[NOT YET SCHEDULED FOR ORAL ARGUMENT]

16-5011 & 16-5012

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

JIHAD DHIAB,
Petitioner–Appellee,
v.
BARACK H. OBAMA, et al.,
Respondents–Appellants/Cross-Appellees,

HEARST CORPORATION, et al.,
Intervenors–Appellees/Cross-Appellants.

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

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL, AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF INTERVENORS–APPELLEES/CROSS-APPELLANTS AND AFFIRMANCE

Arthur B. Spitzer
American Civil Liberties Union of the Nation's Capital
4301 Connecticut Avenue, NW,
Suite 434
Washington, DC 20008
Telephone: (202) 457-0800
Fax: (202) 452-1868
artspitzer@aclu-nca.org

Hina Shamsi
Dror Ladin
Matthew Spurlock
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
Fax: (212) 549-2654
hshamsi@aclu.org
Counsel for *Amici Curiae*

April 8, 2016

COMPLIANCE WITH RULE 29

This brief is submitted pursuant to Federal Rule of Appellate Procedure 29 and District of Columbia Circuit Rule 29.

Pursuant to Federal Rule of Appellate Procedure 29(c), counsel for *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

Pursuant to Circuit Rule 29(d), undersigned counsel certify that separate briefing is necessary. *Amici* address the public's significant interest in release of the videotape evidence at issue in this case, and discuss why the government's argument for suppressing this evidence does not survive First Amendment strict scrutiny. These are issues on which *amici* have substantial expertise and which they are well-suited to discuss. *Amici* understand that other *amicus* briefs will address separate issues, including the government's overclassification of information under Executive Order 13,526. There would be no efficiencies or synergies gained by addressing these issues in a joint brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, *amici* state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amici* certify that:

A. Parties and Amici

Except for the American Civil Liberties Union, the American Civil Liberties Union of the Nation's Capital, the Reporters Committee for Freedom of the Press, the Brennan Center for Justice, the Electronic Frontier Foundation, and any other *amici* who may have not yet entered an appearance in this Court, all parties and intervenors are listed in the brief for the Intervenors–Appellees/Cross-Appellants.

B. Rulings Under Review

References to the rulings under review appear in the brief for the Intervenors–Appellees/Cross-Appellants.

C. Related Cases

References to the related cases appear in the brief for the Intervenors–Appellees/Cross-Appellants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Treaties

Other Authorities

STATEMENT OF INTEREST

The American Civil Liberties Union is a nationwide, non-partisan organization with more than 500,000 members and supporters dedicated to the principles of liberty and equality embodied in the United States Constitution. The ACLU has a long history of defending civil liberties through promoting openness in government and protecting the public's right to know what their government is doing in the face of excessive government claims of national security. The ACLU has a long history of vigorously defending free speech and the American public's right to access judicial records. The ACLU has appeared both as direct counsel and as *amicus curiae* before this and numerous other federal courts in First Amendment cases upholding the public's right to access and related First Amendment issues. The ACLU of the Nation's Capital is the Washington, DC, affiliate of the ACLU.

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association of reporters and editors dedicated to safeguarding the right to a free and unfettered press guaranteed by the First Amendment, and the right of citizens to be informed, through the press, of the actions of their government, including their courts. The Reporters Committee has provided guidance and research in First Amendment and freedom of information litigation since 1970, and it frequently files friend-of-the-court briefs in significant media law cases

involving sealed court documents or court access issues. The Reporters Committee has a strong interest in preserving the presumptive right of access to court proceedings and documents afforded by the First Amendment because such access enables the press to gather the news and report on matters of utmost concern to the public, and because reporters, as representatives of the public, have an interest in observing the conduct of the courts and overseeing the operation of the justice system.

SUMMARY OF ARGUMENT

We live in an age in which photographs, cartoons, words, and even cinema may give rise to unpredictable violence. But while the government may prepare for, and respond to, the possibility of violence in many ways, the Constitution forecloses it from abrogating the public's right to access judicial records unless the First Amendment's strict scrutiny standard is satisfied. Especially in times like these, the First Amendment stands as a bulwark against excessive government secrecy and ensures the informed citizenry that is vital to the survival of democracy.

The American public's interest in seeing the videotapes at issue in this case—of force-feedings and cell extractions at Guantánamo—is particularly acute. President Obama has specifically asked the American people to consider whether force-feeding at Guantánamo is representative of the nation's values. The government's force-feeding program has been condemned by international and domestic legal and ethical bodies, U.S. elected officials, and rights organizations. Yet the government maintains that the program is lawful, appropriate, and humane. The public has a strong interest in seeing for itself the evidence at the heart of such an important and high-profile debate.

