20-3837

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY,
Plaintiff–Appellee,

v.

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

(*Caption continued on inside cover*)

On appeal from the United States District Court
for the Southern District of New York — No. 1:17-cv-7572 (Carter, J.)

BRIEF FOR PLAINTIFF–APPELLEE

Megan Graham
Catherine Crump
Samuelson Law, Technology & Public Policy Clinic
U.C. Berkeley School of Law
354 Law Building
Berkeley, CA 94720-7200
mgraham@clinical.law.berkeley.edu
(510) 664-4381

Xiangnong Wang
Carrie DeCell
Alex Abdo
Jameel Jaffer
Knight First Amendment Institute at Columbia University
475 Riverside Drive, Suite 302
New York, NY 10115
(646) 745-8500
george.wang@knightcolumbia.org

Attorneys for Plaintiff–Appellee

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

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel certifies that Plaintiff–Appellee the Knight First Amendment Institute at Columbia University has no parent corporations and that no publicly held corporation owns 10 percent or more of its stock. The Knight Institute is a non-profit, non-partisan organization governed by a nine-member board of directors, five of whom are associated with Columbia University.

/s/ Megan Graham

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

During his 2016 campaign, former President Donald J. Trump promised that, if elected, he would mandate extreme ideological vetting of people seeking entry into the United States. Upon taking office, he delivered on this promise. Declaring that only individuals who "want to love our country" should be admitted, President Trump ordered the development of a more invasive vetting program for visa applicants and refugees seeking entry into the United States. Pursuant to these orders, agencies implemented policies that appeared to authorize exclusion or removal from the United States based on an applicant's speech, beliefs, or associations.

Seeking to inform the public about these policies, the Knight First Amendment Institute (the "Knight Institute" or "Institute") submitted identical Freedom of Information Act ("FOIA") requests (the "Request") to the Department of Homeland Security ("DHS"), Customs and Border Protection ("CBP"), Immigrations and Customs Enforcement ("ICE"), U.S. Citizenship and Immigration Services ("USCIS"), Department of Justice ("DOJ"), and Department of State ("DOS") (collectively, "Defendants") seeking several categories of records concerning the

exclusion or removal of individuals from the United States based on their speech, beliefs, or associations.

These records are of manifest public importance. They are necessary to inform the public about the government's recent visa vetting policies, about various agencies' policies and practices under relevant provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, and, most importantly, about the government's apparent view that it can exclude or remove people from the United States based on their expression or associations. The government's consideration of such factors in admissibility determinations threatens to abridge the First Amendment rights of U.S. citizens, residents, and visitors to communicate and associate with those who are thus deemed inadmissible, as well as the free expression and free association of non-citizens abroad. The public is entitled to know how the government makes these determinations, and the records at issue in this litigation are necessary to aid the public in understanding the resulting impact on their First Amendment rights.

Disclosure of these records is especially crucial now, as President Biden reconsiders the policies of the prior administration. Indeed,

President Biden has revoked the executive orders and proclamations that formed the backbone of President Trump's "extreme vetting" program and ordered a formal review of key aspects of the current screening and vetting process. Proclamation No. 10,141, 82 Fed. Reg. 7005, 7005–06 (Jan. 20, 2021). The records at issue here would enrich public discourse regarding these important issues.

While Defendants have disclosed some records as a result of this litigation, they have continued to withhold large portions of critical records. In particular, this appeal concerns key withholdings from three sets of records that the district court first ordered disclosed in September 2019. Because DOS, USCIS, and ICE have not justified the withholding of these records under FOIA, this Court should affirm the district court's judgment and order their prompt disclosure.

COUNTERSTATEMENT OF THE ISSUES

1. Whether DOS and USCIS improperly invoked Exemption 7(E), which applies only to law enforcement records, to withhold certain sections of the Foreign Affairs Manual and "model" interview questions contained in manuals, guides, and presentations, and used in admissibility interviews.

2. Whether ICE improperly invoked the deliberative process privilege under Exemption 5 to withhold a memorandum that describes whether the Secretary of State can invoke INA § 212(a)(3)(C) to render someone inadmissible.

COUNTERSTATEMENT OF THE CASE

I. Consideration of speech, beliefs, and associations in admissibility decisions.

Certain INA provisions permit or require government officials to assess an individual's eligibility for a visa (or admissibility) on the basis of their speech, beliefs, and associations—regardless of whether their speech, beliefs, or associations would be protected under the First Amendment. Specifically, the INA states that "[a]ny alien who . . . endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization," 8 U.S.C. § 1182(a)(3)(B)(i)(VII), or who "is a representative of . . . a political, social, or other group that endorses or espouses terrorist activity," 8 U.S.C. § 1182(a)(3)(B)(i)(IV)(bb), is inadmissible.[1] Furthermore, the

[1] *See also* 8 U.S.C. § 1225(c) (providing for expedited removal on same grounds); 8 U.S.C. § 1227(a)(4)(B) (permitting removal of admitted persons on same grounds); 8 U.S.C. § 1158(b)(2)(A)(v) (permitting

INA provides that any "alien whose entry or proposed activities in the United States . . . would have potentially serious adverse foreign policy consequences . . . is inadmissible." 8 U.S.C. § 1182(a)(3)(C)(i). For most non-citizens, the INA permits the Secretary of State to consider a person's "beliefs, statements or associations [that] would be lawful within the United States" if the "the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest."[2] 8 U.S.C. § 1182(a)(3)(C)(iii). In certain circumstances, the Attorney General, Secretary of Homeland Security, or Secretary of State can waive these provisions. *See, e.g.*, 8 U.S.C. §§ 1182(d)(3), 1182(d)(1).

In 2017, against the backdrop of these INA provisions, President Trump declared that only individuals who "want to love our country"

---

removal of refugees otherwise qualified for asylum on similar grounds). Collectively, this brief refers to these as the "endorse or espouse provisions" of the INA.

[2] *See also* 8 U.S.C. §§ 1225(c)(1), 1227(a)(4)(C) (permitting removal on same grounds). Collectively, this brief refers to these as the "foreign policy provisions" of the INA.

should be admitted into the United States[3] and ordered the Secretary of State, Attorney General, Secretary of Homeland Security, and Director of National Intelligence to develop a more invasive vetting program for visa applicants and refugees seeking entry into the United States. This so-called "extreme vetting" process was directed to include, among other things, the "collection of all information necessary for a rigorous evaluation of all grounds of inadmissibility." Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,215 (Mar. 6, 2017); *see also* Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8977 (Jan. 27, 2017); Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,161 (Sept. 24, 2017).

In implementing these directives, various agencies introduced policies for examining visa applicants' and visa holders' beliefs and associations, including policies for the collection, monitoring, and retention of their social media information. For example, DOS announced that on May 31, 2019, it had updated its immigrant and nonimmigrant visa application forms to require applicants to register their social media

[3] *Trump Defends Immigration Restrictions, Wants People "Who Love Our Country*," Chi. Trib. (Feb. 6, 2017), http://trib.in/2vIQeuw [https://perma.cc/F4YT-HNQZ].

identifiers with the government.[4] Likewise, on January 28, 2019, ICE awarded a multi-million dollar contract to a defense company for services related to monitoring the social media and online activities of 10,000 visa applicants and visa holders in the United States per year.[5] Other agencies pursued similar efforts to collect visa applicants' social media identifiers and other sensitive information.

Since taking office, President Biden has pledged to reevaluate these Trump-era screening and vetting policies. On the first day of his

---

[4] DOS, *Collection of Social Media Identifiers from U.S. Visa Applicants* (last updated June 4, 2019), https://travel.state.gov/content/travel/en/News/visas-news/20190604_collection-of-social-media-identifiers-from-U.-S.-visa-applicants.html [https://perma.cc/FC8Z-AJW6].

[5] *See* Amyx, Inc., B-416734.2, 2019 CPD ¶ 143 (Comp. Gen. Apr. 9, 2019) (denying a competitor's bid protest to the blanket purchase agreement issued to SRA International, Inc. by ICE for its Visa Lifecycle Vetting Initiative); *see also* Contract Award No. 70CMSD19FC0000020, https://www.usaspending.gov/award/81011540 [https://perma.cc/DN9C-V8QC] (tracking federal contract providing operational support services for ICE's Visa Lifecycle Vetting Initiative); Fed. Procurement Data System, Contract No. 70CMSD19FC0000020, https://www.fpds.gov (search in search bar for "70CMSD19FC0000020"; then select contract dated May 30, 2019) [https://perma.cc/26TF-TPRS] (same); *see also* Drew Harwell & Nick Miroff, *ICE Just Abandoned Its Dream of "Extreme Vetting" Software that Could Predict Whether a Foreign Visitor Would Become a Terrorist*, Wash. Post (May 17, 2018), https://wapo.st/3v1ZAw2 [https://perma.cc/SK2E-JJEM] (discussing ICE's decision to review social media activity of 10,000 people per year).

administration, President Biden revoked Executive Order 13,769 and the related "extreme vetting" proclamations. Proclamation No. 10,141, 82 Fed. Reg. at 7005. He directed the Secretary of State to order embassies and consulates "to resume visa processing in a manner consistent with the revocation of the Executive Order." *Id.* at 7005–06.

Given the expanded focus on social media accounts in immigration vetting in recent years, and the Biden Administration's active review and reconsideration of these policies, the records at issue in this appeal are especially relevant to current public debate. Without more information about the government's current and historical consideration of speech, beliefs, and associations in making admissibility decisions, the public cannot determine the degree to which the government's policies abridge First Amendment rights, or assess how proposed policies could further impact those rights.

