[ORAL ARGUMENT NOT SCHEDULED]

Nos. 20-5233, 20-5234

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

CAMPAIGN LEGAL CENTER,

Plaintiff-Appellee,

v.

DEPARTMENT OF JUSTICE,

Defendant-Appellant.

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

REPLY BRIEF

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GLOSSARY

EPA	Environmental Protection Agency
FOIA	Freedom of Information Act
Services	U.S. Fish & Wildlife Service and National Marine Fisheries Service

INTRODUCTION AND SUMMARY

The agency documents at issue in this case are non-final drafts (and related emails) of a letter that the Department of Justice sent to the Commerce Department requesting that a citizenship question be added to the census (Gary letter). Our opening brief explained that these documents include editorial comments and suggestions from Department of Justice staff concerning the contents of the letter and the rationale supporting the request and thus reflected "recommendations and deliberations comprising part of a process by which" the Department "formulated" the final letter. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975).

The Supreme Court's recent decision in *United States Fish & Wildlife Service v. Sierra Club, Inc.*, 141 S. Ct. 777 (2021), which issued after the filing of the government's brief, confirms that the withheld materials are protected by the deliberative process privilege. The Supreme Court emphasized that "[a] draft is, by definition, a preliminary version of a piece of writing subject to feedback and change." *Id.* at 786. A draft document is thus almost always "predecisional." *Id.* at 788. Only where an agency treats a draft

document as a "final product" that is "immune from change" and gives the draft "real operative effect" will the draft be considered postdecisional. *Id.* at 787.

The Department of Justice did not treat the draft documents and associated emails at issue as finished products not subject to further change. To the contrary, Department personnel circulated the drafts (which include proposed revisions and other editorial suggestions) for the purpose of obtaining or providing feedback on the contents of the letter. The authors of the drafts thus expressly contemplated "postcirculation changes." *Sierra Club*, 141 S. Ct. at 787. The relevant final product for purposes of the deliberative process privilege was the final version of the letter that the Department transmitted to the Department of Commerce.

Plaintiff cites no case in which this Court or any other has concluded that draft documents like those at issue here were not covered by the deliberative process privilege. Nor does plaintiff address this Court's precedent establishing that documents reflecting an agency's editorial process fall within the contours of the deliberative process privilege. *See, e.g.*, *Formaldehyde Inst. v. Department of Health*

& Human Servs., 889 F.2d 1118, 1123 (D.C. Cir. 1989) ("[E]ditorial judgments—for example, decisions to insert or delete material or to change a draft's focus or emphasis"—are covered by the deliberative process privilege).

Plaintiff asserts instead that the drafts are postdecisional because they were created after the Attorney General's initial decision to send a letter, a decision to which the Attorney General was purportedly committed. The Supreme Court rejected an analogous argument in *Sierra Club*, where the Court rebuffed the argument that a draft document was final because it expressed a conclusion the agency "had already reached and [was] unwilling to change." 141 S. Ct. at 787. The letter the Justice Department transmitted to the Department of Commerce is a final document with an "operative effect." *Id.* The drafts, which were part of a deliberative process that culminated in the final version of the letter, are not.

ARGUMENT

THE GARY LETTER DRAFTS ARE PREDECISIONAL, DELIBERATIVE MATERIALS COVERED BY THE DELIBERATIVE PROCESS PRIVILEGE

A. The Supreme Court's recent decision in *United States Fish & Wildlife Service v. Sierra Club, Inc.*, 141 S. Ct. 777 (2021)—a decision plaintiff does not address—confirms that the Gary letter drafts and associated emails are non-final documents that are subject to the deliberative process privilege. *Sierra Club* involved a rule proposed by the Environmental Protection Agency (EPA). *Id.* at 783-84. In response to the proposed rule, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (together, "Services") prepared draft biological opinions which concluded that the proposed rule was likely to jeopardize certain endangered species. *Id.* at 784. After EPA significantly revised the rule, the Services concluded that the revised rule would not harm any protected species, and EPA issued the revised rule in final form. *Id.* Sierra Club later filed a Freedom of Information Act (FOIA) request seeking the draft biological opinions the Services had created in response to the initial, proposed rule. *Id.* at 785.

The Supreme Court held that the Services properly withheld the draft opinions under FOIA's Exemption 5, because the opinions were protected by the deliberative process privilege. *Sierra Club*, 141 S. Ct. at 786-88. In so doing, the Court rejected Sierra Club's claim that the draft opinions were final, postdecisional documents because they set forth "a conclusion that the Services had already reached and were unwilling to change." *Id.* at 787. The Court emphasized that a "draft is, by definition, a preliminary version of a piece of writing subject to feedback and change." *Id.* at 786. Thus, "a draft document will typically be predecisional." *Id.* at 788. Only where an agency treats a purportedly draft document as "final and immune from change" and gives the draft "real operative effect" will it be considered postdecisional and not privileged. *Id.* at 787. Because the Services treated the draft opinions as subject to further "postcirculation changes" and not as "final product[s]," they qualified as predecisional documents subject to the deliberative process privilege. *Id.* at 787-88.

