* v. *Casey*, 730 F.2d 773, 776 (D.C. Cir. 1984) (internal quotation marks omitted), quoted in *Larson*, 565 F.3d at 862. "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Wolf*, 473 F.3d at 374-375 (quoting *Gardels* v. *CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982), and *Hayden* v. *NSA*, 608 F.2d 1381, 1388 (D.C. Cir. 1979)), quoted in *Larson*, 565 F.3d at 862, in turn quoted in *ACLU* v. *DOD*, 628 F.3d 612, 619 (D.C. Cir. 2011). As explained below, the record in this case readily satisfies that standard.

Here, the governing Executive Order establishes that classification is proper if "the original classification authority is able to identify or describe" "damage to the national security" – including "harm to the * * * foreign relations of the United States" – that "reasonably could be expected" to be caused by "the unauthorized disclosure of" the classified information. 68 Fed. Reg. 15316, 15331. The damage need not be certain or inevitable: the terms of the Executive Order require only a showing that unauthorized disclosure "reasonably could be expected" to result, not that

it necessarily will occur. 68 Fed. Reg. 15316. This Court has recognized that "any affidavit or other agency statement of threatened harm to national security will always be speculative to some extent, in the sense that it describes a potential future harm." *Halperin* v. *CIA*, 629 F.2d 144, 149 (D.C. Cir. 1980), quoted in *Wolf*, 473 F.3d. at 374.

The emphasis in the Executive Order's standards for classifying national security information in the first instance thus looks to the expert judgment of the Executive in assessing the possible harm that would be a likely consequence of unauthorized disclosure.

B. Declarations Of Trade Negotiation Experts Explained The Harm To Foreign Relations That Could Be Expected To Result From Unauthorized Disclosure.

The government repeatedly submitted declarations in district court amply explaining the risk of harm to the foreign relations of the United States that could be expected to result from disclosure of the white paper. The articulated concerns are more than merely plausible and logical, they are plainly compelling and more than sufficient to satisfy the deferential review appropriate under FOIA Exemption 1.

1. The United States engaged over a period of many years in negotiations with 33 other nations in an effort to come to a consensus on the Free Trade Agreement of the Americas, a proposed multinational agreement that would, among other things, extend investor protection rules to cover virtually all of the countries in the Western Hemisphere. An important part of those negotiations was the agreement among the 34 participating governments that they would not disclose negotiating documents, no matter which government produced them, except by consensus among all participating governments. *E.g.*, JA 17 (Davidson: "Under the operating rules of the FTAA negotiations, Western Hemisphere countries participating in this broad negotiation submit their negotiating positions in confidence and are expected to maintain each other's proposals in confidence.").

Investor protection rules ensure that U.S. investors, businesses, and holdings are treated "in a fair and even-handed fashion" by foreign governments; those principles have been "a key element of [U.S.] foreign commercial policy over recent decades." JA 27 (Vargo). Nevertheless,

foreign investment and related subjects "have traditionally been highly controversial" in many foreign countries, and some governments find it "difficult *** to accept some or all of the rules and principles that the United States is seeking" concerning investor protection "unless they have latitude to negotiate." *Ibid.* Disclosure of the white paper, which sets out the position urged by the United States on a key part of those principles, could result in "sharply reduced flexibility" for our negotiating partners. *Ibid.*

Disclosure of the white paper could reduce the negotiating flexibility of our partners because foreign governments would likely face domestic pressure "from internal groups that would not want the U.S. proposals to be adopted." *Ibid.* That pressure could lead foreign governments "to resist or reject U.S. proposals that might otherwise serve as the basis for negotiation or adoption, leading to possible deadlock." JA 28. The resulting harm to foreign relations would not be limited to the immediate effect on our relationship with particular foreign governments but would extend as well to "the longer-range national interest in obtaining an

agreement that serves the economic and diplomatic interests of the United States." *Ibid.*

This explanation clearly establishes the anticipated harm to foreign relations from disclosure of the classified national security information at issue here. On that basis, the district court should have recognized in 2002 that the white paper was properly classified, and should have granted summary judgment at that time. The subsequent declarations bolstered the reasons for protecting this sensitive national security information against unauthorized disclosure.