Nevertheless, the government asserts that it may suppress the videotapes based on the possibility that they could cause an emotional chain reaction

culminating in violence overseas. Neither that argument, nor the evidence the government cites to support it, can survive First Amendment scrutiny. Moreover, the government's speculative argument is a dangerous one, because it lacks a limiting principle. If the rule the government proposes is accepted, it could be applied to suppress from the American public information about lawful or unlawful government conduct, in and outside of the national security context. It would substantially narrow informed public debate and impoverish the marketplace of ideas and information available to Americans. In short, to accept the government's argument would be to give the government far-ranging authority to censor information vital to the democratic oversight that the First Amendment is intended to protect. *Amici* respectfully urge this Court to reject the government's argument and uphold the lower court's decision releasing the videotapes to the public.

ARGUMENT

I. THE PUBLIC HAS A SIGNIFICANT INTEREST IN SEEING FIRSTHAND EVIDENCE OF THE GOVERNMENT'S FORCE-FEEDING OF PETITIONER.

In a speech explaining his commitment to closing the prison at Guantánamo Bay, President Obama asked Americans to "Look at the current situation, where we are force-feeding detainees who are being held on a hunger strike. . . . Is that who we are? Is that something our founders foresaw? Is that the America we want

to leave our children?"[1] The videotapes Petitioner has submitted as evidence in his lawsuit depict the official procedures the government applies to Guantánamo detainees who go on hunger strikes to protest their indefinite detention. The American public has a strong interest in heeding the President's call to see "who we are" by viewing the videotapes for themselves, and debating and determining for themselves whether the government's procedures—and their impact on the Guantánamo detainees our nation held and continues to hold—are consistent with American values, law, and ethics.

Seeking to keep the force-feeding videotapes from the public, the government asserts that its treatment of Petitioner is entirely "lawful, humane, and appropriate." Gov't Br. at 57. But that assertion—which is contradicted by international law and medical ethical standards—is not sufficient in a nation that holds itself out as a government of the people, by the people, and for the people. Although a robust debate about the morality, legality, and ethics of the government's force-feeding program is ongoing, the public has so far been denied access to first-hand evidence about the ongoing operations of the program itself. *Cf. Mills v. Alabama*, 384 U.S. 214, 218 (1966) (First Amendment protects "free discussion of governmental affairs," including "the manner in which government is

[1] Remarks by the President at the National Defense University, May 23, 2013, https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university.

operated or should be operated"). As the district court recognized, access to the videotapes is important to "evaluate the credibility of [Petitioner's] allegations, to assess the fairness of his treatment by the court, and to provide oversight of the institutions of government." Unclassified Appendix ("UA") 276 (internal quotations omitted).

Moreover, the government's position that force-feeding is lawful clashes with the weight of international legal authority. Force-feeding of competent hunger strikers is universally considered a form of cruel, inhuman, and degrading treatment. The practice violates the United States' treaty obligations under the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85 (ratified Nov. 1994); Common Article 3 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (ratified Feb. 2, 1956); and the International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 999 U.N.T.S. 171 (ratified June 8, 1992). Authoritative evaluations of the force-feeding procedures specifically employed at Guantánamo have concluded that the procedures violate these international law prohibitions on ill-treatment and may rise to the level of torture.[2]

[2] *See* United Nations Committee against Torture, Concluding Observations on the Third to Fifth Periodic Reports of United States of America, at ¶ 14 (Nov. 20,

Information available to the public also indicates that the government's practices, depicted in the videotapes, run afoul of the broad consensus that the force-feeding of competent prisoners violates medical ethics. The World Medical Association's ("WMA") 1975 Tokyo Declaration discusses hunger strikes in the context of torture, and instructs physicians to respect competent prisoners' rights to refuse artificial feeding.[3] The WMA's 1991 Declaration of Malta on Hunger Strikers, which was revised in 2006 partly in reaction to hunger strikes by Guantánamo detainees, states that "[f]orcible feeding is never ethically acceptable. Even if intended to benefit, feeding accompanied by threats, coercion, force or use of physical restraints is a form of inhuman and degrading treatment."[4] For similar reasons, the International Committee of the Red Cross is "opposed to forced

---

2014); Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui et al., Situation of Detainees at Guantánamo Bay, UN ESCOR; 62nd Sess., Agenda items 10 and 11, UN Doc E/CN.4/2006/120 ¶¶ 88, 54 (Feb. 27, 2006).

[3] World Med. Ass'n, *Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment* (Tokyo 1975, rev. 2005 & 2006), http://www.wma.net/en/30publications/10policies/c18/index.html.

[4] World Med. Ass'n, *Declaration of Malta on Hunger Strikers* (Malta 1991, rev. 1992 & 2006), http://www.wma.net/en/30publications/10policies/h31/.

feeding or forced treatment."[5] The American Medical Association also warns that "the forced feeding of detainees violates core ethical values of the medical profession."[6] And in March 2015, the Pentagon's Defense Health Board found that force-feeding may violate professional and ethical standards, and recommended against punishing health care providers who opt out of participating.[7]

Because of these legal and ethical prohibitions, U.S. elected officials and domestic and international rights organizations have called for an end to the force-feeding program at Guantánamo. In June 2013, Senator Dianne Feinstein told the Secretary of Defense of her "opposition to the force-feeding of detainees" and her resulting concern about the government's program.[8] In July 2013, Senator Richard Durbin joined Senator Feinstein in urging President Obama to end force-feeding at

---

[5] International Committee of the Red Cross, *Hunger strikes in prisons: the ICRC's position* (2013), http://bit.ly/1RHgo4d.

