RECORD NO. 21-5113

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The
United States Court of Appeals
For The District of Columbia Circuit

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,

Plaintiff - Appellee,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant – Appellant,

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

BRIEF OF APPELLEE

Anne L. Weismann
5335 Wisconsin Avenue, NW, Suite 640
Washington, DC 20015
(301) 717-6610

Counsel for Appellee

Adam J. Rappaport
Conor M. Shaw
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON
1331 F Street, NW, Suite 900
Washington, DC 20004
(202) 408-5565

Counsel for Appellee

THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

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/ Anne L. Weismann
Counsel for Appellee

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Br.	Brief for Appellant
CREW	Citizens for Responsibility and Ethics in Washington
Department	Department of Justice
DOJ	Department of Justice
FOIA	Freedom of Information Act
OLC	Office of Legal Counsel

INTRODUCTION

On March 22, 2019, Special Counsel Robert S. Mueller delivered to Attorney General William P. Barr a report of his nearly two-year long investigation of Russian interference in the 2020 election and the efforts of President Donald Trump to obstruct that investigation. The second volume of the report chronicled the factual evidence of and legal foundation for the President's obstruction of justice. In the 48 hours after Special Counsel Mueller delivered the report, Attorney General Barr went to work to neutralize and undermine that evidence before making the report public. First, he sent a letter to Congress on March 24 significantly misrepresenting the Special Counsel's findings. Simultaneously, senior Department of Justice officials and the Office of Legal Counsel, working in lockstep with Attorney General Barr, drafted a memorandum for the Attorney General to give his pre-formed views on obstruction of justice an air of legitimacy. The Attorney General used both the letter and the memorandum to publicly exonerate President Trump by announcing that based on the exercise of his independent prosecutorial judgment he had concluded the Special Counsel's evidence was not sufficient to prosecute the President.

This case concerns a Freedom of Information Act request for that OLC Memorandum. The Department responded to the request by redacting key portions of the memorandum claiming they were protected by the deliberative process

privilege because the memorandum was created to help Attorney General Barr make a prosecutorial judgment. To the contrary, as the district court learned after reviewing the full memorandum *in camera*, this representation was patently false, and DOJ's redactions purposely misled the court as to the memorandum's true purpose.

Far from the product of a "prosecutorial" decisionmaking process, the OLC Memorandum provided advice on the separate, non-prosecutorial question of what the Attorney General should say publicly to dispel any negative inference the public might draw from the Special Counsel's damning obstruction-of-justice evidence. DOJ's refusal to acknowledge that the Attorney General was engaged in a public relations campaign—which would have exposed his misuse of his office to insulate the President from the Special Counsel's evidence—culminated in its misleading and bad faith conduct before the district court. Taken as a whole, the contents of the OLC Memorandum, the context in which it was created, the process by and timeline in which it was drafted, and the Department's bad faith in litigating its exemption claim all support the district court's conclusion that DOJ had not met its burden of demonstrating that the memorandum was subject to withholding under FOIA Exemption 5.

On appeal, DOJ has offered nothing to disturb this ruling. Instead, it attempts to recharacterize the arguments it made below to avoid any suggestion it

misled the court, and to raise new arguments that are both procedurally barred and futile in light of the ample record that supports the district court's application of settled FOIA law. The time has come to end this deception. The public deserves to know the role Attorney General Barr played in insulating President Trump from the consequences of his misconduct. As the district court properly concluded, it is "time for the public to see" this memorandum. JA233.

COUNTER STATEMENT OF THE ISSUE

Whether the district court correctly concluded that the Department of Justice had not met its burden of proving a memorandum the agency claimed was prepared to assist the Attorney General in making a prosecutorial judgment concerning whether the facts in Special Counsel Mueller's Report were sufficient to establish that President committed obstruction of justice was subject to the deliberative process privilege because it was drafted for an entirely different purpose, was postdecisional, and the Department misrepresented in bad faith the contents and purpose of the memorandum in its declarations and legal filings.

PERTINENT STATUTORY PROVISIONS

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

COUNTER STATEMENT OF THE CASE

A. Factual Background

In May 2017, Deputy Attorney General Rod J. Rosenstein appointed Robert S. Mueller as a Special Counsel to investigate "links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump," "any matters" arising from the investigation, and "any other matters within the scope of 28 C.F.R. § 600.4(a)," which authorizes a special counsel to investigate and prosecute among other things obstruction of justice. 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. Under the terms of the appointment, 28 C.F.R. §§ 600.4-600.10 governed the investigation. *Id.* The Deputy Attorney General explained in the accompanying press release that "a Special Counsel is necessary in order for the American people to have full confidence in the outcome." Press Release, U.S. Department of Justice Office of Public Affairs, Appointment of Special Counsel (May 17, 2017), https://tinyurl.com/t8tkmd39.

In February 2019, shortly before the Special Counsel completed his report, William Barr became attorney general. Prior to his appointment, Mr. Barr, on his own initiative, sent a 19-page letter to DOJ spelling out his criticism of "Mueller's 'Obstruction' Theory," which he characterized as premised on "a novel and legally

unsupportable reading of the law." Memorandum from Bill Barr to Deputy Attorney General Rod Rosenstein and Assistant Attorney General Steve Engel, Mueller's "Obstruction" Theory (June 8, 2018), https://tinyurl.com/ye4bh3ve.

On March 22, 2019, Special Counsel Mueller delivered to Attorney General Barr a 448-page, two-volume report of his investigation. *Report on the Investigation into Russian Interference in the 2016 Presidential Election*, https://www.justice.gov/archives/sco/file/1373816/download. The second volume detailed the Special Counsel's legal and evidentiary findings concerning President Trump's obstruction of justice. Bound by the Office of Legal Counsel's policy barring the indictment of a sitting president, the Special Counsel declined to reach a traditional prosecutorial judgment regarding the obstruction case against President Trump. The Special Counsel stated explicitly, however, that

> if we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state. Based on the facts and the applicable legal standards, however, we are unable to reach that judgment. The evidence we obtained about the President's actions and intent presents difficult issues that prevent us from conclusively determining that no criminal conduct occurred. Accordingly, while this report does not conclude that the President committed a crime, it also does not exonerate him.

Id., Vol. II, p. 2.

Emails produced to CREW in response to its FOIA request show that by the next morning Department officials, including Deputy Attorney General Rosenstein, already were working on a draft letter to Congress concerning the

Special Counsel report. JA126. Their work continued through the following day and by 2:09 p.m. on March 24, the letter was "Done." JA140-41. As to the memorandum they were simultaneously preparing, the group participants noted that they "presumably don't need to finalize that as soon." JA140.

On March 24, 2019, Attorney General Barr publicly released the three and one-half page letter he had sent that day to the chairs and ranking members of the House and Senate Judiciary Committees that claimed to summarize the Special Counsel's report ("March 24 Barr Letter") (https://go.usa.gov/xHwGX). As to the President's obstruction of justice, the letter states:

> [t]he 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 . . . 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.

Id. at 3. In his purported summary of the Special Counsel's Report, the Attorney General omitted any reference to a key statement in the Report that "if we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state." Further, while the Special Counsel's Report highlighted as a first principle that its considerations were guided by Department policy against indicting a sitting president, Report, Vol. 2, p. 1, Attorney General Barr's summary omitted any reference to the critical role that

policy played in the Special Counsel's consideration. Following the publication of this letter President Trump declared himself exonerated. JA231.

Special Counsel Mueller immediately expressed concern with the Attorney General's approach. Within days, he sent a letter to Attorney General Barr explaining the misleading nature of the Attorney General's letter and the fact that in their previous meetings on March 5 and March 24 the Special Counsel had informed the Attorney General that the "introductions and executive summaries of our two-volume report" "accurately summarize the Office's work and conclusions[.]" Special Counsel Mueller Letter to Attorney General Barr, March 27, 2019, https://tinyurl.com/78xursyp. Special Counsel Mueller noted that unlike those summaries and his report, "[t]he summary letter the Department sent to Congress and released to the public late in the afternoon of March 24 did not fully capture the context, nature, and substance of this Office's work and conclusions." JA232. As a result,

> [t]here is now public confusion about critical aspects of the results of our investigation . . . This threatens to undermine a central purpose for which the Department appointed the Special Counsel: to assure full public confidence in the outcome of the investigations.

Id.

