20-3837

To Be Argued By:
ELLEN BLAIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 20-3837

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY,

Plaintiff-Appellee,

—v.—

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, UNITED STATES DEPARTMENT OF STATE, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT,

Defendants-Appellants,

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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UNITED STATES DEPARTMENT OF HOMELAND SECURITY,
UNITED STATES DEPARTMENT OF JUSTICE,
UNITED STATES CUSTOMS AND BORDER PROTECTION,

Defendants.

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BRIEF FOR DEFENDANTS-APPELLANTS

Preliminary Statement

Preventing terrorists or other individuals who threaten national security from entering the United States is one of the most vital tasks given to any federal agency. Congress directed the United States

Department of State (the "State Department"), Citizenship and Immigration Services ("USCIS"), and Immigration and Customs Enforcement ("ICE"), among others, to carry out this mission. Under the Immigration and Nationality Act ("INA"), those agencies are responsible for screening applicants seeking admission to the United States for ties to terrorist organizations and other threats to foreign policy. The three records remaining at issue in this appeal are an important part of the agencies' performance of that critical role. Two of the records, if publicly released, would enable inadmissible visa and immigration applicants who pose a danger to national security to evade detection and gain unlawful entry into the United States. The final record at issue is a draft containing an employee's opinions about INA enforcement policy that is protected by the deliberative process privilege, as confirmed by a recent decision of the Supreme Court. The Freedom of Information Act ("FOIA") exempts these records from disclosure, and the district court's judgment should be reversed.

ARGUMENT

POINT I

The State Department Appropriately Withheld Information in the Foreign Affairs Manual Under Exemption 7(E)

A. The Information Was Compiled for Law Enforcement Purposes

The State Department has satisfied Exemption 7(E)'s threshold requirement, logically and plausibly demonstrating that the withheld portions of the Foreign Affairs Manual ("FAM") were "compiled for law enforcement purposes." *See FBI v. Abramson*, 456 U.S. 615, 624, 626 (1982). The Knight Institute's argument to the contrary depends on an artificial and untenable distinction between "applying" and "enforcing" the law. (Plaintiff-Appellee's Brief ("Pl.'s Br.") 28-31). But the record and common sense make clear that the State Department, in fulfilling Congress's mandate to detect applicants who are ineligible for admission to the United States for terrorism-related reasons or other reasons, is enforcing the law.

The State Department "oversees the visa process abroad through its consular officers who determine visa eligibility." 9 FAM 102.2-2 (available at https://go.usa.gov/x6CEg). The INA directs consular officers to determine an applicant's eligibility or ineligibility for entry into the United States on multiple bases, including drug trafficking or terrorist activity. 8 U.S.C. § 1182(a)(2)(H), (I); (a)(3)(B), (D). Applicants who are denied admission but nevertheless enter the United

States, or who procure admission under false pretenses, are subject to criminal penalties and deportation. 8 U.S.C. §§ 1325-1326.

These responsibilities are part of the State Department's "core duties of enforcing U.S. immigration laws." (JA 64). Volume 9 of the FAM contains detailed instructions for consular officers to perform those enforcement duties. It thus "involve[s] the enforcement of [a] statute"—INA sections 212(a)(3)(B) and (a)(3)(C)—that is "within the authority of" the State Department. *Church of Scientology of California v. Dep't of Army*, 611 F.2d 738, 748 (9th Cir. 1979) (mixed-function agency "must demonstrate that it had a purpose falling within its sphere of enforcement authority in compiling the particular document"), *overruled on other grounds by Animal Defense Fund v. FDA*, 836 F.3d 987 (9th Cir. 2016).

Furthermore, as the district court recognized, and the Institute does not dispute, "law enforcement includes not just the investigation and prosecution of offenses that have already been committed, but also proactive steps designed to prevent criminal activity and to maintain security." *Milner v. Dep't of the Navy*, 562 U.S. 562, 582 (2011) (Alito, J., concurring); *see id.* at 583 ("Particularly in recent years, terrorism prevention and national security measures have been recognized as vital to effective law enforcement efforts in our Nation."). The State Department's applicant-screening function easily satisfies that standard, and volume 9 of the FAM therefore falls "within [the] sphere of [the agency's] enforcement authority." *Lewis v. IRS*, 823 F.2d 375 (9th Cir. 1987); *accord Cooper*

