No. 13-1474

In the Supreme Court of the United States

ELECTRONIC FRONTIER FOUNDATION, PETITIONER

v.

DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Freedom of Information Act, 5 U.S.C. 552, requires disclosure of legal advice of the Office of Legal Counsel of the Department of Justice that was provided to the Federal Bureau of Investigation (FBI), at its request, to inform the FBI's evaluation of certain of its policies.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-26a) is reported at 739 F.3d 1. The opinion of the district court (Pet. App. 27a-46a) is reported at 892 F. Supp. 2d 95.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 2014. A petition for rehearing was denied on March 11, 2014 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on June 9, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Freedom of Information Act (FOIA), 5 U.S.C. 552, generally requires federal agencies to make records available to members of the public upon

request unless the records fall within an enumerated exemption. See 5 U.S.C. 552(a)(3)(A). As particularly relevant here, FOIA Exemption 5 shields from disclosure "inter-agency or intra-agency memorandums or letters which 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). That exemption has been interpreted to apply to documents covered by traditional civil-discovery privileges, including the attorney-client privilege and the deliberative-process privilege. *Department of Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (*Klamath*). The latter privilege covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Ibid.* (citation omitted).

If a person is dissatisfied with the response to her FOIA request, she may bring a civil action against the agency in a federal district court. 5 U.S.C. 552(a)(4)(B). The court "has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." *Ibid.*

2. This case concerns a legal opinion issued by the Office of Legal Counsel (OLC) of the Department of Justice (Department) that was provided to the Federal Bureau of Investigation (FBI).

a. The Attorney General has statutory authority to provide his opinion on questions of law to the President, heads of executive departments, and heads of military departments. See 28 U.S.C. 511-513. By regulation OLC assists the Attorney General in the performance of his function as a legal adviser to the President and Executive Branch departments and in

the preparation of opinions. 28 C.F.R. 0.25(a). As an OLC Special Counsel explained in a declaration filed in this case, "[t]he principal function of OLC is to assist the Attorney General in his role as legal advisor to the President of the United States and to departments and agencies of the Executive Branch." C.A. App. 19. In carrying out that function, "OLC provides advice and prepares opinions addressing a wide range of legal questions involving the operations of the Executive Branch." *Ibid.* But "OLC does not purport, and in fact lacks authority, to make policy decisions," and "OLC's legal advice is not itself dispositive as to any policy adopted." *Id.* at 18-19. Agencies are generally not required to seek opinions from OLC on questions of law.

b. The USA PATRIOT Improvement and Reauthorization Act of 2005 directed the Department of Justice's Office of Inspector General (OIG) to review the use of "national security letters." Pub. L. No. 109-177, § 119, 120 Stat. 219. National-security letters are one mechanism by which the FBI can obtain information from third parties, such as telecommunications companies or financial institutions, in connection with investigations.

OIG initially focused on four federal statutes that authorize the issuance of national-security letters in various contexts. See 12 U.S.C. 3414(a)(5)(A) (Right to Financial Privacy Act); 18 U.S.C. 2709 (Electronic Communications Privacy Act); 15 U.S.C. 1681u(a) and (b) (Fair Credit Reporting Act); 50 U.S.C. 436(a)(1) (National Security Act). OIG concluded that in some instances the FBI was soliciting information from telecommunications companies by sending letters that did not follow the procedures applicable to requests

under those four statutes. OIG referred to such letters as "exigent letters" because they typically adverted to "exigent circumstances." In response to a draft OIG report discussing those letters, the FBI "asserted for the first time that as a matter of law the FBI is not required to serve [national-security letters] to obtain [certain records] in national security investigations." C.A. App. 47.

In the course of responding to the draft OIG report, the FBI sought OLC's advice. C.A. App. 21. OLC then provided the FBI with an opinion, which is the document at issue in this case (OLC Opinion). The OLC Opinion was shared with OIG and other interested government officials, but it has not been disseminated publicly. *Id.* at 26-27.

After considering the OLC Opinion, OIG opined in its final report that the use of the statutory authority discussed in the OLC Opinion "to obtain records has significant policy implications that need to be considered by the FBI, the Department [of Justice], and the Congress." C.A. App. 49. Although the FBI stated that it had reached a policy decision not to rely on this statutory authority, *ibid.*, OIG recommended "that the Department [of Justice] notify Congress of this issue and of the OLC opinion interpreting the scope of the FBI's authority under it, so that Congress can consider [the statutory authority] and the implications of its potential use." *Id.* at 52.