On April 18, 2019, Attorney General Barr testified before Congress and held a press conference. In a statement issued that same day the Attorney General stated that as to the President's obstruction of justice:

> [a]fter carefully reviewing the facts and legal theories outlined in the report, and in consultation with the Office of Legal Counsel and other Department lawyers, the Deputy Attorney General and I concluded that the evidence developed by the Special Counsel is not sufficient to establish that the President committed an obstruction-of-justice offense.

U.S. Department of Justice, Attorney General William P. Barr Delivers Remarks on the Release of the Report on the Investigation into Russian Interference in the 2016 Presidential Election, Apr. 18, 2019, https://tinyurl.com/2v5twu8m.

Proceedings Below.

On April 18, 2019, CREW submitted an expedited FOIA request to the Office of Legal Counsel seeking "all documents pertaining to the views OLC provided Attorney General William Barr on whether the evidence developed by Special Counsel Robert Mueller is sufficient to establish that the President committed an obstruction-of-justice offense." JA63. After receiving no response, CREW filed this lawsuit on May 28, 2019.

Once in litigation DOJ produced 56 pages of records with redactions and withheld 195 pages in full. JA49, 72. It then moved for summary judgment arguing the withheld material fell within Exemption 5 as subject to both the deliberative process and attorney-client privileges. In support of its claims the Department submitted two declarations from Paul P. Colborn of the Office of Legal Counsel and one declaration from Vanessa R. Brinkmann of the Office of Information Policy. Ultimately CREW contested only two withholdings: (1) the March 24,

2019 Memorandum that is the subject of this appeal, and (2) an untitled memorandum shared with the Attorney General. JA106-07.

At the conclusion of the merits briefing and over DOJ's strong objection, JA200-02, the district court directed the agency to deliver to chambers the two contested documents for *in camera* inspection "[i]n order to assist the Court in making a responsible de novo determination[.]" Minute Order, Mar. 1, 2021. Following that review the court issued its opinion and order on May 3, 2021, requiring DOJ to disclose the OLC Memorandum but upholding the agency's reliance on the deliberative process privilege to withhold the untitled memorandum. JA264, 272. The court emphasized that its decision

> turns upon the application of well-settled legal principles to a unique set of circumstances that included the misleading and incomplete explanations offered by the agency, the contemporaneous materials in the record, and the variance between the Special Counsel's report and the Attorney General's summary.

JA263.

The Department moved for a stay pending appeal and simultaneously with its motion released additional portions of the OLC Memorandum, JA297-305, but continued to challenge the Court's ruling that the remainder of the document was not protected by the deliberative process privilege. The district court entered a stay pending appeal based on a finding of irreparable harm absent a stay. In explaining its conclusion that DOJ was not likely to succeed on the merits of its appeal, the

court detailed the record evidence supporting its challenged decision and highlighted that its ruling was "based on the fact that DOJ could not bring itself to tell the Court when it was supposed to what decision-making process was underway." JA338. The Court also pointed out the failure of the agency's stay motion to "dispute the legal proposition that the Court need not predicate a judgment in the agency's favor on inaccurate or incomplete declarations." *Id.*

SUMMARY OF ARGUMENT

The district court properly determined that the Department of Justice had not met its burden of proving that the OLC Memorandum is protected by the deliberative process privilege and exempt from compelled disclosure pursuant to FOIA Exemption 5.

First, contrary to DOJ's declarations submitted in support of its motion for summary judgment and the arguments it made from those declarations, the OLC Memorandum was not the product of a prosecutorial decisionmaking process. The district court's *in camera* review of the memorandum revealed that the first section in fact offered strategic, not legal advice, something the government "omitted entirely from its description of the document or the justification for its withholding," JA248, thereby failing to provide the "proper context" for the rest of the memorandum. *Id.* The *in camera* review also revealed that "the analysis set forth in the memo was expressly understood to be entirely hypothetical," JA249,

since both "the authors and recipient of the memo fully understood that any prosecution was legally barred," JA255. These critical facts, which the Department withheld from the court, completely undermined and contradicted its claim that the memorandum was exempt from disclosure because it was part of a prosecutorial decisionmaking process.

The context in which the memorandum was drafted also dictated this conclusion. The OLC Memorandum was part of a larger effort by Attorney General Barr to neutralize and undermine the overwhelming evidence in the Special Counsel's Report concerning the President's obstruction of justice, as the district court's *in camera* review confirmed. Viewed in its entirety the true purpose of the OLC Memorandum became clear: "getting a jump on public relations." JA253. At the time the memorandum was written, DOJ already had determined it would not prosecute the President, making the supposed "prosecutorial" decision the agency had identified in support of its privilege claim entirely hypothetical. JA248-49.

Second, DOJ failed to meet its burden of demonstrating that the OLC Memorandum, written by the same individuals simultaneously drafting the Attorney General's letter to Congress, was predecisional. Communications between senior Department officials that the agency released in response to the FOIA request at issue show that the memorandum was finalized *after* Attorney

General Barr sent and released publicly a letter to Congress reflecting the same assessment of the Special Counsel's evidence on the President's obstruction of justice. Further, according to those communications, the Attorney General and Deputy Attorney General were more than mere recipients of the memorandum; each played a major role in shaping its content. Based on this factual record the district court properly concluded that the memorandum was not predecisional as it was neither "generated before the adoption of an agency policy" nor "reflected the give-and-take of the consultative process" as the FOIA requires. *See Judicial Watch*, *Inc. v. Food & Drug Admin.*, 449 F.3d 141, 151 (D.C. Cir. 2006). Instead, the OLC Memorandum articulated DOJ's final, settled position, and as such, its disclosure does not imperil the interests that the deliberative process privilege is meant to protect.

Third, the district court properly rejected the agency's false and misleading declarations and its bad faith arguments based on those declarations. The Department's belated acknowledgment on appeal that its briefs were "less precise," and created "confusion" and "inadvertent misimpressions" fails to compensate for its actions below that "deliberately obscured" the fact that its so-called prosecutorial discussion was entirely hypothetical. JA249. Nor did DOJ "inform[] the Court that *whether* the Attorney General should offer a public opinion"—the memorandum's real purpose—"was even a subject of the memorandum." JA250.

Had the agency acknowledged that the actual purpose of the memorandum was not to provide prosecutorial advice but to fraudulently exonerate the President in an effort to undermine the Special Counsel's Report, it would have exposed that the Attorney General misused the power of his office to advance the President's personal and political interests to the detriment of the interests of the American people. Accordingly, the district court properly concluded that DOJ's declarations were "so inconsistent with evidence in the record, they are not worthy of credence." JA255.

Fourth, the Department's *post hoc* arguments made for the first time on appeal cannot substitute for its failure to carry its burden of proof in the district court. DOJ now attempts to redefine the "decisional process" as the consideration by the Attorney General of whether the Special Counsel's obstruction-of-justice evidence suffices under the Principles of Federal Prosecution. This articulation, however, merely recites the question posed to the authors of the memorandum without identifying or explaining the decision-making process to which that question was pertinent. DOJ also acknowledges for the first time on appeal that the memorandum was prepared to help the Attorney General decide what to communicate to the public and Congress about the Special Counsel's evidence. Having "made a strategic decision to pretend as if the first portion of the memorandum was not there and to avoid acknowledging that what the writers were

actually discussion was how to neutralize the impact of the Report in the court of public opinion" in the district court, JA250, DOJ's counsel cannot now override that decision with its own untimely *post hoc* explanation.

Fifth, the district court did not abuse its discretion by not *sua sponte* granting DOJ the opportunity to submit additional declarations before ruling on the parties' cross-motions for summary judgment. The burden fell on the agency, not the district court, to bring to the court's attention any additional evidence in support of its arguments or to correct any mistakes in its filings. Once the court ruled on the parties' cross-motions for summary judgment, DOJ could have filed a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e), or a motion for relief from the court's judgment pursuant to Fed. R. Civ. P. 60(b). Yet it pursued none of these options and now faults the district court for failing, on its own initiative, to offer the agency the opportunity to submit additional declarations.

The Department's criticisms of the district court rest on a fundamental misunderstanding of the nature of the discretion the district court enjoyed and the burden of proof that the agency must meet under the FOIA to justify withholding any portion of requested records. The district court acted well within its discretion when it concluded that the OLC Memorandum must be disclosed based on the multiple briefs the parties filed, the multiple declarations DOJ submitted in support of its arguments, and the *in camera* review that revealed the inaccuracies,

misstatements, and ultimately bad faith of the government. DOJ has provided no basis to upset or overturn that ruling.

