25-897-cv

In the United States Court of Appeals for the Second Circuit

JUSTIN C. MUSTAFA,
Plaintiff,
AMERICAN CIVIL LIBERTIES UNION OF CONNECTICUT,
Intervenor-Appellant,
v.
BYARS, C/O, GARNER C.I.,
Defendant-Appellee,
STANLEY, CAPTAIN, WALKER C.I., EBONIE SUGGS, CCS, WALKER C.I.
PELITIER, C/O, GARNER C.I., SWAN, LT., GARNER C.I.,
Plaintiffs/Defendant-Appellee

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

BRIEF FOR DEFENDANT-APPELLEE

WILLIAM TONG
ATTORNEY GENERAL

Stephen R. Finucane
Assistant Attorney General
165 Capitol Avenue
Hartford, CT 06106
Ph: 860-808-5450
Fax: 860-808-5591
Email: stephen.finucane@ct.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page(s)

Constitution

Statutes

Other

COUNTERSTATEMENT OF THE ISSUES

I. Did the district court abuse its discretion by allowing the ACLU access to view prison video recordings used at trial while also declining to allow the ACLU to reproduce, retain copies, or disseminate the prison videos?

II. Should this Court dismiss the ACLU's appeal or instead proceed to deciding the appeal on the merits, despite the ACLU's arguments and claims of error being waived, abandoned, forfeited, or unpreserved?

INTRODUCTION

The rights of access to materials filed or used in court proceedings are qualified, not absolute, both at common law and under the First Amendment. Properly recognizing these limits, the district court here correctly issued an order regarding access to the prison videos in question: it let the intervenor, the American Civil Liberties Union ("ACLU"), and any other interested member of the public view the videos but not reproduce and disseminate them. That order properly balances the ACLU's and the public's interest in knowing the contents of the videos without compromising prison safety.

There are serious public safety and security concerns arising from the specific prison videos in question, as demonstrated in the sworn testimony from DOC's Deputy Commissioner, William Mulligan. The videos reveal the prison layout, camera blind spots, staff escort procedures, DOC correctional officers' touring schedule within the mental health unit, and transportation procedures, including transport for an unplanned trip to an outside community hospital, as well as the security concerns. Revealing those details for unsupervised and permanent posting on the internet would, Deputy Commissioner Mulligan explained, increase the risk of inmates escaping and committing suicide, or other unsafe behavior and raise related risks.

These security concerns, when balanced against the public's qualified access, are sufficient to justify the court's order allowing access to videos but prohibiting the ACLU's retaining copies and disseminating the videos on the internet. Courts regularly restrict viewing of prison videos to prevent such improper dissemination. It was permissible for the district court below to do so.

In fact, federal statute requires *substantial weight* be given to *any* adverse impact on public safety or the operation of the criminal justice

system caused by the relief when a federal court considers any prospective (non-monetary) relief in a matter concerning prison conditions. *See* 18 U.S.C. § 3626

(a)(1)(A). The district court properly allotted substantial weight to numerous adverse impacts on public safety and the criminal justice system arising from unsupervised access to the videos.

The district court's order also adheres to this court's precedent. This Court clarified in a recent decision that analysis of the public's qualified access to court records must take into account the unique considerations that come with the modern internet age, and this was in the context of a public request for sensitive videos specifically. *See Mirlis v. Greer*, 952 F.3d 51 (2020), *cert denied Greer v. Mirlis*, 141 S. Ct. 1265 (2021). The district court below correctly applied this analysis (and the court certainly did not abuse its discretion in doing so), while weighing the ACLU's qualified right to access court materials and balancing it with the important (and factually unrefuted) safety and security concerns detailed by the defendant and the sworn testimony of the Connecticut DOC's Deputy Commissioner.

The ACLU's appeal lacks merit. Its arguments miss the mark and misapply the law to the facts and evidence at issue below, attempting to simply skate past important public safety concerns. *See* (Hearing Tr. p. 19)(district court stating to the ACLU, given "the significance of prison security . . . you can't just sort of blow by and say the security doesn't matter.")(SA-019); (*id.* p. 17)(district court stating "I don't think that the issue about prison security is frivolous or insufficient . . . .")(SA-017).[1]

The ACLU also fails to acknowledge—let alone analyze and distinguish—this Court's decision in *Mirlis*, a decision that the district court below expressly relied upon throughout its decision and throughout the hearing below. (DC Decision, p. 5, 11, 12, 14, 15, 16)(JA-253, JA-259, JA-260, JA-262, JA-263). Further, the ACLU also does not meaningfully address the important safety and security concerns that serve as the basis of the district court's decision, including the specific, factual matters confirmed in sworn the testimony of Deputy Commissioner Mulligan. The district court carefully weighed the evidence presented

---

[1] Citations to SA refer to the Supplemental Appendix, submitted with this brief. Citations to "JA" refer to the Joint Appendix. *See* (2d Cir. Doc. 20). Citations to "DC Doc." and "2d Cir. Doc." refer to the district court docket and to this Court's dockets respectfully, by ECF entry number.

and properly fashioned a remedy to respect the various competing interests, including the heightened public safety interests.

Finally, most if not all of the ALCU's arguments are waived, forfeited, abandoned, or unpreserved. The ACLU failed to make any request for the videos below during the 30 days after the trial, after which the Court deleted its electronic copies in normal course. Instead, the appellant waited nearly two months before moving for disclosure *via* a motion seeking for the court to compel the defendant to provide access to the videos. The ACLU also failed here on appeal to provide the transcript from the hearing below as part of the appellate record, despite its burden to do so. The appellee, Captain Byars, has nevertheless provided the transcript for the Court in the interest of advancing this appeal to a decision the merits. Further the ACLU failed to acknowledge or brief here on appeal the application of *Mirlis* and other decisions expressly relied upon by the district court in its decision. That constitutes waiver, forfeiture, or abandonment on appeal.

The defendant welcomes a decision on the merits from this Court, given importance of the issue, its impact on other cases, the lack of authority on the specifics at issue in this case in the prison video context,

and given the soundness of the district court's decision. However, the Court may still nevertheless view the waiver or various related arguments made by ACLU with skepticism or even dismiss its appeal, given that the ACLU lacks clean hands concerning procedural matters that elevate form over substance.

COUNTERSTATEMENT OF THE CASE

I. The jury issues a split verdict after viewing video footage and other evidence at trial.

The original lawsuit below was brought by an inmate, plaintiff Justin Mustafa, formally incarcerated within the Connecticut Department of Correction ("DOC"). (DC Doc. 1). He sued the defendant, Christopher Byars, a Correction Officer (now Captain) employed by DOC. The lawsuit arose from use of force by Byars in response to the Mustafa's holding onto his prison cell "food trap" door (the small opening in the door where food can be passed and through which inmates can be handcuffed or uncuffed) refusing the allow Byars to shut the trap. *See* (*id.*) After repeated commands from Byars to let the trap go were not complied with, Byars delivered hand-strike the Mustafa's hand in attempt to gain compliance, and another officer came to help. The officers then managed to get the trap door shut. When Byars delivered the hand strike, he still

had the key in his hand from when he unlocked the trap to provide Mustafa his food tray, and the key struck Mustafa's hand.

