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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 REPLY BRIEF FOR THE 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
RCFP	Reporters Committee for Freedom of the Press (and, collectively, all amici curiae supporting CIEL)
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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INTRODUCTION AND SUMMARY

The district court in this case failed to give deference to the views of United States Trade Representative (USTR) officials concerning the harm to foreign relations that reasonably could be expected to result from unauthorized disclosure of the classified information in the white paper at issue here. Plaintiff the Center for International Environmental Law (CIEL) and its supporting amici curiae the Reporters Committee for Freedom of

the Press and others (RCFP) argue that no deference is due here, but that argument finds no support in the case law of this Court or the record here. They also seek to change the governing standard of review in FOIA cases by recharacterizing the court's disagreements with the Executive as findings of fact. In so doing, they would turn the concept of deference in this sensitive area on its head: urging a deferential standard of review for the district court's rejection of USTR's expert views on foreign relations, rather than requiring deference in the first instance to the foreign policy judgments of the Executive. That argument is contrary to settled precedent, and is particularly inappropriate in light of FOIA Exemption 1's protection against disclosure of classified national security information.

CIEL also suggests that a litigant or a district court can offer critiques of the likelihood that a particular harm to foreign relations will occur and, if so, whether the harm will be as serious as the Executive believes. According to CIEL, if the prospect or seriousness of such a harm is debatable, then a court is free to reject the government's views concerning the need to protect classified information. But that approach again gets the

process exactly backwards. The need for deference to the Executive is at its zenith if there is any doubt or disagreement about the likelihood or significance of an asserted harm to foreign relations. Such questions are necessarily predictive in nature: There is no way to know for certain how a foreign government would react to the disclosure of classified information. Predictions of future harm based on a hypothetical disclosure of classified information are thus necessarily speculative, and this Court has made clear there is nothing wrong with such speculation by government officials. The Executive is charged under the Constitution with conducting the nation's foreign policy and protecting our national security. For that reason, this Court and the Supreme Court have left no doubt that the predictive views of the Executive must be accorded substantial weight.

Nor can CIEL prevail by criticizing the government's declarations as insufficiently specific. The record in this case includes repeated, detailed explanations of why the expert trade negotiators believe that disclosure of classified information would cause specific harms to foreign relations. CIEL's disagreements with the likelihood or perceived seriousness of those

harms cannot be characterized as merely seeking more specific explanations.

Finally, FOIA is a (limited) disclosure statute, not a mechanism to compel the government to change its foreign policy judgment. CIEL makes two arguments that improperly seek to use FOIA litigation as a vehicle to criticize the foreign policy decisions of the United States. First, CIEL argues that the United States should have sought the consent of its negotiating partners to release of the white paper. But nothing in FOIA requires the government to expend negotiating capital by asking foreign governments to agree to permit disclosure of confidential information. Moreover, the white paper (unlike the other three classified documents originally at issue in this case) presents content-specific concerns that warrant maintaining its classified status. The Executive's judgment that seeking consent would not address those concerns is not a basis for compelling disclosure – just the opposite. Second, the United States seeks to preserve its negotiating flexibility for future trade discussions with other governments; CIEL's pejorative characterization of widely accepted

negotiating techniques as somehow untrustworthy is not a proper basis for compelling disclosure of classified information.

ARGUMENT

I. THE EXECUTIVE'S ASSESSMENT OF LIKELY HARM TO FOREIGN RELATIONS IS ENTITLED TO DEFERENCE.

As detailed in our opening brief, USTR repeatedly explained – in reasonable, logical, and carefully substantiated declarations from expert trade negotiators – the harm to foreign relations that could be expected to result from unauthorized disclosure of the white paper. The district court nevertheless three times rejected the government's detailed explanations of that harm. That repeated error represents a misunderstanding of the proper role of judicial review in a FOIA Exemption 1 case.

A. Governing Precedent Requires Meaningful But Deferential Judicial Review Of Government Declarations Explaining Harm To Foreign Relations.

1. This case requires only the application of settled precedent; there is no occasion to revisit or question the well-established decisions of this Court and others concerning the appropriate standard a court should apply when reviewing the assessment of harm to foreign relations or

national security. Courts play an important role in reviewing the Executive's explanations of the likely harm to foreign relations from disclosure of classified information. But governing precedent also unmistakably emphasizes that the Executive is uniquely positioned to assess the prospects of damage to foreign relations and national security.