[6] Letter from Jeremy A. Lazarus, M.D., President of Am. Med. Ass'n to Chuck Hagel, Secretary of Defense, Apr. 25, 2013, http://bit.ly/1Sh4utR.

[7] Dep't of Defense, Defense Health Board, Ethical Guidelines for U.S. Military Medical Professionals (March 2015), http://www.health.mil/Reference-Center/Reports/2015/03/03/Ethical-Guidelines-and-Practices-for-US-Military-Medical-Professionals.

[8] Letter from Senator Dianne Feinstein to Chuck Hagel, Secretary of Defense, June 19, 2013, http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=8af43b52-0301-42b9-8f72-27f88997bd39.

Guantánamo.[9] A broad coalition of rights organizations has also called on the Pentagon to end the program.[10] Yet because the government has repeatedly shielded evidence of the program from public view, the American public is not fully informed, and is unable to participate fully in these important ongoing debates.

In light of the legal and ethical prohibitions against force-feeding and widespread calls for the program's end, the government's insistence on continuing the program itself invites public scrutiny, and makes the American public's interest in seeing what procedures are used, and how, stronger.

The public's interest is further heightened because of the history of torture and abuse at Guantánamo—and the government's efforts to shield wrongdoing there from public scrutiny and debate. When the prison was first established, Americans were told that the "United States is treating and will continue to treat all of the individuals detained at Guantánamo humanely" and that "detainees will not

[9] Letter from Senators Dianne Feinstein and Richard Durbin to Barack Obama, President, July 10, 2013, http://www.feinstein.senate.gov/public/index.cfm/files/serve/?File_id=4bdc8dd7-dc7f-48a4-b718-d8fb6fc4294d.

[10] *See* Letter to Chuck Hagel, Secretary of Defense, May 13, 2013, http://bit.ly/1qahJ8Y.

be subjected to physical or mental abuse or cruel treatment."[11] Even as the government made those representations, it fashioned Guantánamo as a place where terrorism suspects could be detained without process and interrogated without restraint. Investigative reports by the Senate Armed Services Committee,[12] the Justice Department's Office of Inspector General,[13] and numerous independent organizations have now made clear that Guantánamo detainees were subjected to torture and other unlawful interrogation techniques.[14]

Throughout the operation of the detention facility at Guantánamo, the government has responded to public controversy with secrecy. Most recently and of relevance to this matter, when the men indefinitely detained at Guantánamo turned in desperation to hunger strikes in protest against their plight, public debate

---

[11] Office of the Press Secretary, *Fact Sheet: Status of Detainees at Guantánamo*, Feb. 7, 2002, http://www.presidency.ucsb.edu/ws/?pid=79402.

[12] *See* S. Comm. on Armed Services, 110th Cong., *Rep. on Inquiry into the Treatment of Detainees in U.S. Custody*, 43 (Comm. Print 2008).

[13] U.S. Dep't of Justice Office of Inspector Gen., *Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantánamo Bay, Afghanistan and Iraq* (May 2008), http://www.justice.gov/oig/special/s0805/final.pdf.

[14] Constitution Project, *Report of Task Force on Detainee Treatment*, (April 2013), http://detaineetaskforce.org/read/; *Red Cross Finds Detainee Abuse at Guantánamo*, N.Y. Times, Nov. 30, 2004, http://nyti.ms/1DzLy6X (Red Cross found U.S. military was intentionally using psychological and physical torture at Guantánamo and medical professionals participated in what Red Cross called "a flagrant violation of medical ethics").

about and controversy over the prison and its force-feeding policies intensified.[15] As the controversy grew, the government instituted a media blackout about the number and condition of detainees participating in hunger strikes.[16] That blackout continues to this day.[17]

Now, as the force-feeding program continues to be the subject of both widespread public concern and judicial scrutiny, the government seeks to prevent the public from seeing evidence of it. This Court should reject a perpetuation of Guantánamo's dangerous twin legacies of abuse and secrecy.

II. THE GOVERNMENT'S SPECULATIVE ARGUMENT CONCERNING PROPAGANDA AND VIOLENCE DOES NOT JUSTIFY SUPPRESSION OF THE VIDEOTAPES.

It is well established that an open judicial system performs an essential role in American democracy, safeguarding the ability of citizens to "effectively participate in and contribute to our republican system of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982). The First Amendment therefore "protects the public and the press from abridgement of their

---

[15] *See, e.g.*, Editorial, *Hunger Strike at Guantánamo*, N.Y. Times, April 5, 2013, http://nyti.ms/11zpuoQ.

[16] *See* Associated Press, *Guantánamo detainees hunger strikes will no longer be disclosed by U.S. Military*, Wash. Post, December 4, 2013, http://wpo.st/hq_90.