II. The Request and the Records at Issue on Appeal.

Seeking to inform the public about the free-speech implications of the Trump Administration's visa vetting initiatives, and based on the public's need to understand how the government has interpreted and used the endorse or espouse and foreign policy provisions in making

admissibility decisions across administrations, the Knight Institute submitted the Request to various agencies—including DOS, USCIS, and ICE—on August 7, 2017. (JA 36–43). The Institute initially sought six categories of information relating to the Trump Administration's extreme vetting policies and the government's reliance on the endorse or espouse and the foreign policy provisions of the INA. (JA 38–40).

While most of the Request was resolved or is still being litigated in the district court, Defendants' withholding of information from three categories of records is currently before this Court.[6] These records are:

(1) Three Sections of the Foreign Affairs Manual. DOS disclosed partially redacted portions of several versions of three sections

[6] On April 22, 2021, the Knight Institute withdrew the Request as it relates to two USCIS records that were initially at issue on appeal: what the parties and district court have called the Acting Director Memo and the Senior Policy Council Paper. On October 23, 2020, USCIS discretionarily released additional portions of these records. On April 21, 2021, the agency confirmed that a memorandum the Knight Institute located online was, in fact, a version of the Policy Memorandum attached to the Acting Director Memo. Given these releases, the Knight Institute is no longer seeking these records through litigation. This portion of the government's appeal is therefore moot. *See Maine v. U.S. Dep't of Interior*, 298 F.3d 60, 70 (1st Cir. 2002) (dismissing an appeal as moot after the requesting party withdrew its FOIA request for the document); *accord Vest v. U.S. Dep't of Air Force*, 793 F. Supp. 2d 103, 107 nn.2–3 (D.D.C. 2011); *Ferranti v. Gilfillan*, No. 3:04-cv-339-CFD, 2005 WL 1366446, at *1 (D. Conn. May 31, 2005).

of the Foreign Affairs Manual ("FAM").[7] The FAM and the associated Foreign Affairs Handbooks ("FAHs") are authoritative sources of DOS's "organization structures, policies, and procedures."[8] According to DOS, the FAM generally describes policy.[9] At issue on appeal are DOS's Exemption 7(E) withholdings of information in Volume 9 of the FAM ("9 FAM"), comprising: eight versions of 9 FAM § 302.6 ("Ineligibilities Based on Terrorism-Related Grounds"), (JA 66–68, 115–59); three versions of 9 FAM § 40.32 ("Scope of INA 212(A)(3)(B) Notes"), (JA 68–69); and one version of 9 FAM § 302.14 ("Ineligibility Based on Sanctioned Activities"), (JA 69–70). This volume of the FAM "contains directives and guidance" about the "adjudication of U.S. visas, both nonimmigrant and immigrant, providing consular officers with the

[7] Specifically, these records comprise: "Foreign Affairs Manual 9 FAM § 302.6" (C06533909, C06533920, C06533941, C06533947, C06533951, C06533970, C06534007, C06571131) (JA 66–68); "Foreign Affairs Manual 9 FAM § 40.32" (C06533937, C06567707, C06567710) (JA 68–69); "Foreign Affairs Manual 9 FAM § 302.14" (C06571135) (JA 69–70). The Knight Institute provided the district court with one version of 9 FAM § 302.6 as an exemplar. (JA 115–55). Other versions and sections contain substantially similar redactions.

[8] DOS, *Foreign Affairs Manual and Handbook*, https://fam.state.gov [https://perma.cc/5JJC-TKC6] (last visited May 18, 2021).

[9] *Id.*

guidance needed to make informed decisions based on U.S. immigration law and regulations." 9 FAM § 101.1 (2020).

(2) Terrorism-Related Inadmissibility Grounds Questions. USCIS disclosed partially redacted portions of a number of manuals, guides, and presentations regarding the INA's terrorism-related inadmissibility grounds ("TRIG"),[10] and training manuals from the Refugee, Asylum and International Operations Directorate ("RAIO") (collectively, "Training Documents").[11] At issue on appeal are the

[10] The TRIGs are set forth in INA § 212. *See* 8 U.S.C. § 1182(a)(3)(B).

[11] Specifically, these records comprise: USCIS BASIC Instructor Guide on TRIG, versions dated Nov. 2015, 2012, and 2010, (JA 174, 180, 183) (withholding, in JA 180, "TRIG specific model questions that USCIS immigration officers should ask when interviewing applicants" and "material support for terrorism questions that should be asked"); USCIS BASIC Participant Guide on TRIG, versions dated 2012 and 2010, (JA 181, 183–84) (withholding, in JA 181, same two types of questions); USCIS TRIG Training PowerPoint, Course 234, versions dated Mar. 21, 2017, Nov. 2015, May 9, 2012, and May 2010, (JA 179, 181, 182, 184) (withholding, at JA 179, "specific questions that USCIS immigration officers are trained to ask applicants when screening them for possible ties to terrorism and when assessing TRIG bars," and, at JA 182, "follow-up questions that immigration officers should ask when they spot issues in testimony that could trigger a TRIG bar"); USCIS TRIG Instructor Guide, versions dated May 2017 and Mar. 2017, (JA 178, 185) (withholding, in JA 185, "model questions" and "questions officers should ask, that were designed to uncover possible terrorism ties"); USCIS TRIG Participant Guide, versions dated Mar. 2017 and May 2017, (JA 178, 185–86 (withholding, in JA 185–86, "model questions" and "questions

Exemption 7(E) withholdings of what USCIS described as "model" interview questions, (JA 552), which the district court referred to as "the TRIG Questions," (SPA 71). According to USCIS, these "specific questions" are used by immigration officials in admissibility interviews to identify whether there are terrorism-related grounds for inadmissibility under the INA. (*See* JA 552).

(3) Memorandum Titled "ICE Ability to Use 212(a)(3)(C) Foreign Policy Charge." ICE withheld all but the title of a memorandum titled "ICE Ability to Use 212(a)(3)(C) Foreign Policy Charge" (the "Foreign Policy Provision Memo"). (*See* JA 329–32). To justify its withholding, ICE invoked the deliberative process privilege under Exemption 5. (JA 248–49). According to ICE's declaration, the redacted material reflects "opinions, analysis, guidance and legal advice prepared by attorneys in the ICE Office of the Principal Legal Advisor (OPLA), regarding a particular section of the INA." (*Id.*). Specifically, ICE stated that the record contains "a brief summary with notes and quotes

---

officers should ask")); TRIG Exemptions – Group-Based Exemptions/Situational Exemptions (officer training manual), (JA 176–77); and USCIS RAIO Officer Training – Combined Training Course Manual on National Security, versions dated Jan. 24, 2013 and Oct. 26, 2015 (JA 177, 186).

for determining whether Section 212(a)(3)(C) can be used by the Secretary of State as grounds for inadmissibility." (JA 563).

III. District Court Opinions and Orders on Appeal.

The parties filed two rounds of cross-motions for partial summary judgment. The first round addressed DOS's Exemption 7(E) withholdings in the FAM, and the second round addressed USCIS's Exemption 7(E) withholdings of the TRIG Questions and ICE's Exemption 5 withholdings in the Foreign Policy Provision Memo. (JA 12–15). The district court resolved those issues in the Knight Institute's favor in opinions and orders issued on September 13, 2019 and September 23, 2019, respectively. (SPA 2, 39, 53). DOS and USCIS then filed a motion for clarification and reconsideration of the district court's rulings and orders regarding the applicability of Exemption 7(E) to the FAM and TRIG Questions, (JA 17), which the court denied on September 13, 2020, (SPA 57–58).

A. September 13, 2019 Opinion and Order.

In its September 13, 2019 opinion, the district court determined that Exemption 7(E) did not permit the withholding of the three sections

of the FAM in dispute. (SPA 28). It directed DOS to disclose these records in full. (*Id.*).

First, the district court held that DOS had failed to satisfy its burden of showing that the withheld FAM sections met Exemption 7's threshold requirement of being compiled for law enforcement purposes. (*Id.*). The court noted that DOS is a mixed-function agency with "both 'law enforcement and administrative functions,'" and that, accordingly, DOS's claim that the FAM sections were compiled for law enforcement purposes must be "scrutinize[d] with skepticism." (SPA 26) (quoting *Tax Analysts v. IRS*, 294 F.3d 71, 77 (D.C. Cir. 2002)). The court concluded that DOS had failed to meet its burden, specifically noting that some of the redacted portions occurred in the "Definitions" section and that other portions of the FAM contained "recitations of statutes and background" that fall outside of Exemption 7(E). (SPA 27). It also observed that "DOS admits the FAM generally consists of 'policy,'" and explained that "mere descriptions of codified law and policy, even those including 'interpretation and application of immigration laws and regulations,' are not protected under Exemption 7(E)." (SPA 27–28).

Second, the court held that DOS had failed to carry its burden of establishing that disclosure of the portions of the FAM records it characterized as "guidelines" would enable circumvention of the law. (SPA 28). As the district court wrote, "it is unclear how explaining to the public what may constitute grounds for inadmissibility—essentially, a legal interpretation—may potentially help an individual circumvent the law." (*Id.*). In any event, the court observed, "knowledge of the law always enables individuals to avoid committing a crime." (*Id.*).

B. September 23, 2019 Opinion and Order.

In its September 23, 2019 opinion, the district court held that the government could not withhold the TRIG Questions under Exemption 7(E), and that it could not withhold the entirety of the Foreign Policy Provision Memo under Exemption 5.

First, the district court held that "USCIS failed to establish the TRIG Questions are investigatory 'techniques and procedures' protected by Exemption 7." (SPA 51). In contrast to the set of information the court referred to as the "TRIG Exemptions," the court found that the screening and follow-up questions constituting the TRIG Questions are not "necessarily special or technical." (SPA 52–53). The court observed that

the agency "assert[ed] it withheld 'model,' 'sample,' or 'suggested' questions without explaining how they reflect on any specific techniques," or how people "subject to questioning would not inevitably learn the withheld techniques." (SPA 52). The court further found that USCIS's use of the withheld TRIG Questions "over decades" implied that those questions are well known and "susceptible to widespread dissemination," and considered it "safe to assume immigration applicants will remember and report questions related to terrorism to other people." (SPA 53) (quotation marks omitted).

