ORAL ARGUMENT NOT YET SCHEDULED

No. 21-5113

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

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Columbia, No. 1:19-cv-1552-ABJ

BRIEF OF SENATOR SHELDON WHITEHOUSE, SENATOR PATRICK J. LEAHY, SENATOR RON WYDEN, SENATOR RICHARD BLUMENTHAL, SENATOR MAZIE K. HIRONO, SENATOR ELIZABETH WARREN, AND SENATOR CORY A. BOOKER AS *AMICI CURIAE* IN SUPPORT OF APPELLEE AND AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel submits the following certification:

(A) Parties and *Amici.*

To counsel's knowledge, all other parties, intervenors, and *amici* appearing before this Court are as stated in the Brief for the Appellee.

(B) Rulings Under Review.

References to the rulings at issue appear in the Brief for the Appellee.

(C) Related Cases.

Related cases appear in the Brief for the Appellee.

Dated: September 3, 2021

/s/ Sarah Colombo

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STATEMENT REGARDING SEPARATE BRIEFING

Pursuant to Circuit Rule 29(d), I certify that it is necessary to separately file the following Brief of *Amici Curiae*. As members of the Legislative Branch, *Amici* are uniquely qualified to address Congress's intent in drafting the provisions of the Freedom of Information Act relevant to this case, as well as the broader implications of the relevant privilege issues to legislative oversight activities. To *Amici*'s knowledge, this is the only brief submitted in support of affirmance by members of Congress. Accordingly, *Amici* are able to provide the Court with relevant insight, expertise, and a perspective that no other *amici curiae* is capable of providing.

Dated: September 3, 2021

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GLOSSARY OF ABBREVIATIONS

DOJ: Department of Justice

FOIA: Freedom of Information Act

OLC: Office of Legal Counsel

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for the Appellee.

AMICI CURIAE'S IDENTITY, INTEREST, AND AUTHORITY TO FILE[i]

Amici curiae are United States Senator Sheldon Whitehouse of Rhode Island, United States Senator Patrick J. Leahy of Vermont, United States Senator Ron Wyden of Oregon, United States Senator Richard Blumenthal of Connecticut, United States Senator Mazie K. Hirono of Hawaii, United States Senator Elizabeth Warren of Massachusetts, and United States Senator Cory A. Booker of New Jersey. *Amici* share with the Court an interest in upholding government transparency and preserving the proper separation of powers. *Amici* bring unique perspectives to the Court on two separate issues raised in this case. *First*, as members of the legislative branch, *Amici* bring a perspective on the policy and priorities Congress sought to achieve in enacting the Freedom of Information Act and its amendments. *Second*, *Amici* bring a perspective on how FOIA privilege issues affect congressional access to executive branch information for oversight purposes.

[i] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party, nor any person other than the *amici curiae*, or their counsel, contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

SUMMARY OF ARGUMENT

This case concerns the common law deliberative process privilege, in the context of an exemption claim under the Freedom of Information Act. At issue is whether a Department of Justice memorandum that served no agency decisionmaking purpose can be withheld from disclosure under the exemption for predecisional deliberative communications. The court's resolution of this issue will implicate two interests of importance to *Amici*: the congressional policy of transparency and accountability in governmental operations reflected in Congress's enactment of FOIA; and the potential effect on congressional access to executive branch information for appropriate congressional oversight of government conduct.

If FOIA is to serve its purpose of ensuring a government that is transparent and accountable to its citizens, its exemptions must be narrowly construed. Congress's enactment of FOIA and its amendments reflects the understanding that public access to government information is fundamental to democratic accountability and promotes an informed citizenry. While Congress accepted that some situations in government may require confidentiality, Congress drew exceptions to FOIA's transparency principle narrowly. As President Johnson observed upon signing FOIA into law, "only the national security, not the desire of

public officials or private citizens," should limit the public's access to information about government operations.[2]

The deliberative process privilege, as incorporated through FOIA's Exemption 5, protects agency decisionmaking. Where there is no decision for the agency to make, the purpose of the deliberative process privilege is absent, and transparency should prevail. That is precisely the situation here.

DOJ's memorandum cannot be protected under the deliberative process privilege because the purported decision before the agency—whether there was evidence to support an indictment of President Trump—was purely hypothetical. There was no concrete administrative or prosecutorial decision on that question pending or under consideration at the agency; it was a foregone conclusion that President Trump would not be indicted under existing and unchallenged DOJ policy, whether or not evidence in the Mueller Report supported an obstruction of justice charge.

