[ORAL ARGUMENT NOT YET SCHEDULED]

No. 21-5113

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

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,

Plaintiff-Appellee,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Plaintiff-appellee is Citizens for Responsibility and Ethics in Washington. Defendant-appellant is the U.S. Department of Justice. No amici curiae appeared before the district court. Jack Jordan has indicated his intent to participate as amicus curiae before this Court.

B. Ruling Under Review

The ruling under review is a memorandum opinion (JA230-271) and order (JA272-273) issued by Judge Amy Berman Jackson on May 3, 2021. The opinion is not yet reported but is available at 2021 WL 2652852.

C. Related Cases

This case has not previously been before this Court or any court other than the district court. The government's counsel are unaware of any related cases currently pending in this Court or any other court.

/s/ Daniel Winik
Daniel Winik

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INTRODUCTION

The deliberative process privilege protects from compelled disclosure all "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Electronic Frontier Found. v. DOJ*, 739 F.3d 1, 3 (D.C. Cir. 2014) (quotation marks omitted). The privilege serves the vital purpose of "prevent[ing] injury to the quality of agency decisions," *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975), by "assur[ing] agency staff that they can provide their candid opinions and recommendations to decisionmakers without fear of ridicule or reprisal," *Reporters Comm. for Freedom of the Press v. FBI*, 2021 WL 2753938, at *5 (D.C. Cir. July 2, 2021). That protection is nowhere more important than in sensitive and high-profile matters, where government employees rendering advice to a decisionmaker might reasonably be chilled by the prospect of controversy if their advice were disclosed.

This appeal concerns the government's invocation of the deliberative process privilege as to a memorandum from two Justice Department officials—the Assistant Attorney General for the Office of Legal Counsel and the Principal Associate Deputy Attorney General—to then-Attorney General William Barr. The memorandum advised Attorney General Barr on what, if

any, determination he should make regarding whether the facts articulated in Special Counsel Robert S. Mueller III's report were sufficient, under the Principles of Federal Prosecution, to establish that the President of the United States had committed obstruction of justice. The memorandum took as a given the Department's longstanding view that a sitting President cannot actually be prosecuted, but it advised the Attorney General to "conclude that, under the Principles of Federal Prosecution, the evidence developed during the Special Counsel's investigation [was] not sufficient to establish that the President committed an obstruction-of-justice offense." JA305. As reflected in the final page of the memorandum, Attorney General Barr accepted that recommendation. *Id.*

The memorandum qualifies for protection under the deliberative process privilege, which applies to documents "that are both predecisional and deliberative," *Reporters Comm.*, 2021 WL 2753938, at *5. It is undoubtedly "deliberative," in that "it 'reflects the give-and-take of [a] consultative process,'" *id.* And it is also "predecisional," because it records advice provided to the Attorney General in the course of a decisional process. This memorandum no doubt addressed unusual facts and circumstances, but it was otherwise like innumerable other documents in which government employees

advise decisionmakers—documents that agencies and employees trust will be protected from compelled disclosure under the Freedom of Information Act (FOIA).

The district court agreed that the memorandum was "deliberative" and that it recorded advice provided to the Attorney General in the context of a decisional process. Yet the court ordered the government to release the memorandum for two reasons. Both were erroneous.

First, the district court regarded the government's briefs and declarations as misidentifying the relevant "decision-making process." *Citizens for Resp. & Ethics in Washington v. DOJ*, 2021 WL 2652852, at *9 (D.D.C. May 3, 2021). The memorandum, which the district court reviewed *in camera*, makes clear that the Attorney General was considering what, if any, determination to make regarding whether the facts in the Special Counsel's report were sufficient, under the Principles of Federal Prosecution, to establish that the President had committed an obstruction-of-justice offense. And the district court acknowledged that internal deliberations regarding such a determination could be subject to the deliberative process privilege. But the court read the government's submissions as misleadingly suggesting that the Attorney General was considering whether to actually prosecute the President, and it

regarded those supposed misstatements as a basis to order the memorandum disclosed.

That was incorrect. We acknowledge that some passages of the briefs, read in isolation, could have been taken to suggest that the Attorney General was contemplating an actual prosecution of the President. Read as a whole and in context, however, the submissions accurately characterized the nature of the Attorney General's decisional process. The government had no reason to suggest that the Attorney General was then considering the actual filing of charges, when the departmental precedent foreclosing prosecution of a sitting President was public, widely known, and explicitly referenced in both the Special Counsel's report and the Attorney General's letter to Congress. And that is especially so since the privileged status of the memorandum had nothing to do with whether the Attorney General was considering the actual filing of charges.

In any event, even if the district court found the government's submissions insufficiently precise after it reviewed the memorandum *in camera*, the court had no basis to order the disclosure of the memorandum. It should either have adjudicated the withholding of the memorandum on the basis of its *in camera* review or else called for "supplemental affidavits and further

summary judgment briefing," as this Court has held is the "prudent course" where it would allow a district court to "resolve" a FOIA "case for one side or the other." *Pavement Coatings Tech. Council v. U.S. Geological Survey*, 995 F.3d 1014, 1024 (D.C. Cir. 2021). The district court's ruling was less an application of FOIA than, in effect, a sanction—and an improper one—for what the district court erroneously perceived to be litigation misconduct.

Second, the district court found "reason to question whether the [memorandum] *preceded* any decision that was made." 2021 WL 2652852, at *9 (emphasis added). But the district court was wrong to believe that a memorandum drafted contemporaneously with a decisional process, and with an eye toward an anticipated outcome of that process, cannot be "predecisional." A document is "predecisional" if it records "the ingredients of the decisionmaking process," *Sears*, 421 U.S. at 151, as opposed to "communicat[ing] the agency's settled position," *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 786 (2021), regardless of whether it is drafted before, during, or after the decisional process. And a document can memorialize "the ingredients of the decisionmaking process," *Sears*, 421 U.S. at 151, even if it is drafted to support an anticipated outcome of that process, so long as the decisionmaker remains free to accept or reject the drafters' analysis.

In short, this memorandum records advice to the Attorney General on an ongoing decisional process and a recommendation he was free to accept or reject. It therefore falls squarely within the protection of the deliberative process privilege, and the district court's contrary ruling should be reversed.