Second, the district court held that Exemption 5 does not permit ICE to withhold the portions of the Foreign Policy Provision Memo that describe current immigration policy, because those portions are neither pre-decisional nor deliberative. (SPA 38–39). The court rejected ICE's argument that the memo, which was "prepared to assist the Secretary of State in determining whether Section 212(a)(3)(C) of the INA can be used to render an alien inadmissible," was "pre-decisional advice." (SPA 38) (quotation marks omitted). Rather, the court concluded that "ICE's description of the memo suggests the withheld portions are more akin to opinions regarding how to *interpret* policy rather than recommendations

as to how to *make* policy"—in other words, ICE's description matched a post-decisional explanation, not a pre-decisional discussion. (*Id.*). The court also found that ICE had not carried its burden of establishing that the memo was deliberative, observing that the relevant *Vaughn* index entry, *see Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), failed to "detail the record's deliberative nature beyond boilerplate justifications." (SPA 38).

C. The District Court's 2020 Opinion and Order Denying Defendants' Motion for Clarification and Partial Reconsideration.

After the district court ordered Defendants to disclose records pursuant to its summary judgment opinions, DOS and USCIS sought clarification and partial reconsideration of the court's Exemption 7(E) holdings related to the FAM and TRIG Questions. Specifically, DOS and USCIS sought to clarify whether the court's Exemption 7(E) rulings required immediate disclosure to the Knight Institute or whether they permitted supplemental submissions to the court in a further attempt to justify the withholdings. (*See* SPA 61). DOS and USCIS also sought reconsideration of the court's orders to disclose the FAM and the TRIG Questions, and requested that they be allowed to supplement the record

with additional declarations or that the court conduct *in camera* review of the relevant records. (*See id.*).

The district court denied the motion. (SPA 73). The court reiterated its previous holdings that neither DOS nor USCIS was entitled to rely on Exemption 7(E) to withhold the disputed sections of the FAM or TRIG Questions. (SPA 69–70). Therefore, the court ordered DOS and USCIS to promptly disclose the improperly withheld material. (SPA 69, 71).

To facilitate the ordered disclosures, the district court provided additional guidance on the difference between the TRIG Questions and TRIG Exemptions. The district court wrote that the TRIG Questions consist of "the questions and follow-ups designed to *elicit* information from applicants that would shed light on . . . whether the applicant[s] ha[ve] any ties to terrorist organizations and activities," whereas the TRIG Exemptions "are the criteria USCIS uses to *evaluate* applicants' answers." (SPA 71). The court observed that the TRIG Exemptions are "internal to the agency and protectable" under Exemption 7(E), but that the TRIG Questions are, "by definition, shared specifically with applicants." (*Id.*).

Finally, the district court denied DOS and USCIS's request to supplement the record or conduct *in camera* review, holding that neither step was necessary because the agencies had pointed to "no intervening changes in controlling law, newly available evidence, or clear error warranting reversal" of the order to disclose improperly withheld material. (*Id.*).

SUMMARY OF ARGUMENT

This appeal raises a question of critical importance: whether the government may refuse to disclose records showing how it interprets and applies its asserted authority under the INA to exclude or remove people from the United States based on their speech, beliefs, or associations. After careful consideration of the record, the district court properly concluded that it cannot. Consistent with FOIA's strong presumption in favor of disclosure, this Court should affirm the district court's orders, holding that the government has failed to justify its withholdings of the FAM materials and TRIG Questions under Exemption 7(E) and the Foreign Policy Provision Memo under Exemption 5.

First, the district court correctly held that DOS failed to establish that the three sections of the FAM withheld pursuant to Exemption 7(E)

were compiled for law enforcement purposes and would reveal "techniques and procedures." DOS failed to meet the threshold requirement under Exemption 7 of showing that it compiled 9 FAM for a specific law enforcement purpose rather than as guidance for routine application and determinations of the law, rendering Exemption 7(E) entirely inapplicable. Further, DOS failed to show that 9 FAM consists of law enforcement "techniques and procedures." Instead, the withheld portions of 9 FAM appear either to summarize applicable statutes and DOS directives, or to provide a bird's eye view of DOS's considerations in assessing visa applications. In either case, these explanations do not qualify as "specialized" law enforcement "techniques and procedures" protected by Exemption 7(E).

Second, the district court correctly held that USCIS failed to demonstrate that the model TRIG Questions found in the Training Documents fall within the scope of Exemption 7(E). While immigration officials rely on the TRIG Questions to determine an applicant's eligibility for entry, USCIS failed to show that these questions are "techniques and procedures" within the meaning of Exemption 7(E) for two reasons. First, USCIS does not explain how disclosure of the TRIG

Questions would reveal the sort of specialized, calculated techniques and procedures that fall within Exemption 7(E). Second, because the TRIG Questions are commonly used in interviews and written Requests for Evidence, they have been revealed to the public and therefore cannot be withheld under Exemption 7.

Third, the district court correctly held that ICE failed to show that the deliberative process privilege shields the Foreign Policy Provision Memo from disclosure under Exemption 5, because the document is neither predecisional nor deliberative. Indeed, ICE's own characterization of this memo suggests that it provides a *post*-decisional explanation of how to interpret policy. Moreover, ICE has not presented any evidence of the document's deliberative nature beyond boilerplate language and conclusory statements. Even if this Court finds that Exemption 5 applies to parts of the memo, ICE has not met its burden to disclose reasonably segregable portions of the record.

For these reasons, the district court was correct to conclude that DOS and USCIS improperly invoked Exemption 7(E) to withhold the FAM and TRIG Questions, respectively, and that ICE improperly applied Exemption 5 to the Foreign Policy Provision Memo. This Court should

not allow Defendants to withhold critical records from the public based on vague and conclusory assertions. Instead, it should affirm the district court's judgments and order the government to promptly disclose these records to the Knight Institute.

STANDARD OF REVIEW

This Court reviews a district court's summary judgment order in FOIA litigation *de novo*. *Tigue v. DOJ*, 312 F.3d 70, 75 (2d Cir. 2002); *see* 5 U.S.C. § 552(a)(4)(B). "The defending agency has the burden of showing that the withheld records are exempt from FOIA." *Everytown for Gun Safety Support Fund v. ATF*, 984 F.3d 30, 37 (2d Cir. 2020); *see also DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 755 (1989); *see also Spadaro v. CBP*, 978 F.3d 34, 42 (2d Cir. 2020). Although agencies generally enjoy a presumption of good faith in their affidavits, *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994), where the requester challenges an agency's withholdings, the "agency's decision that the information is exempt from disclosure receives no deference." *Bloomberg, L.P. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 601 F.3d 143, 147 (2d Cir. 2010); *see also Cooper Cameron Corp. v. OSHA*, 280 F.3d 539, 543 (5th Cir. 2002). Furthermore, this "good faith presumption . . . only applies when

accompanied by reasonably detailed explanations of why material was withheld." *Halpern v. FBI*, 181 F.3d 279, 295 (2d Cir. 1999). "[V]ague and conclusory affidavits . . . read much like bureaucratic double-talk" and are insufficient to bar disclosure. *Id.* at 293; *see also Wiener v. FBI*, 943 F.2d 972, 978–79 (9th Cir. 1991); *King v. DOJ*, 830 F.2d 210, 219 (D.C. Cir. 1987).

ARGUMENT

FOIA is "vital to the functioning of a democratic society." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Congress enacted FOIA "to ensure an informed citizenry" and to "hold the governors accountable to the governed." *Id.* "Official information that sheds light on an agency's performance of its statutory duties"—like the information at issue in this appeal—"falls squarely within" FOIA's scope. *DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. at 773. Under FOIA, "doubts . . . are to be resolved in favor of disclosure." *ACLU v. Dep't of Def.*, 543 F.3d 59, 66 (2d Cir. 2008), *cert. granted & judgment vacated*, 558 U.S. 1042 (2009).

As explained below, the district court correctly determined that three agencies—DOS, USCIS, and ICE—failed to meet their burdens to

withhold three sets of records under Exemptions 7(E) and 5. Thus, FOIA requires the disclosure of these records.

I. DOS and USCIS improperly withheld information under FOIA Exemption 7(E).

Exemption 7(E) protects information "compiled for law enforcement purposes" that would disclose (1) "techniques and procedures for law enforcement investigations or prosecutions," or (2) "guidelines for law enforcement investigations or prosecutions, if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E); *see also Allard K. Lowenstein Int'l Human Rights Project v. DHS*, 626 F.3d 678, 681 (2d Cir. 2010).

To withhold records under Exemption 7(E), an agency must satisfy two criteria. As an initial matter, the agency must show that the records were compiled for law enforcement purposes. "The threshold requirement for qualifying under Exemption 7 turns on the purpose for which the document sought to be withheld was prepared." *FBI v. Abramson*, 456 U.S. 615, 624 (1982). As agencies with "both law enforcement and administrative functions," DOS's and USCIS's assertions that a record was compiled for law enforcement purposes "must [be] scrutinize[d] with some skepticism." *Tax Analysts*, 294 F.3d at 77 (quoting *Pratt v. Webster*,

673 F.2d 408, 418 (D.C. Cir. 1982)). If a court determines that a record was not compiled for law enforcement purposes, then Exemption 7 is wholly inapplicable to that record.