Applying the deliberative process privilege in these circumstances would extend Exemption 5 and the privilege well beyond its core purpose of protecting agency policymaking. This Court should decline to do that, and instead should narrowly construe the privilege in line with both its purpose and FOIA's policy in

[2] Presidential Statement on Signing the Freedom of Information Act, 2 Weekly Comp. Pres. Doc. 895 (July 4, 1966).

favor of disclosure. If the deliberative process privilege applies any time an executive branch official deliberates or hypothesizes about some abstract question, the exemption will swallow the rule.

An overbroad reading of the deliberative process privilege also threatens to hinder effective congressional oversight—a legislative branch function core to the Constitution's separation of powers. Congress does not consider itself subject to the same limits as a requester under FOIA, and Congress does not recognize common law privileges like the deliberative process privilege. But the executive branch asserts the privilege against Congress anyway.[3] So, broad interpretation of the deliberative process privilege under FOIA will have predictable effects on congressional investigations and inquiries.

The Court should uphold the lower court's ruling requiring disclosure in this case and limit further efforts to expand the deliberative process privilege beyond its proper bounds. This will both protect FOIA and facilitate healthy congressional oversight.

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[3] *E.g.*, *Assertion of Exec. Privilege over Deliberative Materials Regarding Inclusion of Citizenship Question on 2020 Census Questionnaire*, 43 Op. O.L.C. __ (2019); *Assertion of Exec. Privilege over Deliberative Materials Generated in Response to Cong. Investigation into Operation Fast and Furious*, 36 Op. O.L.C. 1 (2012).

ARGUMENT

I. Accepting DOJ's Overbroad View of What Is a "Decision" Under FOIA's "Predecisional" Deliberative Process Privilege Would Undermine FOIA's Purpose of Promoting Government Transparency.

A. Attorney General Barr's Abstract Conclusion that President Trump Did Not Commit Obstruction of Justice Is Not and Cannot Be a Qualifying "Decision" for Purposes of the "Predecisional" Deliberative Process Privilege Under FOIA Exemption 5.

1. For FOIA to Serve Its Purpose, Exemptions Must Be Narrowly Construed.

Congress passed FOIA to create basic standards for accountability and transparency in government. The Act was intended to "clarify and protect the right of the public to information." Freedom of Information Act, Pub. L. 89-487, 80 Stat. 250 (1966). The Supreme Court has repeatedly affirmed this "basic purpose[] [of] ensur[ing] an informed citizenry, vital to the functioning of a democratic society, [and] needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *see also Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171–72 (2004) ("a means for citizens to know what their government is up to" is "a structural necessity in a real democracy" (citations and internal quotation marks omitted)).

Congress's commitment to transparency and accountability in government is reflected not just in the original Act but also in multiple amendments, nearly every provision of which sought to improve transparency by encouraging timely

responsiveness, limiting inappropriate withholdings, and ensuring executive branch agencies have the systems and resources to respond appropriately to FOIA requesters.[4]

In enacting FOIA, Congress accepted that particular situations may require confidentiality or discretion, and included in the Act nine carefully delineated exemptions. These exemptions, however, were never intended to diminish FOIA's overarching purpose of "open[ing] [] agency action to the light of public scrutiny," *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976); Congress intended the FOIA exemptions to be narrowly construed. *See, e.g.*, *Milner v. Dep't of Navy*, 562 U.S. 562, 571 (2011) ("We have often noted the Act's goal of broad disclosure and insisted that the exemptions be given a narrow compass." (internal quotation marks omitted)). As the Supreme Court has observed, "limited exemptions do not obscure

[4] *See, e.g.*, An Act to Amend Section 552 of Title 5, United States Code, Known as the Freedom of Information Act, Pub. L. 93-502, 88 Stat. 1561 (1974) (imposing time limits on agencies to respond); Government in the Sunshine Act, Pub. L. 94-409, 90 Stat. 1241 (1976) (limiting Exemption 3 to apply only to information specified in particular types of statutes); Electronic Freedom of Information Act Amendments of 1996, Pub. L. 104-231, 110 Stat. 3048 (1996) (modernizing FOIA to expand electronic access to information and promote compliance with statutory time limits); Openness Promotes Effectiveness in Our National Government Act of 2007, Pub. L. 110-175, 121 Stat. 2524 (2007) (addressing agency delays and lack of responsiveness and promoting alternatives to litigation); FOIA Improvement Act of 2016, Pub. L. 114-185, 130 Stat. 538 (2016) (requiring foreseeable harm for application of discretionary exemptions).

the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 424 U.S. at 361.