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction under 5 U.S.C. § 552(a)(4)(B). JA6-12. On May 3, 2021, the district court granted the government's motion to dismiss one count of plaintiff's complaint, entered judgment in the government's favor as to the other count with respect to one of two documents at issue, and ordered the government to disclose the other document. JA272-273. That order fully disposes of plaintiff's claims. This Court accordingly has jurisdiction under 28 U.S.C. § 1291. The government timely noticed this appeal on May 24, 2021. JA274; *see* Fed. R. App. P. 4(a)(1)(B)(ii). The district court granted the government's motion for a partial stay of its disclosure order pending this appeal. JA333.

STATEMENT OF THE ISSUE

Whether the deliberative process privilege protects a memorandum from two Justice Department officials to the Attorney General, advising him

on what, if any, determination to make regarding whether the facts in Special Counsel Robert S. Mueller III's report were sufficient, under the Principles of Federal Prosecution, to establish that the President of the United States committed obstruction of justice.

PERTINENT STATUTORY PROVISIONS

The pertinent statutory provision is reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Factual Background

In May 2017, Acting Attorney General Rod J. Rosenstein appointed Robert S. Mueller III to serve as Special Counsel for the Department of Justice, with a mandate to investigate "any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump," as well as "any matters that" might "arise directly from the investigation" and "any other matters within the scope of 28 C.F.R. § 600.4(a)." Order No. 3915-2017, Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters (May 17, 2017), https://go.usa.gov/x6Tcg.

On March 22, 2019, as provided by the applicable regulations, Special Counsel Mueller delivered to Attorney General Barr his *Report on the Investigation into Russian Interference in the 2016 Presidential Election* ("SCO Report," available at https://go.usa.gov/xHwG5). Volume II of the Report addressed the Special Counsel's investigation of whether President Trump had obstructed justice. In the introduction to that volume, the Special Counsel explained that he had taken as a given the prior determination by the Department's Office of Legal Counsel that "the indictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions," violating "the constitutional separation of powers," *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 222, 260 (2000). SCO Report, vol. II, at 1. Given the constitutional barrier to prosecution of the President, and the "[f]airness concerns" implicated by a potential declaration that the President had committed a criminal offense when he could not respond to that accusation in a public trial, the Special Counsel determined that he would not "evaluate the conduct" uncovered by his investigation "under the Justice Manual standards governing prosecution and declination decisions." *Id.* at 2. The Special Counsel went on to state that,

while his report did "not conclude that the President committed a crime, it also [did] not exonerate" the President. *Id.*

Two days later, Attorney General Barr released a letter ("Barr Letter," available at https://go.usa.gov/xHwGX) to the chairmen and ranking members of the House and Senate Judiciary Committees. The letter stated, as relevant:

> The Special Counsel's decision to describe the facts of his obstruction investigation without reaching any legal conclusions leaves it to the Attorney General to determine whether the conduct described in the report constitutes a crime. Over the course of the investigation, the Special Counsel's office engaged in discussions with certain Department officials regarding many of the legal and factual matters at issue in the Special Counsel's obstruction investigation. After reviewing the Special Counsel's final report on these issues; consulting with Department officials, including the Office of Legal Counsel; and applying the principles of federal prosecution that guide our charging decisions, Deputy Attorney General Rod Rosenstein and I have concluded that the evidence developed during the Special Counsel's investigation is not sufficient to establish that the President committed an obstruction-of-justice offense. Our determination was made without regard to, and is not based on, the constitutional considerations that surround the indictment and criminal prosecution of a sitting president.

Id. at 3.

As noted above, this appeal concerns a memorandum to the Attorney General (JA297-305) making recommendations concerning the decision he

announced in his letter to Congress. The memorandum—signed by Steven A. Engel, then Assistant Attorney General for the Office of Legal Counsel, and Edward C. O'Callaghan, then Principal Associate Deputy Attorney General—was dated March 24, the same day as the letter. Like the Special Counsel's report, the memorandum took as a given the Department's longstanding view that the Constitution bars the prosecution of a sitting President, but it advised the Attorney General to make a determination whether the Special Counsel's findings would constitute sufficient evidence of obstruction of justice under the Principles of Federal Prosecution, on the view that the Special Counsel's choice not to make such a determination might otherwise be read to "imply … an accusation" against the President. JA297-298. After analyzing the Special Counsel's findings in light of the Principles of Federal Prosecution, the memorandum presented a recommendation: "We recommend that you conclude that, under the Principles of Federal Prosecution, the evidence developed during the Special Counsel's investigation is not sufficient

to establish that the President committed an obstruction-of-justice offense." JA305.[1]

Attorney General Barr "received the substance of the advice contained in" the memorandum, and "reviewed multiple drafts of that memorandum," before sending his letter to Congress. JA208 ¶ 9. As noted above, the letter explained that the Attorney General had made his determination after "consulting with Department officials, including the Office of Legal Counsel." Barr Letter at 3. Shortly after sending the letter, Attorney General Barr signed the "Approve" line under the recommendation at the end of the memorandum. JA208 ¶ 9; JA305.

B. This Action

1. Plaintiff Citizens for Responsibility and Ethics in Washington submitted a request under FOIA for "all documents pertaining to the views [the Office of Legal Counsel] provided Attorney General William Barr on whether the evidence developed by Special Counsel Robert Mueller [was]

[1] The Principles of Federal Prosecution, codified in the Justice Manual, "provide federal prosecutors a statement of prosecutorial policies and practices" meant "to promote the reasoned exercise of prosecutorial discretion by attorneys for the government." *Justice Manual* §§ 9-27.001, .110, *available at* https://go.usa.gov/xFxta.

sufficient to establish that the President committed an obstruction-of-justice offense." JA63. Plaintiff brought this suit under FOIA to compel the production of responsive records.

At summary judgment, the government justified the redactions to the memorandum in question by asserting the deliberative process and attorney-client privileges under FOIA's Exemption 5, which covers "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency," 5 U.S.C. § 552(b)(5). In support of the withholdings, the government submitted two declarations from Paul P. Colborn, a career employee in the Office of Legal Counsel, and one from Vanessa R. Brinkmann, a career employee in the Office of Information Policy. Colborn explained—quoting the unredacted portion of the first sentence of the memorandum—that the memorandum "was submitted to the Attorney General to assist him in determining whether the facts set forth in Volume II of Special Counsel Mueller's report 'would support initiating or declining the prosecution of the President for obstruction of justice under the Principles of Federal Prosecution.'" JA51 ¶ 17; *see* JA297. Brinkmann likewise explained that the memorandum "was provided to aid" the Attorney General in determining "whether the evidence developed by

[the Special Counsel's] investigation [was] sufficient to establish that the President committed an obstruction-of-justice offense"—a "legal question" that the Special Counsel "did not resolve." JA78 ¶ 11.