3. Petitioner, a nonprofit advocacy organization, sought to obtain a copy of the OLC Opinion from the Department of Justice under FOIA. After the Department responded that the document was exempt from compelled disclosure under FOIA, petitioner filed suit against the Department in the United States

District Court for the District of Columbia seeking an order compelling disclosure of the OLC Opinion. Pet. App. 29a.

The district court granted summary judgment to the Department. Pet. App. 27a-46a. The court concluded that the OLC Opinion had been properly withheld in full under FOIA Exemption 5 because it was protected by the deliberative-process privilege. *Id.* at 41a-44a. The court explained that to qualify for that privilege, a document must be "both 'predecisional' and 'deliberative.'" *Id.* at 41a. The OLC opinion met those requirements, the court found, because it "contains inter-agency material that was generated as part of a continuous process of agency decision-making, namely how to respond to the OIG's critique of the FBI's information-gathering methods in certain investigations." *Id.* at 42a-43a. The court added that it was "not hard to imagine how disclosure of the OLC Opinion would likely interfere with the candor necessary for open discussions on the FBI's preferred course of action regarding the OIG evaluation." *Id.* at 43a-44a.

Because it found that the entirety of the OLC Opinion was subject to Exemption 5, the district court held that no basis existed to require the disclosure of any portion of the memorandum. See Pet. App. 44a-45a. The court did not reach the question whether the document was also protected by attorney-client privilege. See *id.* at 44a.

The district court did hold, however, that portions of the OLC Opinion were independently shielded from disclosure by Exemption 1 of FOIA. See Pet. App. 31a-40a. That exemption protects "matters that are * * * specifically authorized under criteria established by an Executive order to be kept secret in the

interest of national defense or foreign policy and * * * are in fact properly classified pursuant to such Executive order." 5 U.S.C. 552(b)(1). The court held that the government had "demonstrat[ed] that [certain] portions of the OLC Opinion were properly classified under section 1.4(c) [of Executive Order No. 13,526] as intelligence activities, sources or methods and that disclosure of [the] information could reasonably be expected to cause damage to national security." Pet. App. 35a.

4. The court of appeals affirmed. Pet. App. 3a-26a. In a unanimous decision, the court held that the OLC Opinion falls under FOIA Exemption 5. "On the record before us," the court explained, the OLC Opinion "is an 'advisory opinion[], recommendation[] and deliberation[] comprising part of a process by which governmental decisions and polices are formulated.'" *Id.* at 5a (quoting *Klamath*, 532 U.S. at 8) (brackets in original). The OLC Opinion, the court found, "amounts to advice offered by OLC for consideration by officials of the FBI." *Id.* at 16a.

The court of appeals rejected petitioner's argument that, under this Court's decision in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975) (*Sears*), the OLC Opinion constitutes the "working law" of the FBI and therefore should not be covered by the deliberative-process privilege. Pet. App. 12a-19a. Under *Sears*, the court explained, "an agency is not permitted to develop a body of 'secret law,' used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege because it is not designated as 'formal,' 'binding,' or 'final.'" *Id.* at 13a (citation and internal quotations marks omitted). The court concluded, however, that

"OLC did not have the authority to establish the 'working law' of the FBI," and thus the OLC Opinion "did not explain and apply established policy." *Id.* at 15a-16a (citation and internal quotation marks omitted). "Even if the OLC Opinion describes the legal parameters of what the FBI is *permitted* to do," the court continued, "it does not state or determine the FBI's policy." *Id.* at 19a. The court also observed that the FBI had "declined, for the time being, to rely on the authority discussed in the OLC Opinion." *Ibid.*