[17] *See* Miami Herald, *Tracking the Hunger Strike*, http://media.miamiherald.com/static/media/projects/gitmo_chart/.

rights of access to information about the operation of their government." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 584 (1980) (Stevens, J., concurring). The constitutional and common law right of access to judicial records ensures that the public's "constitutionally protected 'discussion of governmental affairs' is an informed one." *Globe Newspaper Co.*, 457 U.S. at 605; *see also Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring) (the First Amendment protects both "uninhibited, robust and wide-open" debate on public issues, as well as "the antecedent assumption that valuable public debate . . . must be informed").[18]

This Court has recognized that "detainee cases are unique" and require heightened independent judicial scrutiny of government calls for secrecy and deference. *Ameziane v. Obama*, 699 F.3d 488, 494 (D.C. Cir. 2012). When the government exercises power over vulnerable noncitizens in the name of national security, as it does here, "the only safeguard on this extraordinary governmental power is the public, deputizing the press as the guardians of their liberty." *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002). As the Supreme Court has long recognized, "informed public opinion is the most potent of all restraints

[18] *Amici* agree with (but do not address here) Press-Intervenors' arguments that the First Amendment right of access applies, that only a judge can adjudicate the public's right to judicial records, and that the district court did not abuse its discretion in its decision below.

upon misgovernment," *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936), because it "alone can here protect the values of democratic government." *N.Y. Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring).

The government's argument in support of curtailing this essential right rests on the possibility that release of the videotapes could result in propaganda that may increase the risk of violence to U.S. personnel and interests. But that argument does not survive strict scrutiny because it is based on thin speculation and the government offers no meaningful limit to it. Indeed, if accepted, the government's argument could be used to justify the suppression of a broad range of images and even texts, including those far removed from the national security context.

A. The First Amendment requires the government to satisfy strict scrutiny before the public's right to the videotapes may be restricted.

Because of the unique importance of First Amendment rights to the structure of American democracy, the Supreme Court requires a stringent showing before these rights may be curtailed. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572. Accordingly, the public's right to open judicial proceedings may not be infringed unless the government "demonstrat[es] that 'closure is *essential* to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise Co. v.*

Superior Court, 478 U.S. 1, 13–14 (1986) (emphasis added) (quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 502 (1984)).[19] The government must show a "substantial probability" of harm backed up by evidence allowing for "specific, on the record findings" supporting the likelihood of harm. *Id.* Conclusory assertions are not sufficient to abridge the First Amendment public access right, *id.* at 15, and speculation certainly does not carry the government's burden. *Globe Newspaper Co.*, 457 U.S. at 609–610 (rejecting mandatory closure of trials involving minor victims of sexual offenses because the government's claims of harm were "speculative in empirical terms" and "open to serious question as a matter of logic and common sense").

The controlling First Amendment standard applies—and is not relaxed—in the national security and law enforcement contexts. *See In re Wash. Post Co.*, 807 F.2d 383, 391 (4th Cir. 1986) (rejecting government argument that strict scrutiny standard is inapplicable when national security interests are at stake); *see also Blount v. Rizzi*, 400 U.S. 410, 420 (1971) (rejecting legislative attempt to substitute "probable cause" standard for traditional First Amendment scrutiny); *cf. N.Y. Times Co.*, 403 U.S. at 719 ("The word 'security' is a broad, vague generality

[19] As Press-Intervenors point out, the First Amendment imposes substantially stricter burdens on government restrictions than when the government seeks to withhold information under the Freedom of Information Act. *See* Press-Intervenors' Br. at 42–45.

whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.") (Black, J. concurring).

Three First Amendment doctrines provide guidance to this Court concerning the showing the government must make to survive First Amendment strict scrutiny in this case.

As the district court recognized below, UA192–93, the most analogous source of authority here is the "heckler's veto" line of cases, in which the Supreme Court has made clear that Americans' First Amendment rights may not be restricted based on fear of a hostile or even violent response. Applying the "heckler's veto" doctrine, the Supreme Court has repeatedly rejected government allegations that "violence was about to erupt" from First Amendment-protected activities as a sufficient justification for abridging rights. *Cox v. Louisiana*, 379 U.S. 536, 550 (1965); *see also, e.g.*, *Street v. New York*, 394 U.S. 576, 592 (1969) (rejecting government justification for curtailing speech that has a "tendency . . . to provoke violent retaliation"); *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966) (rejecting restriction based on government's speculation that "critics might react with disorder or violence"). As the Court explained in *Cox*, "constitutional rights may not be denied simply because of hostility to their assertion or exercise." 379 U.S. at 551 (internal quotation marks omitted). And as the Court elaborated in *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134-135 (1992), content-

based restrictions may not be justified based on speculation that speech may "offend a hostile mob."