2. After briefing on summary judgment, the district court directed the government to submit the memorandum on an *ex parte* basis for *in camera* review, along with another document not at issue here. After conducting that review, the court ordered the disclosure of the memorandum. *Citizens for Resp. & Ethics in Washington v. DOJ*, 2021 WL 2652852 (D.D.C. May 3, 2021). As to the deliberative process privilege, the court held that the memorandum was "largely deliberative" but that it was not "predecisional," for two reasons. *Id.* at *9.

First, the court concluded that "the materials in the record, including the memorandum itself, contradict the FOIA declarants' assertions that the decision-making process they have identified was in fact underway." *Id.* In particular, the court faulted the declarants for not specifically describing two parts of the memorandum: (1) Section I, which addressed whether the Attorney General should make a determination whether the Special Counsel's findings would establish the elements of obstruction of justice; and (2) pas-

sages reflecting the authors' assumption that, under longstanding departmental precedent, a sitting President could not be prosecuted. The court regarded those omissions as "obscur[ing] the true purpose of the memorandum"—which, the court believed, was to "get[] a jump on public relations." *Id.* at *10, *13. In a footnote, the court observed that "internal deliberations about public relations efforts could be covered by the deliberative process privilege," but the court refused "to assess the applicability of [the] privilege on [that] ground," on the theory that the government had "declined to assert" it by making what the court viewed as a "strategic decision to pretend as if the first portion of the memorandum was not there." *Id.* at *11 n.11. The court also relied on another judge's "uneas[e]" with the process that led to Attorney General Barr's March 24 statements, and with the content of those statements, to support its view that the Department acted in bad faith. *Id.* at *14 (citing *Electronic Priv. Info. Ctr. v. DOJ*, 442 F. Supp. 3d 37, 48-49 (D.D.C. 2020)).

Second, the court found "reason to question whether the [memorandum] preceded any decision that was made." *Id.* at *9. According to emails produced in response to plaintiff's FOIA request, the court explained, "the very same people at the very same time" were working on Attorney General

Barr's letter to Congress and on the memorandum advising him with respect to that letter. *Id.* at *15. And the court stated that "the letter to Congress [was] the priority, and it [was] getting completed first." *Id.*; *see also* JA208 ¶ 9 (Colborn declaration explaining that the Attorney General signed the recommendation line on the memorandum "about two hours after" sending his letter); 2021 WL 2652852, at *20 (citing emails the following day circulating signed memorandum and correcting incorrect year in date on front page). The court therefore concluded that the memorandum was "not predecisional." 2021 WL 2652852, at *15.

The court went on to conclude that the memorandum was not protected by the attorney-client privilege. *Id.* at *16-19. That ruling is not at issue here. Having concluded that the memorandum was not privileged, the court declined to address whether the government "reasonably fores[aw] that [its] disclosure would harm an interest protected by" the privileges, 5 U.S.C. § 552(a)(8)(A)(i)(I). 2021 WL 2652852, at *15 n.16.

3. The government moved to stay the district court's order only insofar as it required the disclosure of Section II of the memorandum—the portion addressing whether the Special Counsel's findings were sufficient un-

der the Principles of Federal Prosecution to establish that the President committed obstruction of justice. The government accordingly released the previously redacted portions of the memorandum's introduction and Section I (JA297-305) and informed the district court that it could unseal the previously redacted portions of its opinion, which discussed those parts of the memorandum. The district court then unsealed the full opinion. JA5.[2]

4. The district court granted the government's motion for a stay pending appeal, recognizing that this appeal would otherwise become moot. JA333-341. In assessing the government's likelihood of success on the merits, the court reiterated its conclusion that the memorandum was "deliberative," JA335, and again acknowledged that the deliberative process privilege could protect deliberations concerning "'whether the facts'" in the Special Counsel's report "'constituted an offense that would warrant prosecution,'" JA338. The court nonetheless explained that "[t]he concern that led to [its] ruling was that" the government had "inaccurately described the decision-

[2] Because the portions of the memorandum on which the district court focused its analysis have now been unsealed, the government has not moved to file the full memorandum on an *ex parte* basis for *in camera* review, but it will of course make the full memorandum available to this Court upon request.

making process" on which the memorandum advised the Attorney General. JA335. Although the court understood the actual nature of the Attorney General's decisional process from its *in camera* review of the memorandum, it opined that it "was not required to dissect the text to come up with a way to square" the government's "representations" about the decisional process "with the memorandum itself." JA337.

As to its further holding regarding "the 'pre' portion of 'pre-decisional,'" the court explained that its principal concern "was that the process of drafting the letter to Congress and process of creating the memo to the Attorney General were going on at the same time, involving the same people," such that in the court's view, "the chronology did not support the assertion that the memo played any particular role in the development, as opposed to the memorialization, of the view of the evidence the Attorney General had already decided he would choose to announce." JA337. The court clarified, however, that its qualms "concerning the pre-decisional nature of the document" were a distinctly "secondary ground" for its ruling. JA338.

SUMMARY OF ARGUMENT

The district court erred in determining that the memorandum in question was not covered by the deliberative process privilege.

A. The memorandum provided advice on what, if any, determination the Attorney General should make regarding whether the evidence discussed in the Special Counsel's report was sufficient, under the Principles of Federal Prosecution, to establish that the President obstructed justice. The district court correctly acknowledged that the deliberative process privilege could cover advice on that determination. It nonetheless ordered the disclosure of the memorandum on the view that the government had misdescribed the Attorney General's decisional process by suggesting that the Attorney General was considering whether to seek charges against the President.

That was not an accurate characterization of the government's briefs and declarations. As an initial matter, there was no reason for the government to try to mischaracterize the Attorney General's decisional process. It was well known from a published opinion of the Office of Legal Counsel (referenced in both the Special Counsel's report and the Attorney General's letter to Congress) that the Attorney General would not bring charges against a sitting President, and the privileged status of the memorandum had nothing to do with whether it was directed to an actual charging deci-

sion. At a minimum, then, any misimpression arising from the government's submissions was inadvertent—not, as the district court believed, evidence of bad faith.