The court of appeals also rejected petitioner's argument that the deliberative-process privilege does not apply because the FBI had expressly "adopted" the OLC Opinion as part of a final decision of the FBI. See Pet. App. 19a-23a (citing *Sears*, 421 U.S. at 161). Although the court recognized that the deliberative-process privilege is waived when "an agency chooses *expressly* to adopt or incorporate by reference a memorandum," it explained that petitioner had failed to "point to any evidence supporting its claim that the FBI expressly adopted the OLC Opinion as its reasoning." *Id.* at 19a-21a (citation and internal quotation marks omitted). Petitioner had relied on two Second Circuit decisions in which that court had "held that an agency waived the privilege by referencing an OLC memorandum in its dealings with the public." *Id.* at 21a (citing *Brennan Center for Justice* v. *United States Dep't of Justice*, 697 F.3d 184, 204 (2012); *National Council of La Raza* v. *United States Dep't of Justice*, 411 F.3d 350, 357 (2005)). The court of appeals explained, however, that those cases were "inapposite because, in each one, the agency *itself* publicly invoked the reasoning of the OLC memorandum to *justify* its new position." *Ibid.* In contrast, the public

references that petitioner cited here "did not come from the FBI itself" but rather "originated from the OIG and Congress." *Id.* at 22a. The court further noted that during congressional testimony, the FBI General Counsel had "actually disavowed reliance on the OLC Opinion." *Id.* at 23a.

Finally, the court of appeals affirmed the district court's conclusion that no portion of the OLC Opinion could be disclosed without violating the deliberative-process privilege, finding that determination "supported by the record." Pet. App. 24a. The court of appeals did not reach the district court's Exemption 1 holding, see *id.* at 26a, or address the applicability of the attorney-client privilege.

ARGUMENT

Petitioner contends (Pet. 24-26) that the court of appeals erred in holding that the OLC Opinion was properly withheld under Exemption 5 of FOIA. That contention lacks merit. The decision below reflects a straightforward application of the deliberative-process privilege and does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

1. The court of appeals correctly held that the OLC Opinion, which advised the FBI about the legal bounds of its authority to issue national-security letters, is covered by the deliberative-process privilege and thus falls under Exemption 5 of FOIA.

a. This Court has explained that FOIA Exemption 5 shields from disclosure "predecisional memoranda prepared in order to assist an agency decisionmaker in arriving at his decision," but not "postdecisional memoranda setting forth the reasons for an agency decision already made." *Renegotiation Bd.* v. *Grum-*

man Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975). The court of appeals correctly concluded that the OLC Opinion in this case is a predecisional memorandum. The court found that the OLC Opinion "amounts to advice offered by OLC for consideration by officials of the FBI," Pet. App. 16a, and that "[t]he FBI was free to decline to adopt the investigative tactics deemed legally permissible in the OLC Opinion," *id.* at 19a. The OLC Opinion is thus merely "'an advisory opinion[], recommendation[] and deliberation[] comprising part of a process by which governmental decisions and policies are formulated,' and is therefore covered by the deliberative process privilege." *Id.* at 5a (quoting *Department of Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (brackets in original)).

Relying on *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975) (*Sears*), petitioner contends that the OLC Opinion is not exempt from compelled disclosure because (i) the OLC Opinion constitutes the "working law" of the FBI; and (ii) even if the OLC Opinion does not constitute "working law," the FBI has expressly adopted it. See Pet. 24-26. Those contentions lack merit.

i. *Sears* addressed whether certain memoranda written by the General Counsel of the NLRB come within Exemption 5. The Court first held that memoranda setting forth the grounds on which the General Counsel declines to file a complaint with the agency do not fall under Exemption 5 because they have "the effect of finally denying relief to the charging party," 421 U.S. at 155, and "represent an explanation * * * of a legal or policy decision already adopted by the General Counsel," *id.* at 148, 155-159. Those

memoranda "constitute the 'working law' of the agency" in that they "supply the basis for an agency policy actually adopted." *Id.* at 152-153. In contrast, the Court held that similar memoranda explaining the General Counsel's decision to *approve* the filing of a complaint did not qualify as "working law" because "[t]he filing of a complaint does not finally dispose even of the General Counsel's responsibility with respect to the case," and thus such memoranda merely "reflect the agency's group thinking in the process of working out its policy and determining what its law shall be." *Id.* at 148, 153, 159-160. Because the General Counsel does not have the last word on a case when he or she merely authorizes the filing of a complaint, "the 'law' with respect to [such] cases will ultimately be made not by the General Counsel but by the Board or the courts." *Id.* at 160.