This Court's FOIA Exemption 1 case law is emphatic and consistent: 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* v. *Department of State*, 565 F.3d 857, 865 (D.C. Cir. 2009) (bracketed text in original) (quoting *Center for Nat'l Sec. Studies* v. *DOJ*, 331 F.3d 918, 927 (D.C. Cir. 2003) (*CNSS*), cert. denied, 540 U.S. 1104 (2004), in turn quoting *McGehee* v. *Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983)). That well-understood starting point in FOIA Exemption 1 cases derives from fundamental principles of the Constitution's allocation of primary

authority to the Executive to protect national security and conduct foreign relations on behalf of the United States. See, *e.g.*, *CNSS* 331 F.3d at 926-927 (citing *Zadvydas* v. *Davis*, 533 U.S. 678, 696 (2001); *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988)). As we pointed out in our opening brief, the cases thus establish with no equivocation that courts should give substantial weight to the Executive's expert assessment of likely harm to foreign relations. See USTR Br. 27-32.

The district court here failed to abide by that principle. Instead of giving substantial weight to USTR's assessment of likely harm to foreign relations, the court repeatedly disagreed with the Executive's judgment and characterized the asserted harms as unlikely or insignificant by comparison with harms that the district court believed could be expected in other circumstances. See, *e.g.*, JA 39 (2007 opinion); JA 78 (2011 opinion); JA 103 (2012 opinion). That was error.

2. CIEL and RCFP appear to mistake our precedent-based argument as an assertion that the courts have no role to play in the process of ensuring proper application of FOIA's statutory exemptions, including

Exemption 1. We have made no such claim, and we agree that district courts (and courts of appeals) play an important role in evaluating the government's compliance with its obligations under FOIA, in Exemption 1 cases as well as others.[1] But the well-established case law also makes clear that a reviewing court must tread carefully in the sensitive area of national security and foreign relations.

The principle that the Executive's foreign relations and national security determinations are not subject to judicial second-guessing is consistent with – indeed, it both informs and compels – the requirement of deference established in this Court's and the Supreme Court's decisions: "Because courts lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case, we must accord substantial weight to an agency's affidavit concerning the details of the

[1] Indeed, the brief of RCFP takes aim at a straw man. We have not sought to diminish the role of courts in FOIA Exemption 1 cases, nor have we suggested that the Executive's determination that a document is classified should be conclusive or unreviewable. There is thus no occasion to address most of the arguments raised in the brief of amici curiae.

classified status of the disputed record." *ACLU* v. *DOJ*, 628 F.3d 612, 619 (D.C. Cir. 2011) (internal quotation marks and citations omitted).

A court's disagreement with the conclusions of an agency declarant, or a different view as to the scope or likelihood of harm to foreign relations, is an insufficient basis upon which to discard the government's views on foreign policy. Thus, federal judges have been careful – and rightly so – not to substitute their judgment for the Executive's expert determination of what is likely to cause harm to foreign relations and why. Courts do not conduct foreign relations, and they are not suited to assess whether and how a foreign government is likely to react to disclosure of classified information.

By contrast, officials at USTR conduct trade negotiations with foreign governments around the world, and they are uniquely well-positioned to predict the ways in which disclosure of a confidential document can be expected to interfere with those negotiations (or with arbitrations seeking to enforce trade agreements) in the future. Their judgment about how foreign governments are likely to act in future trade negotiations, and how

they might react to disclosure of the particular classified information at issue here, is uniquely entitled to respect.

3. CIEL and RCFP do not expressly take issue with this well-established requirement of deference. CIEL argues that no deference is required, on the ground that (in CIEL's view) "USTR's assertions of harm to foreign relations is illogical, implausible, or insufficiently detailed." CIEL Br. 21.

That argument confuses two different inquiries. As a general matter, an agency seeking to explain and justify withholdings pursuant to any FOIA exemption must provide an adequately detailed and specific *Vaughn* index, describing the withheld material and explaining why the claimed exemption applies (to the extent possible without disclosing the very information sought to be protected). That was the holding in *King* v. *DOJ*, 830 F.2d 210 (D.C. Cir. 1987), which CIEL relies on (Br. 21). But that case also made clear that "the court owes substantial weight to detailed agency explanations in the national security context." *Id.* at 217.