When read in light of the Department's longstanding, publicly known position on the constitutional barrier to prosecution of a sitting President, the government's submissions accurately characterized the nature of the Attorney General's decisional process. And any inadvertent misimpressions created by the submissions should have been cured by the district court's *in camera* review of the memorandum, which made clear both the nature of the Attorney General's decisional process and the manner in which the memorandum provided advice on that process. Having undertaken that *in camera* review, the district court should either have ruled in the government's favor on the basis of the review or else ordered supplemental submissions to cure any perceived ambiguities in the originals. The court erred in ordering the release of this self-evidently privileged document.

B. The district court further erred in determining that the memorandum was not predecisional because its authors were at the same time involved in drafting Attorney General Barr's letter to Congress. A document

that records predecisional advice, as opposed to memorializing a final decision, does not become postdecisional simply because it is written contemporaneously with the decisional process and finalized after the process has concluded, or even wholly drafted after the decisional process has concluded. It is common, especially in expedited processes, for advice on a decision to be memorialized contemporaneously with the decision itself. Nor does a memorandum advising on a decision become postdecisional if it is written to support an *anticipated* decision, as long as the decisionmaker remains free to accept or reject the advice contained in the memorandum.

The record shows that this memorandum recorded advice to the Attorney General on a decisional process, that the Attorney General received the memorandum in near-final form at the time he was making his decision, and that he was free in making his decision to accept or reject the advice memorialized in the memorandum. The memorandum was therefore predecisional.

STANDARD OF REVIEW

This Court "review[s] the District Court's decision on summary judgment in a FOIA case *de novo*." *Pavement Coatings Tech. Council v. U.S. Geological Survey*, 995 F.3d 1014, 1020 (D.C. Cir. 2021).

ARGUMENT

THE DISTRICT COURT ERRED IN DETERMINING THAT THE MEMORANDUM IN QUESTION WAS NOT PRIVILEGED

A. The Memorandum Advised The Attorney General On A Decisional Process

1. FOIA's Exemption 5, which incorporates the deliberative process privilege, reflects Congress's "legislative judgment that the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl because the full and frank exchange of ideas on legal or policy matters would be impossible." *Judicial Watch, Inc. v. Department of Energy*, 412 F.3d 125, 129 (D.C. Cir. 2005) (quotation marks omitted). "The privilege assures agency staff that they can provide their candid opinions and recommendations to decisionmakers without fear of ridicule or reprisal[,] … protects policymakers from premature disclosure of their proposals before they have been completed or adopted," and "guards against 'confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.'" *Reporters Comm. for Freedom of the Press v. FBI*, 2021 WL 2753938, at *5 (D.C. Cir. 2021). "All of this," the Court has explained, "is in service of the same goal, which

is to 'prevent injury to the quality of agency decisions.'" *Id.* (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975)).

The privilege applies to those documents that are "both predecisional and deliberative." *Reporters Comm.*, 2021 WL 2753938, at *5. Predecisional documents are those that memorialize "the ingredients of the decisionmaking process," *Sears*, 421 U.S. at 151, as opposed to "communicat[ing] the agency's settled position," *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 786 (2021). And "[a] document is deliberative when it is 'prepared to help the agency formulate its position[]' and it 'reflects the give-and-take of the consultative process.'" *Reporters Comm.*, 2021 WL 2753938, at *5 (citation omitted).

The memorandum at issue here provided advice to the Attorney General with respect to a decisional process—namely the Attorney General's consideration of what, if any, determination to make regarding whether the evidence discussed in the Special Counsel's report was sufficient under the Principles of Federal Prosecution to establish that the President obstructed justice. That is clear from the face of the memorandum, which culminates in a formal recommendation that the Attorney General "conclude that, under the Principles of Federal Prosecution, the evidence developed during the

Special Counsel's investigation is not sufficient to establish that the President committed an obstruction-of-justice offense." JA305.

The memorandum contains, in Section I, a brief explanation of why, in the authors' view, the Attorney General should make a decision on that question. As the government explained in its submissions to the district court, the Special Counsel had considered making that determination. JA78 ¶ 11; *see* SCO Report, vol. II, at 2 (addressing determination whether to "evaluate the conduct" uncovered by the investigation "under the Justice Manual standards governing prosecution and declination decisions"). The Special Counsel declined to do so, citing fairness concerns associated with a potential declaration that the President had committed a criminal offense when—as a result of the Department's longstanding view that sitting Presidents are immune from federal prosecution—the President could not respond to the accusation in a public trial. SCO Report, vol. II, at 2.

The memorandum recited these statements in the Special Counsel's report but observed that "the Report's failure to take a position on the matters described therein might be read to imply … an accusation if the confidential report were released to the public." JA298. "Therefore," the memorandum recommended that the Attorney General "examine the Report to determine

whether prosecution would be appropriate given the evidence recounted in the Special Counsel's Report, the underlying law, and traditional principles of federal prosecution." *Id.*

The record establishes that the memorandum was prepared at the same time as, and in connection with, the drafting of the Attorney General's March 24 letter to Congress concerning the Special Counsel's report. This sequence of events indicates that the memorandum's recommendation was made so that if the Attorney General concluded that the evidence recounted in the report would support declining a prosecution, such a conclusion could be communicated publicly, because the authors believed that the Attorney General should dispel any negative inference that the Special Counsel's choice not to opine on the question might otherwise have created.

Any preliminary assessment of the President's conduct within the Special Counsel's Office, in the context of considering the determination the Special Counsel ultimately chose not to make, would unquestionably have been covered by the deliberative process privilege. Deliberations among Department of Justice leadership regarding the same issue are equally privileged. The application of the privilege does not depend on whether the Special

Counsel or the Attorney General was considering bringing an actual prosecution at the time—an option foreclosed by the Department's longstanding constitutional view—or, instead, considering a determination whether the evidence was sufficient to support a prosecution. Although prosecutors most often make determinations regarding the sufficiency of the evidence in the course of considering charges, s*ee Justice Manual* § 9-27.220 (sufficient evidence is a necessary but not sufficient condition for prosecution), deliberations regarding such determinations are equally privileged in other contexts, whether they are undertaken by the Special Counsel, by the Attorney General, or by other prosecutors. In any event, the deliberative process privilege is "aimed at protecting the decisional *process*," and the applicability of the privilege "does not 'turn[] on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared'"; indeed, many decisional processes do not "'ripen into agency decisions'" at all. *Access Reports v. DOJ*, 926 F.2d 1192, 1196 (D.C. Cir. 1991) (emphasis omitted).