2. In elaborating the harm identified above, the government provided additional details about the importance of the reciprocal confidentiality arrangement requiring nondisclosure of documents exchanged among the negotiating governments. JA 49 (Lezny: "the 34 participating governments" have "an understanding * * *, consistent with longstanding practice in multiparty trade negotiations, that they will not release to the public any negotiating document they produce or receive in confidence in the course of negotiations unless there is a consensus among

the 34 governments to do so"). That practice has been consistently followed by all the participating FTAA governments. JA 50.

As explained by an experienced USTR negotiator, disclosure of the white paper would breach the trust of the 33 other negotiating governments that agreed to confidential treatment of all restricted documents, and that breach of trust would be likely to harm the foreign relations of the United States. JA 52 (Bliss: "It is my judgment that unilateral public release by the United States of any restricted FTAA negotiating documents would damage the trust that U.S. negotiating partners have in the United States to protect negotiating documents exchanged with an expectation of confidentiality."). Mutual trust – including, specifically, trust in "assurances from the United States that * * * documents that it provides to or receives from its negotiating partners * * * will be protected from disclosure" – is essential to "the give-and-take of negotiations * * * necessary to conclude trade and investment agreements." JA 52-53. "In the absence of such mutual trust," foreign governments "are more likely to adopt rigid negotiating positions unfavorable to U.S.

economic and security interests, reducing the prospects for compromise and eventual agreement on terms favorable to the United States." JA 53; see also *ibid.* (explaining particular concerns in area of investor protection: "Foreign governments often feel under pressure to protect vested local economic interests," and may view a government's disclosure of its own position "as an unfair effort to entrench its positions," leading to adoption of similar tactics by foreign governments, and "dimming prospects for compromise and eventual agreement").

Breaching the international agreement on confidentiality of restricted documents would most immediately undermine the trust that other governments have in the willingness and ability of the United States to keep confidential the negotiating positions of countries working together to develop international treaties. That loss of trust would in turn threaten ongoing negotiations with other governments concerning other potential trade and investment agreements. JA 86 (Second Bliss: "this loss of trust would substantially impede *** on-going and future U.S. trade and investment negotiations").

Our negotiating partners rely on the willingness and the ability of the United States to keep confidential both their and our negotiating positions. *E.g.*, JA 52-53 (Bliss). Thus, contrary to the district court's suggestions (JA 78 (2011 opinion); JA 103 (2012 opinion)), the loss of trust likely to result from unilateral disclosure would not be diminished by the fact that the United States generated the white paper at issue and circulated it to its negotiating partners, because release would plainly breach the reciprocal commitment to nondisclosure of all such documents.[6] That commitment covered documents received from other governments, as well as documents a government produced itself. JA 49 (Lezny: nondisclosure obligation covers "any negotiating document they produce or receive in confidence in the course of negotiations"); JA 86 (Second Bliss: "A unilateral disclosure by the United States of any confidential FTAA negotiating document, including any document that the United States itself

[6] Nor would such a loss of trust be diminished by the role of the district court in ordering release of the white paper. "A unilateral release of Document 1 by the United States – whether court-ordered or otherwise – would still be a breach of our commitment to hold Document 1 in confidence." JA 86 (Second Bliss).

produced, would breach the reciprocal confidentiality arrangements that the FTAA governments have adopted."). Pursuant to that promise of confidentiality, restricted documents such as the white paper must not be released to the public by the United States or any foreign government involved in the FTAA negotiations without the permission of all the negotiating governments.

3. In addition to those general concerns arising from the commitment by the United States to keep negotiating documents confidential, the government's declarations in this case also explain that the release of the white paper could reasonably be expected to cause "additional harm" due to the specific content of the document – the meaning of the phrase "in like circumstances" – a "key element of the non-discrimination rules set out in U.S. investment agreements." JA 53 (Bliss). The white paper "sets out U.S. views on what the 'in like circumstances' test means and how it should be interpreted." *Ibid.* That phrase "defines the conditions under which" national-treatment and most-favored-nation

rules – "two of the most important obligations included in U.S. investment agreements" – "apply." *Ibid.*

The white paper at issue here was intended only to describe how the concept of "in like circumstances" could be applied in the context of the Free Trade Agreement of the Americas, if that agreement were to include a non-discrimination rule incorporating the phrase. JA 87 (Second Bliss). The white paper was not intended to be "a definitive or exhaustive statement" of the views of the United States on how such non-discrimination rules should be interpreted in other circumstances. *Ibid.* But disclosing it publicly could cause harm to our foreign relations as a result of confusion and mistrust about how similar phrases in other agreements (existing or future) might be understood.