Cameron Corp. v. OSHA, 280 F.3d 539, 545-46 (5th Cir. 2002); *Birch v. USPS*, 803 F.2d 1206 (D.C. Cir. 1986). Contrary to the Institute's assertion that records must be "related to specific criminal investigations or civil violations" (Pl.'s Br. 29-30), Exemption 7(E) contains no such limitation and has been applied to material analogous to the FAM, including "law enforcement manuals." *Tax Analysts v. IRS*, 294 F.3d 71, 79 (D.C. Cir. 2002) ("procedures for law enforcement investigations . . . outside of the context of a specific investigation" are protectable). The State Department has thus shown that the withheld portions of the FAM were compiled for law enforcement purposes.

The Institute wrongly casts the visa processing at issue as "a routine benefit determination" that does not involve enforcement of the immigration laws. (Pl.'s Br. 28). That argument ignores the congressionally mandated purpose of excluding applicants connected to terrorism or criminal activity. Protecting against the entry of dangerous individuals into the country bears no resemblance to the types of "social security [and] disability" determinations that the Institute seeks to compare them to.

Similarly, the Institute's manufactured line between "applying" the law and "enforcing" the law (Pl.'s Br. 29) is unfounded. Consular officers "apply" the INA's provisions to each visa application, thereby "enforcing" the INA by permitting or preventing entry. *See, e.g.*, *Tax Analysts*, 294 F.3d at 78 (guidelines for investigations "clearly satisfy the 'law enforcement purposes' threshold of Exemption 7"). The fact that DHS also enforces the INA does not undermine State's

concurrent enforcement role: as the Institute's own source acknowledges (Pl.'s Br. 28-29), the State Department "works closely with interagency partners, especially the Department of Homeland Security (DHS), in this process." 9 FAM 102.2-2; (JA 68 (withheld information includes "interagency cooperation procedures"), 134 (9 FAM 302.6-2(b)(5)(b) (Secretaries of State and of Homeland Security can both make exception determinations)). And the Institute's criticism of the agency affidavits as "vague and conclusory" (Pl.'s Br. 30 (quotation marks and alterations omitted)) disregards that the State Department's declarant fully supported his characterizations by detailing why the record at issue concerns visa security, the enforcement of the INA's terrorism-related ineligibility grounds, and procedures to screen applicants for national security threats. (Brief for Defendants-Appellants ("Gov't Br.") 24-28; JA 66-69, 115).

Accordingly, the State Department has logically and plausibly explained that volume 9 of the FAM was compiled for law enforcement purposes, and Exemption 7's threshold requirement has been satisfied.

B. The Information Reflects Techniques and Procedures

The State Department has also logically and plausibly demonstrated that the withheld FAM provisions constitute techniques and procedures subject to Exemption 7(E). The Institute relies on only speculative inferences about the records' content to suggest they must be disclosed.

The State Department explained that the withheld material reveals how officials investigate whether an individual is a national security threat. These portions of the FAM direct consular officers to, for example, check certain databases, cooperate with other agencies in a particular process, and evaluate non-public sources of evidence. (JA 67 (9 FAM 302.6-2(E) provides "procedures for flagging certain ineligibilities or potential ineligibilities in a database"; 9 FAM 302.6-3(B)(2)b.(4) "lists credible sources of evidence that may be used in recommending a finding, including sources that are not public knowledge"; 9 FAM 302.6-2(B)(4)c.(4) "provides details about . . . how to account for [a] presumption [of inadmissibility due to terrorist activity] when assessing a visa applicant"), 68 (9 FAM 40.32 N.1.1.c provides "interagency cooperation procedures")). These investigative procedures readily qualify under Exemption 7(E).

The Institute's only basis for disputing that conclusion is its unsupported guesswork about the FAM's contents. As the Institute notes (Pl.'s Br. 33-34 & n.14), the State Department produced portions of the FAM that contain "definitions" provided by INA section 212(a)(3)(B) (JA 120); "background" sections outlining the history of section 212(a)(3)(B) (JA 117-20); and names of entities no longer considered terrorist organizations as identified by statute (JA 126). But those disclosures do not support the Institute's conjecture that the withheld portions of the records are the types of "high-level summaries of statutes and directives" that must be disclosed. (Pl.'s Br. 33). To the contrary, they demonstrate that the State Department carefully distinguished and segregated materials that