USTR's multiple, repeated declarations explaining the reasons for classification of the white paper amply satisfy the requirement in *King*. Unlike the index in *King*, the declarations here clearly articulate both the contents of the white paper and the reasons why disclosing the information in that document reasonably could be expected to cause harm to foreign relations. In these circumstances, *King* and other cases (such as *CNSS*, *Larson*, and *Wolf*) make clear that the district court was obliged to defer to the expert foreign policy judgment of USTR officials.

CIEL asserts that the declarations in the record were not sufficiently specific or detailed. But CIEL's arguments actually demonstrate a disagreement with the agency's conclusions rather than a desire for more detail. The declarations here carefully outline the harms to foreign relations that USTR has identified, and explain why those harms reasonably could be expected to result from disclosure of the white paper. See JA 25-28, 48-54, 84-93 (Vargo, Lezny, Bliss, Second Bliss, Third Bliss). CIEL does not suggest that its fundamental disagreements with USTR's judgment would have dissipated if the agency's declarations were longer

or more numerous. Nor has CIEL suggested that USTR should have provided any particular kind of additional detail about the categories of harms relied on for classification of the white paper.

Instead, CIEL takes issue with whether the Executive's assertions of harm are likely to be correct. See CIEL Br. 22-24, 28-40. But that is not the appropriate measure (nor would such an inquiry be susceptible of testing, other than by risking the very harm at issue). And it is altogether different to disagree with the asserted harm than to characterize it as non-specific.

B. CIEL Misstates The Applicable Standard Of Review.

1. CIEL suggests that the assessment of likely harm to foreign relations is a factual question, susceptible to weighing of evidence and clearly erroneous review. See CIEL Br. 15-20. But this Court's case law directly refutes that argument. Thus, decisions frequently reiterate that courts undertake "*de novo* review" of an agency's use of FOIA exemptions, and "in the context of national security concerns" presented in an Exemption 1 case, such review "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); see also, *e.g.*, *Larson*, 565 F.3d at 862 ("we review the agency's justifications [for withholding] *de novo*"). There is no authority to suggest that a district court should conduct its own fact-finding by weighing the Executive's FOIA Exemption 1 affidavits against contrary assertions, or that a district court's disagreement with an agency's justifications is entitled to deferential review on appeal. In any event, the predictive assessment of likely harm to foreign relations is not a factual question at all, but an expert judgment committed to the Executive.

CIEL (Br. 15-16) misstates the holding of this Court's decision in *Summers* v. *DOJ*, 140 F.3d 1077 (D.C. Cir. 1998). That case held that a district court must engage in the kind of meaningful judicial review that we acknowledge is appropriate and necessary. Thus, a court should carefully "review the *Vaughn* index," *id.* at 1081, should determine whether any withheld information is segregable, and should clearly state the basis for holding that information was properly withheld under particular exemptions, rather than entering a summary order. See also *ibid.* (noting

that district courts "must provide statements of law that are both accurate and sufficiently detailed," citing *Founding Church of Scientology* v. *Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979), and referring to the "district court's obligation to state the legal basis for its resolution of a FOIA summary judgment motion," citing *Coastal States Gas Corp.* v. *Department of Energy*, 644 F.2d 969, 980 (3d Cir. 1981)). Those steps are not at issue here.

In the context of Exemption 1 claims, the *Summers* Court elaborated on its emphasis that a district court should clearly state the legal basis for its decision by explaining that a reviewing court needs to be able to discern, for example, which Executive Order supports classification. See 140 F.3d at 1082. But nothing in *Summers* suggests that a district court's disagreement with the Executive concerning the prospect of harm to foreign relations is in any way a factual determination governed by a clear error standard of review.

Similarly, this Court's observation that a district court's proper review of the government's affidavits "resembles a fact-finding process," *id.* at 1080, does not transform a district court's legal assertions concerning

the adequacy of an agency's affidavits into a factual finding protected by deferential appellate review. And there is no suggestion here that the district court shirked its obligation to review the substance of the USTR affidavits. For that reason, CIEL's reliance on *King*, 830 F.2d 210, is equally misplaced.