These principles apply to truthful information that *might* provoke the sensibilities not only of domestic critics, but also of foreign audiences or hostile groups. *Cf. Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (a principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."); *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (stating that "we have not permitted the government to assume that every expression of a provocative idea will incite a riot" and requiring government to make a showing of a direct, personal risk of an imminent violent reaction). That actual or potential terrorists could possibly react violently to an official U.S. program must not undermine Americans' First Amendment-protected right of access to judicial records about that program.[20]

In another context to which this Court should look—that of incitement—the Supreme Court has held that even when a private party advocates the "duty, necessity, or propriety" of violence, the government may not punish that speech

[20] Even in the Freedom of Information Act context, in which First Amendment rights are not at stake, "fear of blackmail is not a legally sufficient argument to prevent" a required disclosure. *ACLU v. Dep't of Defense*, 389 F.Supp.2d 547, 576 (S.D.N.Y. 2005).

without demonstrating that it is in fact likely to result in imminent violence. *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969). The test for imminence and likelihood is a stringent one, and it is not satisfied by predictions of "illegal action at some indefinite future time." *Hess v. Indiana*, 414 U.S. 105, 108 (1973). Nor can government speculation substitute for a strong, "direct connection between the speech and imminent illegal conduct." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 236, 253 (2002) (rejecting as speculative the government's argument that "virtual child pornography whets the appetite of pedophiles and encourages them to engage in illegal conduct").

Finally, in the prior restraint context, the Supreme Court has made clear that when the government predicts national security harm as a result of publication of information during wartime, the First Amendment requires it to make a stringent showing of immediate, direct harm. In the *Pentagon Papers* case, the government sought to block a classified study it argued would impair the war effort and endanger American lives if made public. The Court held that the government had failed to carry the "heavy burden of showing justification for the imposition of such a restraint." *N.Y. Times Co.*, 403 U.S. at 714. As the Court's concurring opinions explained, the First Amendment bars a prior restraint on national security information—regardless of its classification—unless the government demonstrates that publication would directly cause *immediate* harm to national security. *See id.*

at 730 (Stewart, J., concurring) (requiring showing of "direct immediate, and irreparable damage to our Nation or its people"); *id.* at 726–27 (Brennan, J., concurring) (prior restraint only permissible when it would "inevitably, directly, and immediately cause" serious harm).

In sum, each of these doctrines illustrate that the First Amendment sets a high bar for the kinds of predictions of future hostility or violence that would justify abridging the public's right to access the videotapes, requiring a showing of direct, specific, imminent harm that will in fact occur.

B. The government's argument does not survive strict scrutiny.

The government has not met the stringent First Amendment standard here. It primarily argues that the videotapes must be suppressed because they "*could* be used to increase anti-American sentiment and inflame Muslim sensitivities overseas, thereby placing the lives of U.S. service members and U.S. citizens overseas at increased risk." Gov't Br. at 56 (emphasis added). As *amici* show below, the government has failed to carry the evidentiary burden required to sustain its theory. Its prediction of a possible chain of reactions is far too attenuated to support a finding that sealing is essential, s*ee Globe Newspaper Co.*, 457 U.S. at 609–10, and the blanket ban on videotape evidence it seeks cannot satisfy the First Amendment's narrow tailoring requirement, *see Press-Enterprise*, 478 U.S. at 14. Moreover, the government's position lacks a limiting principle; if

accepted, it would authorize the government to keep secret almost any images or information regarding controversial government activities.

1. The government's evidence in support of its argument fails strict scrutiny.

The government's evidence in support of its argument fails strict scrutiny even on its own terms. When a government rationale—if accepted—would support a far broader ban on open access than the government seeks, the government's "argument based on this interest therefore proves too much, and runs contrary to the very foundation of the right of access recognized in *Richmond Newspapers*." *Globe Newspaper Co.*, 457 U.S. at 610; *see also Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2740 (2011) ("Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes . . . .").

Here, the government's argument for suppressing the videotapes also "proves too much" because it is based on rationales that apply equally to virtually any imagery of or from Guantanamo. For example, the government asserts that "extremist groups" are even now using Guantánamo imagery for recruitment and incitement to violence. Gov't Br. at 16–17 ("ISIL . . . has already demonstrated an interest in using imagery associated with Guantánamo Bay" including "orange jumpsuits" to "encourage" and incite supporters). But all images of Guantánamo

detainees are potentially of interest to groups and individuals hostile to the United States because the continued operation of the facility itself engenders intense controversy and outrage. Indeed, the testimony on which the government relies in making this argument—that of Deputy Under Secretary for Defense Brian P. McKeon, Gov't Br. at 56—undermines its asserted reasons for withholding the videotapes. According to that testimony, it is the "continued operation of the detention facility at Guantánamo" itself that "is used by violent extremists to incite local populations."[21] The dangers of propaganda using "the topic of Guantánamo" to incite violence exist regardless of whether the videotapes are released. *Cf.* Gov't Br. at 58 (urging suppression because groups have "used the topic of Guantánamo in propaganda").