Once an agency has satisfied that initial criterion, it must next show that the records fall into one of two categories. The first category, "techniques and procedures," consists of information that would reveal "how law enforcement officials go about investigating a crime." *Allard*, 626 F. 3d at 682. The second category, law enforcement "guidelines," covers information providing "an indication or outline of future policy or conduct" implicating matters like "resource allocation." *Id.* at 682. Guidelines are exempt "from disclosure only if public access . . . would risk circumvention of the law." *Id.* at 681.

The records withheld by DOS and USCIS do not satisfy these criteria and cannot be withheld pursuant to Exemption 7(E).

A. DOS failed to establish that Exemption 7(E) applies to the withheld portions of the Foreign Affairs Manual.

As the district court held, DOS has failed to justify its withholdings under Exemption 7(E) for several versions of three sections of 9 FAM:

9 FAM § 302.6, 9 FAM § 40.32, and 9 FAM § 302.14.[12] (SPA 2). First, DOS has not shown that 9 FAM was "compiled for law enforcement purposes," and, therefore, the records fall entirely outside the scope of Exemption 7. Second, DOS has not established that the withheld material in 9 FAM constitutes "techniques or procedures," nor does DOS now contend that the records contain "guidelines."

1. 9 FAM was not compiled for law enforcement purposes.

As the district court correctly concluded, DOS has not met its burden of establishing that the withheld information in 9 FAM was "compiled for law enforcement purposes." (SPA 26).

The deference afforded an agency when it asserts a record was compiled for a law enforcement purpose depends on the particular duties of the agency. Where an agency has both administrative and law enforcement functions, courts must "scrutinize with some skepticism the particular purpose claimed for disputed documents." *Pratt*, 673 F.2d at

[12] On March 24, 2021, DOS disclosed less-redacted versions of the FAM records at issue in this appeal after determining that Exemption 7(E) did not apply to certain information within them. The arguments in this brief relate to portions of the FAM records that are still withheld. These records are listed, *supra*, note 7.

418; *see also Tax Analysts*, 294 F.3d at 77 (requiring mixed-function agencies to meet "an exacting standard" when asserting that records were compiled for a law enforcement purpose). Because mixed-function agencies also engage in non-law enforcement duties as a major part of their "day-to-day business," accepting a mixed-function agency's claim that its records were compiled for a "law enforcement purpose" without due consideration may result in "the excessive withholding of agency records which Congress denounced." *Schwartz v. DOD*, No. 15-cv-7077-ARR-RLM, 2017 WL 78482, at *12 (E.D.N.Y. Jan. 6, 2017) (quoting *Pratt*, 673 F.2d at 418).

DOS agrees that it is a mixed-function agency subject to this more exacting standard, (JA 166); *see also Schoenman v. FBI*, 573 F. Supp. 2d 119, 146 (D.D.C. 2008) (stating that "the State Department is a mixed-function . . . agency"), but it has not met its burden of establishing that 9 FAM was compiled for an enforcement purpose. "Law enforcement" is defined as the "detection and punishment of violations of the law." *Law Enforcement*, Black's Law Dictionary (11th ed. 2019). Law enforcement can encompass "both civil and criminal matters," *Tax Analysts*, 294 F.3d at 77, and national security matters, *Strang v. Arms Control &*

Disarmament Agency, 864 F.2d 859, 863 (D.C. Cir. 1989). However, the mere fact that a record addresses civil, criminal, or national security concerns is insufficient to establish that Exemption 7(E) applies; records must be compiled for the specific purpose of *enforcement*. *See Tax Analysts*, 294 F.3d at 77–78; *Strang*, 864 F.2d at 863.

DOS has failed to show that the 9 FAM records were compiled for such a purpose. As DOS explains, 9 FAM only "concerns State's *application* of immigration laws and regulations in processing visa applications." Appellant's Br. 24 (emphasis added). And the FAM itself notes that 9 FAM "deals exclusively with the adjudication of U.S. visas, both nonimmigrant and immigrant, providing consular officers with the guidance needed to make informed decisions based on U.S. immigration law and regulations." 9 FAM § 101.1-1 (2020). Visa adjudication is not an enforcement action, but rather a routine benefit determination made in light of the government's interpretation of immigration law. 9 FAM makes this distinction especially clear when describing the contrast between DOS's and DHS's roles in the visa process. While DOS "oversees the visa process abroad through its consular officers who determine visa

eligibility," 9 FAM § 102.2-1, "DHS enforces and administers U.S. immigration laws." 9 FAM § 102.2-3.

The fact that a record was compiled to help an agency *apply* the law—in this case to process visa applications—is not a sufficient basis to conclude that the information was compiled to *enforce* the law. *Cf. United Am. Fin., Inc. v. Potter*, 531 F. Supp. 2d 29, 46 (D.D.C. 2008) (indicating that, especially for mixed-function agencies, an agency record may not be compiled for law enforcement purposes even when it touches on subject matters that relate to another office's law enforcement duties). Agencies frequently make benefits determinations with reference to controlling legal standards, for example, in the context of visa, social security, disability, or other applications for government benefits. It would vastly expand the scope of Exemption 7 and undermine FOIA's transparency goals if the application of law in each of these routine benefits determinations was equated with law enforcement.

Indeed, none of the cases the government cites supports its claim that the "application" of a law is sufficient to constitute a law enforcement purpose. Appellant's Br. 25. Each case involves records related to specific criminal investigations or civil violations. *See Birch v.*

U.S. Postal Service, 803 F.2d 1206, 1211 (D.C. Cir. 1986) (records involving a Postal Service investigation into potentially illegal activities); *Lewis v. IRS*, 823 F.2d 375, 379 (9th Cir. 1987) (records involving information related to a pending criminal investigation conducted by the IRS); *Cooper Cameron*, 280 F.3d at 545–46 (records compiled for OSHA investigations into workplace compliance with health and safety regulations). None of the 9 FAM sections at issue here are connected to specific violations or investigations.

Nor does DOS's declarant's statement that the records must be withheld to ensure "criminal, terrorists, and other bad actors do not enter the country," Appellant's Br. 25, bring the FAM within the scope of Exemption 7. "[V]ague and conclusory affidavits" that merely recite general law enforcement interests are insufficient to carry DOS's burden. *Halpern*, 181 F. 3d at 293. This is true even where an agency asserts national security concerns. *See, e.g.*, *ACLU of S. Cal. v. USCIS*, 133 F. Supp. 3d 234, 243–44 (D.D.C. 2015) (holding agency failed to show records were compiled for law enforcement purposes where it offered only "vague references to 'national security concerns'"). DOS's declarations do not refer to any specific redaction in the FAM or offer any explanation of

how the redacted information would allow bad actors to enter the country. It is not "the kind of fact-specific justification that either (a) would permit [the plaintiff] to contest the affidavit in adversarial fashion, or (b) would permit a reviewing court to engage in effective de novo review" of the agency's redactions, as FOIA requires. *Halpern*, 181 F. 3d at 293.

Because DOS has not met its threshold burden of demonstrating that the withheld records were compiled for law enforcement purposes, Exemption 7(E) does not apply.

2. DOS failed to establish that the redactions contain "techniques and procedures" or "guidelines."

As the district court further concluded, (SPA 28), the withheld sections of 9 FAM also fail to meet Exemption 7(E)'s specific requirements: they do not consist of "techniques and procedures for law enforcement investigations or prosecutions," nor do they consist of "guidelines" whose disclosure could "reasonably be expected to risk circumvention of the law."[13] 5 U.S.C. § 552(b)(7)(E). On appeal, DOS does

[13] To the extent this brief does not discuss a particular redaction described in the *Vaughn* index, it rests on the argument that the record

not argue that any of the withheld materials consist of guidelines, instead contending that all of the withheld materials consist of techniques or procedures. Appellant's Br. 26–27.

"Techniques and procedures" have a specific meaning in the context of Exemption 7(E). The Second Circuit has defined a "technique" as a "technical method of accomplishing a desired aim," and a "procedure" as "a particular way of doing or going about the accomplishment of something." *Allard*, 626 F.3d at 682 (quoting Webster's Third New International Dictionary (1986)). A technique or procedure must "truly embody a specialized, calculated technique or procedure" to fall within Exemption 7(E). *ACLU v. DHS*, 243 F. Supp. 3d 393, 403–04 (S.D.N.Y. 2017). Moreover, to qualify for the exemption, techniques and procedures must not be well known to the public. *See Schwartz v. DEA*, 692 Fed. App'x 73, 73–74 (2d. Cir. 2017); *Doherty v. DOJ*, 775 F.2d 49, 52 n.4 (2d. Cir. 1985).

---

cannot be withheld because 9 FAM was not compiled for law enforcement purposes.

DOS has failed to satisfy its burden of showing that the withheld FAM sections consist of techniques or procedures for the following five reasons:

First, DOS's own description of the FAM, coupled with publicly accessible portions, support the view that it contains high-level summaries of statutes and directives rather than "specialized, calculated" techniques and procedures. *ACLU v. DHS*, 243 F. Supp. 3d at 403–04. DOS describes 9 FAM as containing "directives and guidance . . . based on statutes, regulations, Executive Orders, Presidential directives, OMB circulars and other sources." 9 FAM § 101.1 (2020). Moreover, available portions of 9 FAM demonstrate that it conveys information at a high and non-technical level. (*See* JA 115–59).[14] This is not the sort of information that Exemption 7(E) was created to protect. *Cf. Citizens for Resp. & Ethics in Wash. v. DOJ*, 746 F.3d 1082, 1095 (D.C. Cir. 2014) (stating that matters of "substantive law enforcement policy are properly the subject of public concern," which

[14] As just one example, the unredacted portions of the definition of "clear and convincing evidence" summarizes where that term appears in INA § 212(a)(3)(B) and provides a non-technical description of what constitutes "clear and convincing evidence" in context. *See* JA 120.

weighs in favor of disclosure (quotation marks omitted) (quoting *ACLU v. DOJ*, 655 F.3d 1, 14 (D.C. Cir. 2011))).