As noted above, the context in which the memorandum was prepared indicates that it was intended to assist the Attorney General in deciding what, if anything, to communicate to Congress and the public about whether the evidence recounted in the Special Counsel's report was sufficient under

the Principles of Federal Prosecution to support a prosecution. The district court properly acknowledged that the deliberative process privilege "could have" applied to "deliberations" concerning "'whether the facts'" articulated in the Special Counsel's report "'constituted an offense that would warrant prosecution,'" JA338, even if the Attorney General engaged in those deliberations for the purpose of determining the content of a possible public statement regarding the report, *see Citizens for Resp. & Ethics in Washington v. DOJ*, 2021 WL 2652852, at *11 n.11, *18 n.18 (D.D.C. May 3, 2021), rather than for the purpose of considering whether to charge the President. And neither the district court nor plaintiff disputed that the Attorney General was in fact making a determination whether the facts described in the Special Counsel's report constituted sufficient evidence of obstruction of justice. In fact, records concerning that determination were the target of plaintiff's FOIA request. JA63 (seeking "all documents pertaining to the views [the Office of Legal Counsel] provided Attorney General William Barr on whether the ev-

idence developed by Special Counsel Robert Mueller [was] sufficient to establish that the President committed an obstruction-of-justice offense"). That should have been the end of the matter.[3]

2. The district court nonetheless ordered the disclosure of the memorandum on the theory that the government had "inaccurately described the decision-making process" on which the memorandum had advised the Attorney General. JA335; *see* 2021 WL 2652852, at *9 ("[M]aterials in the record, including the memorandum itself, contradict the FOIA declarants' assertions that the decision-making process they have identified was in fact underway."). In particular, the court read the government's submissions to "assert[] that the Attorney General was in fact wrestling with a difficult decision about a high-profile criminal prosecution" of the sitting President, 2021 WL 2652852, at *11. The court believed that, having found "inconsistencies and omissions" in the government's submissions, it could properly order the disclosure of the memorandum rather than attempting to "square" what it re-

[3] In maintaining that the memorandum is privileged, the government takes no position on the substance of the memorandum's analysis and advice.

garded as the government's "incomplete representations with the memorandum itself." JA337; *see also* JA338 ("[T]he Court need not predicate a judgment in the agency's favor on inaccurate or incomplete declarations.").

That reasoning was incorrect. Read in light of the Department's well-known and longstanding view that a sitting President cannot be indicted or prosecuted, the government's briefs and declarations accurately characterized the nature of the Attorney General's decisional process. And the district court's *in camera* review of the full memorandum should have dispelled any confusion that might have arisen from inadvertent ambiguities. Furthermore, if after *in camera* review the district court regarded the government's submissions as inadequate to describe the memorandum, the proper course would either have been to adjudicate the withholding of the memorandum on the basis of the *in camera* review or else to solicit further submissions to cure any perceived omissions or ambiguities—not to order the release of this self-evidently privileged document.

a. As an initial matter, there is no basis for the district court's accusations that the government's submissions were "disingenuous," that they "deliberately obscured" the nature of the Attorney General's decisional process, or that they were made in "'bad faith,'" 2021 WL 2652852, at *11-14. To

the extent the submissions were imprecise or incomplete in several passages, or contained ambiguities that produced confusion, any suggestion that the Attorney General was considering whether to seek charges against the President was inadvertent. That is clear for two reasons.

First, the government had no reason to deliberately suggest that the Attorney General was considering actually bringing charges against the President, when the Office of Legal Counsel opinion foreclosing prosecution of a sitting President was not only public and widely known but explicitly referenced in both the Special Counsel's report and the Attorney General's letter to Congress. *See* SCO Report, vol. II, at 1; Barr Letter at 3. Plaintiff itself recognized in the district court that the constitutional constraint that applied to the Special Counsel "applied equally to Attorney General William Barr, who took no steps to overturn, repudiate, or limit" the relevant opinion of the Office of Legal Counsel. JA211.

Second, the government had no reason to mislead the court about whether the Attorney General was considering charges. For the reasons discussed above, the privileged status of the memorandum has nothing to do with whether the Attorney General was considering bringing an actual prosecution. The memorandum is privileged because it advised the Attorney

General on his decision whether the Special Counsel's evidence was sufficient to show that the President obstructed justice, regardless of *why* the Attorney General was making that determination. And there would have been no reason, legal or otherwise, for the government to obscure the true context of the memorandum: that the Attorney General was assessing the evidence not for the purpose of making an actual charging decision, but for the purpose of considering what, if any, determination to make regarding whether the facts constituted sufficient evidence of obstruction. Again, that is exactly the determination that the Special Counsel considered making. Nor would there have been any reason for the government to hide the fact that the sufficiency determination was made in connection with the Attorney General's public statement about that determination; the fact that he made the statement was no secret and indeed formed the basis for plaintiff's request. Much less did the government have any reason to premise its defense of this FOIA case on its ability to establish that the Attorney General was considering prosecuting the sitting President—a showing the government plainly could not have made in light of the public record.

The fact that the government had no reason to mischaracterize the Attorney General's decisional process—in defiance of the public record—is a

compelling reason to believe that any misimpressions created by the government's briefs and declarations were inadvertent, not deliberate. That is the lens through which this Court should make its own assessment of the government's submissions.

The district court also based its finding of "'agency bad faith'" in part on concerns expressed by a different district judge about whether the Attorney General had made an objective determination. 2021 WL 2652852, at *13-14 (citing *Electronic Priv. Info. Ctr. v. DOJ*, 442 F. Supp. 3d 37, 48 (D.D.C. 2020)). The court cited the "'hurried release'" of Attorney General Barr's letter to Congress, and the other district judge's conclusion "'that Attorney General Barr failed to provide a thorough representation of the findings set forth in the Mueller Report,'" as evidence that "'Attorney General Barr's intent was to create a one-sided narrative about the Mueller Report—a narrative that is clearly in some respects substantively at odds with the redacted version of the Mueller Report.'" *Id.* (quoting 442 F. Supp. 3d at 49); *see also id.* at *13 n.14 (asserting that the Attorney General's letter had undermined public confidence in the Special Counsel's work). But that criticism is irrelevant to determining whether the memorandum is protected by the deliberative process privilege. The purpose of Exemption 5 is to protect the ability

of government actors to give candid advice in the course of decisionmaking, regardless of whether courts—or other Department officials—later agree with the decision made or approve of the process leading to it.

b. Read in full, and in that context, the government's briefs and declarations accurately described the decisional process on which the memorandum provided advice.