A reviewing court need not agree with the Executive's assessment of the risks of foreign-relations harm to determine that Exemption 1 authorizes withholding of classified information. The assignment of "significant weight" to the agency's declarations is a recognition that the expert agency is entitled to make that assessment, which is not subject to second-guessing by the plaintiff or the district court. Thus, "[t]he test is not whether the court personally agrees in full with the [agency's] evaluation of the danger – rather, the issue is whether on the whole record the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility * * *." *Gardels* v. *CIA*, 689 F.2d 1100, 1106 (D.C. Cir. 1982).

2. For similar reasons, CIEL's frequent aspersions against the government's descriptions of potential harm to foreign relations as "speculative" are misdirected. See, *e.g.*, CIEL Br. 7-8, 12, 22, 24, 28, 33. A prediction of likely future harm is inherent in the nature of Exemption 1 justifications, which ask agency officials to make a judgment whether disclosure of classified information reasonably could be expected to cause harm to the foreign relations of the United States. Such a hypothetical, prospective inquiry is necessarily predictive in nature, and this Court's case law makes clear that it is properly the province of the Executive to undertake such a predictive judgment. Labeling such a prediction as "speculation" does not diminish its significance or appropriateness.

Indeed, 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. There is nothing improper about an affidavit that contemplates the prospect of such future harms, as long as it does so in a

plausible, reasonable, and logical manner. USTR's declarations here readily satisfied, and exceeded, that standard.

CIEL's assertions setting forth its own contrary views about the likely effect of disclosure, like the district court's disagreement with the government's affidavits, are themselves speculative in the same sense: They all represent predictions about what might happen if classified information were disclosed. See, *e.g.*, CIEL Br. 22-24; JA 78 (2011 opinion). This Court's case law makes clear that the Executive's expert assessment of the likelihood of such harm must be given "substantial weight." See, *e.g.*, *Larson*, 565 F.3d at 865; *Wolf*, 473 F.3d at 374. The predictions of others are not entitled to such weight, and a mere disagreement about the likelihood or significance of a particular kind of harm to foreign relations is not a basis to reject the agency's otherwise logical and careful explanation of the harm that reasonably could be expected to result from disclosure of classified information.

CIEL also uses the term "speculative" to suggest that the United States should be required to point to actual past harm to foreign relations.

See, *e.g.*, CIEL Br. 22 (contrasting "speculation" with "direct evidence"). That argument misunderstands the relevant inquiry, and has been specifically rejected. See, *e.g.*, *Halperin*, 629 F.2d at 149 ("If we were to require an actual showing that particular disclosures of the identities of CIA-retained attorneys have in the past led to identifiable concrete harm, we would be overstepping by a large measure the proper role of a court in a national security FOIA case."). Classification of information as "confidential" is proper where the government can point to harm to foreign relations that "reasonably could be expected" to result from unauthorized disclosure. Executive Order 12958, as amended by Executive Order 13292, 68 Fed. Reg. 15315, 15316 (Mar. 28, 2003). That conditional and hypothetical inquiry is necessarily forward-looking, as evidenced by the future tense of the verb construction in the Executive Order. Such an inquiry need not rely on reference to past events. Proof of actual harm to foreign relations in the past is not required to identify or describe a possible harm in the future that reasonably could be expected to result from unauthorized disclosure. "[T]he purpose of national security exemptions

to the FOIA is to protect intelligence sources before they are compromised and harmed, not after." *Halperin*, 629 F.2d at 149.

CIEL also suggests that the United States should be required to test its theories about possible harm to foreign relations by seeking the consent of the FTAA negotiating governments to release of the white paper. See, *e.g.*, CIEL Br. 23-28. But FOIA does not require an agency to undertake extraordinary measures to disclose a document otherwise outside the scope of the statute's reach. Cf. *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150-153 (1980). Just as the Supreme Court in *Kissinger* recognized that an "agency is not required to create or to retain records," or "to retrieve documents which have escaped its possession," *id.* at 152, so too USTR is not required to seek the consent of foreign governments to release of a document that is otherwise properly classified.[2]

[2] CIEL's protest (Br. 24-25 n.4) that it is not seeking to "compel USTR to seek consent" for disclosure of the white paper fails to acknowledge the necessary effect of its argument: In CIEL's view, the government must either seek consent or be subject to a judicial order requiring release of classified information; that false choice effectively would require the

Continued on next page.