The United States is party to many international agreements that include investment obligations based on such non-discrimination rules, and is likely to address the topic in future negotiations over other proposed treaties. The government has "routinely avoided making public U.S. interpretations of this type concerning 'in like circumstances' or other

specific language included in U.S. investment agreements." JA 53 (Bliss). That consistent confidential treatment of this sensitive subject matter is necessary to preserve the flexibility of the United States to "assert a broader or narrower view of the meaning and applicability" of the phrase in different circumstances. *Ibid.*

That flexibility is essential to advancing the interests of the United States in future investment negotiations with other governments. Disclosure of the content of the white paper would preclude the United States from engaging in "common" and "very useful" techniques for advancing our government's interest in negotiations concerning trade and investment agreements. JA 89 (Second Bliss). For example, U.S. negotiators might start from a different position in an effort to "negotiate up" to the view expressed in the white paper. *Ibid.* Or the United States might agree with a proposal from another country that embodies essentially the same meaning, and might not want it known that the United States had previously advocated a similar position because that knowledge

could entail the loss of "our own negotiating capital," or could make other countries less willing to agree to the proposal. *Ibid.*

Disclosure could also harm the United States if the white paper were used against the government in international arbitration brought by foreign investors accusing the United States of violating non-discrimination rules. JA 87. That could lead in turn to a finding by an arbitrator that the United States has breached its international obligations, subjecting the United States to retaliation, which would itself cause harm to the foreign relations of the United States. *Ibid.*

Notwithstanding the district court's speculation to the contrary, USTR's goals of preserving its negotiating flexibility and ensuring that arbitration is properly limited are not inconsistent with its earlier efforts to urge the FTAA negotiators to adopt a particular view of the phrase "in like circumstances" for purposes of that agreement. Because the Free Trade Agreement of the Americas was never concluded or adopted, the negotiating countries (including the United States) did not bind themselves to any particular interpretation of that phrase, and a foreign government

would not view the adoption by the United States of a different interpretation in a different context (such as negotiation of a future trade agreement) as "a breach of trust" or "an unfair tactic." JA 88. Moreover, international negotiators are sophisticated participants in an ongoing process requiring give-and-take and the necessary alteration of positions as negotiations proceed. JA 89. The goal of maintaining flexibility in this way accords with well-accepted negotiating conventions. *Ibid.* ("Trade negotiating partners will commonly remind each other that 'nothing is agreed until everything is agreed,' which means that a party is free to revise its positions at any point until a final agreement is reached."); JA 90 ("In my experience, negotiators recognize that changes in positions are an essential pathway for reaching agreement, rather than grounds for mistrust."). Nor is such flexibility inconsistent with the government's separate concern that breach of its nondisclosure obligation would lead to a loss of trust among its negotiating partners. JA 88 (although asserting a different interpretation in the context of a different agreement would not be viewed as a breach of trust, "a breach of a confidentiality

understanding, which the trading partners have reached agreement on, is likely to erode mutual confidence").

II. THE DISTRICT COURT IMPROPERLY SECOND-GUESSED THE EXPERT JUDGMENT OF THE EXECUTIVE BRANCH THAT UNAUTHORIZED DISCLOSURE OF CLASSIFIED INFORMATION COULD BE EXPECTED TO RESULT IN HARM TO FOREIGN RELATIONS.

The district court here failed to apply governing precedent, and subjected the government's justifications to improper skepticism and second-guessing. While the court dutifully recited the governing standards, JA 101-102 (citing, *inter alia*, *Wolf*, *ACLU*, and *Larson*), it did not abide by the fundamental dictates of those precedents. Despite the record evidence outlined above, the district court concluded that "USTR's various arguments do not present a logical or plausible explanation for its determination, and the record does not support a reasonable anticipation of harm from disclosure." JA 103. That conclusion fails to accord the requisite "substantial weight" due to the Executive's assessment of the need for confidentiality in the area of foreign relations and of the consequences of disclosing the contents of the white paper. *Larson*, 565 F.3d at 865.