Like the Services in *Sierra Club*, the Department of Justice did not treat the draft Gary letters and associated cover emails as finished products that were immune from change. To the contrary, the drafts'

authors circulated the documents to peers and subordinates at the Justice Department in order to obtain feedback to be incorporated in future drafts. Those peers and subordinates then responded with editorial comments, revisions, and suggestions that they proposed including in revised drafts, reflecting their expectation that there would be future drafts. *See, e.g.*, JA 608 (explaining that the withheld materials "discuss edits, comments and revisions to a draft letter" and "discussion, opinions, and analyses of the various draft versions"). Indeed, plaintiff notes that one of the drafts was labeled "near-final," a label that underscores that the Department did not view the withheld document as a final product. Br. 11. The only document the Department treated as final was the version of the letter it transmitted to the Department of Commerce on December 12, 2017.

Sierra Club also addressed and rejected the primary arguments plaintiff makes in support of its claim that the draft letters were not predecisional. Plaintiff primarily asserts that the drafts are postdecisional because they postdate the Attorney General's internal decision to send a letter, a decision that plaintiff asserts was not subject to further change. The plaintiff in *Sierra Club* made an analogous

argument, alleging that the draft biological opinions should be considered postdecisional because they set forth "a conclusion that the Services had already reached and were unwilling to change." 141 S. Ct. at 787. The Supreme Court rejected that argument, emphasizing that the "determinative fact" is whether the agency "treated [the document] as final" by, for example, "approv[ing] the draft[]" or transmitting it in final form. *Id.* at 788. As noted, the Department plainly did not treat the withheld drafts as final. It neither approved them nor transmitted them to the Commerce Department.

Although the point is not material, plaintiff is also wrong in asserting that the Attorney General's decision was unalterable. As the government explained in its opening brief, Gov't Br. 12, until the Department of Justice sent the final letter to the Commerce Department, there remained a possibility, however remote, that the Attorney General might change his mind about sending it. The Department's deliberations over the contents of the letter might have, for instance, spurred the Attorney General to reconsider. The deliberative process privilege is intended to protect just such deliberations.

In *Sierra Club*, the Supreme Court also dismissed plaintiff's concern that a ruling in the government's favor would mean that "every draft of every government document would be 'predecisional' because it pre-dates the finalization of the document." Br. 13-14. Indeed, the Supreme Court recognized that "a draft document will typically be predecisional" and that drafts will thus almost always be protected by the deliberative process privilege. 141 S. Ct. at 788. Only where an agency treats a draft as final, with a corresponding operative legal effect, will a document labeled "draft" be considered postdecisional. *Id.* at 788-89. That is not the case here.

We explained in our opening brief that plaintiff's theory would require courts in FOIA cases to undertake the difficult task of determining when an internal agency decision is sufficiently final that any later-drafted documents related to that decision are subject to public disclosure. Gov't Br. 12. In response, plaintiff merely states (Br. 16) that "courts are already tasked with deciding whether a document [was] 'predecisional.'" But, as the Supreme Court made clear in *Sierra Club*, the focus of such an inquiry is on the document itself and whether "the agency treats the document" as final. 141 S. Ct. at 786. This Court

follows the same approach, focusing on the nature of the withheld document and how the agency employs that document. Thus, this Court in *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854 (D.C. Cir. 1980) (cited by plaintiff at Br. 16), concluded that a particular document was not predecisional because it was not antecedent to a "formal opinion," did not contain "subjective or personal" opinions, and reflected no "agency give-and-take." *Id.* at 868. Here, there is no question that the Department did not treat the drafts and associated editorial commentary as finished products. They are antecedent to the final letter, include the personal commentary and opinions of Department staff, and reflect the agency's deliberations regarding the content of the final letter. Under the appropriate inquiry, the drafts are predecisional.

Plaintiff also errs in arguing that the Department's deliberations over the contents of the final letter do not involve "policy-implicating judgment." Br. 14. This Court has long recognized that "editorial judgments—for example, decisions to insert or delete material or to change a draft's focus or emphasis," *Formaldehyde Inst. v. Department of Health & Human Servs.,* 889 F.2d 1118, 1123 (D.C. Cir. 1989),

involve the same type of policy-implicating judgments as do "other agency deliberations that precede agency decisions," *Russell v. Department of the Air Force*, 682 F.2d 1045, 1049 (D.C. Cir. 1982). As we noted in our opening brief, this Court has explained that an agency's "editorial judgments" are protected by the deliberative process privilege, and we cited several instances in which this Court and others have concluded that draft documents like those at issue here are subject to the privilege. *See* Gov't Br. 9-11. Plaintiff fails even to acknowledge these cases and cites no instance in which a court has concluded that draft documents like those at issue here were postdecisional.