We're still at it. To improve FOIA transparency, Congress recently limited agencies' ability to assert discretionary FOIA exemptions, requiring agencies not only to find that a FOIA exemption is properly available, but also to identify a specific, foreseeable harm to an interest protected by the exemption that would result from disclosure. FOIA Improvement Act of 2016 § 2 (codified at 5 U.S.C. § 552(a)(8)(A)(i)(I) *see* S. Rep. No. 114-4 at 2–3 (2015) (noting "a growing and troubling trend towards relying on [] discretionary exemptions to withhold swaths of Government information, even though no harm would result from disclosure," and citing potential overuse of Exemption 5 as an example). Even technically meritorious assertions of privilege must yield if there is no appreciable harm to set against the value of transparency.

FOIA's Exemption 5 is no exception to these principles. Exemption 5 excludes from mandatory disclosure "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). In its inclusion of this exemption, Congress accepted agencies' concerns that public scrutiny could constrain "frank discussion of legal or policy matters" in certain circumstances. S. Rep. No. 89-813 at 9 (1965). Congress nevertheless "attempted to delimit the exemption as

narrowly as consistent with efficient Government operation." *Id*.[5] The exemption therefore serves only limited purposes, including, relevantly, to "embody the traditional evidentiary privilege that attaches to predecisional, deliberative communications within an agency." *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 773 (D.C. Cir. 1978), *overruled on other grounds by Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1053 (D.C. Cir. 1981). This purpose reflects Congress's goal of creating a "workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." S. Rep. No. 89-813 at 3.

2. The Purpose of the Deliberative Process Privilege—to Protect Agency Policymaking—Does Not Apply Where There Is No Policy Choice Before an Agency.

The deliberative process privilege covers deliberative documents "that are part of a process by which [g]overnment decisions and policies are formulated[.]" *Reporters Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 361 (D.C. Cir. 2021) (internal quotation marks omitted) (citing *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001)). Thus one necessary element

[5] The notion that "frank discussion" is inhibited by the prospect of disclosure should not be overstated. Members of Congress frequently manage "frank discussion of legal or policy matters," involving conflicting viewpoints and competing priorities, in full public view. Likewise, the executive branch somehow manages to operate even though leaks, press coverage, and even books by its own officials revealing frank internal discussions are commonplace.

to a deliberative process privilege claim is a showing that the withheld document was in fact "predecisional"—that is, that the document was, for instance, "[a]ntecedent to the adoption of an agency policy." *Jordan*, 591 F.2d at 774. Logically, to meet this condition, there must be an actual agency policy or decision at stake. *See, e.g.*, *Paisley v. CIA*, 712 F.2d 686, 698 (D.C. Cir. 1983) ("To ascertain whether the documents at issue are pre-decisional, the court must first be able to pinpoint an agency decision or policy to which these documents contributed."); *see also Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (focusing on "reasons for the *agency's action*") (emphasis added)).

When there is no real decision for the agency to make, the deliberative process privilege does not protect agency decisionmaking—and has no remaining purpose. As this Court has repeatedly reaffirmed, the central purpose of the privilege is "to encourage the candid and frank exchange of ideas in [an] agency's decisionmaking process" without whatever chilling effect might result from disclosure. *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 462 (D.C. Cir. 2014).

Even where there is an agency decision to make, the privilege collapses if it does not precede in time the agency decision. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975) ("It is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the

decision is finally reached . . . as long as prior communications and the ingredients of the decisionmaking process are not disclosed."). So if there is no decision at all, the rationale for the privilege evaporates. One cannot "prevent injury to the quality of agency decisions," *id*., when the agency has no real decision to make. Officials' ruminations unhinged from actual agency decisions are not protected.

The central cases regarding the deliberative process privilege under FOIA Exemption 5 arise from actual exercises of agency authority, where the exercise in question is agency rulemaking, adjudication, or other concrete actions. *E.g.*, *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 783–84 (2021) (addressing memoranda produced as part of an interagency consultation process); *Sears*, 421 U.S. at 148–49 (addressing memoranda regarding the National Labor Relations Board's decision whether to permit filing unfair labor practice complaints); *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 170 (1975) (addressing documents generated to decide whether government contractors had earned statutorily defined "excessive profits" that must be refunded). The deliberative process privilege presupposes some concrete decision for the agency to make: that the agency could have taken different actions, resulting in different outcomes, and the agency had before it a choice. *See, e.g.*, *In re Sealed Case*, 121 F.3d 729, 735 (D.C. Cir. 1997) (addressing documents relating to an investigation into Secretary of Agriculture's conduct and whether to "take

executive action against" him); *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 257 (D.C. Cir. 1977) (holding that discussion regarding negotiation positions may be protected under Exemption 5).