STANDARD OF REVIEW

This Court "review[s] *de novo* a district court's decision on summary judgment in a FOIA case." *Reporters Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 361 (D.C. Cir. 2021) ("*Reporters Committee*"). The decision whether to perform *in camera* inspection is left to the "broad discretion of the trial court judge," *Lam Lek Chong v. U.S. Drug Enf't Admin.*, 929 F.2d 729, 735 (D.C. Cir. 1991) and is reviewed for abuse of discretion. *Spirko v. U.S. Postal Serv.*, 147 F.3d 992, 996 (D.C. Cir. 1998) ("[W]e review the district court's decision to inspect the documents in camera only for abuse of discretion.").

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE DEPARTMENT OF JUSTICE FAILED TO MEET ITS BURDEN OF SHOWING THE OLC MEMORANDUM WAS PROTECTED BY THE DELIBERATIVE PROCESS PRIVILEGE.

A. The Department Of Justice Bears The Burden Of Proving The OLC Memorandum Is Deliberative And Predecisional.

1. Standards Governing FOIA Cases.

FOIA cases differ from the typical administrative review cases not only because the court exercises *de novo* review under the express language of the statute, 5 U.S.C. § 552(a)(4)(B), but also because the government bears the burden of proving that an asserted exemption applies. *Id.*; *Reporters Committee*, 3 F.4th at 361. Courts typically decide FOIA cases on summary judgment, which a court may grant for the government "only if [it] detect[s] no genuine issue of material fact as to an exemption's applicability." *Id.* (citing *Pavement Coatings Tech. Council v. U.S. Geological Survey*, 995 F.3d 1014, 1020 (D.C. Cir. 2021)). Stated differently, because the FOIA "reflects a general philosophy of full agency disclosure," *Dep't of Defense v. FLRA*, 510 U.S. 487, 494 (1994) (internal quotations omitted), an agency's failure to meet its burden of proof properly results in a disclosure order. *See Judicial Watch*, *Inc. v. U.S. Secret Service*, 726 F.3d 208, 214-15 (D.C. Cir. 2013) (FOIA "grants federal district courts jurisdiction 'to order the production of

any *agency records* improperly withheld from the complainant.'") (quoting 5 U.S.C. § 552(a)(4)(B)).

In determining whether to grant summary judgment for the agency, a court properly may rely on agency declarations, but only when those declarations "are not called into question by contradictory evidence in the record or by evidence of bad faith." *Id.* at 215 (quoting *Consumer Fed. of Am. v. Dep't of Agric.*, 455 F.3d 283, 287 (D.C. Cir. 2006)). *See also Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009) (court may grant summary judgment only where agency submissions "describe the justification for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith."). Recognizing that "those who contest denials of FOIA requests . . . are, necessarily, at a disadvantage because they have not seen the withheld documents," this Court has stressed the need for the agency's evidence in support of its exemption claims to be "accurate in every detail," cautioning "[t]here is no excuse for submitting a *Vaughn* index that contains errors, even minor ones. We expect agencies to ensure that their submissions in FOIA cases are absolutely accurate." *Schiller v. NLRB*, 964 F.2d 1205, 1209 (D.C. Cir. 1992). *See also Am. Immigr. Council v. U.S. Dep't of Homeland Sec.*, 905 F. Supp. 2d 206, 217 (D.D.C. 2012) (same).

The FOIA also authorizes courts, in their discretion, to "examine the contents of [the withheld records] in camera to determine whether such records or any part thereof shall be withheld under any of the [FOIA's] exemptions[.]" 5 U.S.C. § 552(a)(4)(B). But such review "'is not a substitute for the government's obligation to justify its withholding in publicly available and debatable documents[.]" *Schiller*, 974 F.2d at 1209 (quoting *Lykins v. U.S. Dep't of Justice*, 725 F.2d 1455, 1463 (D.C. Cir. 1984)). Where a court's *in camera* review exposes that the asserted exemptions do not apply, courts can properly reject the exemption claims, *id.* at 1209, and order disclosure, *Am. Immigr. Council*, 905 F. Supp. 2d at 218-19.

2. Proof Requirements to Justify Withholding Under the Deliberative Process Privilege.

As the Supreme Court has explained, "the core purpose" of the FOIA is to increase "public understanding *of the operations or activities of the government*." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989) (internal quotation omitted). Further, "[c]onsistent with the Act's goal of broad disclosure," the FOIA's nine exemptions "consistently have been given a narrow compass," *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989), and the underlying facts "viewed in the light most favorable to the requester," *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1350 (D.C. Cir. 1983). *See also Milner v. U.S. Dep't of Navy*, 562 U.S. 562, 565 (2011).

To properly assert the deliberative process privilege under Exemption 5, the government must show that the document in question is both predecisional and deliberative. *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). *See also Formaldehyde Inst. v. Dep't of Health & Hum. Servs.*, 889 F.2d 1118, 1121 (D.C. Cir. 1989) (A document that is predecisional but not "part of the deliberative process" falls outside "the confines of Exemption 5."). Critically, the court "must be able 'to pinpoint an agency decision or policy to which the document contributed.'" *Senate Comm. of P.R. v. U.S. Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987) (quoting *Paisley v. CIA*, 712 F.2d 686, 698 (D.C. Cir. 1983)). "If there is no definable decisionmaking process that results in a final agency decision, then the documents are not pre-decisional." *Paisley*, 712 F.2d at 698. A document's status as predecisional, standing alone, will not satisfy the privilege's requirements; it "must also be part of the deliberative process by which a decision is made." *Taxation With Representation Fund v. IRS*, 646 F. 2d 666, 678 (D.C. Cir. 1981) (citations omitted).

Courts also consider "the nature of the decisionmaking authority vested in the officer or person issuing the disputed document," *Senate Comm. of P.R.*, 823 F.2d at 586 (citation and quotation omitted) and judge a document's finality by the "action taken by the responsible decisionmaker in an agency's decision-making process[.]" *Rockwell Int'l Corp. v. U.S. Dep't of Justice*, 235 F.3d 598, 602 (D.C.

Cir. 2001). As DOJ notes, the privilege can apply even if no final decision is made, Br. at 25 (quoting *Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1196 (D.C. Cir. 1991)), but its application still requires the agency to identify a specific decision-making process to which the documents relate. *Senate Comm. of P.R.*, 823 F.2d at 585.

B. The Department Of Justice Failed To Establish That The OLC Memorandum Was Part Of A Prosecutorial Decisionmaking Process.

Applying this well-established caselaw it is clear DOJ fell far short of meeting its evidentiary burden. While the agency purported to "pinpoint" a specific "prosecutorial" decisionmaking process to which the OLC Memorandum contributed, *Senate Comm. of P.R.*, 823 F.2d at 585, the factual record reveals that the memorandum was actually created for an entirely different purpose. Accordingly, the district court correctly concluded based on its *in camera* review, the timeline in which the memorandum was developed, and the context in which the Department prepared the memorandum that although the OLC Memorandum "is largely deliberative," it is not "'predecisional,' because 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." JA246.

Taken as a whole and contrary to DOJ's newly minted claims on appeal, the Department's declarations, legal arguments, and failure to contest CREW's characterization of the memorandum left no doubt that the agency was claiming that the OLC Memorandum was exempt from disclosure as part of a decisionmaking process on whether to prosecute the President for obstruction of justice. First, the agency's declarations expressly misdirected the Court to a supposed prosecutorial decisionmaking process that underlay the memorandum. Specifically, as the district court explained, Paul Colborn's First Declaration describes the purpose of the OLC Memorandum as follows:

> **it 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**."

JA246 (citation omitted). Vanessa Brinkman's Declaration provides a similar description of the memorandum's purpose as "provided to aid in the Attorney General's decision-making process" related to the "legal question" left unresolved by the Special Counsel's Report, specifically the "determination as to whether the President committed an obstruction-of-justice offense[.]" JA78. The language and context of both declarations left the clear impression that the memorandum was prepared to advise the Attorney General on whether to prosecute the President for obstruction of justice. This impression, however, is decidedly false; the

memorandum was created for the entirely different purpose of advising the Attorney General how to spin the obstruction-of-justice evidence to protect the President. *See* JA253.