Second, a substantial portion of the withheld material appears to consist of definitions and explanations of statutory language, which cannot be techniques and procedures within the meaning of Exemption 7(E). (*See, e.g.*, (JA 66); (JA 120) (indicating material withheld from JA 120–27 "explains terms used in INA 212(a)(3)(B) in alphabetical order")).[15] A number of redactions appear in a section titled "Definitions," which appears to contain only high-level statements of law and policy and the meaning of various terms used in 9 FAM. The surrounding unredacted portions provide logical comparisons for the kind of information and depth of analysis that can be expected in withheld material in the section. The unredacted portions summarize statutory text, provide high-level descriptions of DOS policy, and indicate how DOS interprets the statutory provisions. (*See, e.g.*, (JA 123–24)

[15] This argument also applies to other parts of the FAM described as consisting of definitions, even those those parts are not located in the definitions section of the exemplar record. (*See, e.g.*, (JA 67) (describing withholdings in 9 FAM § 302.6-2(B)(4)b as definitions); (JA 68) (providing justifications for withholdings in 9 FAM § 40.32 N2, which is labeled "Definitions" in the record)).

(definition of "Incitement of Terrorism"); (JA 125) (definitions of "Representative" and "Subgroup")). These are not techniques and procedures shielded from disclosure by Exemption 7(E).

DOS argues that there is "no logical or factual basis" for inferring, as the district court did, that the definitions within the "Definitions" sections of 9 FAM contain "recitations of statutes and background" information. Appellant's Br. 29 (quotation marks omitted). But it was both logical and reasonable to rely on the context surrounding the withholdings to determine that they contain similar sorts of information as the unredacted definitions.[16] Regardless, it is DOS that bears the burden of showing that each redaction from the "Definitions" section contains a protected technique or procedure.

[16] In one instance, the redacted 9 FAM § 302.6-2(B)(3)(d) paragraph almost certainly covers the definition of "material support"; it is referenced as such later in the FAM and contains verbatim factors from the INA definitions section for material support. (*Compare* (JA 121), *with* (JA 146) (stating that 9 FAM § 302.6-2(B)(3) provides "further information on material support")). DOS also withheld definitional paragraphs for "Clear and Convincing Evidence," (JA 121), "Endorsing or Espousing Terrorism," (*id.*), "Member of a Terrorist Organization," (JA 121–23), and "Terrorist Organization," (JA 125–27). As the district court found, the "similarity between the withheld information and the INA's text . . . suggests Exemption 7(E) does not apply." (SPA 27).

Third, some of the withheld materials appear to summarize publicly available statutes, memoranda, and directives, and thus do not consist of techniques or procedures.[17] *Schwartz*, 692 Fed. App'x at 73–74. The redactions in 9 FAM § 302.6-2(B)(1)b cover "interagency cooperation procedures" summarized from a memorandum that has been publicly released.[18] (JA 66, 117). The FAM sections on exemptions for the Kurdistan Democratic Party, Iraqi National Congress, and Patriotic Union of Kurdistan, (JA 67, 140–144),[19] and the Kosovo Liberation Army,

---

[17] DOS's declarant claims that that the redacted information is not publicly available elsewhere. JA 166 ("The information that is redacted, including in 9 FAM 302.6-2(B)(3), does not appear unredacted elsewhere . . . ."). This claim is contradicted by the factual record before this Court. While government affidavits are accorded a presumption of good faith, the Court is not obligated to credit them where, as here, they are demonstrably inaccurate. *See Ctr. for Constitutional Rights v. CIA*, 765 F.3d 161, 166 (2d Cir. 2014).

[18] *See* Memorandum of Understanding Between Sec'y of State and Sec'y of Homeland Sec. Concerning Implementation of § 428 of the Homeland Security Act of 2002, H.R. Doc. No. 108-131 (2003), https://www.govinfo.gov/content/pkg/CDOC-108hdoc131/pdf/CDOC-108hdoc131.pdf [https://perma.cc/4NAW-PUN8]. The redactions in 9 FAM § 40.32 similarly describe "interagency cooperation procedures" that are memorialized in that public memorandum. (JA 68).

[19] *See* USCIS, Policy Memorandum on Implementation of § 264(a)(l), Subtitle E, Title XII, of the Nat'l Def. Auth. Act for Fiscal Year 2015, and Updated Processing Reqs. for Discretionary Exemptions to Terrorism-Related Inadmissibility Grounds for Activities and Ass'n Relating to the Kurdistan Democratic Party and the Patriotic Union of Kurdistan (Mar.

(JA 67, 144–48),[20] likewise appear to withhold information found in publicly available memoranda. Similarly, DOS redacted the section titled "Security Advisory Opinions," (JA 67, 148–54), even though publicly available memoranda discuss circumstances and procedures for requesting Security Advisory Opinions.[21] It is unlikely that the FAM,

---

13, 2015), https://www.uscis.gov/sites/default/files/document/memos/2015-0313_KDP_PUK_Exemption_TRIG_PM_Effective.pdf [https://perma.cc/WH29-YEK9].

[20] *See* USCIS, Exercise of Authority Under § 212(d)(3)(B)(i) of the INA, https://www.uscis.gov/sites/default/files/document/legal-docs/KLA%20Excerise%20of%20Authority.PDF [https://perma.cc/26EF-9CZV]; Lauren Kielsmeier, Acting Deputy Dir., USCIS, Policy Memorandum on Implementation of New Discretionary Exemption Under INA § 212(d)(3)(B)(i) for Activities Related to the INC, KDP, and PUK (Jan. 23, 2010), https://www.aclusocal.org/sites/default/files/wp-content/uploads/2013/01/Implementation-of-New-Discretionary-Exemption-under-INA-Sec.-212d3Bi-for-Activities-Related-to-the-INC-KDP-and-PUK-Jan.-23-2010.pdf [https://perma.cc/Y5VX-GHFQ] (released in full in response to 2013 ACLU of Southern California FOIA request).

[21] *See* Sec. Rex Tillerson et al., Memorandum to the President on Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities (Oct. 23, 2017), https://www.dhs.gov/sites/default/files/publications/17_1023_S1_Refugee-Admissions-Program.pdf [https://perma.cc/6W26-RKWK]; Sec'y of State, Dep't of State Cable on Implementing Immediate Heightened Screening and Vetting of Visa Applications (Mar. 17, 2017), https://www.aila.org/infonet/dos-cable-on-implementing-immediate-heightened [https://perma.cc/BUL5-PM2Y] (unredacted DOS cable archived by the American Immigration Lawyers Association discussing considerations and process for requesting Security Advisory Opinions).

which summarizes DOS directives, has more in-depth information in the short space allocated than these publicly available documents.

Fourth, DOS's effort to withhold many portions of 9 FAM as "techniques and procedures" fails because DOS's *Vaughn* index does not actually make this claim, instead describing these portions as "guidelines."[22] Despite its representations in the *Vaughn* index, however, DOS does not argue that the records are exempt as "guidelines" within the meaning of Exemption 7(E). Instead, DOS now asserts that the records describe "techniques or procedures." Appellant's Br. 27.

DOS has failed to meet its burden of justifying the redactions described as "guidelines" in the *Vaughn* index. Agency declarations must

[22] *See* (JA 67–68) (describing following portions withheld in 9 FAM § 302.6 as "guidelines": § 302.6-2(B)(4)d.(3)–(5); § 302.6-2(B)(4)e.(2) and (5); § 302.6-2(B)(5)c.(2)–(4); § 302.6-2(B)(5)e.(1)(a)–(e), (3), and (4); § 302.6-2(C); § 302.6-3(B); § 302.6-3(C); § 302.6-4(B); § 302.6-4(C)); (JA 68–69) (describing following portions withheld in 9 FAM § 40.32 as "guidelines": N1.1.b, N2.8.a.(3)(a)–(b) from the 2015 version; N3, N5.1.e from the 2005 version; N3, N11 from the 1994 version); N2.3 from the 2015 version; N3.2.d from the 2015 version; N4 from the 2005 version; N4, N5, N7 from the 1994 version; N3.3.c from the 2015 version; N7.1, N7.2-2, N7.2-3 from the 2005 version; N8.1, N9.2 from the 1994 version; N3.4.c, N3.4.e from the 2015 version; N8.b, N8.d from the 2005 version); (JA 69) (describing following portions withheld in 9 FAM § 302.14 as "guidelines": § 302.14-2(C); § 302.14-3(B)(3)e; § 302.14-3(B)(3)g; § 302.14-3(C); § 302.14-6(B)(2)c; § 302.14-6(C); § 302.14-7(C); § 302.14-8(C); § 302.14-3(B)(3)i; § 302.14-3(B)(3)h; § 302.14-7(B)(3)(1)).

contain "reasonably detailed explanations of why material was withheld." *See Halpern*, 181 F.3d at 295. The fact that DOS used the term "guidelines" in such an imprecise way shows that these entries are insufficiently detailed or tailored to justify the redactions. *See Wiener*, 943 F.2d at 979 (9th Cir. 1991) (stating that agencies must "tailor the explanation to the specific document withheld"); *King*, 830 F.2d at 219 (holding that "[s]pecificity is the defining requirement of the *Vaughn* index and affidavit" and that affidavits should be rejected if they are "too vague or sweeping"). Given that the agency describes the withheld information exclusively as "guidelines" in the *Vaughn* index, it simply failed to justify the withholding of that information as "techniques or procedures."