Humans make decisions every day. Quotidian decisions by government officials are not what FOIA Exemption 5 contemplates for protection. The exemption contemplates formal, authorized decisions within the agency's delegated power—real decisions with concrete consequences.

Because the very purpose for the privilege is to protect authorized agency decisionmaking, the rationale for the privilege—protecting the candor of such decisionmaking—simply does not extend beyond that scope. Unhinging the exemption from actual administrative decisionmaking, to roam free across any musings of whatever nature by any executive branch official, will leave little of the transparency Congress intended FOIA to provide.

3. DOJ Could Not Have Engaged in Predecisional Deliberation Here Because There Was No "Decision" To Make.

This case involved no pending agency decision. The DOJ memorandum at issue discusses whether the evidence identified in the Mueller report would support the indictment of the president. But DOJ policy had already settled that President Trump would not be indicted, *see A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222 (2000), and DOJ does not assert (nor is there evidence for it to assert) that the policy would be reconsidered. This

memorandum was an exercise in conjecture, and conjecture does not constitute an agency "decision" for purposes of the predecisional deliberative process privilege under FOIA Exemption 5.

No authorized legal or administrative consequence—none—would result from the purported "decision" on which DOJ hinges its privilege claim. Just the opposite: all legal consequences and administrative outcomes were preordained by decisions DOJ had already made. DOJ's moving target definitions of what its "decision" was all founder on that fact.

At various junctures, DOJ has identified two different "decisions" that purportedly formed the basis of its claim to the "predecisional" deliberative process privilege. Initially, perhaps recognizing the difficulty in relying on abstract legal conjecture as "decision making," DOJ suggested that the memorandum in question was part of a process that might have led to a decision to indict the President. *See, e.g.*, Brief for Appellant 29–39.

That did not fly. JA255 ("The agency's redactions and incomplete explanations obfuscate the true purpose of the memorandum . . ."). With that argument collapsed, DOJ now acknowledges that the "decision" was untethered to any ultimate prosecutorial decision or any other administrative choice before the agency, and would never have led to indicting President Trump for obstruction of justice. *E.g.*, Brief for Appellant 3. DOJ identifies no decision pending before the

agency that had any concrete consequence in authorized agency action—effectively conceding the memorandum was simply abstract rumination—and seeks to expand the privilege beyond its bounds to overcome that failure. *See id.* at 29–30 (arguing analysis supporting the determination should be privileged "*regardless of why the Attorney General was making that determination*.") (emphasis added). DOJ's attempt to manufacture agency "decisionmaking," after the fact, and unconnected to any real pending decision, should not justify its claim under Exemption 5.[6]

The facts outlined in the record do not meet the most basic standards for Exemption 5. DOJ has identified no concrete decision that would affect any authorized action by the agency. The only relevant decision—whether to indict the president—was preordained by the Office of Legal Counsel's own precedent that a

[6] Nor can DOJ now, at this point in the case, rely on any other decision before the agency, as there is no other pending decision identified in the record before the Court. Any argument that there may have been other possible decisions pending before DOJ that have not yet been identified in the record has been forfeited. *See Colbert v. Potter*, 471 F.3d 158, 165 (D.C. Cir. 2006) (appellate courts do not consider evidence outside of the record except in the rare case where "injustice might otherwise result"). In suggesting that the district court imposed an "improper" "sanction" by failing either to find privilege on grounds the government did not advance, or to offer the government another bite at the apple in supplemental declarations, Brief for Appellant 4–5, 40–43, DOJ ignores these basic precepts of forfeiture.

sitting president could not be indicted. DOJ does not argue, and there is no basis in the record to believe, that DOJ or OLC were reevaluating this preexisting policy.[7]

Any discussion that took place at DOJ about whether the Mueller Report contained sufficient evidence to support an indictment of President Trump was thus purely academic.[8] No pending decision or potential agency action turned on the results of this exercise. Because the Attorney General's supposed legal conclusion that President Trump did not commit obstruction of justice was untethered to any actual agency decision, the Attorney General could not have required anybody to "assist [him] in arriving at [an agency] decision." *Grumman*, 421 U.S. at 184. There was no decision to make.