Mustafa sued claiming the strike amounted to excessive force and assault, and that the time he spent in his cell afterwards before a supervisor arrived and took him to the medical unit amounted to deliberate indifference to his serious medical needs. (DC Docs. 1; 9). The plaintiff brought claims under 42 U.S.C. § 1983, claiming violation of the Eighth Amendment and also brought claims for assault under state law. (*Id.*) At trial, there were stationary surveillance camera video footage and handheld camera video footage entered as exhibits by both sides and played for the jury. The videos depict the inside of the Garner Correctional Institution ("Garner"), a maximum security, Level-4 prison in Newtown, Connecticut. *See* (JA-145 – JA-155).

The jury found for the Byars on the deliberate indifference claim and found for the plaintiff on the excessive force and assault claims and awarded damages on October 3, 2024. (DC Doc. 111). The district court entered judgment on October 21, 2024. (DC Doc. 117).

II. The district court orders briefing and holds a hearing on the concerning the disputes over the ACLU's access to the prison videos.

This appeal arises from a post-trial, post-judgment dispute (not with the plaintiff, but with the ACLU. (JA-83 – JA-93). The ACLU intervened after judgment entered and raised disputes over the manner and method of accessing trial exhibits from the civil trial. (*Id.*) This included dispute over whether the intervening ACLU could obtain unfettered, unsupervised access and possession of five videos that were exhibits at trial, which depicted numerous aspects of the Garner prison. (*Id.*) The ACLU was not party to the underlying lawsuit, but rather sought intervenor party status after trial and after judgment entered. (*Id.*) The ACLU claimed rights under both the common law and the First Amendment, seeking to obtain and possess its own personal copies of the video records, absent any supervising or restrictions. *See* (DC Docs. JA-83, JA-102, JA-156).

Given the important safety and security concerns, the district court (Bolden, J.,) correctly first sought briefing, evidence, a hearing, and post-hearing briefing to ensure the dispute was fully litigated and correctly decided. (JA-111). That is, the district court correctly recognized there

were competing interests to balance, and in doing so, the district court gave substantial weight to the public safety and security concerns.

The district court not only sought out briefing and argument in aid of navigating the legal issues, it also held a hearing. *See* (Hearing Tr. p. 1-50)(SA-001 – SA-050). At that hearing, the parties offered argument concerning the dispute over video access. (*Id.*) In fact, the district court asked for argument and assistance in interpreting the *Mirlis* decision specifically and how it applies in this case. *See* (Hearing Tr. 3, 4, 5, 6, 10, 11, 12, 13, 14, 15, 24, 25, 35, 41)(SA-003, SA-004, SA-005, SA-006, SA-010, SA-011, SA-012, SA-013, SA-014, SA-015, SA-024, SA-025, SA-035, SA-041).

The Court stressed the importance of the prison security concerns at the hearing:

> The Court [questioning ACLU's counsel]: when you sort of blanketly say that that's not enough, I guess I'm going to push back because what I need help with is how do I think about what the significance of prison security because, obviously, we're talking about a place that is secure, so, you can't just sort of blow by and say the security doesn't matter.

(Hearing Tr. p. 19)(SA-019); *see also* (Hearing Tr. p. 17)(district court finding that, "I don't think that the issue about prison security is frivolous or insufficient . . . .")(SA-017).

The Court also heard and considered argument concerning specific risks, received evidence and briefing, and weighed sworn testimony from DOC Deputy Commissioner Mulligan detailing his security and safety concerns implicated by the specific videos at issue. (JA-145 – JA-155); (Hearing Tr. p. 26-30)(SA-026 – SA-030). Important concerns arising from the videos included escape risk, suicide risk, assaults, killings, drug use, the impact of camera blind spots, knowledge of staff offices and responses, camera locations, metal detector locations, and other concerns. *See* (*Id.*); *see also* (JA-145 – JA-155). As argued at the hearing, one of the "important things with touring and timing and scheduling, especially in a mental health facility, especially in a restrictive housing unit of a mental health facility . . . is if you know the touring scheduling and the timing intervals[,] it's a good way to commit suicide." (Hearing Tr. p. 27 – 28)(SA-027 – SA-028). "If you know, okay, someone's gone by on their tour and they're not going to be around for X number of times,

that's when you would, unfortunately, try to take your own life. That happens." (Hearing Tr. p. 28)(SA-028).

Concerning escape risk, the handheld videos showing the unplanned trip to an outside hospital are particularly dangerous and concerning: "throughout my career in the Connecticut [DOC], transportation to outside medical hospital specifically have raised especially heightened concerns from a security and safety standpoint for myself, DOC, and its officials." (Mulligan Decl., p. 8, ¶18)(JA-152). "There are a variety of protocols and processes to have heighted security measures around these transports, especially since they are to public, unsecure locations, where escape or other serious problems could be planned or attempted." (Mulligan Decl., p. 8, ¶18)(JA-152). Mulligan's testimony then further addressed that two of the videos (Exhibits H and I) depict Mustafa before and after his unplanned transport to an outside hospital. (*Id.*) The videos show the exist and re-entry process and related protocols, such as restraints, escort process, locations of the facility, and the actual points of exit and re-entry.

The Court also considered how intelligence is compiled and gathered piecemeal, in case after case. Improper viewing of the videos

"gives [those with nefarious motives] more intelligence, and intelligence is always a mosaic, right, a little piece here, and little piece there, another piece here[,] and next thing you know you have enough to do something you shouldn't be doing." (Hearing Tr. p. 28)(SA-028).

Critically, the sworn testimony of DOC's Deputy Commissioner specifically stressed that the concerns of the videos showing the locations, process, protocols, and the public safety and security risks *increase* if the videos were to be disclosed in an unsupervised manner in comparison to supervised view (such as for example, the supervised viewing available to the public at trial). (JA-145 – JA-155). To be clear, the Deputy Commissioner's testimony establishes a separate, increased safety and security risk that comes with unfettered dissemination of the videos specifically (especially on the internet), as opposed to supervised viewing, such as the videos being played in court or for the ACLU at counsel's office. (Mulligan Decl. ¶¶ 7, 8, 23)(JA-146, JA-155). Also, there is no dispute that the videos do not show actual hand strike, the challenged use of force that the jury found to be excessive. *See, e.g.*, (DC Decision p. 16)(JA-264).

At the hearing, the defendant raised and offered supervised viewing access as a middle ground and possible basis for relief, and the defendant also raised this middle ground both before and after the hearing as well. *See* (DC Doc. 142 p. 7, 1-2, 5-7)(JA-100, JA94-JA-95, JA-98-JA-100); (DC Doc. 152 p. 21, 8, 12, 15, 17-18, 19 n.3)(JA-134, JA-121, JA-125, JA-128, JA-130-JA-131, JA-132 n.3); (Hearing Tr. p. 44, 43)(SA-044, SA-043); (DC Doc. 157 p. 8, 5, 7)(JA-143, JA-140, JA-142). The Court pressed the ACLU at the hearing on this option extensively, including repeatedly asking for any workable rule or standard to apply to the specific concerns for prison videos:

> The Court: Well, . . . we can issue an order that makes the state allow people to be able, because it had been viewed in court, that individuals could view it, but they could view it at some place or whatever, but they couldn't take the videos with them. . . . so, in essence, you actually get to see what was seen - - what was seen in public court. You just don't get to, you just don't get to retain the images.