must be disclosed from those that are exempt as law enforcement techniques and procedures. For instance, the State Department properly withheld the portions of the FAM describing procedures and instructions for detecting membership in the Palestine Liberation Organization (JA 131-33) or the Kosovo Liberation Army (JA 67, 141-42), and procedures and requirements for issuing Security Advisory Opinions (JA 67, 148-150).[1] These sections identify which applications "should be [reviewed] with particular care" and what officials should look for, squarely qualifying as techniques and procedures. *Allard K. Lowenstein Int'l Human Rights Project v. DHS*, 626 F.3d 678, 682 (2d Cir. 2010) (if an agency "informs tax investigators that cash-based businesses are more likely to commit tax evasion than other businesses, and therefore should be audited with particular care, focusing on such targets constitutes a 'technique or procedure' for investigating tax evasion").

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[1] While the Institute correctly notes that other agencies have released some information concerning those subjects (Pl.'s Br. 36-37 n.18-21), the Institute offers no basis to conclude that the information withheld here is the same. The records demonstrate otherwise. *Compare* USCIS Policy Memorandum (excluding Kurdistan Democratic Party (KDP) from the definition of Tier III organizations under the INA, https://go.usa.gov/x6CPu*) with* JA 140-41 (releasing "background" information on the KDP and its exclusion from Tier III, but withholding information following the heading "procedures").

The fact that some of the withheld material appears within sections labeled "definitions" cannot overcome State's uncontroverted explanation that the redacted material contains specialized and technical information. The Institute states that this information "appears to" recite statutory language (Pl.'s Br. 34) or constitutes "legal interpretations" of the INA (Pl.'s Br. 39-40), but the State Department's productions and affidavits attest to the contrary.

The Institute's attempt to compare redacted and unredacted sections does nothing to support its case. For example, the Institute surmises that the redacted paragraph 9 FAM 302.6-2(B)(3)(d) "almost certainly" contains the definition of "material support" for terrorist activities, because "it is referenced as such later in the FAM" at 9 FAM 302.6-2(B)(5)g.(f). (Pl.'s Br. 35 n.16 (comparing JA 121 with JA 146)). But the FAM itself indicates that the two paragraphs contain different information: the latter section explains that the former section includes "*further* information on material support" for terrorism, not the same information. Along the same lines, the Institute's arguments depend on mere conjecture about "the similarity between the withheld information" and public information (Pl.'s Br. 35 n.16 (quoting SPA 27))—that speculation is not only baseless, but also contradicted by the Department's descriptions of the content of the withheld material and the reasons for withholding.

The Institute objects that the Department's *Vaughn* index describes some of the withheld information as containing "guidelines" rather than "techniques or procedures." (Pl.'s Br. 38). But the Institute

fails to acknowledge that the State Department's declaration explained that the withheld information reveals how the agency conducts the relevant investigations—namely, a technique or procedure under Exemption 7(E). *Allard K. Lowenstein*, 626 F.3d at 682 (defining "techniques and procedures" as "how law enforcement officials go about investigating a crime"). And the Institute ignores altogether the fact that, as State has attested, public release of this information "could enable terrorists and other bad actors to avoid detection or develop countermeasures to circumvent the ability of the Department to effectively use these important law enforcement techniques, thereby allowing circumvention of the law." (JA 64; Gov't Br. 28). Courts have concluded that almost identical material —information used to evaluate immigration applicants—could enable an applicant to tailor his testimony and escape detection. *Heartland Alliance Nat'l Immigrant Justice Ctr. v. USCIS*, 840 F.3d 419, 421 (7th Cir. 2016); *Ibrahim v. Dep't of State*, 311 F. Supp. 3d 134, 143 (D.D.C. 2018) (disclosing information in USCIS's Refugee Application Assessment "could reasonably be expected to risk circumvention of the law by enabling applicants for refugee status to plan strategic but inaccurate answers"). Accordingly, it makes no difference if the material constitutes "guidelines" or "techniques and procedures" because State has made the showing that disclosure could reasonably be expected to risk circumvention of the law. (Gov't Br. 28).