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[7] *Amici* rather wishes they were, as OLC has driven this question of presidential immunity from prosecution into an executive branch corner from which its colloquial viewpoint is, as a practical matter, final, without any opportunity for an Article III court to actually determine "what the law is" as to presidential immunity. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803).

[8] The likeliest explanation is that the DOJ analysis was prepared to defend a political narrative the Attorney General sought to promote in order to give cover to President Trump. That is not "predecisional" in any sense, as DOJ has not identified any real decision before the agency in the record. Worse still, if the memorandum were doctored to arrive at a pre-ordained result, the memorandum is more than just not predecisional, it is a piece of actual, substantive evidence of a scheme to mislead—just the sort of thing Congress is supposed to investigate. It would be a rank abuse of FOIA to allow the exemption to shield executive branch wrongdoing.

There could not have been a threat of premature disclosure of an agency decision or position, because no decisional event existed. *Coastal States*, 617 F.2d at 866. There was no choice before the agency that could have "direct [or] appreciable legal consequences," *Sierra Club*, 141 S. Ct. at 787, because the "choice" was preordained. Indeed, it was DOJ's false suggestion—that is, the suggestion that the decision not to indict was based on an independent evaluation of the sufficiency of the evidence—that was misleading, "suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action." *Coastal States*, 617 F.2d at 866.[9]

Finally, to the extent the document constitutes potential evidence of mischief or wrongdoing, transparency is even more important. *In re Sealed Case*, 121 F.3d at 746 (stating that the deliberative process privilege "disappears altogether when there is any reason to believe government misconduct occurred"). Whatever they were up to, it was not authorized agency decisionmaking and cannot enjoy the protection of the privilege.

[9] Whether the Court concludes that DOJ's hypothetical discussions should be viewed as unprotected "post-decisional" materials, or simply as untethered to any decision and therefore any protected decisionmaking process, the result is the same. Post-decisional discussions are not protected by the privilege for the same reason that deliberations untethered to an actual agency decision are not protected. *Jordan*, 591 F.2d at 774 ("Communications that occur [a]fter a policy has already been settled upon[,] for example, a communication promulgating or implementing an established policy[,] [a]re not privileged.").

B. The Court Should Interpret the Deliberative Process Privilege Narrowly To Align With the Purpose of FOIA.

We urge that the Court constrain the scope of FOIA exemptions to Congress's intended limits. For instance, cases interpreting the deliberative process privilege to protect agency deliberations about "'massaging' the agency's public image," *ICM Registry, LLC v. U.S. Dep't of Com.*, 538 F. Supp. 2d 130, 136 (D.D.C. 2008), seem well outside those bounds. The fact that agency officials deliberate does not necessarily require application of the deliberative process privilege—unless a pending, authorized agency administrative decision is the subject of their deliberations.

Expansion of the privilege as DOJ suggests in this case would extend the privilege beyond FOIA's breaking point. Here, with no indication in the record that the Attorney General was considering whether to indict President Trump,[10] nor any suggestion that the withheld materials relate to any other decision, the government simply has not carried its burden of demonstrating that a real deliberative process was underway, a necessary predicate to the deliberative process privilege.

[10] In fact, the record suggests the opposite. The memorandum expressly states that "were there no constitutional barrier" its recommendation would be to decline to commence a prosecution. JA297. In other words, a premise of the memorandum itself was that no concrete consequences would flow from its speculative analysis.

Expanding the deliberative process privilege to "decisions" outside the scope of pending, authorized agency action—in this case to a hypothetical legal rumination—will enable the executive branch to conjure up blockades to FOIA production whenever it finds them expedient. This outcome would run directly counter to FOIA's core purpose and would allow the exemption to undermine the transparency and accountability Congress intended in the Act.

II. An Overly Broad View of the Deliberative Process Privilege Threatens Congressional Oversight and the Proper Balance of Power Between Congress and the Executive Branch.

Amici have a second strong interest here in ensuring that the deliberative process privilege is properly construed within an appropriately narrow scope: an overly broad reading of the privilege would bolster aggressive executive branch resistance to legitimate congressional oversight. While congressional oversight is not directly at issue in this case, the Court should be aware of the potential effects of its decision on that constitutional prerogative.