(Hearing Tr. p. 44)(SA-044); *see also* (Hearing Tr. p. 43)(district court asking "why isn't there the First Amendment interest satisfied by the middle ground, which is providing people access to be able to view it . . . but you can't hold onto copies of the videos?")(SA-043).

The ACLU responded that it had not considered such possible remedy.

> Mr. Barrett: Yes. ***I have not thought about that***. If the gating criteria were none, that is to say literally anyone can come and see the information, ***I do think that's an interesting approach I have not considered***.

(Hearing Tr. p. 44)(SA-044)(emphasis added).

III. The district court grants the ACLU's request in part and denies it in part, allowing the ACLU access to view the prison videos but not copy, reproduce, or disseminate them.

The district court then issued its remedy in exactly that fashion: ordering supervised viewing facilitated by defense counsel. (DC Decision p. 1, 16, 17)(JA-249, JA-264, JA-265). The district court even included a provision that addressed the only concern that the ACLU could identify during the above exchange: namely, that other members of the public also be allowed the same supervised access upon request. *See* (DC Decision p. 17 n.5)(JA-265 n.5). The district court stated that, "[a]lthough not expressly addressed in this Ruling and Order, there is no reason that the relief afforded the ACLU herein[,] the viewing of [the video] exhibits . . .[,] should not also be provided to any member of the public upon timely request." (DC Decision p. 17, n.5)(JA-265 n.5)(citation omitted).

In explaining its ruling, the district court emphasized the need to balancing the competing interests. "It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." (DC Decision p. 15)(JA-263)(quoting *Warner Communications*, 435 U.S. at 598; and citing *In re NBC Universal, Inc.*, 426 F. Supp. 2d 49, 56 (E.D.N.Y. 2006)(citing *In re Providence J. Co., Inc.*, 293 F.3d 1, 16 (1st Cir. 2002).

The district court stressed the importance of this during the hearing. "[P]art of what *Mirlis* is also telling us is that to the extent that there can be sensitive information . . . being permanently available on the internet, which is, like I said, I think it changed the game." (Hearing Tr. p. 35)(SA-035). "[T]he challenge . . . is that a lot of these access cases are at a time when the technology wasn't such that it's a different thing when someone has to go down to the courthouse and get something, when someone can just put it on the internet and it's there and it's there permanently and so . . . it raises to another degree any sort of security interest." (Hearing Tr. p. 35-36)(SA-035 – SA-036). That is, "*Mirlis*

recognized that the world has changed since say the *CBS* case and they recognize that there is something different about the availability of information that can be permanently available on access like the internet." (Hearing Tr. p. 41)(SA-041)(citing *Mirlis*, 952 F.3d at 56, 61-62, 66, 67); *In re Application of CBS, Inc.*, 828 F.2d 958 (2d Cir. 1987)). "And I think what you're saying is that the First Amendment law hasn't really evolved to sort of deal with that." (Hearing Tr. p. 41)(SA-041). The district court also found that courts in this Circuit often seal or issue protective orders for videos depicting the layout and security procedures of correctional facilities. *See* (DC Decision p. 13-14)(JA-261 – JA-262)(collecting cases).

The district court then ruled that the ACLU's qualified right to access was satisfied by allowing the ACLU to view the video recordings, but that the safety and security concerns justified prohibiting the ACLU from retaining their own copies of the footage, which would result in unfettered dissemination of the prison videos and lead to them being

permanently published on the internet.[2] (DC Decision p. 1, 16, 17)(JA-249, JA-264, JA-265).

The defendant complied with the district court's order, and the ACLU viewed the videos at undersigned's office without issue. *See* (DC Doc. 163). The defendant, through counsel, has also heeded the district court's decision concerning access by other members of the public, to include facilitating supervised viewing for another member of the public that made a request to undersigned to see the video.

The ACLU now appeals the district court's decision. (JA-267, JA-20); (2d Cir. Doc. 1); (DC Doc. 165).

The district court decision is included in the record. (DC Decision)(JA-249-JA-265); *see also* (2d Cir. Doc. 2); (DC Doc. 162). It is also published electronically. *See Mustafa v. Byars*, No. 3:19-CV-1780(VAB), 2025 WL 876267, 2025 U.S. Dist. LEXIS 52865 (D. Conn. Mar. 21, 2025).

---

[2] At no point has the ACLU disputed that it wishes or plans to disseminate the videos on the internet if able to retain its own copies.

STANDARD OF REVIEW

Generally, "[i]n reviewing a district court's order to seal or unseal, we examine the court's factual findings for clear error, its legal determinations de novo, and its ultimate decision to seal or unseal for abuse of discretion." *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 139 (2d Cir. 2016)(citing *United States v. Doe*, 63 F.3d 121, 125 (2d Cir. 1995); *United States v. Amodeo*, 44 F.3d 141, 146 (2d Cir. 1995)(*Amodeo I*)); *see also Mirlis*, 952 F.3d at 58 (quoting *Brown v. Maxwell*, 929 F.3d 41, 47 (2d Cir. 2019)). The Court should apply these standards here.

To be sure, the Court has noted that it "has not articulated with precision the standard that governs appeals from a district court's decision to grant an intervenor's request to copy audio and visual recordings adduced in court proceedings." *See Mirlis*, 952 F.3d at 58 (citing *United States v. Graham*, 257 F.3d 143, 148 (2d Cir. 2001)). In *Mirlis*, this Court reviewed the matter using an abuse-of-discretion standard, given that the parties on appeal agreed that that standard should apply, but it noted the possibility of a "more searching" standard

in the future. *See Mirlis*, 952 F.3d at 58.[3] In noting this, the Court also mentioned that in *Graham*, the Court would have affirmed under either standard considered. The same applies here.

The Could should apply abuse of discretion here, as it did in *Mirlis*. The ACLU contends that abuse of discretion review applies to "sealing decisions as a whole." *See* (App. Br. p. 27)(2d Cir. Doc. 19.1 p. 38)(citing *Bernstein*, 814 F.3d at 139); *see also Mirlis*, 952 F.3d at 58 ("we examine the court's . . . ultimate decision to seal or unseal for abuse of discretion.")(internal quotation omitted). And factual findings by the district court are reviewed for clear error. *Bernstein*, 814 F.3d at 139 *Mirlis*, 952 F.3d at 58.

---

[3] In noting this in the *Mirlis* opinion, the Court also noted that the Court in *Graham* would have affirmed the district court's decision under either standard considered. *Mirlis*, 952 F.3d at 58. The same applies here. The Court's current precedents apply abuse of discretion review to the ultimate decision and remedy, clear error review for factual determinations, and *de novo* review for legal determinations. *See Bernstein*, 814 F.3d at 139 (citation omitted); *Mirlis*, 952 F.3d at 58 (citation omitted). The Court should apply those standards here.