Second, DOJ's briefs advanced and expanded upon these misleading declarations by explaining that the memorandum contained "prosecutorial advice," JA20, and "prosecutorial analysis," *id.*; describing the withheld information as reflecting "Prosecutorial Deliberations," JA29, and "prosecutorial recommendations to the Attorney General," JA32; characterizing the dispute between the parties as whether the Attorney General was involved in a "prosecutorial decision-making process," JA183; and arguing for the Attorney General's "ultimate authority to otherwise institute or decline a prosecution," JA187. The mere use of the word "prosecution" conveyed that the Attorney General was considering whether to prosecute the President. *See Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/prosecution (defining prosecution as "the institution and continuance of a criminal suit involving the process of pursuing formal charges against an offender to final judgment"). The Department also cited in support caselaw that "deliberations about whether to pursue prosecution are generally protected by the deliberative process privilege," JA34, clearly conveying that the deliberations at issue concerned whether to prosecute the President.

Not only were these legal and factual arguments inaccurate, but CREW in its briefs directly challenged their accuracy—a challenge that DOJ failed to refute. For example, CREW argued that far from "provid[ing] legal advice to aid Attorney General Barr in deciding whether to bring a prosecution," "the memorandum served to help the Attorney General falsely spin the findings of Special Counsel Mueller into a vindication of President Trump and to sow doubt about and undermine the findings of the Special Counsel." JA100. CREW disputed the power of the Attorney General to make a prosecutorial decision *vis-à-vis* the President and his obstruction of justice given DOJ regulations governing special counsel investigations, JA111, and argued that "OLC's views 'on the legal question of whether the evidence developed by Special Counsel Mueller was sufficient to establish that the President committed an obstruction of justice offense,' . . . were submitted in a vacuum and *were not pertinent to any prosecutorial decision*[.]" JA110 (quotation omitted) (emphasis added).

The Department took issue with CREW's claim that the Attorney General lacked the authority to make a prosecutorial decision with respect to the President, insisting there were no "limitations or obligations . . . triggered as to a prosecutorial decision or action regarding the President[.]" JA187. At *no* time, however, did DOJ state that the Attorney General was not making a decision on whether or not to prosecute the President, despite have multiple opportunities to do

so at multiple stages before the district court. Indeed, the agency criticized CREW for failing to offer "evidence that the Attorney General actually made his own final *prosecutorial determination* before receiving and considering the advice contained within the withheld material," JA184-85 (emphasis added), reflecting a clear understanding of the issue as CREW had framed it.

Third, the district court's *in camera* review confirmed not only that the Attorney General was not making the prosecutorial decision that the Department had described but also that the declarants and litigators had deliberately obscured the fact that the agency's so-called prosecutorial discussion was "entirely hypothetical." JA249. That review showed that the first section of the OLC Memorandum "offers strategic, as opposed to legal advice, about whether the Attorney General should take a particular course of action." JA248. DOJ, however, "omitted [this subject] entirely from its description of the document or the justification for its withholding." *Id.* Not only did this omission mislead the court, it also was "a problem because Section I is what places Section II and the only topic the agency does identify—that is, whether the evidence gathered by the Special Counsel would amount to obstruction of justice—into its proper context." *Id.*

The *in camera* review also revealed there was a "shared understanding" between the memorandum's authors and the Attorney General about "whether

prosecuting the President was a matter to be considered at all," specifically "the fact that he would not be prosecuted was a given." *Id.* This was made manifest by the authors' statement that "*were there no constitutional barrier*, we would recommend . . . that you decline to commence such a prosecution." JA249. As a result, "the analysis set forth in the memo was expressly understood to be entirely hypothetical[.]" *Id.* Yet DOJ redacted these "critical caveats," *id.*, that provided necessary context to understand the memorandum's true purpose.

Significantly, the Department "strongly resisted" *in camera* review, JA252, a resistance that makes sense considering that it was this process that exposed the agency's duplicity and the memorandum's true purpose. Thus exposed, DOJ is now left to argue that notwithstanding what the *in camera* review revealed, the court should not have ordered the disclosure of a "self-evidently privileged document[.]" Br. at 40. But far from confirming the privileged nature of the memorandum, the *in camera* review revealed that "Attorney General Barr had a completely different reason for opining on the subject, and the redacted information reveals that the authors and recipient of the memo fully understood that any prosecution was legally barred." JA255. Based on the record before it the court properly concluded "that the agency has fallen far short of meeting its burden to show that the memorandum was 'prepared in order to assist an agency

decisionmaker in arriving at his decision.'" JA249 (quoting *Formaldehyde Inst.*, 889 F.2d at 1122).

On appeal the Department attempts to blunt the devastating impact of the Court's *in camera* review by miscasting it as a lens the district court used "through which to appraise the government's declarations, as opposed to a basis on which to evaluate the privileged status of the memorandum." Br. at 41. This is categorically false. The court explained in detail how its *in camera* review revealed the substantive content and purpose of the memorandum, specifically that "the Attorney General was *not* then engaged in making a decision about whether the President should be charged with obstruction of justice[.]" JA248. In other words, the *in camera* review revealed *facts* that undermined the government's arguments and that formed the "factual basis for its decision." Br. at 41 (quoting *City of Virginia Beach v. U.S. Dep't of Commerce*, 995 F.2d 1247, 1252 n.12 (4th Cir. 1993)).

Fourth, the district court also appropriately considered the context in which the OLC Memorandum was drafted, which undermined DOJ's claim that the memorandum is predecisional. That context includes the fact that two days after receiving the Special Counsel's Report the Attorney General sent a letter to Congress that condensed "into less than four pages" "the almost 200 . . . detailed pages of Volume II" concerning the evidence of the President's obstruction of

justice, which "he'd hardly had time to skim, much less, study closely[.]" JA230-31. The inaccuracies in this letter also prompted a rare public response from the Special Counsel, who told the Attorney General he was concerned with the "public confusion about critical aspects of the results of our investigation" that the Attorney General's letter had caused and that "threatens to undermine a central purpose" of his investigation: "to assure full public confidence in [its] outcome[.]" JA232.

That the Attorney General was attempting to negate the public impact of the Special Counsel's Report was also highlighted by another court's conclusion that after reviewing "'the redacted version of the Mueller Report . . . Attorney General Barr distorted the findings in the Mueller Report.'" JA252 (quoting *Elec. Privacy Info. Ctr. v. U.S. Dep't of Justice*, 442 F. Supp. 3d 37, 49 (D.D.C. 2020) ("*EPIC*")). Examining the substantially similar circumstances, the *EPIC* court observed:

> The speed by which Attorney General Barr released to the public the summary of Special Counsel Mueller's principal conclusions, coupled with the fact that Attorney General Barr failed to provide a thorough representation of the findings set forth in the Mueller Report, causes the Court to question whether 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. See also id. at 50 (inconsistencies between Attorney General's statements and the Special Counsel's Report itself "cause the Court to seriously question whether

Attorney General Barr made a calculated attempt to influence public discourse about the Mueller Report in favor of President Trump").

The portions of the OLC Memorandum that DOJ has now made public reinforce this conclusion as they reveal that far from starting from a position of neutrality in evaluating the evidence of the President's obstruction of justice, the agency was concerned that the failure of the Special Counsel to reach a charging decision "might be read to imply such an accusation if the confidential report were released to the public." JA298. In other words, DOJ sought to dispel even a hint that the President was guilty of obstruction of justice notwithstanding substantial evidence to the contrary.

In sum, the Department of Justice falsely asserted that the memorandum pertained to a prosecutorial decisionmaking process, when in fact it advised the Attorney General on how to publicly spin the Special Counsel's obstruction-of-justice evidence. Accordingly, this Court should affirm the district court's grant of summary judgment to CREW with respect to the OLC Memorandum.

C. The Department Of Justice Failed To Meet Its Burden Of Demonstrating That The OLC Memorandum Was Predecisional.

The district court also correctly determined that DOJ failed to meet its burden of demonstrating that the OLC Memorandum was predecisional. Three separate grounds support that determination. First, communications between senior Department officials showed that the memorandum was finalized *after* Attorney

General Barr released his misleading summary of the Special Counsel's Report to Congress, *see* JA255-57, 266-71. Second, the letter and the memorandum were "being written by the very same people at the very same time." JA257. Third, the putative "authors and the recipients of the memorandum [were] working hand in hand to craft the advice that is supposedly being delivered by OLC." JA257. From this evidence the district court correctly concluded that the memorandum was not "generated before the adoption of an agency policy" nor did it "reflect[] the give-and-take of the consultative process," *Judicial Watch*, *Inc. v. Food & Drug Admin.*, 449 F.3d 141, 151 (D.C. Cir. 2006) (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)), a finding this Court should affirm.