And despite the Institute's claim to the contrary, withholding of information about a terrorist organization can constitute a law enforcement technique or procedure. *Heartland Alliance*, 840 F.3d at 420-21

(withholding names of organizations designated "Tier III" terrorist organizations is "a technique of a law enforcement investigation that is squarely within the 7(E) exemption," as it tends to make interviewees "less guarded" in their responses to questions). Here, the State Department withheld detailed information about terrorist organizations for consular officers to use when questioning applicants for ties to those organizations; releasing such information would, as the Seventh Circuit concluded, render "this type of questioning . . . ineffectual." *Id.*

Finally, the Institute seeks more detail in State's *Vaughn* index and declarations. (Pl.'s Br. 40-41). For the reasons already discussed, the State Department provided ample explanation to support its withholdings. Moreover, State withheld individual sentences and portions of paragraphs in the FAM (JA 127-29); State cannot provide additional detail without including "factual descriptions that if made public would compromise the secret nature of the information." *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973); *accord Keys v. DOJ*, 830 F.2d 337, 349 (D.C. Cir. 1987) (*Vaughn* index is not required to provide "a degree of detail that would reveal precisely the information that the agency claims it is entitled to withhold"); *New York Times Co. v. DOJ*, 758 F.3d 436, 440 (2d Cir. 2014) (agreeing with D.C. Circuit rule).

The State Department has logically and plausibly justified the application of Exemption 7(E) to the redacted portions of the FAM.

POINT II

USCIS Appropriately Withheld Information in the Terrorism-Related Inadmissibility Ground Materials Under Exemption 7(E)

The Institute contends that so-called "TRIG Questions," relating to the terrorism-related inadmissibility grounds under the INA, must be disclosed. But those questions are inextricable from the "TRIG Exemptions" that the district court deemed protected, and both categories are exempt from disclosure for the same reasons.

As described in the government's opening brief (Gov't Br. 34-35), any individual who is a member of a "terrorist organization" or who has engaged or engages in terrorism-related activity is "inadmissible" to the United States and is ineligible for most immigration benefits. (JA 361-65). There are multiple ways in which an individual could be deemed inadmissible—for example, the applicant might affiliate with one of the 72 currently listed foreign terrorist organizations, *see* https://go.usa.gov/x6CPS; engage in broadly-defined "terrorist activities," 8 U.S.C. § 1182(a)(3)(B)(iii); or "persuade[ ]" another to "support a terrorist organization," 8 U.S.C. § 1182(a)(3)(B)(VII)). If an individual meets certain criteria for ineligibility, the Secretaries of Homeland Security and State may nevertheless exempt individuals from the inadmissibility bar. 8 U.S.C. § 1182(d)(3)(B). Currently, there are eight "situational" exemptions to that bar (e.g., the applicant provided support to the terrorist group while under duress) and twenty-six "group-based" TRIG exemp-

tions (e.g., the applicant was a member of one of the listed exempted groups at the time of the applicant's activities with the group). *See* Terrorism-Related Inadmissibility Grounds Exemptions, https://go.usa.gov/xsB8Y; (JA 386-97).

USCIS immigration officers must necessarily ask questions to determine whether a TRIG bar applies, and also ask questions to determine whether a TRIG exemption may be available. Determining whether an applicant is subject to the multiple terrorism-related inadmissibility grounds, and if so whether any exemption is available, is inherently context-specific. Accordingly, each TRIG bar, like each TRIG exemption, requires separate and detailed lines of questioning. For example, an immigration officer may ask one series of questions designed to elicit whether an applicant is associated with Al-Qa'ida in the Indian Subcontinent, a designated terrorist organization (*see* https://go.usa.gov/x6CPS), but a different series of questions to determine if the applicant is associated with ISIS-Bangladesh, another designated terrorist organization (*see id*.). And if such a TRIG bar applies, the immigration officer will ask yet a different series of questions to determine whether an exemption is available, such as whether the applicant provided "limited" or "insignificant" material support. http://go.usa.gov/xsB8Y.

Thus, as USCIS explained, the questions USCIS officers ask reflect "specialized methods" used "to screen for possible terrorism ties and terrorism-related inadmissibility grounds" (JA 552)—that is, law enforcement techniques and procedures within Exemption 7(E). The "particular information the questions and

follow-ups were designed to elicit includes information that would shed light on terrorist organizations' activities" (JA 552-53), and the withheld information includes "specific examples for issue spotting during applicant interviews" and identifies "key words used by applicants that could identify their associations with terrorist groups" (JA 182-83).