Given that the Court here (as in *Graham*) should affirm regardless of the standard employed, the defendant respectfully submits that the Court should therefor refrain or abstain from changing or modifying the standards of review in a case where that will not impact the outcome.

In sum, this Court has, in similar circumstances, reviewed factual determinations for clear error, legal determinations *de novo*, and the district court's ultimate decision for abuse of discretion. *See Mirlis*, 952 F.3d at 58; *see also Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 431 (5th Cir. 1981)("We take our lesson, then, as we must, from the Supreme Court and review the district court decision for abuse of discretion."). The Court should do so here.

SUMMARY OF ARGUMENT

This Court should affirm the district court's decision. The district court's decision properly considered, balanced, and accommodated various competing interests when fashioning its remedy of allowing the ACLU and the public appropriate access to videos depicting the insides and inner workings of a high security, Level 4 prison; access similar to those who attending the trial itself where the videos were played in court as exhibits. The district court's decision correctly considered and complied with requirements of the First Amendment, the common law, and federal statutes governing prospective relief in prison cases. The district court correctly decided the dispute below, and the district court certainly did not abuse its discretion.

ARGUMENT

I. The District Court Properly Allowed the ACLU Access to View the Prison Video Recordings While Also Correctly Denying the Copying of the Videos or Dissemination of Them on the Internet; The District Court Certainly Did Not Abuse Its Discretion.

The district court correctly decided the matter below, and it certainly did not abuse its discretion. The court carefully crafted a remedy that weighed and accounted for the competing interests based on the specific facts and specific videos, and the court narrowly tailored the relief based on the evidence before it and based upon concerns voiced by the parties at the hearing. The relief issued properly balanced the ACLU's ability to access the videos with the important public safety and security concerns arising from unsupervised disclosure of the specific videos (that depicted the inside of a high security prison) in the modern internet age.

A. Precedent and every relevant legal principle support the district court's ruling.

Traditional analysis of court materials has changed in recent years, especially in the light of prominent rise of the internet in the modern era, reaching nearly every facet of American life. The district court below and this Court in *Mirlis* recognized the analysis has evolved to properly

consider disclosure of sensitive video recordings in the internet era. (DC Decision p. 5, 14, 15, 16 n.3)(JA-253, JA-262, JA-263, JA-264 n.3); *Mirlis*, 952 F.3d at 56, 66.

"But we must also acknowledge what *has* changed since we decided *CBS* in 1987: The astonishing and pervasive rise of the Internet; the attendant ease with which videos may be shared worldwide by individuals; and the eternal digital life with which those videos are likely endowed by even a single display online." *Mirlis*, 952 F.3d at 66 (original emphasis). "These are all factors that multiply and intensify the privacy costs to the individual of releasing sensitive videos . . . ." *Id.*

Further, both in *Mirlis* and in this case (and also in *Warner Communications*) the trial transcripts were and are readily available to the public and a sufficient (or even better) source of the information on the videos. *See Mirlis*, 952 F.3d at 54, 56; (DC Decision p. 16)(JA-264); (Hearing Tr. p. 10-11, 15-16, 30)(SA-10 – SA-11, SA-015 – SA-016, SA-30); *Warner Communications*, 435 U.S. at 595 ("Since release of the transcripts had apprised the public of the tapes' contents, the public's 'right to know' did not, in Judge Sirica's view, overcome the need to safeguard the defendants' rights on appeal.").

The district court correctly recognized this and correctly applied the relevant legal principles below: (1) the common law right of public access; (2) policy considerations underlying the Prison Litigation Reform Act; and (3) the First Amendment and the case law interpreting it. Under all three, the district court's decision was proper, and certainly not an abuse of discretion.

1. Common Law

"Adjudicating a claim regarding the common law right of public access is a three-step process." (DC Decision p. 5)(JA-253)(quoting *United States v. Akhavan*, 532 F. Supp. 3d 181, 184 (S.D.N.Y. 2021)). "First, a court must first conclude that the documents at issue are indeed 'judicial documents.' . . . In order to be designated a judicial document, the item filed must be relevant to the performance of the judicial function and useful in the judicial process." (DC Decision p. 5)(JA-253)(quoting *Lugosch v. Pyramid Co.*, 435 F.3d 110, 119 (2d Cir. 2006)).

"Second, the court 'must determine the weight of [the] presumption [of access].'" (DC Decision p. 5)(JA-162)(quoting *Lugosch*, 435 F.3d at 119). "In so doing, the court should consider 'the role of the material at

issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts." (DC Decision p. 5)(JA-253)(quoting *Lugosch*, 435 F.3d at 119; and citing *United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995)(*Amodeo II*)). "Generally, the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance.'" (*Id.*)

"Third, 'the court must "balance competing considerations against [the weight of the presumption of access]."'" (DC Decision p. 5)(JA-253)(original brackets)(quoting *Lugosch*, 435 F.3d at 119; and citing *Amodeo II*, 71 F.3d at 1050). "Such countervailing factors include but are not limited to 'the danger of impairing law enforcement or judicial efficiency' and 'the privacy interests of those resisting disclosure.'" (DC Decision p. 5)(JA-253)(quoting *Lugosch*, 435 F.3d at 119; and citing *Amodeo II*, 71 F.3d at 1050). "For example, the Second Circuit has recognized certain privacy concerns unique to video evidence that may be widely disseminated on the internet." (DC Decision p. 5-6)(JA-253-JA-254)(citing *Mirlis*, 952 F.3d at 56).

The district court correctly applied this Court's precedent, most notably *Mirlis*, to any common law claims brought by the ACLU. The district court correctly balanced competing considerations that weighed against unfettered and unsupervised release of the of the prison videos.

The district court allowed the ACLU access to the videos rather than denying access altogether. *See* (DC Decision p. 1, 16, 17)(JA-249, JA-264, JA-265); (DC Doc. 163). This renders the district court's discretionary decision, timing of decision, and balancing of competing interests under the common law analysis entitled to even more deference on appeal, as there was no denial of access or denial or a right to know, only a denial of a request to copy sensitive video materials. *See United States v. Beckham*, 789 F.2d 401, 414-415 (6th Cir. 1986).

"[W]hen the right to make copies of tapes played in open court is essentially a request for a duplicate of information already made available to the public and the media, then the district court has far more discretion in balancing the factors." *Id.* "We do not believe a fundamental right is implicated as long as there is full access to the information and full freedom to publish." *Id.* at 415. "In the case before us, the public and the press had the opportunity to hear the tapes in

question and to inspect the documentary exhibits. The public playing of the tapes in an open courtroom was open to anyone who would draw near and listen." *Id.*

Just as in *Beckham*, the public and the press in the case below had the opportunity to see the video tapes in question, to inspect documentary exhibits, and to publish or report on the information learned. The ACLU was afforded the same rights or opportunities to view the videos as those members of the public or press that attended the trial itself.

Further, the district court also correctly recognized and allotted substantial weight to the adverse impacts on public safety or the criminal justice system, as addressed next.