The "working law" principle recognized in *Sears* reflects the general propositoin in FOIA that "an agency must disclose its rules governing relationships with private parties and its demands on private conduct." *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 n.20 (1989) (citation omitted); see 5 U.S.C. 552(a)(2). Under that general rule, "agency documents that are binding on the public, govern the adjudication of individual rights, [or] require particular conduct or forbearance by any member of the public" must be disclosed. *Afshar* v. *Department of State*, 702 F.2d 1125, 1143 (D.C. Cir. 1983) (citation and internal quotation marks omitted; brackets in original). As the court of appeals correctly explained, the "working law" principle applies to "a document that represent[s] a conclusive or authoritative statement of [an agency's] policy,

usually a higher authority instructing a subordinate on how the agency's general policy applies to a particular case, or a document that determine[s] policy or applie[s] established policy." Pet. App. 17a.

That principle has no general application to OLC opinions, which do not regulate the public or establish an agency's policy, but rather serve to provide legal advice to agencies. OLC opinions operate by custom and practice of the Executive Branch to provide the legal backdrop for broader policy deliberations within the Executive Branch. But OLC's legal advice itself—as opposed to any decisions or policies that might be informed by that advice—is not the "working law" of any agency. As the court of appeals explained, an OLC opinion is "controlling" only in the limited sense that "agencies customarily follow OLC advice that they request," not because OLC has any statutory authority to establish an agency's law or policy. Pet. App. 18a. In other words, OLC "may analyze and recommend, but the power to decide remains with the [relevant agency]," *Renegotiation Bd.*, 421 U.S. at 189.

The court of appeals thus correctly explained that "[e]ven if the OLC Opinion describes the legal parameters of what the FBI is *permitted* to do, it does not state or determine the FBI's policy." Pet. App. 19a. Rather, the FBI formulated its own policies after reviewing the OLC Opinion and taking into account other relevant considerations. Accordingly, the OLC Opinion is not the FBI's "working law," but is instead "precisely the kind of predecisional deliberative advice * * * contemplated by Exemption 5 which must remain uninhibited and thus undisclosed," *Renegotiation Bd.*, 421 U.S. at 186.

ii. *Sears* also held that "documents incorporated by reference in non-exempt [memoranda of the NLRB General Counsel] lose any exemption they might previously have held." 421 U.S. at 161. The Court explained that "if an agency chooses *expressly* to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion," that memorandum may not be withheld under Exemption 5. *Ibid.*

Petitioner errs in contending (Pet. 25-26) that the FBI has "expressly adopted" the OLC Opinion as its final decision. Express adoption occurs only when (i) "the reasoning in the [document] is adopted by the [agency] as *its* reasoning," *Renegotiation Bd.*, 421 U.S. at 184, (ii) "in what would otherwise be a final opinion," *Sears*, 421 U.S. at 161. Neither requirement is met here. Petitioner has not identified any document or statement of the FBI that adopted the OLC Opinion as the FBI's own, much less a document or statement that could be characterized as a "final opinion." Indeed, as the court of appeals explained, the FBI "actually *disavowed* reliance on the OLC Opinion" when the FBI's General Counsel testified before Congress that the OLC Opinion "did not in any way factor into the FBI's flawed practice of using exigent letters between 2003 and 2006." Pet. App. 23a.

Petitioner cites three asserted bases for express adoption: "repeated and explicit references to the OLC Opinion in a public report of the OIG; Congressional testimony about the Opinion from the FBI's general counsel; and executive branch reliance on the Opinion to ensure intelligence-gathering procedures comply with the law." Pet. 19. Those asserted bases, however, "utterly fail[] to support the conclusion that

the reasoning in the [OLC Opinion] [was] adopted by the [FBI] as *its* reasoning." *Renegotiation Bd.*, 421 U.S. at 184.

First, the OIG could not, through its statements, act for the FBI to adopt the memorandum as the *FBI's* policy, as the court of appeals held, Pet. App. 22a, and petitioner makes no effort to explain how it could. Moreover, mere references to a document do not constitute express adoption. See, *e.g.*, *Tigue* v. *United States Dep't of Justice*, 312 F.3d 70, 81 (2d Cir. 2002), cert. denied, 538 U.S. 1056 (2003). Indeed, even a statement that an agency "agrees with the conclusion" of a document is insufficient for adoption unless the agency adopts the document's *reasoning* as its own. *Renegotiation Bd.*, 421 U.S. at 184. Second, as discussed above, the FBI General Counsel's testimony disavowed reliance on the OLC Opinion. See C.A. App. 70. That testimony therefore could not be deemed to have "expressly * * * adopt[ed] or incorporate[d] by reference" the OLC Opinion as the FBI's own. *Sears*, 421 U.S. at 161 (emphasis omitted). Finally, with respect to the alleged "executive branch reliance on the Opinion to ensure intelligence-gathering procedures comply with the law," Pet. 19, if merely consulting a document containing advice qualified as expressly adopting it, little would be left of the deliberative-process privilege, the core purpose of which is to protect the confidentiality of advice that an agency considers in formulating policies.