USCIS has also logically and plausibly explained "how the release of [the requested] information might create a risk of circumvention of the law." *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1194 (D.C. Cir. 2009) (agencies need not meet "a highly specific burden of showing how the law will be circumvented," as exemption 7(E) requires only that the agency "demonstrate[ ] logically" that the law could be circumvented (quotation marks and citation omitted)). Contrary to the Institute's assertion, the questions embedded in the TRIG training materials are indeed "intertwined" with the surrounding context (Pl.'s Br. 43), and their release would inform immigration applicants why an immigration officer is asking particular questions, which of the multiple TRIG bars the officer is evaluating, and which of the multiple TRIG exemptions might apply.

For example, USCIS produced an Academy Guide dated June 2012, which provides a "non-exhaustive" list of factors for an immigration officer to consider when determining whether an applicant provided material support under duress. https://knightcolumbia.org/documents/e9ba8a202e at 27. However, USCIS withheld a set of "[h]elpful questions to determine the duress" that appear at the end of that list on the same

page. *Id*. If those questions were disclosed, an applicant would understand that the questions are intended to elicit information about whether he or she provided support under duress, thus potentially enabling an applicant to tailor his or her testimony and improperly gain entry to the country. (JA 183 (attesting that disclosing this information could enable future applicants to avoid detection), 384 (redacting paragraph following statement: "Possible material support questions to address in an interview or Request for Evidence")). *See, e.g.*, *Rosenberg v. ICE*, 13 F. Supp. 3d 92, 113-14 (D.D.C. 2014) (material containing "specific questions" subject to 7(E) because it reveals "the rationale for a particular question," as well as "recommendations of follow-up questions").

The Institute's insistence that the questions would not "tell a visa applicant what the 'right' or 'wrong' answers are" (Pl.'s Br. 44, 47) misapprehends the point: an applicant seeking to avoid revealing his terrorist ties would plainly benefit from knowing in advance what USCIS will ask to determine those ties. *See Heartland Alliance*, 840 F.3d at 421; *Barouch v. DOJ*, 87 F. Supp. 3d 10, 30 n.13 (D.D.C. 2015). Similarly, the Institute's characterization of the questions as "routine," and therefore not a law enforcement technique or procedure, is baseless. (Pl.'s Br. 44-45). The Institute attempts to compare the withheld information here to that in *ACLUF v. DOJ*, 243 F. Supp. 3d 393, 396, 404-05 (S.D.N.Y. 2017), but as explained in the government's opening brief, that case is fundamentally different. There, the government agency itself described the questions as "routine[ ]," and it had already made them public by providing copies of interview

questions and answers to lawyers, and by allowing questioning to be filmed and broadcast by television and internet—a far different practice than simply asking varied sets of questions to members of the public. (Gov't Br. 39-41, citing 243 F. Supp. 3d at 404-05). Nothing similar has occurred here. *See Frank v. CFPB*, 327 F. Supp. 3d 179, 184 (D.D.C. 2018) (distinguishing *ACLUF* for same reasons).

Furthermore, the Institute does not dispute (Pl.'s Br. 47-48) the principle that "even for well-known techniques or procedures, Exemption 7(E) protects information that would reveal facts about such techniques or their usefulness that are not generally known to the public, as well as other information when disclosure could reduce the effectiveness of such techniques." *Broward Bulldog, Inc. v. DOJ*, 939 F.3d 1164, 1191 (11th Cir. 2019). The Institute urges that this rule is inapplicable because "only the TRIG Questions, not the surrounding contextual information, are at issue." (Pl.'s Br. 48). But the Institute requests that the agency publicly release all of the questions and their relations to the specific TRIG bars and exemptions to which they apply. Such a disclosure—which is materially distinct from one-off repetition of individual questions asked of one applicant in an interview—would reveal nonpublic information about USCIS's questioning techniques that would thwart the agency's ability to effectively screen for terrorist ties and other national-security threats.

USCIS has therefore logically and plausibly justified the application of Exemption 7(E) to the "TRIG Questions."[2]

POINT III

ICE Appropriately Withheld the Foreign Policy Memo Under Exemption 5

ICE properly withheld its Foreign Policy Memo—an informal, draft document prepared by one employee containing the employee's opinions regarding when the Secretary of State may deny entry under INA section 212(a)(3)(C) for foreign policy related reasons. As the Supreme Court reaffirmed after the government's opening brief was filed, such draft documents are predecisional and deliberative, and therefore privileged.