2. Prison Litigation Reform Act

Federal law specific to relief in prison cases mandates not only careful consideration of safety and security concerns, but it requires *substantial weight* be given to *any* adverse impact on public safety or the criminal justice system when considering prospective relief in any civil action with respect to prison conditions. *See* 18 U.S.C. § 3626(a)(1)(A). "The court shall give substantial weight to any adverse impact on public

safety or the operation of a criminal justice system cause by the relief." *Id.*

The statute also allows only the narrowest form of prospective relief to address a federal right. *See* 18 U.S.C. § 3626(a)(1)(A). Here, the relief sought by the ACLU qualifies as "prospective relief" as under the text of the PLRA. *See* 18 U.S.C. § 3626(5)(7)("the term 'prospective relief' means all relief other than compensatory monetary damages.").

"Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." 18 U.S.C. § 3626(a)(1)(A). "The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." *Id.*

Here, the district court's decision correctly applied these legal requirements and considered the important public safety and policy reasons underlying the statutes. The district court did not bar or prohibit the ACLU from accessing the videos outright. Instead, the ACLU was

granted access to the video evidence in question, the ACLU availed itself of that access, and the access mirrored the access to the videos that was availed to those who actually attended the trial. *See* (DC Decision p. 1, 16, 17)(JA-249, JA-264, JA-265); (DC Doc. 163)(Notice of Compliance); *Warner Communications*, 435 U.S. at 609 ("The First Amendment generally grants the press no right to information about a trial superior to that of the general public." "But the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public."); *Westmoreland v. CBS*, 752 F.2d 16, 21 (2d Cir. 1984)("the opportunity for all members of the public to see and hear the trial as it occurs is protected by the First Amendment."); *Beckham*, 789 F.2d at 409 (recognizing that the Supreme Court in *Warner Communications* "noted that the public never had access to the Watergate tapes as physical objects and that the press had only the same rights as the general public.")(citing *Warner Communications*, 435 U.S. at 609).

In considering the manner of access, however, the Court properly considered and correctly gave *substantial* weight to *any* adverse impact on public safety when considering the form of relief issued. *See* (DC

Decision p. 1, 11, 12, 13, 14-15, 16, 17)(JA-252, JA-259, JA-260, JA-261, JA-262 – JA-263, JA-264, JA-265); 18 U.S.C. § 3626(a)(1)(A); (Hearing Tr. p. 17, 19)(SA-017, SA-019). The plain text of the statute and the strong policy justifications reflected by the statutory text defeat any of the appellant's common law claims as a matter of law.

Both here and in *Warner Communications*, the existence of an applicable statutory structure obviated any common law claims. "[A]lthough the Court [in *Warner Communications*] discussed the common-law right of access, it did not apply it. The Presidential Recordings Act governed access to the tapes and obviated the need to exercise the common-law right." *Beckham*, 789 F.2d 401, 410 (citing *Warner Communications*, 435 U.S. at 606-607 & n.18). That is, "the existence of the [statutory] Act is, as we hold, a decisive element in the proper exercise of discretion with respect to release of the tapes." *Warner Communications*, 435 U.S. at 607.

Further, the statute here—18 U.S.C. § 3626(a)—also informs the analysis for the appellant's First Amendment claims, especially given that the country's lawmakers view the safety concerns within the prison context to require substantial weight and consideration from the courts;

this further informs the First Amendment balancing analysis detailed below and is properly considered within that analysis.

3. First Amendment

"[T]he public and the press have a 'qualified First Amendment right to attend judicial proceedings and to access certain judicial documents.'" *Lugosch*, 435 F.3d at 120 (quoting *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004); *see also* (DC Decision p. 6 quoting same)(JA-254). The right is not absolute and is subject to balancing by the courts of competing interests, including law enforcement and public safety interests. "[T]he First Amendment right of access to criminal trials is not absolute. It does not foreclose the possibility of *ever* excluding the public. What offends the First Amendment is the attempt to do so without sufficient justification." *New York Civ. Liberties Union v. New York City Transit Auth.*, 684 F.3d 286, 296 (2d Cir. 2011)(citation omitted).

"We have articulated two different approaches for determining whether 'the public and the press should receive First Amendment protection in their attempts to access certain judicial documents.'" *Lugosch*, 435 F.3d at 120 (quoting *Hartford Courant Co.*,

380 F.3d at 92). "The so-called 'experience and logic' approach requires the court to consider both whether the documents 'have historically been open to the press and general public' and whether 'public access plays a significant positive role in the functioning of the particular process in question.'" *Lugosch*, 435 F.3d at 120 (quoting *Hartford Courant Co.*, 380 F.3d at 92; *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986)). "The courts that have undertaken this type of inquiry have generally invoked the common law right of access to judicial documents in support of finding a history of openness." *Lugosch*, 435 F.3d at 120 (quoting *Hartford Courant Co.*, 380 F.3d at 93). "The second approach considers the extent to which the judicial documents are 'derived from or [are] a necessary corollary of the capacity to attend the relevant proceedings.'" *Lugosch*, 435 F.3d at 120 (quoting *Hartford Courant Co.*, 380 F.3d at 93).

In applying either approach here, both allow limited access to the specific prison videos at issue in order to prohibit unsupervised dissemination of the videos on the internet. The district court found that historically, courts in this Circuit often seal or issue protective orders for videos depicting the layout and security procedures of correctional

facilities. *See* (DC Decision p. 13-14)(JA-261 – JA-262)(collecting cases). District courts regularly, routinely, and historically find that videos of correctional facilities and correctional responses or safety protocols are "highly 'sensitive.'" *See, e.g., Edwards v. Middleton*, No. 19-Civ.-1362(VB)(JCM), 2021 WL 961762, 2021 U.S. Dist. LEXIS 48189, *14 (S.D.N.Y. Mar. 15, 2001). "The Court is cognizant that surveillance videos from correctional facilities are highly 'sensitive' and must be treated as confidential for discovery purposes, because they may 'provide information . . . that could be used to exploit potential gaps in surveillance,' such as 'the geographical layout of the jail, the location of the cameras, [and] the view from the cameras.'" *Id.* "Courts have found good cause to restrict public access to footage capturing 'the manner in which officers respond[] to . . . incidents [at prisons] and the techniques used to gain control of [inmates],' which 'could be used by inmates to create a disturbance or uprising, or attempt to escape,' or might otherwise compromise the safety of facility staff, inmates and the public." *Edwards*, 2021 U.S. Dist. LEXIS 48189, *14-15 (collecting cases). Courts have historically sealed, partially sealed, supervised, or protected access for prison videos, both surveillance and handheld videos. *See id.*; (DC

Decision p. 13-14)(JA-261 – JA-262); *Harris v. Livingston Cty.*, No. 14-CV-6260(DGL)(JWF), 2018 WL 6566613, 2018 U.S. Dist. LEXIS 210509, at *6-8 (W.D.N.Y. Dec. 13, 2018).

In fact, the key concern that courts consistently protect against is unfettered public access and dissemination of the videos, and they often protect against that *via* supervised or limited access as an alternative. *Edwards*, 2021 U.S. Dist. LEXIS 48189, *15. "[R]ather than foreclosing discovery of this footage, such courts have issued protective orders *prohibiting* its use beyond the pending litigation and/or its *dissemination to the wider public*." *Id.* (added emphasis).