Vanessa R. Brinkmann, a career employee in the Office of Information Policy, explained that the Attorney General was considering "whether the evidence developed by [the Special Counsel's] investigation [was] sufficient to establish that the President *committed* an obstruction-of-justice offense," JA78 ¶ 11 (emphasis added)—not whether the President should be charged with such an offense. She went on to explain that that "legal question" was one the Special Counsel's Office "did not resolve," *id.*, referring to that Office's determination that it would not "evaluate the conduct [it] investigated under the Justice Manual standards governing prosecution and declination decisions," SCO Report, vol. II, at 2. By contrast, the question whether the President should actually be *prosecuted* was not one that the Special Counsel's Office considered to be open; the Office regarded that question as settled by departmental precedent. *Id.*

Paul P. Colborn, a career employee in the Office of Legal Counsel, likewise explained that the Attorney General was determining whether the Special Counsel's findings "'would support initiating or declining the prosecution of the President for obstruction of justice under the Principles of Federal Prosecution.'" JA51 ¶ 17. That was a direct quotation from the first sentence of the memorandum. JA297. In its redacted form, that sentence did not contain the concluding phrase "without regard to any constitutional barrier to such a prosecution under Article II of the U.S. Constitution." *Compare id.* (unredacted) *with* JA86 (redacted). But the quoted passage accurately described the analysis undertaken by the Attorney General that the Special Counsel had declined to undertake. The district court believed it was misleading to say "that the decision was about whether the evidence would support 'initiating or declining' the prosecution, as opposed to[] whether the evidence could support a criminal charge in the absence of a constitutional bar." JA336. But as discussed above, the constitutional bar was well known and reflected a longstanding Department position. Even in more ordinary cases, moreover, a determination whether the evidence would be sufficient to support a prosecution is not the same as a determination whether to file charges. *See Justice Manual* § 9-27.220 (discussing other factors informing

prosecution decisions). And the declaration's conditional language—"*would* support"—underscored that the Attorney General was addressing only the sufficiency of the evidence, not actually deciding whether to seek charges. The declaration thus accurately and precisely described the memorandum's analysis.

The government's briefs, too, accurately described the Attorney General's decisional process. The opening brief explained that the memorandum and other withheld documents provided "legal advice and prosecutorial analysis on th[e] question" "whether the evidence developed by Special Counsel Mueller was sufficient to establish that the President *committed* an obstruction-of-justice offense." JA20 (emphasis added). It then described the memorandum in question as providing the authors' advice on "'whether the facts recited [in Volume II of the Special Counsel's Report] would support initiating or declining the prosecution of the President for obstruction of justice under the Principles of Federal Prosecution.'" JA32. That characterization—quoting the Colborn declaration, which in turn quoted a passage of the memorandum that was never redacted—was accurate for the reasons discussed above.

Certain statements in the government's reply brief were less precise in characterizing the Attorney General's decisional process. For example, the reply brief described the memorandum as "containing analysis about whether evidence supports initiating or declining a prosecution" (as opposed to whether it *would* support initiating or declining a prosecution). JA193. And the reply brief criticized plaintiff for suggesting "that the Attorney General was not engaged in 'a legitimate decision on whether to initiate or decline prosecution of the President for obstructing justice.'" JA194; *see also id.* (criticizing plaintiff's "supposition that [the memorandum] 'was not part of a deliberation about whether or not to prosecute the President'"); JA197 (criticizing plaintiff's "speculation … that 'the Attorney General was not seeking legal advice from [the Office of Legal Counsel] in order to make a prosecution decision'").

The government regrets the wording of those passages. But the reply brief, when read as a whole and in light of the overall context of the memorandum—especially the fact that the bar to prosecution of a sitting President was well known and established—was consistent with the memorandum and the government's other submissions. In the last three passages cited above, for example, the government was responding to plaintiff's argument

that the Attorney General lacked authority to make *any* determination concerning the strength of the evidence against the President—an argument the government continues to believe is incorrect. The government recognizes that some of the confusion that arose could have been ameliorated if the reply brief had specified more precisely the nature of the government's disagreement with that proposition, stating that the Special Counsel regulations did not preclude the Attorney General from making a sufficiency determination even if he could not bring actual charges. Elsewhere in the brief, however, the government rebutted plaintiff's arguments about the Attorney General's decisional process in more precise terms, explaining that those arguments "flow[ed] from" the "irrelevant and unsupported premise[] that the Attorney General lacked authority to make a prosecutorial decision regarding whether the evidence developed by Special Counsel Mueller's investigation was sufficient to establish that the President had *committed* an obstruction-of-justice offense"—as opposed to whether he should be charged with such an offense. JA182-183 (emphasis added). And the reply brief once again quoted the Colborn declaration's accurate statement that "the memorandum was submitted to the Attorney General to 'assist him in determining whether the facts set forth in Volume II of Special Counsel

Mueller's report "would support initiating or declining the prosecution of the President for obstruction of justice under the Principles of Federal Prosecution."'" JA191 (emphasis omitted).

The district court criticized the government's submissions for not explicitly describing, as a premise of the memorandum, the Department's longstanding view that a sitting President cannot be prosecuted. The government recognizes that its choice to redact references to the constitutional bar from the version of the memorandum that it initially produced—and, accordingly, not to discuss the redacted passages in its submissions—likely had the unfortunate effect of contributing to confusion arising from the imprecise language discussed above. But that redaction reflected a good-faith effort to disentangle the decision memorialized at the end of the memorandum (Attorney General Barr's approval of the recommendation), along with the advice that exactly corresponded with the ultimate decision, from the analysis that informed the advice. JA79 ¶ 12. Thus, the government released "the factual information contained in the memorandum's header, the information contained in footnote one, the Attorney General's signature and decision, and [the] recommendations that substantively matched the Attorney General's decision," but withheld the memorandum's statements about the

constitutional barrier to prosecution of a sitting President on the view that they were part of the memorandum's "reasoning and legal analysis." JA79-80 ¶¶ 12-13.

The correctness of that judgment call is no longer at issue because the relevant portions of the memorandum have now been released. What matters is that, contrary to the district court's apparent view, the omission from the government's submissions of any explicit reference to the constitutional barrier did not reflect an effort to obscure the nature of the Attorney General's decisional process. The Office of Legal Counsel opinion foreclosing prosecution was public and widely known, and both the Special Counsel's report and the Attorney General's letter to Congress expressly referred to that opinion. *See* SCO Report, vol. II, at 1; Barr Letter at 3.