"Documents are 'predecisional' if they were generated before the agency's final decision on the matter, and they are 'deliberative' if they were prepared to help the agency formulate its position." *United States Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 786 (2021). But "[a] document is not final solely because nothing else follows it." *Id.* "What matters . . . is not whether a document is last in line, but whether it communicates a policy on which the agency has settled"—that is, "whether the agency treats the

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[2] The Institute recently withdrew its request for two documents that USCIS withheld pursuant to Exemption 5. (Pl.'s Br. 9 n.6). Accordingly, USCIS's Exemption 5 withholdings are no longer at issue in this appeal.

document as its final view on the matter." *Id.* A postdecisional "document will have 'real operative effect,'" whereas a predecisional document "leaves agency decisionmakers 'free to change their minds.'" *Id.* (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975), and *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 189-90 (1975)).

In evaluating whether a document was predecisional, the Supreme Court in *Sierra Club* "start[ed] with the obvious point that the [agency] identified these documents as 'drafts.'" *Id.* "A draft is, by definition, a preliminary version of a piece of writing subject to feedback and change," *id.*—and such a document "will typically be predecisional because . . . calling something a draft communicates that it is not yet final," *id.* at 788. While the "label 'draft' is [not] determinative," if context reveals draft documents to be "what they sound like: opinions that were subject to change," the privilege applies. *Id.* at 786, 788; *accord ACLU v. DOJ*, 844 F.3d 126, 133 (2d Cir. 2016) (document "is a draft and for that reason predecisional").[3]

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[3] The Institute incorrectly suggests that the statement in *National Council of La Raza v. DOJ* that "[d]rafts and comments on documents are quintessentially predecisional and deliberative," 339 F. Supp. 2d 572, 583 (S.D.N.Y. 2004), *aff'd*, 411 F.3d 350 (2d Cir. 2005), was "plainly overruled by *Sierra Club*." (Pl.'s Br. 60-62). But *Sierra Club* is fully consistent with the idea that a draft, as long as it is actually a non-final document and not merely labeled a draft to invoke the deliberative process privilege, is quintessentially and

That is the case here. The ICE Foreign Policy Memo is predecisional and deliberative because it is a draft with all of the hallmarks of a draft. ICE has attested that the draft is not "final." (JA 249). And the surrounding context confirms that ICE did not "treat" the Foreign Policy Memo "as final" or engage in the "charade" of mislabeling a final decision as a draft. *Sierra Club*, 141 S. Ct. at 788. The draft contains an ICE employee's "opinions regarding the use of Section 212(a)(3)(C)" and "analysis on whether the Secretary of State should use Section 212(a)(3)(C) . . . to render an alien inadmissible," as well as "notes supporting the employee's opinions." (JA 249, 563). The Memo has further indicia that it was not, and was not treated as, final: it is unsigned, unaddressed, and unorganized. (JA 563); *see ACLU v. DOJ*, 844 F.3d at 133 ("unsigned and undated," "informal and preliminary" document was predecisional). Indeed, the Institute points to nothing suggesting that the draft was not a draft.

Instead, the Institute suggests that the Memo cannot be predecisional because there was no "'identifiable final agency decision.'" (Pl.'s Br. 51-52 (quoting *Brennan Center for Justice v. DOJ*, 697 F.3d 184, 202 (2d Cir. 2012)). But an agency need not "identify a specific decision" to establish that a record is predecisional. *Sears*, 421 U.S. at 151 n.18. Whether an agency ever issues a "final agency document" is irrelevant—as long as the "draft is still a draft," it is "thus still predecisional and deliberative." *National Security Archive*

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inherently predecisional and deliberative. *See* 141 S. Ct. at 786-88.

v. CIA, 752 F.3d 460, 463 (D.C. Cir. 2014) (Kavanaugh, J.); *accord ACLU v. DOJ*, 844 F.3d at 133 ("never published" draft op-ed was predecisional). The privilege is not "contingent on later events—such as whether the draft ultimately evolved into a final agency position." *National Security Archive*, 752 F.3d at 463; *see Sierra Club*, 141 S. Ct. at 786 ("A document is not final solely because nothing else follows it. Sometimes a proposal dies on the vine." (citing *National Security Archive*, 752 F.3d at 463)). The relevant question is whether the agency treated the record as final. *Sierra Club*, 141 S. Ct. at 786, 788. ICE did not do so here.