The court acknowledged that a release of the white paper would violate our confidentiality agreement with other governments, but considered the resulting harm to foreign relations to be "less compelling." JA 103. The district court incorrectly distinguished the release of information provided by a foreign government – which the court believed "typically supports withholding disclosure under Exemption 1," *ibid.* – from the disclosure of information originally created by the U.S. government. The court asserted that "the resulting affect [sic] on the United States' foreign relations * * * is not identical" to the harm that could be expected to result from releasing information that originated with a foreign government. *Ibid.* The district court cited no evidence in the record (or in the case law) to support its view of the extent of harm to foreign relations. Rather, the court simply expressed its disagreement with the judgment of the experienced USTR negotiator whose declaration made clear that, "because the confidentiality agreement covered *all* of the

material exchanged during negotiations, the loss of trust is the same." *Ibid.*; see JA 53, 86 (Bliss, Second Bliss).[7]

The district court also characterized the government's declarations – which explained the resulting lack of trust by foreign governments that could be expected to result from breach of the nondisclosure agreement – as being "at a high level of generality." JA 104. The court accused the government of failing to "articulat[e] particular reasons why its foreign negotiating partners would have any continued interest in maintaining the secrecy of the United States' own initial position on the phrase 'in like circumstances.'" *Ibid.* But there is no need to speculate about *why* a foreign government might seek to maintain the confidentiality of a particular

[7] The court cited other lower court cases upholding application of FOIA Exemption 1 to classified information withheld by USTR on other grounds, suggesting that the harm to foreign relations here is less consequential than the issues addressed in those cases. JA 103-104 (citing *Brayton* v. *USTR*, 657 F. Supp. 2d 138 (D.D.C. 2009); *CIEL* v. *USTR*, 237 F. Supp. 2d 17, 32 (D.D.C. 2002)). However, there is no basis in those cases or in any of this Court's precedents to support the proposition that the government must show that release of classified information would cause harm identical to that upheld in an earlier case concerning different information.

document (even one produced by another government): The confidentiality agreement does not require a government to give a reason for objecting to release of a document; an objection for any reason or no reason at all is enough to maintain the obligation of confidentiality.[8]

The district court was wrong to conclude that the harm to foreign relations that could be expected to result from not keeping our promises to other governments is somehow inadequate to justify classification. It was certainly "plausible," *e.g.*, *Larson*, 565 F.3d at 862, for USTR's expert negotiators to conclude that breaching a promise made to another county would likely damage that relationship. And nothing in the record is to the contrary. Indeed, if the United States cannot be trusted to protect its own documents from disclosure when we have promised to do so, other governments could reasonably doubt our willingness and ability to meet

[8] Even after December 31, 2013, release is not permitted if the originating government objects, which it can do without specifying any reason. JA 92 (Third Bliss). As noted above, the United States intends to notify the other participating governments that the white paper at issue in this case should remain restricted, and thus should not be disclosed by any government, even after 2013.

other obligations of confidentiality. And the resulting loss of credibility could understandably impair future efforts at diplomacy and negotiation, which depend on mutual trust. *E.g.*, JA 53 (Bliss).

Moreover, as we have explained, the court was simply mistaken to conclude that the record here lacks a specific articulation of the particular harms associated with disclosure of the white paper's content. JA 53-54, 87-89 (Bliss, Second Bliss). Indeed, the district court itself recognized many of the government's explanations of why foreign governments would have a continued interest in nondisclosure of the white paper, although the court sought to minimize the significance of those statements. See, *e.g.*, JA 105 (concluding that effect on negotiating posture of other countries "is substantially mitigated because the FTAA negotiations are not ongoing"). Moreover, USTR explained that the United States is and will be engaged in other negotiations with foreign governments, including some of the 33 governments involved in the FTAA negotiations, concerning other proposed trade and investment agreements (which likely also will include negotiations concerning investor protection and the phrase "in like

circumstances"), but the district court failed to recognize the concerns that the Executive explained would be implicated by release of the white paper. JA 86 (Second Bliss: "The United States is currently negotiating a number of potential trade and investment agreements, some of which involve the FTAA countries.").