The government also asserts that the videotape evidence will be "used as a recruitment tool" by "terrorist groups" engaged in violence against Americans, including Americans overseas. Gov't Br. at 56–58 (citing to ISIL and al Qaeda propaganda); *see also* Gov't Br. at 60–61.[22] This assertion likewise proves too

[21] *Guantánamo Detention Facility and the Future of U.S. Detention Policy, Hearing Before the United States Senate Committee on Armed Services*, 114th Cong. 3 (2015) (statement of Brian P. McKeon, Deputy Under Secretary for Defense for Policy).

[22] The government asserts that "the district court misunderstood [its] argument" on this point, because the videotapes would not merely "spur terrorist propaganda" but would be used for recruitment and incitement. Gov't Br. at 60. However, the

much. Groups hostile to the United States utilize a broad, unpredictable, and uncontrollable range of information—both true and fabricated—about the United States and its policies for recruitment. In light of the tremendous variety of information that, for example, the Taliban, ISIS, and other groups attempt to capitalize on, the government has failed to demonstrate that the evidence here will directly trigger violence against U.S. personnel. To cite just a few examples, the Taliban has reportedly used as recruiting tools the controversy regarding the construction of a mosque near the World Trade Center[23] and the prisoner exchange of Sergeant Bowe Bergdahl.[24]

According to a Pentagon official, the Taliban has even recruited militants on the basis of the "[l]ack of progress in achieving comprehensive Middle East peace."[25] Indeed, many aspects of U.S. foreign policy are or could be regarded as

---

district court clearly considered the government's speculative argument and rejected it. *See* UA275 n5, UA192.

[23] *See* Sami Yousafzai, *Taliban Using Mosque Controversy to Recruit*, Newsweek, Aug. 30, 2010, http://bit.ly/19GezBA.

[24] *See* Holly Yan, Masoud Popalzai, and Catherine Shoichet, *Taliban Video Shows Bowe Bergdahl's release in Afghanistan*, CNN, June 5, 2014, http://cnn.it/1mQAvuu.

[25] *The Posture of U.S. Central Command, Hearing Before United States Senate Committee on Armed Services*, 112th Cong. 8 (2011) (Testimony of General James N. Mattis, USMC Commander for U.S. Central Command).

inflammatory by some hostile entity disposed to violence. But the attenuated danger that such a group could add a new basis to its existing efforts to drum up recruits cannot support the restriction on Americans' First Amendment rights that the government seeks here. In light of the broad range of information that could potentially be used in an attempt to recruit individuals to a militant cause, the government's failure to offer direct evidence that suppression of the videotapes is essential to prevent recruitment fails strict scrutiny.

Finally, the government suggests a loose, unsupported analogy between the videotapes here and instances in which extreme disrespect of the Muslim faith or Muslims led to violent reactions. Gov't Br. at 57–58.[26] But because it is impossible to predict with any accuracy what activity and imagery will actually and directly lead to violence, the government may not condition Americans' rights on the bare possibility of offense potentially leading to hostilities. For example,

[26] The government has not established a rational connection between the unrest in the instances it cites and its speculations with respect to the videotapes here. The government's examples of violent reactions to extreme offense are not remotely comparable. They include (1) reports that NATO personnel in Afghanistan burned holy books, "generally regarded as one of the most offensive acts in the Muslim world," Sangar Rahimi and Alissa J. Rubin, *Koran Burning in NATO Error Incites Afghans*, N.Y. Times, Feb. 21, 2012, http://nyti.ms/1yHDmeW; and (2) a video depicting "desecration," in particular, soldiers "urinating over . . . three bodies" and mocking the dead with the quip "[h]ave a great day, buddy." Graham Bowley and Matthew Rosenberg, *Video Inflames a Delicate Moment for U.S. in Afghanistan*, N.Y. Times, Jan. 12, 2012, http://nyti.ms/1yHDtac.

photographs of torture and abuse of detainees at the Abu Ghraib prison, including images of unclothed detainees posed in "dehumanizing, sexually suggestive ways," were first published by the media in 2004, and again in 2006. *ACLU v. Dep't of Defense*, 543 F.3d 59, 64 (2d. Cir. 2008). There is no evidence of their publication resulting in violence or unrest.[27] Even if there were such evidence, however, the American public's right to see those photos would outweigh the mere possibility that the publication of the photos could lead to hostile acts by uncontrollable third parties.

Moreover, there is strong reason to doubt the accuracy of the government's speculations here, because its similar recent predictions have been overblown and unreliable. Six months after the Press-Intervenors moved to unseal the videotape evidence in this case, the government declassified and made public a 500-page summary of a Senate Select Committee on Intelligence investigative report that is rife with graphic and gruesome details of the Central Intelligence Agency's

[27] Although the government opposes the release of additional Abu Ghraib photos in litigation, it did not in that context point to any public examples of violence following the release of similar photographs in the past. *See* Decl. of Megan M. Weiss, *ACLU v. Dep't of Defense*, No. 04 Civ. 4151 (S.D.N.Y. Dec. 19, 2014), Dkt. 530; Decl. of Sinclair M. Harris, *ACLU v. Dep't of Defense*, No. 04 Civ. 4151 (S.D.N.Y. Dec. 19, 2014), Dkt. 531. The government's arguments for withholding of these additional photos have failed even under the lower Freedom of Information Act standard. *ACLU v. Dep't of Defense*, 389 F.Supp.2d at 575.