b. Although petitioner claims that it does not seek a blanket rule requiring disclosure of all OLC opinions (see Pet. 9 n.3), its novel "working law" theory seems designed to accomplish that result. See Pet. 9 ("OLC opinions, like the one at issue here, are 'precisely the

kind of agency law in which the public is so vitally interested and which Congress,' in passing FOIA, 'sought to prevent the [government] from keeping secret.'") (brackets in original) (quoting *Sears*, 421 U.S. at 156). Such a rule would be contrary to the purposes of FOIA. As this Court has explained, Exemption 5 reflects Congress's conclusion that "the frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public; and * * * the decisions and policies formulated would be the poorer as a result." *Sears*, 421 U.S. at 150 (internal quotation marks omitted) (citing S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966)). It has long been understood by courts and Congress that "those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process." *Id.* at 150-151 (quoting *United States* v. *Nixon*, 418 U.S. 683, 705 (1974)) (emphasis omitted).

That concern has special force for OLC. OLC provides balanced legal advice to government agencies by "striv[ing] to ensure that it candidly and fairly addresses the full range of relevant legal sources and significant arguments on all sides of a question." C.A. App. 55. OLC's candor in setting forth and evaluating arguments on all sides of a question, and agencies' incentive to seek OLC's legal advice in the first place, could be compromised if such opinions were routinely subject to mandatory public disclosure. Although OLC will sometimes make its opinions public after consultation with the affected agency and appropriate consideration of whether public dissemination would be harmful, the process of obtaining legal advice from

OLC would be chilled if public disclosure were mandatory. Foreclosing the possibility that the President and Executive Branch agencies could receive candid advice in confidence, moreover, would have a deleterious effect on the accomplishment of the purposes of the statutory provisions for the Attorney General to furnish his opinion on questions of law to the President and to other agencies, see 28 U.S.C. 511-513, as well as the effectiveness of the Presidency itself and the President's constitutional obligation to take care that agencies faithfully execute the laws, see U.S. Const. Art. II, § 3.

c. Accordingly, the court of appeals correctly held that petitioner had failed to present any sound basis to overcome the deliberative-process privilege in this case. The court did not reach the district court's conclusion that FOIA Exemption 1 protects portions of the OLC Opinion or the government's contention that the attorney-client privilege independently protects the document from disclosure. See Gov't C.A. Br. 43-44. Were this Court to grant review, the government could raise those exemption claims as a basis for affirmance or partial affirmance of the judgment below.

2. Petitioner contends that the decision below conflicts with Second Circuit decisions addressing the applicability of FOIA Exemption 5 to particular OLC opinions. See Pet. 16-23.[1] Although the cited Second

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[1] Petitioner suggests (see Pet. 16) that the purported conflict extends more broadly, but does not identify any decisions of other circuits that conflict with the decision below. The petition (at 21) briefly discusses *Niemeier* v. *Watergate Special Prosecution Force*, 565 F.2d 967 (7th Cir. 1977). That decision has no bearing on the issues here. The Seventh Circuit determined that because a "final agency dispositional document" had quoted from and relied

Circuit precedent is seriously flawed (see pp. 21-22, *infra*), it does not conflict with the decision below.

a. In *National Council of La Raza* v. *United States Department of Justice*, 411 F.3d 350 (2d Cir. 2005) (*La Raza*), a coalition of advocacy groups sought release of an OLC memorandum written for the Department that analyzed whether particular provisions of federal immigration law could be enforced by state and local officials. See *id.* at 352. The Second Circuit presumed that the memorandum was subject to the deliberative-process privilege, *id.* at 356 & n.4, but held that the Department had "incorporated the OLC Memorandum into agency policy through its repeated reference to, and reliance on, the Memorandum," *id.* at 352. The court cited references to the memorandum by the Attorney General at a press conference, *id.* at 353, four letters written by the Attorney General or an Acting Assistant Attorney General, *id.* at 353-354, and a presentation given by the "counsel to the Attorney General" to the FBI's Criminal Justice Information Services Policy Advisory Board, *id.* at 354-355. The court concluded that "the repeated references to the OLC Memorandum made by the Attorney General and his high-ranking advisors, the substance of their comments, and the way in which their comments were used—that is, to assure third parties as to the legality of the actions the third parties were