Finally, the district court criticized the government's submissions for not describing the memorandum's two-paragraph preliminary analysis of *whether* the Attorney General should make a determination regarding the Special Counsel's findings, as opposed to its much lengthier substantive analysis of what determination the Attorney General should make. In hindsight, the government acknowledges that it would have been preferable to have described the two preliminary paragraphs in its declarations; doing so

might have eliminated the district court's misimpression that the government was suggesting the Attorney General was considering actually filing charges against the President. But the omission of any such discussion was not a "strategic decision," 2021 WL 2652852, at *11 n. 11, designed to mislead the court. *See supra* pp. 28-31. It simply reflected the fact that the two-paragraph discussion in Section I was peripheral to the memorandum; indeed, had those paragraphs been placed in the introduction instead of being labeled as Section I, they would likely not have been perceived as a standalone part of the analysis at all. In any event, the government has not appealed the portion of the district court's order requiring that those paragraphs be released, and their presence or absence from the memorandum has no bearing on whether the substantive analysis in the memorandum qualifies for protection under the deliberative process privilege (which is all that remains at issue in this appeal).

In short, although the government regrets imprecise language in its reply brief, and any misimpression arising from the choice to redact the memorandum's references to the constitutional barrier to prosecution of a sitting President, the government respectfully submits that its filings, read

as a whole and in context, accurately characterized the nature of the Attorney General's decisional process—and certainly did not reflect any deliberate effort to mislead.

c. At any rate, even if the government's declarations and briefs had left some ambiguity or uncertainty, the district court's *in camera* review should have dispelled any misunderstanding about the nature of the Attorney General's decisional process or the memorandum's role in advising on that process, because the memorandum specifically set forth the relevant context. The court's review of the memorandum should have made clear that the memorandum was protected by the deliberative process privilege. Yet the court ordered the government to disclose this self-evidently privileged document on the ground that the *in camera* review revealed "inconsistencies and omissions" in the government's submissions; having found those "inconsistencies and omissions," the court believed, it "was not required to dissect the text to come up with a way to square" the government's supposedly "incomplete representations with the memorandum itself." JA337. That reasoning was mistaken for several reasons.

First, the court erred in considering its *in camera* review of the memorandum only as a lens through which to appraise the government's declarations, as opposed to a basis on which to evaluate the privileged status of the memorandum. FOIA cases are generally resolved based on declarations, but *in camera* review is proper in limited circumstances, including where "the agency affidavits are insufficiently detailed to permit meaningful review of exemption claims." *Quinon v. FBI*, 86 F.3d 1222, 1228 (D.C. Cir. 1996). Although the government opposed *in camera* review in this case on the ground that the declarations here were adequate, the court concluded otherwise, and it is well established that where a court chooses to conduct *in camera* review, the review itself can be the basis for the court's ruling. *See, e.g.*, *Phillippi v. CIA*, 546 F.2d 1009, 1012-1013 (D.C. Cir. 1976) (courts may adjudicate propriety of withholding "on the basis of in camera examinations of the relevant documents"); *City of Virginia Beach v. U.S. Dep't of Commerce*, 995 F.2d 1247, 1252 n.12 (4th Cir. 1993) ("By conducting *in camera* review, the district court established an adequate factual basis for its decision."). The district court should accordingly have upheld the government's withholding determination after its *in camera* review.

Second, to the extent the district court's concern was that the government forfeited the legal argument that the memorandum should be withheld in the context of the decisional process the Attorney General actually undertook, that is incorrect. As discussed above, the government expressly asserted that the memorandum and other withheld documents provided "legal advice and prosecutorial analysis on th[e] question" "whether the evidence developed by Special Counsel Mueller was sufficient to establish that the President *committed* an obstruction-of-justice offense," JA20 (emphasis added)—not whether he should be charged.

Third, to the extent the district court's concern was that the declarations would not give plaintiff an adequate factual basis on which to litigate the application of the deliberative process privilege, the court could and should have remedied that concern by directing the government to submit supplemental declarations. This Court has repeatedly recognized that it is appropriate for district courts to require supplemental declarations where they find an agency's declarations insufficient to support summary judgment for the agency. *See, e.g.*, *Spirko v. U.S. Postal Serv.*, 147 F.3d 992, 997 (D.C. Cir. 1998) (district court's options in case of insufficient declarations include "requesting further affidavits"); *ACLU v. DOJ*, 655 F.3d 1, 19 (D.C. Cir. 2011)

(similar); *Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 394 n.19 (D.C. Cir. 1987) (similar); *King v. DOJ*, 830 F.2d 210, 225 (D.C. Cir. 1987) (similar).

Indeed, this Court recently explained that where an agency has "fail[ed] to establish that it is entitled to judgment as a matter of law" in a FOIA case, "the *prudent course*" is for the district court to call for "supplemental affidavits and further summary judgment briefing," if doing so would allow the court to "resolve th[e] case for one side or the other." *Pavement Coatings Tech. Council v. U.S. Geological Survey*, 995 F.3d 1014, 1023-1024 (D.C. Cir. 2021) (emphasis added). And district courts regularly take that "prudent course." *See, e.g.*, *Electronic Priv. Info. Ctr. v. DEA*, 192 F. Supp. 3d 92, 103 (D.D.C. 2016) (ordering agency "to provide a more detailed explanation through supplemental briefing and additional declarations, or to produce relevant documents for *in camera* review," where its justifications for withholding were "conclusory, vague, or otherwise insufficient"); *Beltranena v. Clinton*, 770 F. Supp. 2d 175, 187 (D.D.C. 2011) ("[W]here—as here—'an agency's affidavits regarding its search are deficient, courts generally … direct the agency to supplement its affidavits.'" (quoting *Jarvik v. CIA*, 741 F. Supp. 2d 106, 122 (D.D.C. 2010)); *Smith v. ATF*, 977 F. Supp. 496, 503 (D.D.C. 1997) ("The Court believes that judicial economy is best served by allowing

defendant an opportunity to correct the deficiencies in its declaration."); *see also Gatore v. DHS*, 292 F. Supp. 3d 486, 495 (D.D.C. 2018) (ordering *in camera* review only where the agency had already "submitted three additional declarations"). Alternatively, the court could simply have directed the government to show cause why the memorandum's references to the policy against charging a sitting President could not be unredacted—a step that would have resolved any perceived ambiguity in the original declarations.

What the district court should not have done was to reject the assertion of the deliberative process privilege even though the memorandum contained deliberative advice to the Attorney General on an ongoing decisional process. The district court's ruling here was less an application of FOIA than what amounted to a sanction for the government's supposed litigation misconduct—and a mistaken one, for the reasons discussed above. That was error, and it should be reversed.