physical and psychological torture of detainees.[28] Before the report's release, government officials objected to its publication, asserting that it would "pose[] an unacceptable risk to U.S. personnel and facilities abroad."[29] None of that transpired.[30] Likewise, for years, detainees at Guantánamo have been barred from describing their personal experiences and memories of torture, unlawful detention, and other abuse by the U.S. government, because the government maintained that release of the information would cause significant harm to national security. *See, e.g.*, Second Amended Protective Order, *United States v. Mohammad*, Dkt. No. AE 013DDD (U.S. Mil. Comm. Dec. 16, 2013).[31] After the release of the Senate Intelligence Committee's summary report, details of detainees' torture have been available worldwide, and have been discussed in open court, without any of the

---

[28] *See* Senate Select Committee on Intelligence, Executive Summary, *Committee Study of the CIA's Detention and Interrogation Program*, Dec. 3, 2014, http://1.usa.gov/1RUx1uY.

[29] Josh Rogin, *Kerry Puts Brakes on CIA Torture Report*, Bloomberg View, Dec. 5, 2014, http://bv.ms/1rX4SqW; *see also* Erin Kelly, *Officials Fear Torture Report Could Spark Violence*, USA TODAY, Dec. 9, 2014, http://usat.ly/1A8PnLi (White House spokesman warned that "release of the report could lead to a greater risk that is posed to U.S. facilities and individuals all around the world").

[30] *See* Senator Dianne Feinstein, Senate Select Committee on Intelligence Hearing, Feb. 12, 2015 (noting that the administration's threat assessment "was not correct"), http://cs.pn/1SDqejW.

[31] http://www.redress.org/downloads/ksm-ii-(ae013ddd(ksm-et-al))-second-amended-protective-order.pdf.

national security harms predicted by the government. *See* Government's Mot. to Amend Protective Order, *United States v. Mohammad*, Dkt. No. AE 013RRR (U.S. Mil. Comm. Jan. 30, 2015) (government motion to allow discussion of treatment of detainees in light of Senate Intelligence Committee report release).[32] When the government has cried wolf as often as it has in this context, this Court should approach its cries here with skepticism.

The government's predictions of harm are further undermined by the fact that the force-feeding program at Guantánamo is already well known and well documented. When sealed facts are already public, restrictions on the public access right are justified only if, despite what the public already knows, unsealing would still give rise to a substantial probability of harm. *Washington Post v. Robinson*, 935 F.2d 282, 292 (D.C. Cir. 1991) ("Because disclosure of the contents of the plea agreement would only have confirmed to the public what was already validated by an official source . . . it could hardly have posed any additional threat to the ongoing criminal investigation"); *In re The Herald Co.*, 734 F.2d 93, 101 (2d. Cir. 1984) (questioning "whether the information sought to be kept confidential has already been given sufficient public exposure to preclude a closure order"); *cf. Ameziane*, 699 F.3d at 498 ("it would have been proper to consider

[32]http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE013RRR(Gov)).pdf .

whether the government already had publicly acknowledged [the detainee's] clearance for transfer"). Although images may well be more powerful than a written description of the procedure, the passage of time and the public's knowledge of the procedure lessen any inflammatory impact of the videotapes at issue here. The government has failed to provide evidence making the necessary showing of harm in light of the passage of time.

2. The government's argument has no limiting principle.

The difficult truth is that it's virtually impossible to know in advance when and which images will provoke people to violence. Here, the government offers no limiting principle to its claimed authority to suppress images depicting controversial government conduct—lawful or unlawful. Accepting its argument would permit government censorship of a broad range of images that might at some point result in a hostile response. This, the First Amendment does not allow.

Under the government's theory, it can deny Americans First Amendment-protected information that might increase anti-American outrage, offend the "sensitivities" of over 1 billion people overseas (whose only shared characteristic under the government's formulation is their religion), and potentially result in violent attacks against U.S. personnel or allies. In this case, the rule the government proposes would cover conduct that it asserts is lawful and humane. But to accept this rule, at least in the absence of a specific, credible, fact-based

threat of imminent violence directed at specific people, *see supra* p. 13–18, which the government has not shown, would also be to accept that the government has far-reaching power to suppress evidence of its own misconduct. After all, the worse the misconduct, the stronger the government's argument for censoring it based on an asserted fear of violent outrage.[33]

Applying the government's logic and the rule it proposes, it could suppress graphic imagery such as a photo of a naked little girl fleeing the aftermath of napalm dropped in Vietnam, or of families decimated by drone strikes in Yemen. And the government's logic is not limited to national security: a broad range of controversial videos and imagery has increased criticism of American policies and practices domestically and abroad. They include, for example, videos of the beating of Rodney King and the killing of Eric Garner. Release of each resulted in

[33] Nor is the government's logic limited to information in its possession. The government's attempts to censor speech are evaluated under the same First Amendment strict scrutiny standard that applies to the public's right of access to government information. *Globe Newspaper Co.*, 457 U.S. at 607 (requiring showing of "compelling governmental interest" where closure is "narrowly tailored to serve that interest"); *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979) (assessing whether state's interest was narrowly tailored in the context of it seeking to punish newspaper's publication of "truthful information about a matter of public significance"). To hold that the government can withhold the videotapes in this case would also be to hold that the government could, consistent with the First Amendment, prosecute a third party—such as CBS's 60 Minutes news program—for broadcasting the tapes.

widespread protests, and in the case of the Rodney King video, riots. They also provoked necessary national debates and galvanized movements for policy reform.