Plaintiff also mistakenly asserts that the draft letters and cover emails "do not fit the mold of cases" where an agency employee "draft[ed] [a] document so that a supervisor or colleague could decide a particular issue." Br. 15. The documents at issue reflect editorial comments and suggestions from subordinates and colleagues of then-Acting Assistant Attorney General John Gore, the primary author of the Gary letter, and the Justice Management Division's General Counsel Arthur Gary, who signed it. *See* JA 393-95; JA 440-42; JA 608-16; JA 804, 821. Those comments and proposed revisions were intended

to aid Assistant Attorney General Gore and Mr. Gary in deciding upon the final contents of the Department's letter to the Commerce Department. The documents fit comfortably within the body of case law recognizing that draft documents and editorial commentary are subject to the deliberative process privilege.

B. Plaintiff similarly misses the mark in arguing that withholding the materials at issue would not further the goals of the deliberative process privilege. *See* Br. 9-13. Plaintiff mistakenly asserts (Br. 10) that withholding the draft documents at issue would not "encourage open, frank discussions on matters of policy." To the contrary, disclosing the materials would discourage agency personnel from sharing their candid views on the substance, phrasing, and quality of agency communications like the Gary letter. *See* Gov't Br. 9-10. Moreover, as discussed, an agency's "editorial review process" implicates the same policy-based judgments as other agency deliberations and is equally subject to the deliberative process privilege. *Russell*, 682 F.2d at 1049.

Plaintiff's interpretation of the deliberative process privilege is particularly likely to discourage agency personnel from providing frank

advice. Under plaintiff's theory, an agency staff member who had reason to believe an agency head had determined to proceed with a particular policy would be discouraged from offering a candid assessment of a draft document laying out that policy and its rationale. The employee might reasonably fear that a court would later determine that the agency head's initial decision was final and that any subsequent documents and critiques relating to that decision were thus subject to public disclosure. That is precisely the type of chilling effect that the deliberative process privilege is designed to avoid.

Plaintiff is also incorrect in arguing that the disclosure of the draft letters and editorial comments would not risk "public confusion about the reasons and rationales for DOJ's decision to issue the Gary Letter." Br. 12. The draft documents plaintiff seeks contain editorial commentary reflecting the "subjective [and] personal" views, *Coastal States Gas Corp.*, 617 F.2d at 868, of the various career and other agency personnel who were tasked with reviewing drafts of the letter. To the extent those views were not implemented in the final version of the Gary letter, they do not reflect the agency's reasons and rationales

for the Department's action, but rather the personal opinions of the authors.

C. The government explained in its opening brief, and the Supreme Court's decision in *Sierra Club* affirms, that the relevant final agency action in this case is the final version of the letter that the Department of Justice transmitted to the Department of Commerce. *See* Gov't Br. 10-12. Because the Gary letter drafts and associated emails were part of the deliberative process that culminated in the final version of the letter, they are predecisional and protected by the deliberative process privilege. However, even assuming that the Attorney General's initial decision to send a letter was a relevant final decision (which it was not), the documents would nonetheless be protected by the deliberative process privilege because they reflect the Department's deliberations regarding how best to communicate that decision to the Census Bureau, Congress, and the public. *See* Gov't Br. 13.

Plaintiff notes that the Justice Department bore the burden of establishing that the Gary letter is a messaging document and contends that the Department failed to introduce "any admissible facts that

would meet this burden." Br. 16-17. Plaintiff does not explain what additional facts are missing, and its contention that the government failed to establish that the Gary letter and drafts are messaging documents is plainly wrong. The Gary letter communicates the Department of Justice's request for a citizenship question to the Department of Commerce and provides the Department's official reasons for that request. It is thus self-evidently a messaging document. The *Vaughn* Indices that the Department prepared and submitted also make clear that the withheld materials include drafts of, and proposed revisions to, the final letter and were thus part of the deliberative process regarding the contents of the Department's message to the Commerce Department and others. *See, e.g.*, JA 608-16.

Plaintiff incorrectly states (Br. 16) that the government "conceded [in the district court] that the withheld materials are not messaging documents." The government did not do so. *See* Gov't Br. 14. The government repeatedly emphasized in the district court that the withheld materials were predecisional because they predated the agency's decision as to the final "content of the [Gary letter]." *See* Dkt. No. 26, at 5; *see also id.* at 6 ("[T]he pertinent agency decision was the

determination of the *contents* of the correspondence in question."). The government thus made clear that the relevant final agency decision here was the agency's decision regarding the substance and phrasing of the Gary letter. Whether that decision is viewed as the sole final agency decision relating to the Department's request or as a subsidiary final decision that followed the Attorney General's decision to send the letter is irrelevant. In either case, the district court erred in concluding that all deliberations ceased upon the Attorney General's initial decision to send a correspondence.

CONCLUSION

For the foregoing reasons, the district court's orders requiring the government to produce the documents at issue here should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 2,747 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Century Schoolbook 14-point font, a proportionally spaced typeface

/s/ Gerard Sinzdak
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CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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