Here, the district court correctly interpreted *Mirlis* and other related decisions when balancing the competing interests involved. *See* (DC Decision p. 13, 14, 15-16, 17)(JA-261, JA-262, JA-263 – JA-264, JA-265)(citing sworn testimony of Deputy Commissioner Mulligan). Also, the district court correctly held that this approach is "consistent with how courts have evaluated limitations to the right to access under the First Amendment." (DC Decision p. 15-16)(JA-263 – JA-264)(collecting cases).

The First Circuit ruled similarly when interpreting the First Amendment and the Supreme Court's decision in *Warner*

Communications. *See In re Providence Journal Co.*, 293 F.3d at 16 (citing *Warner Communications*, 435 U.S. at 608-10). The First Circuit recognized that the Supreme Court in *Warner Communications* "rejected the argument that the First Amendment right of access allowed the media to obtain copies of tapes that had been entered into evidence at a criminal[4] trial." *In re Providence Journal Co.*, 293 F.3d at 16 (citing *Warner Communications*, 435 U.S. at 608-10). "Elaborating on this point, the Justices [in *Warner Communications*] explained that the constitutional right to attend criminal trials morphed into a right to attend the trial sessions at which the tapes were played and to report upon what was seen and heard in the courtroom, *but did not confer the right to replicate evidentiary materials in the custody of the court*." *Id.* (emphasis added).

---

[4] Some of the cases reference rights to access in criminal trials, as some of the challenges arise from criminal proceedings. However, the Second Circuit has also recognized limited or qualified rights to access in civil trials as well, not just criminal ones. *See Westmoreland*, 752 F.2d at 23 ("the First Amendment does secure to the public and to the press a right of access to civil proceedings."); *New York Civ. Liberties Union v. New York City Transit Auth.*, 684 F.3d at 298 ("we have concluded that the First Amendment guarantees a qualified right of access not only to criminal but also to civil trials and to their related proceedings and records."); *see also Lugosch*, 435 F.3d at 124.

The Sixth Circuit has ruled similarly as well. *See Beckham*, 789 F.2d at 409 (citing *Warner Communications*). The Sixth Circuit recognized that the Supreme Court in *Warner Communications* "noted that the public never had access to the Watergate tapes as physical objects and that the press had only the same rights as the general public." *Beckham*, 789 F.2d at 409 (citing *Warner Communication*). "This passage [from *Warner Communications*] indicates clearly that there is a difference between an opportunity to hear the tapes and access to the tapes themselves." *Id.* at 409. When applying the reasoning from *Warner Communications*, the Sixth Circuit found "that there was no obstruction of the free flow of information. There were no restrictions on media access to the trial or on the publication of information in the public domain." *Id.* Simply stated, "[i]f a right to copy the tapes and transcripts in this case exists, it must come from a source other than the Constitution." *Id.*

The Fifth Circuit has also ruled in a similar manner. *Belo Broadcasting Corp.*, 654 F.2d at 426. There, "the broadcasters assert both a constitutional and a common law right of access to the tapes. We deal first with the claimed right of constitutional derivation: there is no

such first amendment right." *Id.* The Court further held that "the Supreme Court squarely rejected a claimed constitutional right of physical access to trial exhibits" in *Warner Communications*, 435 U.S. at 608-09. *Belo Broadcasting Corp.*, 654 F.2d at 427.

Similar to the facts here, the press in *Belo* were allowed to listen to tapes played in court and were free to report on them, they just could not retain the tapes and play them over the airwaves, which the Court held was not constitutionally required. *Id.* at 427. "Members of the press were allowed to listen as the tapes were played in court; transcripts were prepared and distributed for their use; reporters and broadcasters were free to report this information as they wished." *Id.* "All that was denied them was the right to play these tapes over the air waves; that the Constitution does not require." *Id.* The reasoning applies here as well. Access has been provided; unrestricted physical possession is not constitutionally required. *See id.*; (DC Decision p. 1, 16, 17)(JA-249, JA-264, JA-265); (DC Doc. 163).

This Court's precedents also support the district court's decision, as they also confirm that First Amendment rights of access are not absolute in these instances. *See, e.g.*, *New York Civ. Liberties Union.*, 684 F.3d at

296. "[T]he First Amendment right of access to criminal trials is not absolute." *Id.* "It does not foreclose the possibility of *ever* excluding the public. What offends the First Amendment is the attempt to do so without sufficient justification." *Id.* (original emphasis).[5] The ACLU was not excluded from access, and there was also sufficient justification to require supervised access. Research of this Court's precedents concerning sealing or First Amendment rights to access trial documents do not reveal cases where a district court was reversed for providing supervised access and viewing of prison videos, let alone those showing the restrictive housing unit at a maximum-security prison and showing the escort and exist processes for an unplanned trip to an outside community hospital. This was recognized and subject to discussion at the hearing:

---

[5] In support of its holding that the analysis in *Mirlis* is consistent with how courts have evaluation limitations to the right to access under the First Amendment, the district court cited to a collection of cases. This includes *United States v. Beckham*; *In re Providence J. Co., Inc.*; and *New York C.L. Union v. New York City Transit Auth.* *See* (DC Decision p. 15-17)(JA-263 – JA-265). While the district court expressly cited and relied upon these cases in its decision, the ACLU does not reference them anywhere in its brief.

> The Court [questioning ACLU's counsel]: I'm going to really press you here, because one of the challenges is I don't think any of the cases we have, have delt with prisons, correct? I don't think any of the cases you've cited have dealt with a prison, correct?
>
> [ACLU's Counsel]: That's right.

(Hearing Tr. p. 19)(SA-019). This Court's decisions in First Amendment access cases, such as *In re Application of National Broadcasting Co.*, 635 F.2d 945 (2d Cir. 1980)(*United States v. Myers*) for example, are therefore not applicable. Such cases did not include facts within the prison context, nor do they assess specific public safety and security concerns for unrestricted dissemination of video footage depicting the inside of a maximum-security prison, and the do not address the security problems detailed in Deputy Commissioner Mulligan's sworn testimony credited by the court below.

Moreover, this Court's decision in *Mirlis* further confirms the district court's decision in this case was constitutionally permissible, especially given the modern developments of the internet. In fact, both in *Mirlis* and in this case, the trials arose from civil litigation, rather than serious criminal matters. "Unlike in *CBS*, Mirlis's civil litigation did not

involve a crime of national importance; the core information it conveyed was already public and had been publicized; the video recording at issue was of a highly sensitive and personal nature; and—perhaps most relevantly—the Internet's rise over the last 30 years has had tremendous implications for the ease and immediacy of access to videos, as well as the permanence of those videos . . . ." *Mirlis*, 952 F.3d at 61 (citing *In re Application of CBS, Inc.*, 828 F.2d 958). The same applies here, and the district court correctly held that. The ACLU does not attempt to argue otherwise, instead ignoring *Mirlis* and these other cases cited above.