A recent decision from this Court confirms that a "document is predecisional if it was 'generated before the agency's final decision on the matter[.]'" *Reporters Committee*, 3 F.4th at 362 (quoting *Coastal States*, 617 F.2d at 866). The Supreme Court also has recently confirmed that "[d]ocuments are 'predecisional' if they were generated before the agency's final decision on the matter." *United States Fish & Wildlife Serv. v. Sierra Club*, *Inc.*, 141 S. Ct. 777, 786 (2021).

Here the district court correctly applied this principle to hold that the OLC Memorandum was not predecisional based on its review of the chronology of emails transmitted between the authors of both Attorney General Barr's letter to Congress and the OLC Memorandum that they were preparing in tandem to

address the Special Counsel's evidence on the President's obstruction of justice. JA256-58. The record shows that the Attorney General's letter was finalized just before 5:00 pm on March 24, 2019, JA257, 271, and the memorandum was finalized the following day, March 25, 2019, just before 9:00 am. JA260, 271.[1] The court also pointed to evidence that the decision to finalize the letter before the memorandum was no accident. At 2:18 pm on March 24, Assistant Attorney General Engel circulated a draft of the memorandum and wrote in the text of the email, "OK. here's the latest memo, btw, although we presumably don't need to finalize that as soon." JA269. The drafters of both documents intended to complete the letter first and the memorandum second, and that is precisely what they did. Because the letter set forth the Department's final word on the sitting President's obstruction of justice and the memorandum was completed after the letter, the memorandum could not qualify as a predecisional record.

In its analysis, the district court also followed this Court's instruction to scrutinize who drafted the withheld document. The D.C. Circuit explained in *Coastal States* that:

> [t]he identity of the parties to the memorandum is important; a document from a subordinate to a superior official is more likely to be predecisional, while a document moving in the opposite direction is more likely to contain instructions to staff explaining the reasons for a decision already made.

[1] One typo—an error in the year on the date of the memorandum—was corrected later on the morning of March 25, 2019. JA271.

617 F.2d 854, 868. While this Court emphasized recently in *Reporters Committee* that a record does not fall outside of the protection of the deliberative process privilege simply because a superior gives direction to a subordinate, it reaffirmed the notion that application of the privilege is more tenuous where there is evidence that a superior is "providing any sort of direction or explaining the basis for a final decision to his subordinates[.]" 3 F.4th at 364.

In accordance with *Coastal States*, 617 F.2d at 868, the district court here made two observations that support its decision. First, it noted that the individuals drafting Attorney General Barr's letter to Congress and the OLC Memorandum were the same. JA257. That the letter and the memorandum were drafted by the same individuals working in tandem and that the letter communicated the Attorney General's final word on the same matter reinforce the conclusion that the memorandum—just like the letter—"communicate[d] the agency's settled position[.]" *Sierra Club*, *Inc.*, 141 S. Ct. at 786.

Second, the email correspondence capturing the editing process demonstrates that the Attorney General and Deputy Attorney General were not mere recipients of the memorandum; each shaped its content. Although the memorandum purports to be from "Stephen A. Engel, Assistant Attorney General, Office of Legal Counsel" and "Edward C. O'Callaghan, Principal Associate Deputy Attorney General" and through "The DEPUTY ATTORNEY GENERAL"

(Rod Rosenstein), both Deputy Attorney General Rosenstein and Attorney General Barr's Chief of Staff Brian C. Rabitt commented on a draft version of the memorandum and circulated the final copy on March 25, 2019. JA268, 271. The correspondence also indicates that Chief of Staff Rabitt, Attorney General Barr, and others were working together in person, which suggests the OLC Memorandum may reflect the views of the Attorney General himself. *See* JA266 ("The AG and I plan to be here tomorrow"); JA266 ("The AG, Steve and I are here"); and JA267 ("Great. We're working in the AG's conference room"). Deputy Attorney General Rosenstein's participation in the drafting also is noteworthy because he shared the Attorney General's views on the President's obstruction set forth in the March 24, 2019 letter to Congress. *See* Attorney General Barr Letter to Chairs of House and Senate Judiciary Committees (representing that both the Attorney General and the Deputy Attorney General "have concluded that the evidence developed during the Special Counsel investigation is not sufficient to establish that the President committed an obstruction-of-justice offense").

This correspondence substantiates the district court's conclusion that "the authors and the recipients of the memorandum [were] working hand in hand to craft the advice that is supposedly being delivered by OLC," JA257, specifically the Attorney General's opinion on the Special Counsel's evidence concerning the President's obstruction of justice. The fact that the opinions expressed in drafts of

the memorandum were shared with senior Department leadership rather than simply passing from a subordinate office to the Attorney General buttresses the district court's conclusion that the memorandum was not predecisional. *See Coastal States*, 617 F.2d at 868.

On appeal, DOJ attempts to cast the memorandum in a new light that ignores the evidence of record. While it is true that "[d]ates are but one way to illustrate a chronology," *Judicial Watch*, *Inc. v. Food & Drug Admin.*, 449 F.3d 141, 151 (D.C. Cir. 2006), the Department failed to offer any evidence that undercuts or calls into question the chronology established by the record on which the district court relied. The First Coburn Declaration merely contains boilerplate language stating that the memorandum was predecisional because it "was provided prior to the Attorney General's decision on the matter," JA53, an assertion the contemporaneous emails discussed above squarely disprove. *See* JA266-71. While it is also true that *draft versions* of the OLC Memorandum were circulated among the authors prior to the submission of the Attorney General's letter to Congress, the question of whether those drafts were predecisional was not at issue in the district court nor is it at issue on appeal. Instead, the only question is whether the final version of the memorandum was predecisional.

The Second Coburn Declaration does little to change the matter. DOJ points to it as evidence that the Attorney General "'had received the *substance of the*

advice contained in' the memorandum before 'making his decision and sending the letter.'" Br. at 46 (quoting JA207-08) (emphasis added). But the problem with this logic is the same: the government bears the burden of justifying its decision to withhold the final version of the memorandum, not draft versions that the Attorney General may have received prior to issuing his letter to Congress. Simply put, the record lacks any evidence contradicting the fact that the OLC Memorandum, which is the only document at issue, was finalized and provided to Attorney General Barr *after* the transmission of his letter to the chairs and ranking members of the House and Senate Judiciary Committees.

In an effort to overcome these fatal factual deficiencies in the record, the Department quotes out of context passages from two Supreme Court decisions implying they support the government's position, but neither does. The government repeatedly invokes the phrase "ingredients of the decisionmaking process," used by the Court in *NLRB v. Sears*, *Roebuck & Co.*, 421 U.S. 132, 151 (1975) ("*Sears*"), to imply that whether a record contains those ingredients is the key to determining whether it is predecisional. *See*, *e.g.*, Br. at 22 ("Predecisional documents are those that memorialize the ingredients of the decisionmaking process as opposed to communicating the agency's settled position.") (internal citations omitted). *See also id.* at 5, 45-48.

While the Court in *Sears* acknowledged that "the line between pre-decisional documents and postdecisional documents may not always be a bright one," 421 U.S. at 152 n.19, it explained that "final opinions are pr[i]marily postdecisional—looking back on and explaining, as they do, a decision already reached or a policy already adopted[.]" *Id.* As such, they pose "a negligible risk of denying to agency decisionmakers the uninhibited advice which is so important to agency decision," *id*.—the underlying purpose that the deliberative process privilege protects—but are at the same time subject to an "increased public interest" because "the public is vitally concerned with the reasons which did supply the basis for agency policy actually adopted," *id*. at 152.

Sears's articulation of the principles underpinning the distinction between predecisional and postdecisional records supports the district court's ruling that the memorandum at issue here was not predecisional. Attorney General Barr's letter to Congress articulated the agency's final action with respect to the sufficiency of the Special Counsel's evidence on the President's obstruction of justice, albeit untethered from any actual prosecution decision. The OLC Memorandum succeeded that letter and, like the letter, was nothing more than an effort to "get[] a jump on public relations." JA253. Under the reasoning of *Sears*, because the memorandum merely memorialized an after-the-fact basis for the opinion Attorney General Barr already had expressed in his letter to Congress, its disclosure poses at

most a negligible risk of denying to agency decisionmakers uninhibited advice. At the same time, as *Sears* recognizes, the public interest in the disclosure of this postdecisional document is heightened—a point that cannot be overstated in this particular context. It is hard to imagine a memorandum of greater public interest than one purporting to substantiate a false and misleading exoneration of the President of the United States issued by the Attorney General while DOJ was simultaneously withholding from public scrutiny the report of the Special Counsel who had actually investigated, chronicled, and summarized the President's repeated efforts to obstruct justice.