On the one hand, Congress takes the view that FOIA jurisprudence on the deliberative process privilege does not directly affect the legislative branch. Congressional investigations are not instituted under FOIA, and Congress is not in the same position as a FOIA requester in relation to FOIA exemptions.[11] *See* 5

[11] Even so, *Amici* have found themselves in the unhappy position of being disfavored even as compared to a FOIA requester, experiencing less process and

U.S.C. § 552(d) (FOIA "is not authority to withhold information from Congress"); S. Rep. No. 89-813 at 10 (FOIA "only refers to the public's right to know, [and] it cannot . . . be backhandedly construed as authorizing the withholding of information from the Congress, the collective representation of the public."). Congress has long maintained that the exercise of its constitutional prerogative of inquiry and oversight need not yield to common law privileges (such as the deliberative process privilege); instead reserving to its committees the right to reject invocations of such privileges when necessary to the committee's performance of its legislative functions.[12] Congress can, case-by-case, determine that its investigative purposes overcome common law privileges.[13]

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less responsiveness from an executive branch agency than FOIA requires be given to a member of the public, and Members of Congress have accordingly resorted to FOIA on occasion to acquire executive branch information. *E.g.*, Complaint, *Blumenthal v. U.S. Nat'l Archives & Records Admin.*, No. 18-2143 (RDM) (D.D.C. Sept. 17, 2018).

[12] *See generally* Morton Rosenberg, Cong. Rsch. Serv., 95-464, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry* (1995); Morton Rosenberg, The Const. Project, *When Congress Comes Calling: A Study on the Principles, Practices, and Pragmatics of Legislative Inquiry* 65-71 (2d ed. 2017).

[13] In any event, courts have long recognized that the deliberative process privilege is a qualified privilege that can be overcome by a showing of need, such as a legislature's need to perform its constitutionally assigned investigative and legislative functions. *See, e.g.*, *In re Sealed Case*, 121 F.3d at 737 & n.5 (noting that the qualified nature of the deliberative process means that it can be "overcome by a sufficient showing of need" in congressional investigations and contrasting to FOIA context, in which "need" is not relevant).

That's on the one hand. On the other hand, the executive branch has its own view of what Congress is entitled to see. FOIA jurisprudence has a practical impact on how executive branch agencies respond to inquiries from congressional committees, because common law privileges found in FOIA cases are relied upon by agency officials to resist congressional access to agency records.[14] This practical impact of FOIA jurisprudence on Congress will be particularly significant if the Court accepts DOJ's stunningly broad view of the deliberative process privilege in this case.

Congress possesses broad authority to conduct investigations in furtherance of its constitutionally assigned functions. As the Supreme Court has articulated, "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927). The Supreme Court has repeatedly reaffirmed Congress's broad oversight powers. *Barenblatt v. United States*, 360 U.S. 109, 111 (1959) ("The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power

[14] *See, e.g.* Mem. Supp. Def.'s Mot. Summ. J. & Opp. Plf.'s Mot. Summ. J at 21–22, *Comm. on Oversight & Reform v. Lynch*, 156 F. Supp. 3d 101 (D.D.C. 2016) (No. 12-1332) (supporting claim to executive privilege with citation to discussion of FOIA Exemption 5 and deliberative process privilege in *Klamath*, 532 U.S. 1, 8–9 (2001)); *id.* at 28–29 (same, with citation to discussion of FOIA Exemption 5 and attorney work product in *Coastal States*, 617 F.2d at 864, and *Judicial Watch, Inc. v. Dep't of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005).

to enact and appropriate under the Constitution."); *United States v. Bryan*, 339 U.S. 323, 331 (1950) ("[T]he great power of testimonial compulsion [is] necessary to the effective functioning of courts and legislatures . . . ."); *see also Comm. on Judiciary v. Miers*, 558 F. Supp. 2d 53, 102 (D.D.C. 2008) (finding presidential advisors do not have absolute immunity and noting "Congress's power of inquiry is as broad as its power to legislate and lies at the very heart of Congress's constitutional role").

Courts have an important role in vindicating these constitutional legislative powers. *See United States v. A.T.&T.*, 551 F.2d 384, 390 (D.C. Cir. 1976) (conflict between the legislature and the executive branch over a congressional subpoena may be resolved judicially); *see also Comm. on Judiciary v. McGahn*, 968 F.3d 755, 760 (D.C. Cir. 2020) (holding the House Committee on the Judiciary has standing to seek judicial enforcement of subpoena). Courts police the separation of powers, and essential to the proper separation of powers is a legislature's ability to perform its constitutional oversight responsibilities, including gathering the information necessary to perform those assigned functions.