And of course, the district court's decision below, along with the various Circuit Court cases cited above, are in accord with the Supreme Court's decision in *Warner Communications*. Here, as in *Warner Communications*, access to the trial itself and also to the tapes were allowed, but copies to be retained were not. Nothing more was required there in *Warner Communications*, and the same is true here given the circumstances.

"Notwithstanding the presumption of access under both the common law and the First Amendment, the documents may be kept under seal if 'countervailing factors' in the common law framework or

'higher values' in the First Amendment framework so demand." *Lugosch*, 435 F.3d at 124.

Here, the Court did allow access, which alleviates the common law or First Amendment challenges, but the supervised restriction imposed by the district court for the video access would also satisfy the legal requirements for sealing, both under the 'countervailing facts' and the 'higher values' analysis, to the extent they are analyzed in that manner. And the district court's determinations certainly adhere to the analysis under 18 U.S.C. § 3626(a), where courts allocate 'substantial weight' to 'any impact' upon public safety or the criminal justice system for prospective relief in cases with regard to prisons.

Here, the Court's findings and determinations in both its written decision and at the hearing satisfy the requirements to justify its decision and narrowly tailored remedy. (DC Decision p. 13)(JA-261)(citing sworn testimony of Deputy Commissioner Mulligan); (DC Decision p. 13, 14, 15-16, 17)(JA-261, JA-262, JA-263 – JA-264, JA-265). The district court properly weighed and balanced the competing interests and correctly fashioned a remedy that accommodated them. The court's decision appropriately analyzed and assessed the developments of the modern

internet age and the safety and security risks that come with them. The decision as a whole was the correct decision, and it certainly does not rise to the level of an abuse of discretion. This Court should affirm.

B. The ACLU fails to account for controlling precedent and the compelling safety and security concerns the district court relied on.

Here on appeal, the ACLU ignores *Mirlis* completely (as does the applicant *Amicus*), with no mention of it anywhere in its brief. *See* (App. Br. p. 1 – 64; v – x)(2d Cir. Doc. 19 p. 1-77); (2d Cir. Doc. 23.1, p. 1-21)(*Amicus*). The appellant certainly is aware of the decision, given that the district court asked the parties to address it during the hearing, the parties (including the ACLU) then offered argument at the hearing, and the parties also submitted briefing as to *Mirlis'* application below as well. It appears the ACLU has no good argument to advance here on appeal, so they ignore it altogether. They may not do so of course. *See Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931, 934 (7th Cir. 2011).

The lack of any argument is telling. Correct application of *Mirlis's* reasoning renders the outcome reached below to be the appropriate one. This is so in both the common law and First Amendment context. (DC Decision p. 15)(JA-263). Further, the ACLU's ignoring of *Mirlis* and its

reasoning here on appeal is especially glaring because the district court specifically noted the *significance* of the fact that the cases that the ACLU relied upon below predated *Mirlis*. *See* (DC Decision p. 16 n.3)(JA-264 n.3). Further, here on appeal, the ACLU continues to ignore other relevant decisions, including various Circuit Court decisions specifically relied upon by the district court in its First Amendment holding and analysis. *See* (n.4 *supra*).

The ACLU simply cannot show that the district court abused its discretion on this record. Given the availability of the trial transcripts as a better source of information compared with the videos (as was the case in *Mirlis*), given the serious prison security and safety concerns that the district court specifically credited and balanced, given that the district court did provide relief and allow access to the videos, and given that that ACLU *had not even considered*[6] supervised viewing as a remedy

---

[6] For simplicity, the defendant presumes for argument's sake that the ACLU had not considered before the Court's inquiry at the hearing whether access through supervised viewing would be sufficient. However, it appears unlikely that that was the case, given that the defendant specifically offered that precise remedy in advance of the hearing as a middle ground for relief in its pre-hearing briefing. *See* (JA-100, JA94 – JA-95, JA-98 – JA-100); (JA-134, JA-121, JA-125, JA-128, JA-130 – JA-131, JA-132 n.3).

before being questioned about it at the hearing, it is difficult to see how the ACLU can show that the district court's tailored remedy allowing for supervised access to the ACLU and to any other member of the public's timely request somehow amounted to an abuse of discretion. This is especially so given that the district court included a provision to address access for other members of the public in response to the specific concern raised by the ACLU at the hearing. As detailed above, when questioned about supervised viewing that would put the ACLU in the same position as those who attended the trial, the only concern the ACLU could identify was that it believed other members of the public should be allowed to view the videos in the same manner, that relief and access not be provided to the ACLU only. (Hearing Tr. 44, 43)(SA-044, SA-043). The district court addressed that concern, and allowed that specific relief proposed by the ACLU. (DC Decision p. 17 n.5)(JA-265 n.5).

The court clearly determined that any presumptions of entitlement to access beyond supervised view, especially retaining copies to publish on the internet, were rebutted and outweighed by the "significant safety and security risks of the 'widespread and likely permanent dissemination' of sensitive videos depicting the layout and security

procedures of correctional facilities," which in this case was a Level 4 maximum-security prison. *See* (DC Decision p. 14-15)(JA-262 – JA-263)(quoting *Mirlis*, 952 F.3d at 67). That is, the district court correctly determined that, "[g]iven the security concerns discussed above, providing the ACLU access to the exhibits equal to that afforded to members of the public in open court is sufficient to vindicate the public's right of access to exhibits shown at trial." (DC Decision p. 15-16)(JA-263 – JA-264). "[W]hile the First Amendment and common law right to access require that the ACLU be afforded an opportunity to view the video exhibits in a manner equal to that of a member of the public viewing the exhibits at trial, copies of the video exhibits for permanent retention and unfettered use need not be provided due to the safety and security concerns related to the operation of a correctional facility." (DC Decision p. 17)(JA-265). This was the correct decision in the given circumstances, and it was certainly not an abuse of discretion. This Court should affirm.

II. The ACLU's Arguments and Claims of Error Are Waived, Forfeited, Abandoned, or Unpreserved, But the Defendant Nevertheless Welcomes a Decision on the Merits.

The appellant makes all sorts or arguments or accusations about waiver of arguments. *See* (App. Br. p. 28 – 32)(2d Cir. Doc. 19). However,

the ACLU does not come to the table with clean hands, rendering such arguments more projection than legally governing analysis. Conversely, the defendant welcomes a decision on the merits affirming the district court's thorough, well-reasoned, and narrowly tailored decision.

The ACLU has not properly preserved or presented the arguments, claims, or even the record here on appeal as would be necessary to charge reversable error. It failed to read the trial transcripts before the hearing below. (Hearing Tr. p. 10-11; 15-16; 30)(SA-10 – SA-011, SA-015 – SA-016, SA-030). It also failed to even consider before the hearing whether supervised viewing and access of the videos would be a sufficient remedy, despite having clear notice that it was offered as an alternative remedy by the defendant. (Hearing Tr. p. 44, 43)(SA-044, SA-043); (DC Doc. 142 p. 7, 1-2, 5-7)(JA-100, JA94-JA-95, JA-98-JA100); (DC Doc. 152 p. 21, 8, 12, 15, 17-18, 19 n.3)(JA-134, JA-121, JA-125, JA-128, JA-130-JA-131, JA-132 n.3); (DC Doc. 157 p. 8, 5, 7)(JA-143, JA-140, JA-142).