B. The Memorandum Recorded Predecisional Advice

The district court equally erred in determining that the memorandum was not predecisional because "the very same people at the very same time" were working on it and on Attorney General Barr's letter to Congress, 2021 WL 2652852, at *15; *see* JA337-338.

In determining whether a document is "predecisional," as noted above, courts ask whether it "communicates the agency's settled position," *Fish & Wildlife Serv.*, 141 S. Ct. at 786, as opposed to memorializing "the ingredients of the decisionmaking process," *Sears*, 421 U.S. at 151. The relevant question, in other words, is "whether the agency treats the document as its final view on the matter" or whether, instead, the document "leaves agency decisionmakers 'free to change their minds.'" *Fish & Wildlife Serv.*, 141 S. Ct. at 786. Various factors can shed light on that question. One, for example, is whether the document's author has the authority to decide the matter at issue; if not, then the document is likely predecisional. *See, e.g.*, *Electronic Frontier Found. v. DOJ*, 739 F.3d 1, 9 (D.C. Cir. 2014). Another is whether the document is directed from a subordinate to a superior official or the opposite; if a document flows from a superior to a subordinate, it is less likely to be predecisional. *See, e.g.*, *Brinton v. Department of State*, 636 F.2d 600, 605 (D.C. Cir. 1980); *but see Reporters Comm.*, 2021 WL 2753938, at *7 ("There is no … directional precondition to protection under the deliberative process privilege.").

The record here points uniformly to the conclusion that the memorandum records predecisional advice to the Attorney General, rather than "communicat[ing] the [Attorney General's] settled position," *Fish & Wildlife*

Serv., 141 S. Ct. at 786. The memorandum was framed as offering advice, JA297, and presented the Attorney General with options to approve *or disapprove* the recommendation that it offered, JA305. And the memorandum's predecisional character is further described in the two Colborn declarations. The first explained that the memorandum "was provided prior to the Attorney General's decision in the matter" and contained "advice and analysis supporting a recommendation regarding the decision he was considering." JA53-54 ¶ 21. And the second clarified that, although the Attorney General did not sign the recommendation until after sending his letter to Congress, he "had received the substance of the advice contained in" the memorandum before "making his decision and sending the letter," he "reviewed multiple drafts of that memorandum," and "[t]he substance of the advice contained in [the memorandum] did not change in any material way between the time when [he] last received a draft of the memorandum and the time" he signed the recommendation line. JA207-208 ¶ 9.

A document memorializing "the ingredients of the decisionmaking process," *Sears*, 421 U.S. at 151, does not become postdecisional simply because it is finalized—or even entirely drafted—after the process has concluded. As this Court has explained, "[i]t would exalt form over substance

to exempt documents in which staff recommend certain action or offer their opinions on given issues but require disclosure of documents which only 'report' what those recommendations and opinions are." *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242, 257 (D.C. Cir. 1977); *see also, e.g., Citizens for Resp. & Ethics in Washington v. DOJ*, 658 F. Supp. 2d 217, 234 (D.D.C. 2009) ("[T]he information withheld by DOJ recounts the 'ingredients of the decisionmaking process,' and for that reason the information withheld qualifies as predecisional—despite the fact that the interview in which the information was disclosed took place after the decisions were made."). And for good reason: It is not at all unusual—particularly in a matter being handled in expedited fashion—for a document memorializing predecisional advice to be prepared contemporaneously with, or even after, the decision itself.

In ruling on the government's stay motion, the district court clarified that its concern "was not just that the final version of the [memorandum] was initialed after the letter went out" but rather that, because "the process of drafting the letter to Congress and process of creating the memo to the Attorney General were going on at the same time, involving the same people, … the chronology did not support the assertion that the memo played

any particular role in the development, as opposed to the memorialization, of the view of the evidence the Attorney General had already decided he would choose to announce." JA337. In other words, the court believed that the Attorney General's "decision to speak prompted" the drafting of the memorandum to support that decision. JA338.

But advice can remain predecisional even where it is given in support of an anticipated decision. Indeed, it is common for a decisionmaker to indicate his or her intended course of action and ask for a memorandum providing advice with respect to that course. As long as the decisionmaker remains free to change his or her mind by rejecting the advice contained in the requested memorandum, the memorandum remains predecisional: It records "the ingredients of the decisionmaking process," *Sears*, 421 U.S. at 151, rather than "communicat[ing] the [decisionmaker's] settled position," *Fish & Wildlife Serv.*, 141 S. Ct. at 786. Relatedly, the decisionmaker's agreement with the conclusion of the memorandum does not necessarily mean that all of the reasoning in the memorandum reflects the decisionmaker's position. *See, e.g.*, *Electronic Frontier Found.*, 739 F.3d at 10-11.

It makes sense to treat memoranda in support of an anticipated decision as predecisional. Such memoranda genuinely are "ingredients of the

decisionmaking process," *Sears*, 421 U.S. at 151, in the sense that they can prompt the decisionmaker to rethink elements of the decision that seem weaker than expected when written out. *Cf. Stalcup v. CIA*, 768 F.3d 65, 71-72 (1st Cir. 2014) (documents analyzing new data, prepared after CIA had initially determined the cause of a plane crash, were predecisional because "any reasonable government entity presented with new data" would "determine whether its prior assessment was accurate or whether it needed to change its position"). The district court's ruling, if affirmed, would severely undercut the deliberative process privilege by allowing the compelled disclosure of such memoranda. In turn, it would jeopardize the quality of governmental decisionmaking. *See Sears*, 421 U.S. at 151; *Reporters Comm.*, 2021 WL 2753938, at *5.

In sum, the record reflects—and the district court did not dispute—that this memorandum recorded advice and a recommendation to the Attorney General on an ongoing deliberative process, that the Attorney General was free to accept or reject that advice and recommendation, and that the Attorney General reviewed the memorandum in near-final form before making his final decision. The district court therefore erred in concluding that the memorandum was not predecisional.

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

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[4] The Acting Assistant Attorney General is recused in this matter.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9,745 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in 14-point Book Antiqua, a proportionally spaced typeface.

/s/ Daniel Winik
Daniel Winik

ADDENDUM

TABLE OF CONTENTS

5 U.S.C. § 552(b)(5)

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

…

(b) This section does not apply to matters that are—

…

(5) inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested[.]