CIEL's argument also mischaracterizes the nature of the harm anticipated from disclosure. Although a mechanism exists to seek the consent of the FTAA negotiating governments prior to release of documents where release is otherwise deemed appropriate (as with the other three documents at issue earlier in this litigation), the availability of that mechanism does not address the issue of whether any of those governments would view release of the white paper as ordered by the district court – without the consent of the FTAA governments and in violation of the confidentiality obligation undertaken by the United States – as a breach of trust. Nor does the existence of such a mechanism address the concern that the release of a confidential document (without the required consent) could lead those or other governments to doubt whether the United States would be willing or able to honor its confidentiality agreements in the future.

United States to seek consent to avoid breaching its obligation to keep the document confidential.

In any event, the courts have never required the government to run the risk of causing actual harm to foreign relations or national security as a means of verifying the possibility of such harm. FOIA protects classified national security information from disclosure precisely to avoid such a risk.

II. RELEASE OF THE WHITE PAPER REASONABLY COULD BE EXPECTED TO CAUSE HARM TO FOREIGN RELATIONS.

The record in this case includes ample and repeated explanations by expert trade negotiators demonstrating the basis for the Executive's assessment of the harm that could be expected to result from release of the white paper here. Those descriptions of a likely future harm need not be certain or inevitable. See, *e.g.*, *Gardels*, 689 F.2d at 1106 (refusing to reject agency prediction of harm "because it cannot prove conclusively that * * * some intelligence source or method would in fact be compromised or jeopardized"). The government is not required to establish beyond a reasonable doubt, or even by a preponderance of evidence, that the predicted harm will necessarily come to pass. It would be impossible to do so, given the nature of assessing the likely effect of contingent events on the fluid dynamic of international relations. Instead, the case law of this Court

and others makes clear that in this sensitive area of our nation's relationships with other governments, the Executive's reasonable and plausible description of such possible future harms must be given substantial weight by a reviewing court. Nothing in the briefs of CIEL and RCFP overcomes the government's reasonable assessment of likely harm to the foreign relations of the United States.

A. Breaching The Reciprocal Confidentiality Agreement With Other Governments Would Likely Result In A Loss Of International Trust.

1. The United States agreed with its FTAA negotiating partners that all 34 governments would maintain the confidentiality of negotiating documents submitted by any one of them to the others. See, *e.g.*, JA 17, 49 (Davidson, Lezny). That agreement requires the United States to protect from disclosure the negotiating documents it submitted, as well as those submitted by other governments. The reciprocal nature of that obligation was clearly and repeatedly explained by USTR's trade negotiation experts. See JA 49, 86 (Lezny, Second Bliss).

The decision below requires the United States to breach its obligations to other countries, as the district court itself recognized. See JA 77-78 (2011 opinion). Such a breach of its international responsibilities would likely (and unsurprisingly) cause other governments to lose trust in the ability or willingness of the United States to honor its commitments in future trade negotiations. See JA 52-53, 86 (Bliss, Second Bliss).

USTR officials explained the harm that could be expected to occur from the consequent loss of trust in the United States by the governments of other countries. Most obviously, foreign governments would no longer trust that the United States would in the future do what it had promised to do here: protect from disclosure negotiating documents exchanged with an expectation of confidentiality. See JA 52-53 (Bliss). Mutual trust on such matters is fundamental to international negotiations on sensitive questions of trade policy. And a loss of trust concerning the need for confidentiality of negotiating positions would have a specific adverse consequence – leading foreign governments to adopt rigid negotiating positions and

making compromise more difficult – which would be inimical to the goal of reaching mutually beneficial trade treaties. See JA 53.[3]

2. CIEL argues that the United States should have sought the consent of the 33 other FTAA governments in order to permit release of the white paper without breaching its confidentiality obligations. See CIEL Br. 28. The district court similarly assumed that the harm could be avoided by seeking consent. See JA 106 (2012 Opinion). But nothing in FOIA requires the government to expend negotiating capital by asking foreign governments to agree to permit disclosure of confidential information – thereby potentially giving those foreign governments leverage to demand concessions from the United States – merely because FOIA litigation is pending. As we have explained (*supra*, 19-21), the fact that a mechanism exists for the United States and its negotiating partners to consider release of certain negotiating documents (where no party objects) does not

[3] This general harm – a belief by foreign governments that the United States cannot be trusted to maintain the confidentiality of negotiating positions – is distinct from the specific harms related to the content of the white paper, discussed below. CIEL's brief confuses the two. See, *e.g.*, CIEL Br. 22-24.

diminish the harm to foreign relations that could be expected to result from the decision in this case, which requires disclosure in breach of an existing international agreement. Moreover, the specific concerns related to the content of the white paper, discussed below, support the Executive's decision not to seek consent from the other negotiating governments; those separate harms would not be ameliorated or avoided by seeking the consent of the FTAA governments.