In theory, Congress and the executive branch should engage in a process of "accommodation," in "a spirit of dynamic compromise [that] would promote resolution of [a] dispute in the manner most likely to result in efficient and effective functioning of our governmental system." *United States v. A.T.&T.*, 567

F.2d 121, 127 (D.C. Cir. 1977). But that requires good faith and good will, which the branches are at liberty to withhold. All too often, in practice, executive agencies turn to broad and aggressive claims of confidentiality to stymie or delay meaningful congressional investigation of their conduct. Since those agencies are the custodians of the sought records, as a practical matter they succeed. *See, e.g.*, *Breaking the Logjam: Principles and Practice of Congressional Oversight and Executive Privilege: Hearing Before the Subcomm. on Fed. Courts, Oversight, Agency Action, and Fed. Rts.* 8, 117th Cong. (2021) (statement of Jonathan David Shaub) ("In current practice, the executive branch has essentially unchecked authority to withhold any piece of information it chooses from Congress.").[15]

Very often, when a congressional committee issues a request or subpoena to an executive agency, the agency asserts vague "confidentiality interests" and refuses to respond. *E.g.*, Letter from Pat A. Cipollone, Counsel to the President, to William A. Burck (May 7, 2019), https://s3.documentcloud.org/documents/5991764/McGahn-Cipollone-Letter.pdf (directing former White House Counsel

[15] *See also, e.g.*, Mem. from William H. Rehnquist, Ass't Att'y Gen., O.L.C., U.S. Dep't of Just., to John D. Ehrlichman, Ass't to the President for Domestic Affs., Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff" 6-7 (Feb. 5, 1971), https://www.justice.gov/olc/page/file/1225961/download ("[T]he Executive Branch has a headstart in any controversy with the Legislative Branch, since the Legislative Branch wants something the Executive Branch has, and therefore the initiative lies with the former. All the Executive has to do is to maintain the status quo, and he prevails.")

Donald F. McGahn II to refuse to comply with a House Judiciary Committee subpoena on grounds of "Executive Branch confidentiality interests and executive privilege").

Agencies often refuse even to provide a privilege log, which would be customary in litigation; and they often provide only the most limited description of the records the agency is withholding. The agency does not necessarily invoke a specific privilege, and rarely does the president actually assert executive privilege.[16]

This obstructive practice is inconsistent even with the executive branch's long-standing view of how the assertion of executive privilege should proceed. A memorandum issued by President Reagan and adopted by subsequent administrations instructs, "executive privilege shall not be invoked without specific Presidential authorization"—and is to be asserted "only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary." Mem. from President Ronald Reagan to Heads of Exec. Dep'ts and Agencies, Procedures Governing Responses to Congressional Requests

[16] Since 2009, the president has formally asserted executive privilege only twice. President Obama asserted the privilege in the course of Congress's investigation into Operation Fast and Furious, and President Trump asserted the privilege over a set of documents related to the decision to include a citizenship question on the 2020 Census. *See Breaking the Logjam* 6; *see also, supra,* note 3.

for Information 1 (Nov. 4, 1982), https://www.justice.gov/ola/page/file/1090526/download.

The "non-assertion assertions" of executive privilege we often see contravene these basic instructions. Where the agency withholds its records without a presidential assertion of executive privilege, Congress is left with little recourse. Under the Reagan memorandum, Congress depends on DOJ, through the Attorney General and the Office of Legal Counsel, in consultation with White House Counsel, to be a dispassionate ombudsman of executive privilege determinations. *Id.* at 2. If DOJ should choose not to be dispassionate, but instead put its thumb on the scale for the executive branch it serves, the process will fail.

Thus arise the practical consequences for Congress should court decisions endorse overly broad views of FOIA's exemptions, particularly the deliberative process privilege. Though deliberative process is widely recognized by courts to be a qualified privilege, it has long been the executive branch position that the President's "executive privilege" justifies withholding agency deliberations from Congress even where those deliberations did not involve the President, or even the

White House.[17] While Congress in general and *Amici* in particular dispute the executive branch's self-serving view of executive privilege, that executive branch view nevertheless informs how executive branch agencies respond to congressional inquiries.