Then on appeal, the ACLU failed to provide the transcript from that very hearing held by the district court, thus depriving this Court of an adequate record for meaningful appellate review. *See, e.g.*, (2d Cir. Doc.

7); (JA-1 – JA-267)(2d Cir. Doc. 20 p. 1 – 94); Fed. R. App. 10(a)(2) *et seq.*; Fed. R. App. Pro. 30(a)(1)(D) *et seq.*

This Court has a long-established practice of dismissing appeals that fail to provide a sufficient record to such an extent that the Court cannot conduct meaningful review. *See, e.g.*, *Wrighten v. Glowski*, 232 F.3d 119, 120 (2000)(citation omitted); *Singh v. Home Depot U.S.A., Inc.*, 543 Fed. Appx. 119, 119 (2d Cir. Nov. 27, 2013)(summary order)("consistent with the long-established practice of this Court, we are compelled to dismiss Singh's appeal.")(citation omitted); *Smolen v. Menard*, 398 Fed. Appx. 684, 685 (2d Cir. Oct. 28, 2010)(summary order)("we have frequently observed, the absence of relevant trial transcripts deprives us of the ability to conduct meaningful appellate review.")(citation omitted).

Further, failure to brief a matter on appeal that was litigated below can constitute waiver, forfeiture, or abandonment on appeal. *See United States v. Graham*, 51 F.4th 67, 80 (2d Cir. 2022)(discussing and distinguishing waiver, forfeiture, and abandonment); *see also Debique v. Garland*, 58 F.4th 676, 684 (2d Cir. 2023). "[A]n appellant's brief must contain appellant's contentions and the reasons for them, with citations

to the authorities and parts of the record on which the appellant relies." *Debique*, 58 F.4th at 684 (quotation omitted). "We consider abandoned any claims not adequately presented in an appellant's brief, and an appellant's failure to make 'legal or factual arguments' constitutes abandonment." *Id.* (quotation omitted).

The ACLU appears to have waived, forfeited, or abandoned any argument or claim of error concerning the district court's interpretation of the *Mirlis* decision and its application to the facts in this case. This includes the district court's specific ruling that *Mirlis's* reasoning applies equally to the First Amendment challenges brought (as opposed to common law claims only) and is consistent with First Amendment balancing conducted by other courts. *See* (DC Decision p. 15)(JA-263)(collecting cases). As addressed above, nowhere in their appellate brief does the ACLU reference *Mirlis*, let alone attempt to distinguish it or argue it. Simply stated, it is not briefed at all, let alone adequately briefed. The ACLU therefore waived, forfeited, or abandoned such arguments, claims of error, or rights even to appellate review. *See Graham*, 51 F.4th at 80 ("Forfeiture, a mere 'failure to make the timely assertion of a right' when procedurally appropriate, allows a court . . . to

disregard an argument at its discretion (in civil cases) . . . ."); *id.* ("Waiver, the 'intentional relinquishment or abandonment of a known right' at or before the time of appeal, 'extinguish[es] an error' along with any appellate review.").

Finally, any claims or arguments about delay below, including delays in access or concerning alleged rights to contemporaneous review are waived, forfeited, or abandoned. The ACLU itself delayed, and it has unclean hands concerning arguments about the delay of resolution. The ACLU waited nearly two months after judgment entered to file its motion below. *See* (DC Doc. 137)(JA-83); (DC Doc. 117). The ACLU never sought access to the Court's electronic copies of the videos during the 30 days following trial before they were destroyed in the normal course; after that 30 days, the Clerks' office routinely destroyed its electronic copies. To the extent the timing of decision of the issue below is material (which it is not, as the district court determined that its analysis would have been the same regardless, *see* (Hearing Tr. p. 17)(SA-017)), the ACLU contributed to the delay.

In view of all of this, the ACLU does not come to the table with clean hands concerning arguments of waiver or failure to preserve matters or arguments.

Ultimately, the defendant wishes to assist this Court (and the district court) in correctly analyzing the issues and applying the law to the facts, rather than expending resources quibbling over which argument, sub-argument, response, or reply by which party was waived or not (including whether a party may have even waived a waiver argument). *See Graham*, 51 F.4th at 79 (assessing whether a party "'waived' the waiver argument").

Given that the district court presciently recognized that these issues could impact other prison cases—which comprise nearly twenty-five percent of the district court's docket—the defendant respectfully submits that the Court should decide the matter on its merits. *See* (Hearing Tr. p. 17, 34, 37)(SA-017, SA-034, SA-037); (DC Decision p. 16 n.4)(JA-264). Further, another district court in this Circuit has also recognized that, "Second Circuit case law concerning the protection of jail security footage is surprisingly scant," which further supports a decision on the merits in this instance, as it will provide guidance to litigants and

district courts in future cases. *See Harris*, 2018 U.S. Dist. LEXIS 210509, at *7; *see also Hartford Courant Co.*, 380 F.3d at 91 ("courts have similarly considered the viability of an asserted First Amendment claim on appeal from the dismissal of an action on procedural or jurisdictional grounds.")(citation omitted).

Therefore, as a courtesy to the Court and in the spirit of efficiency, the defendant has provided (and borne the costs of) the transcript from the hearing below for the Court to consider here on appeal *via* a supplemental appendix, even though the ACLU's intentional decision to omit the transcript would have deprived the Court of an adequate record needed for meaningful appellate review and ultimately subjected the appeal to dismissal absent correction. *See* (SA-001 – SA-051); (2d Cir. Doc. 7)(ACLU choosing to omit the transcript: "I am not ordering the transcript."); Fed. R. App. Pro. 10; *Wrighten*, 232 F.3d at 120 (appellant's "failure to provide these transcripts deprives this Court of the ability to conduct meaningful appellate review. We therefore dismiss th[a]t portion of the appeal . . . .")(citation omitted).

CONCLUSION

This Court should affirm the decision of the district court. Alternatively, the Court should dismiss the appeal as unpreserved.

Respectfully submitted,

DEFENDANT-APPELLEE
Christopher Byars

WILLIAM TONG
ATTORNEY GENERAL

By: __/s/_*Stephen R. Finucane*_____
Stephen R. Finucane
Assistant Attorney General
165 Capitol Avenue
Hartford, CT 06106
Tel: (860) 808-5450
Fax: (860) 808-5591
Email: stephen.finucane@ct.gov

Dated: October 15, 2025

CERTIFICATE OF COMPLIANCE

As required by Federal Rule of Appellate Procedure (FRAP) 32(g)(1), I hereby certify that this brief complies with the type-volume limitations of FRAP 32(a)(7)(B), as modified by Second Circuit Local Rule 32.1(a)(4), in that this brief contains 10,083 words, excluding the parts of the brief exempted by FRAP 32(f). I further certify that this brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32 (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Century Schoolbook font.

__/s/_*Stephen R. Finucane*_____
Stephen R. Finucane
Assistant Attorney General

Dated: October 15, 2025

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 2025, I caused the foregoing brief to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

__/s/_*Stephen R. Finucane*_____
Stephen R. Finucane
Assistant Attorney General