The Department also relies on *Sierra Club*, *Inc.*, which similarly provides no support for its arguments. There the Supreme Court held that draft opinions created by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service in response to a proposed EPA rule were predecisional records subject to the deliberative process privilege even though the EPA had amended its proposed rule and the other agencies ultimately offered different, final opinions with respect to the EPA's amended rule. 141 S. Ct. at 783-89. The Court recited the black letter proposition that the deliberative process privilege "distinguishes between predecisional, deliberative documents, which are exempt from disclosure, and documents reflecting a final agency decision and the reasons supporting it, which are not." *Id.* at 785–86. Citing *Sears*, the Court reiterated that "[d]ocuments 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." *Id.* at 786. In ruling that the draft opinions were predecisional, the Court relied on the fact that the agency had labeled them "drafts," *id.* at 786; functionally they were "drafts of drafts," *id.* at 788; they were "prepared by lower-level staff and sent to the Services' decisionmakers for approval," *id. at 788*; and they were created four months prior to the release of the agencies' final opinions. *Id.* at 784.

The records at issue in *Sierra Club*, *Inc.*, could not differ more from the memorandum at issue here. The OLC Memorandum was not described by the agency as a draft. To the contrary, its markings, which include the initials of the purported author and recipient, indicate that it was a final copy. JA297, 305. The memorandum was drafted collaboratively by senior agency officials including representatives of the two highest offices in the Department. JA266-71. And, as discussed above, the memorandum was issued after the agency action that it purported to discuss. JA271. In sum, *Sierra Club*, *Inc.*, supports not undermines the district court's conclusion that the OLC Memorandum was not a predecisional document but rather an articulation of the agency's final, settled position.

Finally, while DOJ correctly notes that "advice can remain predecisional even where it is given in support of an anticipated decision," Br. at 48, that again

misses the mark because here a decision was not *anticipated*—it *already had been made*. Attorney General Barr had already issued his misleading summary of the Special Counsel's Report in a letter to Congress when the final draft of the memorandum was created. JA271.

Because the OLC Memorandum was finalized after Attorney General Barr's letter to Congress, drafted by the same people who contributed to the letter, and advocated an agency position that already had been adopted, the district court correctly concluded that it was not predecisional. *See Sears*, 421 U.S. at 152; *Judicial Watch*, *Inc.*, 449 F.3d at 151; *Coastal States*, 617 F.2d at 866. This court should affirm that ruling.

D. The District Court Properly Rejected The Department of Justice's Misleading Declarations And Its Bad Faith Arguments Based On Those Declarations.

The district court also correctly decided not to rely on DOJ's declarations and legal arguments that misled the court in falsely describing the purpose and substance of the OLC Memorandum as in aid of the Attorney General's prosecutorial decisionmaking. *See* JA250-55. In the context of FOIA litigation, agency submissions must be accurate "to permit adequate adversary testing of the agency's claimed right to an exemption." JA238 (quotation and citation omitted). This Court has confirmed on multiple occasions that a court may properly reject an agency declaration that is "called into question by contradictory evidence in the

record or by evidence of agency bad faith." *Judicial Watch*, *Inc. v. U.S. Secret Service*, 726 F.3d at 215.

Adherence to this rule is critical because a fundamental asymmetry lies at the core of all FOIA litigation: the withholding agency has exclusive access to all the relevant facts, leaving both the plaintiff and the courts at the mercy of the agency's declarations. That is why this Court has stressed the need for the agency's proof to be "accurate in every detail," recognizing that where agency declarations do not meet this requirement they properly may be discounted. *Schiller v. NLRB*, 964 F.2d at 1209. Further, when confronted with "evidence of bad faith on the part of the agency" *in camera* review—like that conducted here—"may be particularly appropriate [.]" *Quinon v. F.B.I.*, 86 F.3d 1222, 1228 (D.C. Cir. 1996).

In this case, the district court found DOJ's declarations to be not only inaccurate but "so inconsistent with evidence in the record, they are not worthy of credence" by suggesting that "it fell to the Attorney General to make a prosecution decision or that any such decision was on the table at any time." JA255. The court's *in camera* review revealed direct and fundamental contradictions between the actual content and purpose of the OLC Memorandum and the descriptions the agency declarants offered. *See*, *e.g.*, JA337. Further, DOJ lawyers—who had access to the fully unredacted document—relied on those misstatements and inaccuracies to advance legal arguments that lacked a factual basis on fact, all of

which led the court properly to conclude that the Department had acted in bad faith. JA254.

Confronted with its misstatements and litigation choices, DOJ has belatedly expressed regret. For example, its stay motion notes its regret that certain "passages" in its brief were not clearer, JA291, and concedes its briefs were "susceptible to an interpretation that the Attorney General was considering whether a prosecution or indictment of the sitting President should actually be commenced." JA290. The Department has expressed similar sentiments on appeal, Br. at 35 ("Certain statements in the government's reply brief were less precise in characterizing the Attorney General's decisional process"), Br. at 36 (recognizing "confusion" in its reply brief), and acknowledged that "it would have been preferable to have described the two preliminary paragraphs in its declarations[.]" Br. at 38. But tellingly DOJ has made no effort to correct its false and misleading statements, has offered no new evidence to support its claimed underlying intentions, and even more remarkably has chosen instead to blame the district court for the agency's repeated failure to accurately describe a document that was solely in its possession. *See*, *e.g.*, Br. at 5 (chastising the district court for imposing "in effect, a sanction—and an improper one"), 44 (same).

The record before the district court supports its conclusions on all fronts. DOJ redacted key portions of the OLC Memorandum that provided the necessary context for the memorandum as a whole and "deliberately obscured" the fact that the so-called "prosecutorial discussion" was entirely hypothetical. JA249. Moreover, neither DOJ declarant "informed the Court that whether the Attorney General should offer a public opinion was even a subject of the memorandum." JA250. To bolster the value of the Principal Associate Deputy Attorney General's "candid prosecutorial recommendations to the Attorney General" that the memorandum purportedly expressed, DOJ's brief added a "flourish . . . that did not come from either declaration" specifically his purported involvement "in supervising the Special Counsel's investigation and related prosecutorial decisions[.]" *Id.* The district court correctly questioned why such a misleading (and unsupported) fact was even included in the Department's arguments. JA253. Taken as a whole, these critical omissions and misleading statements that the agency offered to meet its burden of proof support the district court's assessment that the agency had "obfuscate[d] the true purpose of the memorandum[.]" JA255.

Nor was the district court confused as DOJ has suggested. JA282. In its order granting the request for a stay pending appeal, the court explained,

> The Court did not rule as it did because the declarations were "confus[ing];" it found the declarations and the justifications in the agency's pleadings for invoking Exemption 5 to be misleading. The Department chose not to tell the Court the purpose of the

> memorandum or subject it addressed *at all*, and no amount of apologizing for "imprecision" in the language it did use can cure the impact of that fundamental omission.

JA335 (emphasis in original) (fn. omitted).

Despite the clear, misleading nature of the government's submissions to the district court, DOJ now insists that at most they represent "inadvertent misimpressions" and should have been construed "in light of the Department's longstanding, publicly known position on the constitutional barrier to prosecution of a sitting President[.]" Br. at 19. But it fell to the Department, which alone bears the burden of proving it has met every element of its asserted exemption claims, to raise this point in the district court. Not only did it fail to do so, but it also took additional affirmative steps to mislead the court, such as redacting the portions of the memorandum that referenced and discussed this policy, and it misleadingly failed to acknowledge to the district court the true role this policy played in its deliberations. *See*, *e.g.*, JA248, 249, 255. By hiding the agency's internal acknowledgment of the impact of its position on prosecuting a sitting president, DOJ created a false narrative about the Special Counsel's findings concerning the President's obstruction of justice and hid the memorandum's true purpose: helping the Attorney General blunt and neutralize the Special Counsel's damning report.

Moreover, the letter that the Attorney General sent to Congress expressly disavowed relying on Department policy on prosecuting a sitting president.

According to that letter, his decision that the Special Counsel's evidence does not "establish that the President committed an obstruction-of-justice offense . . . *was made without regard to*, *and is not based on*, *the constitutional considerations that surround the indictment and criminal prosecution of a sitting president*." March 24 Barr Letter (emphasis added). Having publicly disavowed any reliance on DOJ's longstanding position on indicting a sitting president the agency cannot validly claim now that this policy, although unstated in its submissions, should have dispelled any suggestion that it acted in bad faith or submitted misleading declarations.