Recognizing the risk of harm to foreign relations that could result from a breach of trust in the circumstances presented here would not in any way "undermine Congress's intent that the courts provide an independent check on the classification and withholding of documents." CIEL Br. 33. The government has proceeded in good faith, entering into FTAA negotiations with 33 foreign governments on the basis of a mutual confidentiality arrangement governing negotiating documents that was agreed to before CIEL submitted a FOIA request seeking those documents. And the white paper at issue was created specifically for the purpose of ongoing FTAA negotiations; the confidentiality arrangement is not being

used to shield disclosure of a document that would otherwise be unclassified. Moreover, the mere existence of a confidentiality obligation is not the basis for the asserted harm to foreign relations here.[4] Rather, the breach of trust resulting from violating that obligation, and the resulting impediment to compromise in future negotiations, have been explained in detail and are properly subject to judicial review, accompanied by the deference due to the Executive's role in international affairs.

CIEL also contends that USTR might be wrong in its assessment that disclosure of the white paper in breach of the reciprocal confidentiality arrangement, and the consequent loss of trust in the United States, could lead foreign governments to adopt more rigid negotiating positions. CIEL acknowledges that the government's description of such a possible harm to foreign relations "could be true." CIEL Br. 22. But CIEL asserts that "it may also be true" that a different outcome would result from releasing the white paper. *Ibid.* Under CIEL's view of Exemption 1, FOIA would require

[4] The government has not argued here that "the confidentiality arrangement *per se* justifies classifying and withholding Document 1." CIEL Br. 33.

release of classified information wherever the prospect of harm to foreign relations is debatable. That extraordinary position finds no support in the statutory text or the case law of this Court or any other. Classified national security information is not subject to disclosure merely because someone can posit an alternative scenario that might not result in harm to foreign relations.

Similarly, CIEL contends that a breach of trust might cause somewhat less harm to foreign relations than the Executive has articulated, arguing that FOIA should require disclosure if only a smaller degree of harm could be expected. See CIEL Br. 32 (suggesting that "FOIA's purpose and intent would require USTR to show that the reduction in trust would cause enough damage to the national security to outweigh FOIA's policy of 'full agency disclosure'"); CIEL Br. 33 (calling into question "how much the loss of foreign government trust would affect US interests"). There is no support for the idea that FOIA Exemption 1 does not apply unless the anticipated harm to foreign relations rises above a threshold level. The relevant inquiry is whether a document is properly classified under the

terms of the relevant Executive Order. See 68 Fed. Reg. 15316 (E.O. 13292, sec. 1.2(a)(3), authorizing classification at the Confidential level based on identification of any "damage to the national security"); cf. 68 Fed. Reg. 15315 (*id.*, sec. 1.2(a)(1), (2), requiring identification of "serious" or "grave" damage to warrant classification at Secret or Top Secret levels).[5]

Like the district court, CIEL suggests there may be a different effect on foreign governments because the white paper was submitted by the United States rather than one of its negotiating partners. See CIEL Br. 29-30; see also JA 78 (2011 opinion); JA 103 (2012 opinion). But even if such a distinction were valid, the disclosure of the white paper would still be expected to cause a breach of trust and some harm to foreign relations. The USTR declarations are unequivocal: The confidentiality obligation is reciprocal and covers U.S. positions as well as those of other governments. JA 49-50, 52, 86 (Lezny, Bliss, Second Bliss). It is no answer that other

[5] The reference to "the requisite degree of harm to the national security" in *King*, 830 F.2d at 224, refers to the distinction in the Executive Order among damage, serious damage, and grave damage.

negotiations might be based on different confidentiality obligations or that some confidential documents may be deemed more sensitive than others.[6]

B. The Confidential Negotiating Position Of The United States Concerning The Meaning Of "In Like Circumstances" Is Particularly Sensitive.