The executive branch's conflation of the deliberative process privilege under FOIA and the President's purported executive privilege has practical consequences for Congress. In practice, questionable invocations of deliberative process privilege frequently underlie agency decisions to withhold records from Congress—decisions that are purportedly grounded in "executive privilege," yet fail to actually assert that privilege consistent with executive branch guidelines, and fail to follow the ordinary prerequisites for assertion of privilege in litigation.

These deliberative process privilege claims can be pernicious to congressional oversight investigations. As just one example, in August 2018, the Trump White House withheld more than 100,000 pages of documents related to

[17] The executive branch's increasingly broad assertions of executive privilege rely on OLC's largely unchallenged interpretations of the executive privilege doctrine, in some cases expressly rejecting district court decisions. *See, e.g.*, *Immunity of the Dir. of the Off. of Pol. Strategy & Outreach from Cong. Subpoena*, 38 Op. O.L.C. 5, 15–16 (2014) ("We therefore respectfully disagree with the *Miers* court's analysis and conclusion, and adhere to the Executive Branch's longstanding view that the President's immediate advisors have absolute immunity from congressional compulsion to testify."). OLC legal opinions carry weight and affect government operations, but in many circumstances can be difficult to test in court.

then-Supreme Court nominee Brett Kavanaugh's tenure as a lawyer for the George W. Bush administration. DOJ and the White House identified a "significant portion" of these documents as protected under the deliberative process privilege. Letter from William A. Burck, to Senator Charles Grassley, Chairman, S. Comm. on the Judiciary 4–5 (Aug. 31, 2018), https://www.judiciary.senate.gov/imo/media/doc/2018-08-31%20Burck%20to%20Grassley%20-%20Accounting%20of%20Kavanaugh%20WHCO%20Records.pdf.[18] These records were then withheld from Congress without explanation or support beyond vague and conclusory descriptions such as "deliberations and candid advice concerning the selection and nomination of judicial candidates" and "discussions relating to or about executive orders or legislation considered by the Executive Office of the

[18] This vague invocation of the deliberative process privilege is consistent with a larger pattern in the Trump administration of frivolous executive privilege assertions that capitalized on the gaps left open by overly broad court decisions on the scope and application of privileges that might be invoked (whether properly or not) in the oversight context. For example, in April 2019, then-Attorney General Barr refused to comply with a House Judiciary Committee subpoena for the un-redacted Mueller Report. Barr asked President Trump to assert "executive privilege" as a "protective" measure and "pending a final decision on the matter." Letter from William P. Barr, Att'y Gen., to President Donald J. Trump (May 8, 2019), https://int.nyt.com/data/documenthelper/819-barr-trump-letter-privilege/fe8c83dc6778bfe4bb74/optimized/full.pdf. The Trump White House even extended its assertions of "executive privilege" to block testimony from individuals outside of the executive branch—opening an "apparently novel" avenue to further impede congressional oversight. Ben Wilhelm, Cong. Rsch. Serv., IN11177, *Executive Privilege and Individuals Outside the Executive Branch* (2020).

President." *Id.* The President never formally invoked executive privilege, and the blank pages provided to Congress were stamped "constitutional privilege" with no further definition, explanation, or justification.

The guidelines for asserting executive privilege are procedurally and substantively disputed between the branches, and the opportunity for mischief in interbranch interactions is vast. Against that backdrop, the importance to Congress of properly narrow interpretations of privileges under FOIA is plain: whether rightly or wrongly, FOIA exemptions, and in particular the deliberative process privilege, spill into executive branch privilege assertions in the oversight context. In particular, a decision here permitting the executive branch to conjure up "non-decision decisions" as a means to withhold records under the deliberative process privilege will undoubtedly re-surface in the congressional oversight context. Like asserting executive privilege without any actual assertion, claiming deliberations are pre-decisional without any actual decision fails at the most basic test: the meaning of words. An expansive view of this privilege, particularly in the hands of agency officials largely unchecked in their ability to block access to executive branch information, could wreak serious harm to robust and healthy congressional oversight. Such an outcome may appeal to shortsighted executive officials, but only to the detriment of the Constitution and the people.

CONCLUSION

For the foregoing reasons, *Amici* urge the Court to affirm the district court's decision.

Dated: September 3, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(5), the undersigned certifies that this brief has been prepared in proportionally spaced typeface, Times New Roman, in 14-point font. The undersigned further certifies that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because it contains 6,142 words excluding the parts of the brief exempted under Federal Rules of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2021, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the District of Columbia via the Court's CM/ECF system. Counsel for all parties will be served electronically by the Court's CM/ECF system.

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