Moreover, DOS has still not explained how the records that its declarant calls "guidelines" qualify, instead, as "specialized, calculated technique[s] or procedure[s]." *ACLU v. DHS*, 243 F. Supp. 3d at 404. For example, DOS withheld a section of 9 FAM § 302.6-3(B), titled "Not a Permanent Bar," (JA 158), which is described as containing "guidelines for situations in which an individual may cease to be inadmissible." (JA 67). But elaboration on what does not constitute grounds for

inadmissibility—essentially a legal interpretation—is not a technique or procedure.[23] Similarly, DOS withheld information in 9 FAM § 302.6-2(B)(4)d.(3)–(5) because it "provides information about the Palestine Liberation Organization that is used as a guideline for determining whether an applicant is associated with the organization and therefore inadmissible." (JA 67). Providing information about an organization is not the same as describing a technique or procedure.

Fifth, for a number of other records, the DOS *Vaughn* index is too "vague and conclusory" to justify its withholdings. *Halpern*, 181 F.3d at 293. For example, DOS withheld information from 9 FAM § 40.32 that it describes as "procedures for finding and evaluating sources of information," but provides no context whatsoever that would allow this Court to evaluate whether these procedures "truly embody a specialized,

[23] This argument also applies to DOS's withholding in 9 FAM § 306-2(B)(4)c.(4). (JA 67, 130) (describing withheld information as "details about the conditions under which to apply a presumption of inadmissibility . . . and how to account for that presumption when assessing a visa applicant"). While DOS does not call this material a "guideline," it also does not assert it is a technique or procedure, and like 9 FAM § 302.6-3(B), it amounts to a legal interpretation. The same is true for 9 FAM § 302.14-3(B)(3)j, which is described as containing "procedures for using certain sources of information," but is found in the portion of the record summarizing Presidential Proclamation No. 8697. (JA 69).

calculated technique," *ACLU v. DHS*, 243 F. Supp. 3d at 403–04, or whether they are known to the public, *see Schwartz*, 692 Fed. App'x at 73–74. The *Vaughn* index entry for 9 FAM § 40.32, which describes the withheld material as "procedures for investigating whether an applicant is a member of a terrorist organization," is similarly too vague and conclusory to meet the government's burden. (JA 68).[24]

The district court correctly held that DOS failed to meet its burden to justify its withholdings in the FAM under Exemption 7(E). This Court should affirm the district court's order to disclose the withheld portions.

B. USCIS failed to establish that Exemption 7(E) applies to the TRIG Questions.

As the district court correctly held, USCIS improperly invoked Exemption 7(E) to withhold the TRIG Questions—the model questions used to interview visa applicants. (SPA 51). The TRIG Questions are distinct, segregable pieces of information that do not constitute protected

[24] The arguments made above regarding definitional material also apply to both of these withholdings. Both discuss material contained in 9 FAM § 40.32's "Definitions" section. The three versions of this record are not contained in the Joint Appendix, but they are available on the Institute's website. *See, e.g.*, 9 FAM § 40.32 N2 Definitions, at 4–12 (Jan. 2, 2015), https://knightcolumbia.org/documents/f6fb5f4a0f [https://perma.cc/N3DU-KERK].

techniques and procedures, and thus the district court appropriately ordered their disclosure.

The district court properly pinpointed two discrete types of information withheld in the Training Documents[25]: (1) TRIG Questions (outward-facing questions used to elicit information from visa applicants), and (2) TRIG Exemptions (factors for considering applicant answers that are applied with discretion). (SPA 51–53, 71). USCIS has failed to demonstrate that the TRIG Questions are techniques or procedures within the meaning of Exemption 7(E) for two reasons:

First, USCIS has failed to demonstrate that disclosing the TRIG Questions would reveal any technique or procedure. In addressing agency withholdings of interrogation or interview questions, courts have rejected the application of Exemption 7(E) to records that do not reveal any specialized technique or procedure. In *ACLU v. DHS*, for example, the court ruled that Exemption 7(E) did not apply to a set of questions that CBP used to elicit information from minors "regarding affiliations between suspected smugglers and each other, criminal organizations, and gangs, as well as their modus operandi." 243 F. Supp. 3d at 402. The

[25] These Training Documents are identified, *supra*, note 11.

court concluded that CBP had "not established that there is anything technical about the questions asked, that any special method or skills are being used, or that children who were subjected to questioning would not thereby learn the 'technique' that CBP wishes to keep secret." *Id.* at 403 (citation omitted); *see also Albuquerque Pub. Co. v. DOJ*, 726 F. Supp. 851, 857 (D.D.C. 1989) (concluding that Exemption 7(E) did not apply where there was "nothing exceptional or secret about the techniques . . . described").

By contrast, when courts have permitted withholding of questions, the questions have been inextricably intertwined with contextual information that sheds light on the background motivations for the questions, thereby illuminating a law enforcement technique independent of the questions themselves. *See Rosenberg v. ICE*, 13 F. Supp. 3d 92, 114 (D.D.C. 2014) (analyzing withholding of questionnaire containing both questions and the rationale for a particular question as a whole, and concluding that disclosure would reveal techniques); *Frank LLP v. CFPB*, 327 F. Supp. 3d 179, 183–84 (D.D.C. 2018) (permitting withholding of investigative hearing transcripts that revealed "the specific information and types of information sought, the manner of

questioning, the sequencing of questioning, and the manner and sequence of follow-up questions" where general knowledge of this information would compromise ability to use this technique in the future).

Here, USCIS's descriptions show that the TRIG Questions are similar to the routine interview questions at issue in *ACLU v. DHS*. USCIS asserts that it withheld "model," "sample," or "suggested" questions but never explains how their disclosure would reveal any specific law enforcement techniques. (JA 552). It provides no evidence that the TRIG Questions contain any explanation of the techniques leveraged in interviews, or that they reveal an ordering of questions that could imply a technique. Knowing what sample questions might be asked in an interview does not tell a visa applicant what the "right" or "wrong" answers are, nor does it divulge how an applicant's answers factor into an admissibility determination. As a result, the TRIG Questions do not reveal "a specialized, calculated technique or procedure," *ACLU v. DHS*, 243 F. Supp. 3d at 404.

Second, the TRIG Questions are public-facing and therefore not protected by Exemption 7(E). *See id.* at 404 (concluding that questions

were not protected law enforcement techniques when they were publicly revealed to "hundreds of children" and their lawyers, and when information about routine questioning was available on television and the internet); *see also Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 249 (2d Cir. 2006) (indicating that a requesting party can overcome asserted exemptions by showing that the withheld material is in the public domain); *Schwartz,* 692 Fed. App'x at 74 (video footage not covered by Exemption 7(E) where agency had released screen shots and public report detailed investigative techniques). The questions asked by USCIS necessarily become known to applicants when the questions are asked in interviews or mailed to them in Requests for Evidence. (*See* JA 384). Indeed, as USCIS concedes, "TRIG examinations are conducted in several USCIS immigration adjudications, including asylum, adjustment of status to lawful permanent residency, naturalization, or temporary protected status," Appellant's Br. 33 n.8 (citing JA 361–63), showing that the questions are known to the public. This information is sufficient to meet the Knight Institute's burden of production. *Inner City Press*, 463 F.3d at 249 (explaining that requesters have burden of production to establish

information is publicly available). USCIS has not provided any contrary evidence, nor has it explained any practices it employs to keep these questions confidential from the public.

USCIS's attempt to distinguish *ACLU v. DHS* is unavailing. USCIS argues that there were extensive pre-existing disclosures of the questions at issue in that case. *See* Appellant's Br. 39. But *ACLU v. DHS* did not set a floor for how extensive disclosure must be for records to be considered publicly available; it only noted a difference between questions that are already known to the public and questions that are not. *See* 243 F. Supp. 3d at 402 (explaining that "to invoke Exemption 7(E) here, the agency must justify its assertion that its practice of asking the questions at issue . . . is not already known to the public"). Here, just like in *ACLU v. DHS*, the questions are routinely posed to members of the public—in this case, applicants for travel and immigration benefits—and are thereby publicly known.

Separately, the government relies on a series of cases for the proposition that release of the TRIG questions would enable applicants to tailor their answers and avoid detection, Appellant's Br. 38–39, but these cases are inapposite. *Heartland Alliance National Immigration*

Justice Center v. DHS dealt with a list of groups designated as terrorist organizations, disclosure of which would have deterred interviewees from volunteering their association with those groups. 840 F.3d 419, 421 (7th Cir. 2016). There, DHS effectively withheld red-flag *answers* to interview questions—answers which are not routinely made public, and the disclosure of which would understandably enable interviewees to avoid giving those answers. Here, in contrast, USCIS seeks to withhold interview *questions*—questions which are routinely posed to interviewees and thus disclosed to the public, and the disclosure of which reveals no "right" or "wrong" answers. The other case the government points to, *Barouch v. DOJ*, 87 F. Supp. 3d 10, 30 n.13 (D.D.C. 2015), similarly involved the disclosure of information beyond just questions themselves, and in any event, the case merits little weight because that court's analysis was limited to a single footnote examining an argument that the *pro se* plaintiff did not advance.

Furthermore, USCIS argues that "even if there had been some repetition of the questions by interviewees," the exemption applies to "information that would reveal facts about such techniques or their usefulness that are not generally known to the public." Appellant's Br. 42

(quoting *Broward Bulldog, Inc. v. DOJ*, 939 F.3d 1164, 1191 (11th Cir. 2019)). That may be true, but it is not applicable to this case given that only the TRIG Questions, not the surrounding contextual information, are at issue. In any event, USCIS asserts this claim in a conclusory manner without pointing to any specific TRIG Questions or articulating any specific harms from disclosure. Therefore, it has failed to meet its burden to justify the withholdings. *Halpern*, 181 F.3d at 293.