1. Beyond the obvious harm to foreign relations that could be expected to result from a decision that compels the United States to breach its international obligations, the content of the white paper raises additional concerns. The document explained what the term "in like circumstances" would mean if it were incorporated in a non-discrimination

[6] CIEL suggests in a footnote that the reciprocal confidentiality obligation – and the likely harm to foreign relations that could result from its breach – can be disregarded because the agreement among the FTAA negotiating governments was not reduced to writing and submitted to the court. See CIEL Br. 29-30 n.6. But there is no requirement in FOIA or the Executive Order that the government enter into written agreements with foreign governments concerning every international obligation or arrangement. And whatever language is used to describe the confidentiality requirement, the government has been clear throughout this case that it has an obligation to its negotiating partners not to release the white paper without permission of the other participating governments, and that release of the document without permission would be seen by foreign governments as a breach of trust by the United States. It is that breach – rather than the particular description of the underlying confidentiality obligation – that gives rise to the harm to foreign relations sought to be avoided here.

clause – such as a national-treatment or most-favored-nation provision – in the FTAA. See JA 53, 87 (Bliss, Second Bliss). Such non-discrimination rules are an important but sometimes controversial part of international trade and investment treaties. See JA 27 (Vargo).

In order to preserve the negotiating flexibility of the United States in bilateral and multilateral discussions that can be expected to occur in the future, the government has been careful not to make public its positions in past negotiations concerning the meaning of the phrase "in like circumstances." See JA 53 (Bliss). Disclosure of the white paper in contravention of that consistent practice would limit the negotiating freedom of the United States in the future, which would cause harm to our foreign relations by making it more difficult to achieve trade agreements that protect the interests of U.S. citizens and businesses.

USTR trade negotiators explained that such a harm reasonably could be expected to occur because disclosing the white paper would limit the ability of the United States to use well-established negotiating techniques. The declarations offered two examples of such techniques: The United

States might prefer in some circumstances to negotiate up to the position outlined in the white paper, or the government might instead agree to a foreign government's position that is essentially the same as that in the white paper, thereby avoiding the expenditure of negotiating capital and any reluctance that some foreign governments could have to agreeing with a proposal advanced by the United States. See JA 89 (Second Bliss).

In addition to the loss of negotiating flexibility, disclosure of the white paper could also harm the foreign relations of the United States if an international arbitrator were to conclude that the meaning of "in like circumstances" outlined in the white paper could be used to find the United States in breach of its international obligations to foreign investors under a different treaty that also uses such language. Such a finding could lead to international trade retaliation, which would obviously harm the foreign relations of the United States. See JA 87.

2. Like the district court, CIEL discounts the significance of those harms. CIEL does not dispute that disclosure of the white paper reasonably could be expected to reduce our future negotiating flexibility.

Instead, it argues that maintaining such flexibility is somehow untrustworthy and should not be protected. See CIEL Br. 37 (arguing that negotiating flexibility "is inconsistent with USTR's asserted need to maintain its negotiating partners' trust") (citing JA 107 (2012 opinion)). That suggestion is incorrect.

As USTR's declarations explained, there is nothing inconsistent or unfair about seeking to preserve such common and useful negotiating techniques. See USTR Br. 42-44 (citing JA 88-89 (Second Bliss)). In any event, CIEL cannot overcome the government's description of a reasonably likely harm to foreign relations by arguing that the government should not conduct foreign relations in a particular way. FOIA litigation is not a means for imposing limits on the government's exercise of its foreign affairs power.

CIEL's different predictive assessment of the likelihood of an adverse arbitration decision is likewise not sufficient to overcome the expert judgment of the Executive's experts in the area of negotiating and interpreting international trade agreements. See CIEL Br. 39 (arguing that

"sophisticated international arbitrators * * * would not consider Document 1 to bind the United States in an arbitration proceeding"); see also JA 109 (2012 opinion). Moreover, CIEL's objection is misdirected: the risk of harm to foreign relations was not based on a concern that arbitrators would fail to recognize the white paper as non-binding, but that "international arbitrators may nonetheless be willing to look at Document 1 for assistance in interpreting the phrase 'in like circumstances' since the term is not specifically defined in trade agreements." JA 87 (Second Bliss). CIEL is not an expert in assessing the risk of an adverse arbitration decision, and principles of deference properly ensure that a litigant cannot substitute its judgment for that of the federal government in this sensitive area of foreign relations.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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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.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,005 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ *H. Thomas Byron III*
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CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2012, I electronically filed the foregoing Final Reply 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.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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