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expressly on the reasoning of a legal memorandum, the document had "expressly adopt[ed] or incorporat[ed] the whole [legal] memorandum." *Id.* at 972-974. Petitioner has pointed to no such "final agency dispositional document" citing and incorporating the OLC Opinion. Petitioner also suggests (Pet. 22) a conflict among the Second Circuit's own decisions. This Court does not ordinarily grant review to resolve intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

being urged to take—are sufficient to establish that the Department incorporated the Memorandum into its new policy regarding state and local immigration law enforcement authority." *Id.* at 357.

The Second Circuit conducted a similar analysis in *Brennan Center for Justice* v. *United States Department of Justice*, 697 F.3d 184 (2012) (*Brennan Center*). In that case, the plaintiff sought three OLC memoranda addressing the constitutionality of a recently enacted statutory provision requiring organizations that receive funds for HIV/AIDS and anti-human trafficking work to adopt a policy opposing prostitution and sex trafficking. See *id.* at 188; cf. *Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2324-2325 (2013). The memoranda had been written for the Department of Health and Human Services (HHS) and (with respect to one of the memoranda) the U.S. Agency for International Development (USAID). See *Brennan Center*, 697 F.3d at 190-192 & n.3.

The Second Circuit explained that it was undisputed that the memoranda were predecisional and deliberative and therefore presumptively protected by the deliberative-process privilege. See *Brennan Center*, 697 F.3d at 202, 206. The court further held that the memoranda "d[id] not constitute 'working law,' or 'the agency's effective law and policy.'" *Id.* at 203 (quoting *Sears*, 421 U.S. at 153); see *id.* at 207. But the court then found that one of the three memoranda had been expressly "adopted by reference by USAID in nonexempt communications, and therefore must be disclosed." *Id.* at 203. The court rested that adoption finding on a footnote in a guidance document issued by USAID as well as a reference to the memorandum

by the U.S. Global AIDS Coordinator during congressional testimony. See *id.* at 204. The court understood the two statements to have publicly "referenc[ed] [the] protected document as authoritative." *Id.* at 205. But the court held that the other two documents continued to be protected by Exemption 5 because there was "insufficient evidence that those memoranda were expressly adopted or incorporated by reference by USAID." *Id.* at 207.

Finally, in *New York Times Co.* v. *United States Department of Justice*, 756 F.3d 100 (2014), the Second Circuit held that FOIA required the Department to disclose an OLC memorandum that "contain[ed] confidential legal advice to the Attorney General," *id.* at 112, on a contemplated lethal operation against a U.S. citizen abroad. See *id.* at 112-121. The court found that Exemption 5 had been "waived," primarily based on what it characterized as the "official[] releas[e]" of a "DOJ White Paper" containing reasoning that "virtually parallel[ed] the [OLC] Memorandum in its analysis of the lawfulness of targeted killings." *Id.* at 115-117. The court also noted its view that the Attorney General had "publicly acknowledged the close relationship between the DOJ White Paper and previous OLC advice," *id.* at 116, and cited statements by other government officials adverting to OLC advice on the issue, *id.* at 111, 116-118.[2]

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[2] In all three decisions, the Second Circuit concluded that the attorney-client privilege had also been overcome based on its view that "when a document has been relied upon sufficiently to waive the deliberative-process privilege, that reliance can have the same effect on the attorney-client privilege." *Brennan Center*, 697 F.3d at 207-208; see *New York Times*, 756 F.3d at 116-117; *La Raza*, 411 F.3d at 360-361.

b. The Second Circuit's line of precedent does not conflict with the decision below.

First, none of the cited cases held that an OLC opinion represented the "working law" or "effective law and policy" of the agency to which it was submitted and therefore had lost its Exemption 5 protection. Accordingly, no colorable argument exists that the court of appeals' holding that the OLC Opinion did not constitute the FBI's "working law" conflicts with Second Circuit precedent.