Finally, USCIS argues that the TRIG Questions should be analyzed alongside the TRIG Exemptions, but this argument fails as USCIS stops short of showing that the former is not segregable from the latter. *See* Appellant's Br. 36. Agencies must "take reasonable steps necessary to segregate and release nonexempt information." 5 U.S.C. § 552(a)(8)(A)(ii). Information is segregable unless it is "inextricably intertwined . . . such that disclosure would compromise the confidentiality of information that is entitled to protection." *Hopkins v. HUD*, 929 F.2d 81, 86 (2d Cir. 1991) (internal citation and quotation marks omitted). And even in cases permitting agencies to withhold certain information, courts have analyzed the release of interview

questions and their contextual information separately. *See Rosenberg*, 13 F. Supp. 3d at 114; *Frank LLP*, 327 F. Supp. 3d at 183–84.

The TRIG Questions are reasonably segregable from the TRIG Exemptions because the two are not inextricably intertwined. As the district court explained, the TRIG Questions are "designed to *elicit* information from applicants," while the TRIG Exemptions are used "to *evaluate* applicants' answers." (SPA 71) (quotation marks omitted). Indeed, USCIS's own *Vaughn* index identifies model questions as a distinct category within the withheld material. *See supra* note 11 (identifying relevant *Vaughn* entries). To the extent USCIS asserts that the TRIG Questions and TRIG Exemptions reveal the same type of information, there is no reason to believe that the disclosure of routinely asked questions reveals the specialized techniques or procedures covered by Exemption 7(E). *See ACLU v. DHS*, 243 F. Supp. 3d at 405. Therefore, even if this Court disagrees with the district court's distinction between the TRIG Questions and the TRIG Exemptions, it is clear based on prior precedent and USCIS's own *Vaughn* index that some of the withheld material does not reveal specialized techniques and procedures and is reasonably segregable.

The TRIG Questions are not protected under Exemption 7(E) because they do not reflect specialized, calculated law enforcement techniques, and because they are known to the public. The district court's order requiring USCIS to disclose reasonably segregable portions of the Training Documents should be affirmed.

II. ICE improperly withheld information under FOIA Exemption 5.

Exemption 5 applies to "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). This exemption allows the government to withhold records that would be privileged in civil discovery, including under the deliberative process privilege. *U.S. Fish & Wildlife Serv. v. Sierra Club*, 141 S. Ct. 777, 785 (2021); *see also Tigue*, 312 F.3d at 76.

"An inter- or intra-agency document may be withheld pursuant to the deliberative process privilege if it is: (1) predecisional, *i.e.*, prepared in order to assist an agency decisionmaker in arriving at his decision; and (2) deliberative, *i.e.*, actually related to the process by which policies are formulated." *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 356 (2d Cir. 2005) (quotation marks and ellipsis omitted). Because the deliberative

process privilege is intended to protect "the decision making processes of government agencies," it does not apply to "communications made after the decision and designed to explain it," as disclosure in those circumstances cannot impede the formulation of policy or the quality of an agency's decision. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150, 152 (1975).

As the district court correctly held, ICE failed to demonstrate that the Foreign Policy Provision Memo falls within the deliberative process privilege under Exemption 5 because it is neither predecisional, nor deliberative. (SPA 38).

A. ICE failed to establish that the Foreign Policy Provision Memo is predecisional.

As the district court concluded, "ICE failed to demonstrate the Foreign Policy Provision Memo was pre-decisional." (SPA 38). A document is "predecisional" only if "the preparer was not the final decisionmaker and . . . the contents confirm that the document was originated to facilitate an identifiable final agency decision." *Brennan Ctr. for Justice v. DOJ*, 697 F.3d 184, 202 (2d Cir. 2012) (quoting *Providence Journal Co. v. Dep't of the Army*, 981 F.2d 552, 559 (1st Cir. 1992)); *see also Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 482 (2d Cir.

1999); *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 981 (9th Cir. 2009). As this Court made clear in *Tigue*, "while the agency need not show *ex post* that a decision was made, it must be able to demonstrate that, *ex ante*, the document . . . related to a specific decision facing the agency." 312 F.3d at 80.

Neither ICE's original nor its supplemental *Vaughn* index establish that the Foreign Policy Provision Memo "originated to facilitate an identifiable final agency decision." *See Brennan Ctr.*, 697 F.3d at 202 (quotation marks omitted). To begin, ICE fails to pinpoint any identifiable decision facing the agency. (*See* JA 248–49, 563). Instead, its description of the memo vaguely refers to "non-final agency decisions, options being considered, and recommendations," as well as "issues of public significance." (JA 249). Unlike in *Tigue*, where the agency clearly demonstrated that a withheld memo "was specifically prepared for use by [a commission] in advising the IRS on its future policy" regarding criminal investigations, 312 F.3d at 80, ICE has not shown that the Foreign Policy Provision Memo relates to any specific decision facing the agency. ICE cannot sustain its burden under Exemption 5 by ambiguously alluding to a "decision that possibly may be made at some

undisclosed time in the future." *Lahr*, 569 F.3d at 981. Without reference to any actual decision, such "vague and conclusory" language typifies the "bureaucratic double-talk" insufficient to support the application of the deliberate process privilege. *Halpern*, 181 F.3d at 293.

Moreover, ICE's supplemental description of the memo suggests that it reflects the agency's *post*-decisional understanding of the law. ICE notes that the memo addresses "whether Section 212(a)(3)(C) can be used by the Secretary of State as grounds for inadmissibility." (JA 563). This statement indicates the memo contains the agency's explanation, interpretation, or application of existing law, specifically INA § 212(a)(3)(C), rather than any development of new policy. Indeed, the district court properly found that "the withheld portions are more akin to opinions regarding how to *interpret* policy rather than recommendations as to how to *make* policy." (SPA 38).

ICE attempts to improperly broaden the scope of Exemption 5 by characterizing communications relating to the *application* of INA § 212(a)(3)(C) as predecisional without any mention of an identifiable policy decision. But courts in this circuit have been clear that the deliberative process privilege only applies to records related to an

identifiable agency decision that was under consideration at the time the record was created. *Compare Brennan Ctr.*, 697 F.3d at 202 (holding that the withheld memo was predecisional because the agency clearly identified the final agency decision to which the memo related), *with Nat'l Day Laborer Org. Network v. ICE*, 486 F. Supp. 3d 669, 698 (S.D.N.Y. 2020) (finding Exemption 5 inapplicable to an ICE "memorandum [that] regards the implementation or 'application of an existing policy' . . . 'as opposed to the formulation of a new policy'").

B. ICE failed to establish that the Foreign Policy Provision Memo is deliberative.

ICE also failed to show that the Foreign Policy Provision Memo is deliberative in nature. A document is "deliberative" if it "formed an essential link in a specific consultative process, reflects the personal opinions of the writer rather than the policy of the agency, and if released, would inaccurately reflect or prematurely disclose the views of the agency." *Brennan Ctr.*, 697 F.3d at 202 (ellipsis omitted) (quoting *Providence Journal Co.*, 981 F.2d at 559); *see also Sierra Club*, 141 S. Ct. at 786 ("Documents are . . . 'deliberative' if they were prepared to help the agency formulate its position."). "A document that does nothing more

than explain an existing policy cannot be considered deliberative." *Pub. Citizen, Inc. v. Off. of Mgmt. & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010).

The touchstone of the deliberative prong is "whether the disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Dudman Commc'ns Corp. v. Dep't of Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987). Even materials that can be "plausibly labeled 'deliberative'" will not fall within Exemption 5 if they "reveal nothing about an agency's decisionmaking process." *Id.* This is because "[t]he release of materials that do not embody agency judgments . . . is unlikely to diminish officials' candor or otherwise injure the quality of agency decisions." *Petroleum Info. Corp. v. Dep't of Interior*, 976 F.2d 1429, 1436 (D.C. Cir. 1992). This inquiry into the potential impact of disclosure on agency candor and decisionmaking "enables [courts] to contain Exemption 5 within its proper scope." *Id.*

The conclusory *Vaughn* index entries for the Foreign Policy Provision Memo fail to establish that the record was deliberative or that release of the memo would have any effect on ICE's decisionmaking

process. ICE states that the memo contains "opinions regarding the use of Section 212(a)(3)(C) of the INA" and "notes supporting the employee's opinions." (JA 563). But these statements are insufficient to demonstrate that the memo "formed an essential link in a specific consultative process, reflects the personal opinions of the writer rather than the policy of the agency, [or] if released, would inaccurately reflect or prematurely disclose the views of the agency." *See Brennan Ctr.*, 697 F.3d at 202. In fact, the relevant *Vaughn* index entry merely recites boilerplate language contained in other entries invoking the deliberative process privilege. (*Compare* JA 248–49 (entry for Foreign Policy Provision Memo), *with* JA 206–12, 216, 225–48 (entries containing identical boilerplate language)). While agency statements generally receive a presumption of good faith, there is no corresponding presumption that boilerplate and conclusory statements are sufficient to sustain the government's claim that the withholding is proper. *Halpern*, 181 F.3d at 295. Thus, ICE's cursory statements about the memo's deliberative nature should receive no deference and cannot sustain the agency's invocation of the deliberative process privilege.

C. ICE failed to disclose reasonably segregable portions of the Foreign Policy Provision Memo.

ICE has not established that there is no reasonably segregable factual information contained in the Foreign Policy Provision Memo. Even if the deliberative process privilege applies, the agency must still disclose "any reasonably segregable portion of a record" under 5 U.S.C. § 552(b). *See Loving v. Dep't of Defense*, 550 F.3d 32, 38 (D.C. Cir. 2008) (holding that the "deliberative process privilege does not protect documents in their entirety; if the government can segregate and disclose non-privileged factual information within a document, it must"); *Karnoski v. Trump*, 926 F.3d 1180, 1204 (9th Cir. 2019) (same). Purely factual information cannot be "in and of [itself], privileged." *Hopkins*, 929 F.2d at 85; *see also Grand Cent. P'ship*, 166 F.3d at 482. To withhold factual observations from disclosure, agencies must examine "whether [they] are inextricably intertwined with the privileged opinions and recommendations such that disclosure would compromise the confidentiality of deliberative information." *Hopkins*, 929 F.2d at 85 (quotation marks omitted).