And the Institute's argument fails for an additional reason: ICE's description adequately places the Memo in its administrative context and specifies that it was written to "determin[e] whether section 212(a)(3)(C) can be used by the Secretary of State as grounds for inadmissibility." (JA 248-49, 563). That is an identifiable decision that suffices to support the predecisional and deliberative nature of the document. *See Tigue v. DOJ*, 312 F.3d 70, 80 (2d Cir. 2002) (document "was prepared to assist [agency] decisionmaking on a specific issue," and is therefore privileged even though "the government does not point to a specific decision made by the [agency] in reliance on the [withheld document]"). ICE has done more than simply refer to a vague "decision that possibly may be made." *Lahr v. National Safety Transp. Bd.*, 569 F.3d 964, 981 (9th Cir. 2009).

Moreover, the Foreign Policy Memo is deliberative. It "reflects the personal opinions of the writer," *Grand Central Partnership v. Cuomo*, 166 F.3d 473, 482 (2d

Cir. 1999): ICE attests that it contains the author's "opinions" regarding the application of section 212(a)(3)(C) as a ground of inadmissibility, as well as "notes supporting the employee's opinions." (JA 563). The Memo also reflects policy judgments concerning the grounds for applying section 212(a)(3)(C), and its release could "inaccurately reflect . . . the views of the agency" because it contains the opinions of one employee. *Grand Central*, 166 F.3d at 482; *see Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 855 (D.C. Cir. 1980) (privilege designed "to protect 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 actions").

The Institute ignores these facts. It merely contends that the agency's justification was "boilerplate and conclusory," based on the similarity of ICE's *Vaughn* index entry with other entries. (Pl.'s Br. 55-56). But the only question is whether the agency has justified withholding this particular document, regardless of whether it used similar language to justify withholding other documents. Indeed, "categorization and repetition provide efficient vehicles by which a court can review withholdings that implicate the same exemption for similar reasons." *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 147 (D.C. Cir. 2006). In addition, the Institute puzzlingly asserts that ICE's explanation that the Memo contains the "employee's opinions" is somehow insufficient to indicate that the Memo contains "personal opinions of the writer." (Pl.'s Br. 56). The Institute fails to explain what more ICE could have done to make that showing.

The Institute also speculates that the Foreign Policy Memo "likely" "explains existing agency policy, rather than recommendations from an inferior to a superior." (Pl.'s Br. 63). But the Institute again ignores the record: ICE attests that the Memo "supplies factors for consideration while providing analysis on whether the Secretary of State should use Section 212(a)(3)(C) Foreign Policy Charge to render an alien inadmissible under the INA," and provides the employee's "opinions" and supporting "notes." (JA 563). Accordingly, the Memo reveals the employee's personal opinions about what factors the Secretary of State should consider; it does not express the views of a decisionmaker or an authoritative description of "existing agency policy." (Pl.'s Br. 63). Nor does ICE "impl[y]" that the "deliberative process privilege [should] protect[ ] every expression of a government employee's opinion." (Pl.'s Br. 64). Rather, the agency has demonstrated that these particular opinions, expressed in an informal, undated, and unsigned draft document, were part of a deliberative process.[4]

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[4] The Institute also argues that ICE has not established there are no segregable disclosable portions of the Memo, speculating that ICE's withholding of the whole memo necessarily "suggests there may be reasonably segregable information that has been improperly withheld alongside purportedly privileged content." (Pl.'s Br. 57-59). But the Institute admits that the agency averred that it had conducted the necessary segregability review (JA 203, 568), and does not otherwise identify any specific deficiency. *See Porup v.*

Finally, the working law doctrine does not apply because there is no evidence that "the document binds agency officials or members of the public." *ACLU v. NSA*, 925 F.3d 576, 594 (2d Cir. 2019). The Institute makes no mention of the working law doctrine, thereby conceding that the Foreign Policy Memo is not subject to disclosure on that ground.

Accordingly, ICE logically and plausibly justified the application of Exemption 5's deliberative process privilege to the Foreign Policy Memo.

CIA, __ F.3d __, No. 20-5144, 2021 WL 2021615, at *11 (D.C. Cir. May 21, 2021) (sworn statements of line-by-line review are sufficient).

CONCLUSION

The judgment of the district court should be reversed.

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June 9, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 5040 words in this brief.

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