In short, to accept the government's argument that images can be suppressed if they could be used as propaganda and might then provoke violence is not just contrary to the First Amendment, it would transform the marketplace of ideas that the First Amendment protects. It would give a veto over public debate both to those who threaten violence, and to the government. The consequent impoverishment of public debate—and policy change through democratic means—is illustrated by imagining what would have happened if the Abu Ghraib photos had not been published by the 60 Minutes news program in 2004. Had those photos not been leaked and were they instead the subject of litigation like this one, the government could have made harm arguments similar to the ones it makes here.[34] Not only did the photos vividly depict U.S. military personnel engaged in torture, cruelty, and inhumane and degrading treatment of prisoners, they were published at the height of the war in Iraq, with U.S. troops fighting on the ground there, and also in Afghanistan. The government's arguments against public release in that context would essentially be that the more egregious the evidence of

[34] Indeed, the government has continued to make similar arguments in a Freedom of Information Act lawsuit for release of additional photographs of abuse, but these arguments have been rejected. *ACLU v. Dep't of Defense*, No. 04 Civ. 4151 (S.D.N.Y. March 20, 2015) (ordering release of photos).

government abuse, the more its inflammatory potential to result in violence, and the greater the need to keep it from the American public. If those arguments were accepted and the photos suppressed, we would have a very different world than we do: one without the domestic and international debate concerning U.S. policies of torture and cruel treatment that immediately followed publication, and without the changes in policy that then resulted.

This Court should reject the government's arguments to withhold the videotapes from the public.[35]

CONCLUSION

For the reasons set forth above, this Court should uphold the District Court's judgment in favor of Petitioner and the Press-Intervenors.

[35] In its briefing, the government appears to have abandoned a rationale it previously advanced to this Court, asserting that because enemies of the United States might manipulate and alter the videotapes for their own ends, the tapes should not be released. Gov't Br. at 18−19, *Obama v. Dhiab*, 14-5299 (D.C. Cir. filed Mar. 4, 2015), Dkt. 1540360. *Amici* note, however, that the government's declarants in this appeal continue to "agree with the statements and conclusions" made in previous declarations, which asserted this argument. UA214; UA258–59. Even as the government's other arguments lack a limiting principle, this argument dispenses with even the concept of a limit. Propagandists can manipulate and splice any media image to depict the United States in a negative light. Under this rationale, the government could bar the public from seeing even information that the government concedes poses no danger, based on speculation that it could be manipulated in order to create entirely different information. Rank speculation of this kind cannot justify withholding of the videotapes.

Respectfully submitted,

/s/ Hina Shamsi

Hina Shamsi
Dror Ladin
Matthew Spurlock
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
Fax: (212) 549-2654
hshamsi@aclu.org

Arthur B. Spitzer
American Civil Liberties Union
of the Nation's Capital
4301 Connecticut Avenue, NW, Suite 434
Washington, DC 20008
Telephone: (202) 457-0800
Fax: (202) 452-1868
artspitzer@aclu-nca.org

Counsel for Amici Curiae

Dated: April 8, 2016

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,605 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

Dated: April 8, 2016

/s/ Hina Shamsi

Hina Shamsi
Dror Ladin
Matthew Spurlock
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
Fax: (212) 549-2654
hshamsi@aclu.org

Arthur B. Spitzer
American Civil Liberties Union
of the Nation's Capital
4301 Connecticut Avenue, NW, Suite 434
Washington, DC 20008
Telephone: (202) 457-0800
Fax: (202) 452-1868
artspitzer@aclu-nca.org
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of *Amici Curiae* the American Civil Liberties Union, the American Civil Liberties Union of the Nation's Capital, and the Reporters Committee for Freedom of the Press was filed upon counsel for Respondents–Appellants/Cross-Appellees and Intervenors–Appellees/Cross-Appellants via this Court's electronic filing system on this 8th day of April, 2016.

/s/ Hina Shamsi

Hina Shamsi
Dror Ladin
Matthew Spurlock
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
Fax: (212) 549-2654
hshamsi@aclu.org

Arthur B. Spitzer
American Civil Liberties Union
of the Nation's Capital
4301 Connecticut Avenue, NW, Suite 434
Washington, DC 20008
Telephone: (202) 457-0800
Fax: (202) 452-1868
artspitzer@aclu-nca.org

Counsel for Amici Curiae