The Department's self-serving claim that it had no reason to mislead the court, Br. at 29, or "to suggest that the Attorney General was then considering the actual filing of charges," Br. at 4, also misses the mark. First, DOJ misstates the basis for the district court's bad faith finding. That finding rested not on the fact that the memorandum contained purely legal advice, but that it contained strategic, not prosecutorial advice about whether the Attorney General should comment at all on the Special Counsel's evidence, and if so, what he should say—facts the agency hid entirely from the court in its on-the-record submissions to cover up the Attorney General's true role. *See* JA246-55; JA335-37.

Second, contrary to its claims here, DOJ did, in fact, have reasons to hide the OLC Memorandum's true purpose. Had the Department acknowledged that the

actual purpose of the memorandum was to maximize the impact of the Attorney General's fraudulent exoneration of the President, it necessarily would have acknowledged that the Special Counsel's complaints about the misleading nature of the Attorney General's summary of his investigation were valid. And most significantly it would have exposed the Attorney General's misuse of the power of his office, with the assistance of DOJ, to aid the President and undermine the DOJ's institutional interests in serving justice—even at the cost of papering over the unlawful actions of a sitting president. Under these circumstances, the district court correctly declined to rely on DOJ's misleading declarations and arguments and to order disclosure of the full OLC Memorandum given the agency's failure to meet its burden of proof. *See*, *e.g.*, *Cause of Action Inst. v. Export-Import Bank of the U.S.*, No. 19-cv-1915, 2021 WL 706612, at *14 (D.D.C. Feb. 23, 2021) (disclosure of records ordered when "[e]ven the briefest in camera review reveals that [the agency's] description is plainly overbroad and . . . seemingly inaccurate, as their content has nothing to do with" the exemption claimed). *See also Judicial Watch*, *Inc. v. U.S. Secret Service*, 726 F.3d at 215 (summary judgment for agency only appropriate where the agency's declarations "are not called into question by contradictory evidence in the record or by evidence of agency bad faith").

E. The District Court Did Not Abuse Its Discretion By Failing To Afford The Department Of Justice An Opportunity To Submit Additional Declarations Before Ruling On The Parties' Cross-Motions For Summary Judgment.

After the parties had fully briefed all issues raised by their cross-motions for summary judgment, DOJ had submitted multiple supporting declarations, and the district court had conducted an *in camera* review, the district court granted summary judgment for CREW with respect to the OLC Memorandum, ordering its disclosure. Now, on appeal, DOJ argues for the first time that the district court erred by failing to provide the agency, *sua sponte*, with an opportunity to file a new and untimely declaration. Federal procedure and practice, however, are to the contrary. The district court exercised appropriate discretion in ordering *in camera* review and reaching a decision on the record before it. *See Spirko*, 147 F.3d at 996; *Lam Lek Chong*, 929 F.2d at 735. No authority of which CREW is aware either in the Federal Rules of Civil Procedure, the FOIA, or related case law supports the proposition that a district court must afford an agency defendant additional process where the agency fails to carry its burden of proof and does not affirmatively request any additional opportunities to supplement the record.

The Federal Rules of Civil Procedure expressly provide that "[w]hen an act may or must be done within a specified time" a court "may, for good cause, extend that time . . . on motion made after the time has expired if the party failed to act because of excusable neglect." Fed. R. Civ. P. 6(b)(1). As applied here, the rule

required DOJ to proactively move for leave to file an additional declaration once the parties had completed briefing on cross-motions for summary judgment, which it never did. Even if it had filed such a motion, it would have been within the Court's discretion whether to grant it and allow the filing of a supplemental declaration. *See*, *e.g.*, *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 894 (1990) (affirming a district court's decision to decline to admit supplemental affidavits that were untimely). But that is a purely academic issue here, where the Department failed to avail itself of any opportunity to move to supplement the record.

Having failed to seek leave to supplement the record before the district court's ruling DOJ could still have acted after the court issued its decision with a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e), or a motion for relief from the Court's judgment pursuant to Fed. R. Civ. P. 60(b) on the basis of "mistake, inadvertence, surprise, or excusable neglect," or "any other reason that justifies relief." The Department, however, failed to take any of these steps as well.

Nevertheless, DOJ now faults the district court for failing to "direct[] the government to submit supplemental declarations." Br. at 42. The cases it cites, however, provide no support for this novel suggestion. First, contrary to DOJ's mischaracterization, *Pavement Coatings Tech. Council*, 995 F.3d at 1024, does not

stand for the proposition that "the prudent course" here was for the district court to give the agency an opportunity to file new declarations. *See* Br. at 43. In that case, the court declined to give the agency a second bite at the apple after it had lost in the district court and instead "le[ft] to the District Court the decision how to proceed" on remand. *Pavement Coatings Tech. Council*, 995 F.3d at 1024. The appellate court suggested a slate of options for the district court to pursue in its discretion to bring the case to resolution, such as conducting a paper trial, creating a stipulated evidentiary record, or permitting the parties to file supplemental affidavits and briefs—all of which it viewed as preferable to discovery in the FOIA setting. *Id.* This case therefore offers no support for the government here, where the district court conducted an *in camera* review and, based on the full record, correctly determined that the government had not met its burden to withhold the OLC Memorandum under Exemption 5 and granted summary judgment for CREW.

The other decisions DOJ cites, *see* Br. at 43-44, reinforce the conclusion that the district court here acted well within its discretion. In *Elec. Priv. Info. Ctr. v. United States Drug Enf't Agency*, 192 F. Supp. 3d 92, 110 (D.D.C. 2016), because the court was unable to sustain the DEA's claim of exemption with respect to some materials, it ordered the DEA to either "submit the relevant documents to the Court for *in camera* review, or to supplement the record with a declaration[.]" *Id.* The

district court here followed a similar course, deciding in its discretion that an *in camera* review was warranted "[i]n order to assist the Court in making a responsible de novo determination[.]" Minute Order, Mar. 1, 2021.

In *Smith v. Bureau of Alcohol, Tobacco & Firearms*, the court allowed the agency defendant "to correct the deficiencies in its declaration" in lieu of granting the plaintiff's motion for *in camera* review. 977 F. Supp. 496, 503 (D.D.C. 1997). Both choices, however, were well within the district court's discretion. The court in *Beltranena v. Clinton*, 770 F. Supp. 2d 175, 187 (D.D.C. 2011), made the unremarkable observation that courts generally prefer to let an agency "supplement its affidavits" rather than "grant discovery"—a proposition also recognized in *Pavement Coatings*. But none of these cases suggest that a district court is acting outside its authority or abuses its discretion when it conducts an *in camera* review and rules on cross-motions for summary judgment without ordering parties to file supplemental declarations or briefs.

Indeed, it is not even clear that DOJ's procedural objection is properly before this Court given that the agency never sought from the district court the relief it seeks now. This Court has "well-established discretion not to consider claims that litigants fail to raise sufficiently below and on which district courts do not pass." *Cruz v. Am. Airlines, Inc.*, 356 F.3d 320, 329 (D.C. Cir. 2004). *See also Holy Spirit Ass'n v. CIA*, 636 F.2d 838, 846 (D.C. Cir. 1980) (district court "did

not abuse its discretion in denying the Agency's post-judgment offer of proof"). The Department could have sought leave to file new declarations on multiple occasions but elected not to.[2]

Accordingly, this Court should not entertain the Department's untimely invitation to further delay disclosure of the full, unredacted memorandum to CREW and the public. Given the overwhelming evidence in the record supporting the district court's ruling, remanding this matter to give DOJ yet another chance to justify its exemption claim will only waste more time, expense, and judicial resources, a waste that is entirely without justification. *See Maydak v. U.S. Dep't of Justice*, 218 F.3d 760, 768 (D.C. Cir. 2000).

II. THIS COURT SHOULD REJECT THE DEPARMENT OF JUSTICE'S NEW THEORY OF DELIBERATIVE PROCESS THAT IT FAILED TO RAISE BELOW.

The evidence before the district court undermined and disproved the assertion by DOJ that it was engaged in an ongoing decision-making process involving a prosecutorial judgment, the justification underlying its deliberative process claim. Perhaps recognizing the bind in which it placed itself, DOJ on appeal attempts to re-define the basis for its exemption claim in two equally flawed ways.