Petitioner asserts (Pet. 18-19) a conflict with *Brennan Center*, characterizing that decision as having held that "an OLC opinion constitutes an agency's 'law' if it is 'effectively binding on the agency' or left the agency with 'no decision to make,' as in *Sears*." Pet. 18 (quoting *Brennan Center*, 697 F.3d at 203). But *Brennan Center* did not suggest, as petitioner appears to contend, that OLC opinions typically constitute a client agency's "working law." Rather, the quoted sentence simply observed that the "plaintiff d[id] not submit * * * evidence suggesting that the OLC's recommendation was effectively binding on the agency." 697 F.3d at 203. Both the Second Circuit and the D.C. Circuit thus apply the same standard for "working law"—that "an agency must disclose binding agency opinions and interpretations that the agency actually applies in cases before it," Pet. App. 13a-14a (internal quotation marks omitted)—but neither has held that OLC opinions generally meet that standard. Indeed, the Second Circuit's extensive discussion of adoption or waiver in the three cited opinions would have been unnecessary if the circuit subscribed to petitioner's evident view that OLC opinions generally qualify as "working law."

The Second Circuit decisions did each rely on an adoption or waiver theory to find that Exemption 5 protection had been lost. But as the court of appeals explained, *La Raza* and *Brennan Center* are "inapposite because, in each one," the Second Circuit concluded that "the agency *itself* publicly invoked the reasoning of the OLC memorandum." Pet. App. 21a (citing *Brennan Center*, 697 F.3d at 204; *La Raza*, 411 F.3d at 357). And the Second Circuit's later decision in *New York Times* is similarly inapposite.

In *La Raza*, in concluding that the OLC opinion had been expressly adopted, "the court found that the 'Attorney General and his high-level staff made a practice of using the OLC Memorandum to justify and explain the Department [of Justice]'s policy.'" Pet. App. 21a (brackets in original) (quoting *La Raza*, 411 F.3d at 358). In *Brennan Center*, the relevant memorandum was provided to HHS and USAID, and the Second Circuit found that the memorandum had been "adopted by reference by USAID in nonexempt communications." 697 F.3d at 190 & n.3, 203. *Brennan Center*, moreover, expressly held that certain documents cited by the plaintiff did not support an adoption theory because they were "neither written by a decisionmaker nor released publicly by the decisionmaking agency." *Id.* at 204 n.15; see *id.* at 204 n.16 ("This letter is * * * of limited relevance in determining whether or not the February 2004 opinion should be subject to disclosure because *it was not authored by a decisionmaker from USAID or HHS*.") (emphasis added). And in *New York Times*, the OLC advice was provided to the Attorney General, and the Second Circuit relied principally on what it understood to be an official release of a white paper drafted

by the Department of Justice disclosing the analysis in the OLC memorandum at issue, as well as statements by the Attorney General and others, to find "waiver" (a legal principle that petitioner has not invoked). 756 F.3d at 114, 116-117, 120-121; see Pet. 20 n.18 (acknowledging that Second Circuit in *New York Times* stated its holding as one of "waiver"); see also *New York Times*, 756 F.3d at 116 (discussing adoption in connection with waiver ruling).

In this case, the relevant "public references to the OLC Opinion did not come from the FBI itself." Pet. App. 22a. Instead, they "originated from the OIG and Congress." *Ibid.* As the court of appeals explained, such references could not "establish that *the FBI* adopted the OLC Opinion as *its own* reasoning." *Ibid.*

c. In the view of the United States, the Second Circuit decisions cited by petitioner have significantly misinterpreted FOIA by, for example, finding adoption based on brief public references to a document that do not satisfy the *Sears* requirement of express adoption or incorporation by reference; failing to identify a plausible basis for overcoming the attorney-client privilege; and, in *New York Times*, relying on what it found to be a public release of a document tracking the reasoning of a non-disclosed OLC opinion, without expressly incorporating it, to support a finding of waiver. That erroneous line of decisions threatens the ability of Executive Branch lawyers to provide confidential legal advice to governmental decisionmakers and thus may require this Court's intervention in an appropriate case. But for the reasons given by the court of appeals, the Second Circuit's decisions do not support petitioner's arguments here. This case is therefore not a suitable vehicle to

consider the Second Circuit's understanding of Exemption 5.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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