The district court suggested that any harm could be mitigated if foreign governments would consent to the disclosure of the white paper, pointing out that "the record lacks any indication that the United States' FTAA partners would oppose disclosure." JA 106.[9] But that is not the standard this Court has set forth for determining whether release of classified information reasonably could be expected to cause harm to the

[9] The lack of objection by other governments when the United States sought consensus among its negotiating partners to release the other three documents previously withheld in this litigation (see JA 69 (2011 opinion)) provides no basis for ordering release of the remaining document. The fact that the United States was willing to seek consent of other governments to release those three documents "hardly means that other" disclosures should be compelled. See *Winter* v. *NRDC*, 555 U.S. 7, 31 (2008) (rejecting view that the government's willingness to comply with certain court-imposed restrictions undermines the government's challenge to other restrictions; noting that "no good deed goes unpunished" under that rationale).

foreign relations of the United States. The court's approach would require USTR to seek the consent of our negotiating partners whenever a FOIA requester seeks disclosure of information subject to an international confidentiality agreement. FOIA does not require the United States to expend its negotiating capital by asking other governments to consent to the release of confidential information.[10]

Moreover, the court's independent and unsupported assessment of the likely views of foreign governments does not address the additional concerns the government identified, including that disclosure of the white paper could reasonably be expected to harm foreign relations in future treaty negotiations (and in arbitral proceedings). See, *e.g.*, JA 53 (Bliss, noting "additional harm with respect to Document 1"). The Executive's declarations explained (contrary to the district court's characterization) that the concerns arising from disclosure are "tied," in part, "to the specific content of the document at issue." JA 106 (2012 opinion). The topic of non-

[10] Moreover, if the district court's prediction were wrong, the court's order would compel disclosure even in the face of an objection by one or more foreign governments.

discrimination rules for foreign investment is particularly sensitive, and disclosure could affect current and future negotiations on the same topic with other governments, including some of those involved in the FTAA process. JA 86 (Second Bliss).

The court pointed to a perceived inconsistency "between USTR's expressed desire both to maintain the trust of foreign governments by adhering to the confidentiality agreement and to maintain its own flexibility to assert a different interpretation of 'in like circumstances' in different contexts." JA 107. But the government's declarations explained that sophisticated international trade negotiators understand that the U.S. position during the aborted FTAA negotiations would not bind the United States in other circumstances, and that such well-accepted and widely practiced flexibility (with respect to ongoing and future negotiations concerning other proposed treaties) would not be perceived by other governments as a breach of trust. JA 88-90 (Second Bliss).

The assessment of how foreign government negotiators are likely to view release of the white paper is fundamentally a predictive judgment

within the expertise of USTR, the expert agency within the Executive Office of the President charged with conducting the government's international trade negotiations. The district court's refusal to accept the government's plausible and detailed explanation was improper second-guessing in an area outside the judiciary's expertise. See, *e.g.*, JA 107-110 (2012 opinion); compare JA 87-90 (Second Bliss). A district court's subjective belief that foreign governments might react in a particular way, contradicting the expert assessment of the Executive in the sensitive area of foreign affairs, is not an appropriate basis for ordering the government to disclose classified national security information. Nor should a court override the Executive's judgment concerning its negotiating options when dealing with foreign governments in the diplomatic arena. JA 109 (2012 opinion, concluding that U.S. negotiating flexibility would not be impaired by disclosure).

* * * *

The district court incorrectly rejected the Executive's expert judgment concerning the harm to foreign relations that could be expected to result from disclosure of the white paper. The government's declarations are

logical and plausible, and they articulate in great detail the foreign relations concerns that form the basis for classification. The declarations "are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Larson*, 565 F.3d at 862. The district court's decision is thus a prime example of the kind of "searching judicial review" that this Court has consistently rejected in favor of a "deferential posture" towards the Executive's assessment of national security and foreign relations harms. *Id.* at 865.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

STUART F. DELERY
Principal Deputy Assistant Attorney General

RONALD C. MACHEN
United States Attorney

MATTHEW M. COLLETTE

/s/ H. Thomas Byron III
H. THOMAS BYRON III
(202) 616-5367
Attorneys, Appellate Staff
Civil Division, Room 7260
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Of Counsel:

TIMOTHY M. REIF
General Counsel

DAVID J. APOL
Attorney

Executive Office of the President
Office Of The United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

NOVEMBER 2012

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Palatino Linotype, a proportionally spaced font.

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/s/ H. Thomas Byron III
H. THOMAS BYRON III

CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2012, I electronically filed the foregoing Final Brief For The Appellants with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that I will cause eight paper copies of this final brief (appendix deferred) to be filed with the Court within two business days.

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H. THOMAS BYRON III