[2] Of course, had the Department of Justice sought post-judgment relief it still would have been within the district court's discretion whether or not to grant such relief. *Holy Spirit Ass'n*, 636 F.2d at 846.

First, the Department now defines the "decisional process" as

> 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.

Br. at 22. Standing alone, however, this merely recites the question posed to the memorandum's authors but fails to identify or explain the specific decisionmaking process to which that question was pertinent. The deliberative process privilege requires the identification of a "definable decisionmaking process," *Paisley*, 712 F.2d at 698, not just the free-floating deliberations DOJ describes here, untethered to any specific decisional process.

To be sure, this Court has recognized that the predecisional requirement of the deliberative process privilege applies to "'the *process* leading to a decision to initiate, or to forego, prosecution,'" *Access Reports*, 926 F.2d at 1196 (quoting *Senate of Puerto Rico*, 823 F.2d at 585 n. 38), and does not require a "final decision[.]" *Id.* at 1196 (quotation and citation omitted). But while an agency need not identify "a specific decision in connection with which a memorandum is prepared," *id.* (quotation and citation omitted), it still must identify a process capable of resulting in a decision. *See Vaughn v. Rosen*, 523 F.2d 1136, 1146 (D.C. Cir. 1975) (recognizing that "a 'final decision'" may not be "necessary for there to be a 'deliberative process'" under Exemption 5 but noting "the failure of the affidavits relied on to come to grips and define what it is out of this mass of

documents that the Government considers 'the deliberative process' and thus entitled to protection"). Here, the process DOJ describes lacks that fundamental prerequisite and instead describes an entirely academic exercise with no end goal. Or, as described by the district court in a May 25, 2021 Minute Order commenting on the Department's stay motion, "DOJ states for the first time in its motion to stay, that after he received the Special Counsel's Report, the Attorney General *was considering 'electing' to opine* on the question of whether the facts in the Special Counsel's Report would support a criminal prosecution . . . understanding that any actual prosecution was constitutionally foreclosed." (emphasis added).

Second, DOJ now contends for the first time that the OLC Memorandum was prepared "to assist the Attorney General in deciding *what*, *if anything*, *to communicate to Congress and the public*" about the sufficiency of the Special Counsel's evidence on obstruction. Br. at 25-26 (emphasis added). *See also id.* at 1-2 ("*what*, *if any*, *determination* he should make[.]"); *id.* at 3, 18, 22, 30 (same phrasing). In other words, the agency on appeal is attempting to litigate a different theory of deliberative process privilege than the one it advanced below.

The district court recognized that "internal deliberations about public relations efforts could be covered by the deliberative process privilege[.]" JA250. Here, however, the court determined that DOJ had "made a strategic decision to pretend as if the first portion of the memorandum was not there and to avoid

acknowledging that what the writers were actually discussing was how to neutralize the impact of the Report in the court of public opinion." *Id.* Accordingly, the court concluded that it was "under no obligation to assess the applicability of a privilege on a ground the agency declined to assert, *id.*, and properly ruled that DOJ had not carried its burden of proof. After all, it is the agency, not the Court, that must "'justify its withholding in publicly available and debatable documents.'" *Id.* (quoting *Lykins v. U.S. Dep't of Justice*, 725 F.2d 1455, 1463 (D.C. Cir. 1984)).

The Department's decision not to raise this argument in the district court (and be honest about the true nature of the OLC Memorandum) bar its counsel from raising it for the first time on appeal. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 50 (1983) ("courts may not accept appellate counsel's *post hoc* rationalizations for agency action"). As this court has recognized, "[t]he interests of judicial economy and finality militate against" the kind of "piecemeal approach" DOJ seeks here. *Holy Spirit Ass'n*, 636 F.2d at 846. The agency and its experienced counsel and declarants fully controlled how they litigated this case before the district court, including the decision to proffer declarations that falsely described the decisionmaking process to which the OLC Memorandum relates. They must now live with the consequences of their actions; to otherwise allow counsel to substitute their own version of facts for the agency's failed proof would upset the fundamental principle in FOIA litigation that it is the agency—not its

counsel—that bears the burden of proof. *See Morley v. CIA*, 508 F.3d 1108, 1120 (D.C. Cir. 2007) ("*post hoc* explanation cannot make up for the [agency] Declaration's silence"); *accord Judicial Watch*, *Inc. v. FDA*, 449 F.3d at 150 ("counsel's post hoc explanation" insufficient to compensate for the ambiguities in the agency's declarations); *Kleinert v. Bureau of Land Mgmt.*, 132 F. Supp. 3d 79, 88 (D.D.C. 2015) (*post hoc* explanation insufficient to overcome agency's failure to provide an adequate description); *Toensing v. Dep't of Justice*, 890 F. Supp. 2d 121, 148 (D.D.C. 2012) (same).

Moreover, even if DOJ had admitted that the true purpose of the OLC Memorandum was to shape the public narrative about the Special Counsel's evidence of the President's obstruction of justice—*i.e.*, "getting a jump on public relations," JA253—it still would not have qualified for protection under Exemption 5 because the agency did not satisfy the foreseeable harm requirement, 5 U.S.C. § 552(a)(8)(A). As applied to the deliberative process privilege, foreseeable harm requires "a focused and concrete demonstration of why disclosure of the particular type of material at issue will, in the specific context of the agency action at issue, actually impede those same agency deliberations going forward." *Reporters Committee*, 3 F.4th at 370. Further, "just mouthing the generic rationale for the deliberative process privilege itself," will not suffice. *Id.* Importantly, the harm must be to "an exemption-protected interest," *Judicial Watch*, *Inc. v. Dep't of*

Commerce, 375 F. Supp. 3d 93, 98 (D.D.C. 2019), which excludes information whose disclosure might embarrass public officials "'because errors and failures might be revealed, or because of speculative or abstract fears.'" S. Rep. No. 114-4, at 7 (quoting White House Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 21, 2009)).

Although the district court ruled for CREW on other grounds, *see* JA258 n.16, the court noted that the Department's declaration "did little to provide 'context of insight into the specific decision-making processes or deliberations at issue, and how they in particular would be harmed by disclosure' of the contested records," and "merely recite[d] the elements of the privilege." JA258 n.16. Further, the government's litigation conduct and efforts to obscure the memorandum's true purpose strongly suggest DOJ seeks to prevent the public from accessing information that would confirm the degree of Attorney General Barr's misrepresentations to the American public and Congress and his misuse of the powers of his office to elevate the personal and political interests of the President over the interests of the public: all harms to an interest the deliberative process privilege does not protect.

In sum, this Court should not consider an argument that the Department of Justice failed to argue below, is not reflected in the record, and that would in any event fail.

* * * *

Applying well-settled legal principles to the factual record before it, as amplified by its *in camera* review and the context and timeline in which the OLC Memorandum was created, the district court properly denied summary judgment for the Department of Justice, which had failed to carry its burden of proving the withheld memorandum was predecisional and subject to withholding under FOIA Exemption 5. At the same time, given the affirmative evidence that the OLC Memorandum is not predecisional, the district court properly granted summary judgment for CREW and ordered the memorandum's disclosure. It is now time for the public to see the full, unredacted document so it can assess for itself the role the Attorney General played in attempting to exonerate President Trump against the weight of the damning evidence set forth in the Special Counsel's Report that he obstructed justice. Faithful adherence to the law requires no less.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

/s/ Anne L. Weismann
Anne L. Weismann
(D.C. Bar No. 298190)
5335 Wisconsin Avenue, N.W.
Suite 640
Washington, D.C. 2015
Phone: 301-717-6610
Weismann.anne@gmail.com

Adam J. Rappaport
(D.C. Bar No. 479866)
Conor M. Shaw
(D.C. Bar No. 1032074)
Citizens for Responsibility and Ethics
in Washington
1331 F Street, N.W., Suite 900
Washington, D.C. 20004
Phone: (202) 408-5565
arappaport@citizensforethics.org

Attorneys for Plaintiff

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Dated: August 26, 2021 /s/ Anne L. Weismann
Counsel for Appellee

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I hereby certify that on this 26th day of August, 2021, I caused this Brief of Appellee to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Mark R. Freeman
Sarah E. Harrington
Daniel Terry
Daniel Wiknik
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 514-2000

Counsel for Appellant

Jack Jordan
LAW OFFICE OF JACK JORDAN
3102 Howell Street
North Kansas City, Missouri 64116
(816) 746-1955

Counsel for Amicus Curiae

/s/ Anne L. Weismann
Counsel for Appellee

ADDENDUM

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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[.]