ICE has not provided adequate information about whether the Foreign Policy Provision Memo contains segregable factual information.

The broad nature of ICE's withholding under Exemption 5—of the entire memo, including headings and factual observations—suggests there may be reasonably segregable information that has been improperly withheld alongside purportedly privileged content. Indeed, out of the four-page memo, ICE disclosed only the title, "ICE ability to use 212(a)(3)(C) Foreign Policy Charge," leaving the substance of the document entirely redacted. (*See* JA 329–32). Yet ICE discusses the reasonable segregability of the record as a whole in a conclusory manner. (*See* JA 203, 568). No other detail about segregability is given beyond a boilerplate statement that the "staff, under . . . supervision, has reviewed each record line-by-line to identify information exempt from disclosure or for which a discretionary waiver of exemption could be applied" and that "all information not exempted from disclosure . . . was correctly segregated and non-exempt portions were released." (JA 203, 568).

To the extent the Foreign Policy Provision Memo contains both factual and deliberative information, ICE must release the purely factual information unless it can establish this material is inextricably intertwined with the agency's deliberative functions. For example, the document "includes a brief summary with notes and quotes" about INA

§ 212(a)(3)(C). (JA 563). Yet, ICE has not explained how these facts are "'inextricably intertwined' with privileged opinions and recommendations such that disclosure would compromise the confidentiality of the deliberative information. *See Hopkins*, 929 F.2d at 85 (determining that the agency "offered no details as to the contents of specific reports, but only asserted in a conclusory fashion that any factual observations . . . [were] 'inextricably intertwined' with the reports' privileged opinions and recommendations" and remanding to the district court with instructions to examine the reports).

D. ICE's argument that the Foreign Policy Provision Memo is "quintessentially privileged" has no merit.

On appeal, ICE argues that the Foreign Policy Provision Memo is "quintessentially privileged" for two reasons: (1) "[d]rafts are inherently predecisional and deliberative," and (2) "notes supporting the employee's opinions" are deliberative. Appellant's Br. 49–50. Neither argument is persuasive.

First, a record is not predecisional merely because it is identified as a draft. As the Supreme Court recently explained, although a "draft is, by definition, a preliminary version of a piece of writing, . . . that is not to say that the label 'draft' is determinative." *Sierra Club*, 141 S. Ct.

at 786. Rather, "a court must evaluate the documents 'in the context of the administrative process which generated them.'" *Id.* (quoting *Sears*, 421 U.S. at 138, and finding that draft environmental impact opinions were predecisional because they were part of the consultative process that ultimately produced a final "no jeopardy" opinion). Rather, the relevant question under the Supreme Court's decision in *Sierra Club* is "whether the agency treats the document as its final view on the matter." *Id.* at 786. ICE has failed to show that the Foreign Policy Provision Memo does not represent its final view. Instead, ICE summarily asserts that "[t]he information being withheld contains . . . draft . . . information" and that "[t]he document is not a final draft" without providing any context about the specific decision facing the agency *ex ante*. (JA 248–49).

In support of its position, ICE cites three cases to claim that "[d]rafts are inherently predecisional and deliberative." Appellant's Br. 49–50. Yet, in two of the cases, the courts held that the drafts were predecisional only after evaluating the administrative context that generated them, and the third has been plainly overruled by *Sierra Club*. In *ACLU v. DOJ*, this Court held that the drafts were predecisional because one document contained draft language for a Justice Department

white paper that was subsequently disclosed, and the other was a proposed op-ed article that was never published. 844 F.2d 126, 132–33 (2d Cir. 2016). Similarly, in *National Security Archive v. CIA*, the court determined that a draft of an agency's official history was predecisional because only the "agency's official history [can be] a final agency decision." 752 F.3d 460, 463 (D.C. Cir. 2014). Unlike the detailed explanations of the relevant administrative contexts in these cases, ICE's description here is devoid of any detail about the context in which the memorandum could have been generated. These cases are thus inapposite.

Similarly, ICE's broad reading of *National Council of La Raza v. DOJ* has no support and, in any event, has been foreclosed by recent Supreme Court precedent. In *La Raza*, only a subset of the challenged records were draft documents. 339 F. Supp. 2d 572, 583 (S.D.N.Y. 2004). While the court stated that "drafts and comments on documents are quintessentially predecisional and deliberative," it did so only when discussing draft documents for which the deliberative process privilege was not in dispute. *Id.* The district court's statement is therefore best seen as dictum. Moreover, to the extent *La Raza* can be read to say that

all drafts are protected by the deliberative process privilege, this has plainly been overruled by the Supreme Court's language in *Sierra Club*. 141 S. Ct. at 786 (indicating key question is whether record is treated as an agency's "final view on the matter," not whether it is a "draft").

Second, the deliberative process privilege does not apply merely because a document contains a government "employee's opinions." In arguing that the memo is deliberative, ICE presumes that "notes supporting the employee's opinions" necessarily "constitute 'the personal opinions of [the] writer' rather than the policy of the agency," which then generally renders a document "deliberative." Appellant Br. 49–50. But, not all employee opinions fall within the scope of the deliberative process privilege. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 859–60, 868 (D.C. Cir. 1980) (rejecting the application of the deliberative process privilege to a "regional counsel opinion" from attorneys to auditors regarding the interpretation of regulations). As explained above, to qualify under deliberative process privilege, the document must reveal the agency's policymaking process "in such a way as to discourage candid discussions." *Dudman*, 815 F.2d at 1568 (stating Exemption 5 "protect[s] the executive's deliberative process . . . not . . . specific materials"). The

deliberative prong requires a more searching analysis than the mechanical approach upon which the government relies.

Here, ICE's *Vaughn* index entries lack factual detail to support its argument that the Foreign Policy Provision Memo reflects "the personal opinions of [the] writer rather than the policy of the agency." *See* Appellant's Br. 49–50. The description does not indicate there is anything subjective or personal about the memo. In fact, ICE even acknowledged that "the document is not organized like typical ICE memoranda and is not . . . formally addressed to ICE leadership." (JA 563). Because ICE attorneys prepared the memo with the purpose of "determining whether Section 212(a)(3)(C) can be used by the Secretary of State as grounds for inadmissibility," the document likely explains existing agency policy, rather than recommendations from an inferior to a superior. *Cf. Coastal States Gas Corp.*, 617 F.2d at 868–69 (finding that memoranda from lawyers to auditors that interpreted regulations "do not contain subjective, personal thoughts on a subject," but "rather, they simply explain and apply established policy" in specific factual situations). As the court explained in *Coastal States*, "straightforward explanations of agency regulations" do not reflect "agency give-and-take of the

deliberative process by which the decision itself is made." *Id.* at 868. Thus, there was "no possibility whatsoever that an attorney performing this job [of interpretation] would be less 'frank' or 'honest' if he or she knew that the document might be made known to the public." *Id.* at 869. Likewise, as a straightforward explanation of how INA § 212(a)(3)(C) can be used as a ground for inadmissibility, the Foreign Policy Provision Memo is not deliberative simply because it contains an employee's opinion.

If the deliberative process privilege protected every expression of a government employee's opinion, as ICE implies it should, then Exemption 5 would significantly undermine FOIA's general presumption favoring disclosure. *See Petroleum Info.*, 976 F.2d at 1436 n.8 (stating that because "even the most mundane material" could be thought to reveal agency policy judgments "in some sense," "the kind and scope of discretion involved must be of such significance that disclosure genuinely could be thought likely to diminish the candor of agency deliberations in the future"). Requiring agencies to "plausibly demonstrate the involvement of a policy judgment in the decisional process . . . enables [courts] to contain Exemption 5 within its proper scope." *Id.* at 1436. This

Court should not allow ICE to transform "opinions regarding the use of Section 212(a)(3)(C) of the INA as a ground for inadmissibility" and supporting notes into personal views of the writer covered by the deliberative process privilege, without the agency providing specific details on the deliberative context surrounding the Foreign Policy Provision Memo. (*See* JA 563).

CONCLUSION

For the reasons set forth above, the judgment of the district court should be affirmed.

Dated: May 19, 2021

Respectfully submitted,[26]

/s/ Megan Graham

Megan Graham
Catherine Crump
Samuelson Law, Technology & Public Policy Clinic
U.C. Berkeley School of Law
353 Law Building
Berkeley, CA 94720-7200
(510) 664-4381
mgraham@clinical.law.berkeley.edu

[26] Counsel wish to thank Berkeley Law students Schuyler Standley and Melody Wong for their contributions to the brief.

/s/ Xiangnong Wang
Xiangnong Wang
Carrie DeCell
Alex Abdo
Jameel Jaffer
Knight First Amendment Institute
at Columbia University
475 Riverside Drive, Suite 302
New York, NY 10115
(646) 745-8500
george.wang@knightcolumbia.org

Attorneys for Plaintiff-Appellee

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the word limit of Federal Rule of Civil Procedure 32(a)(7)(B) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 12,955 words, and that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6).

Dated: May 19, 2021 */s/ Megan Graham*

CERTIFICATE OF SERVICE

I, Megan Graham, an attorney, hereby certify that on May 19, 2021, I caused the foregoing brief to be filed with the Court and to be served upon counsel of record via the Court's ECF email system.

Dated: May 19, 2021 */s/ Megan Graham*