No. 24-300

In the Supreme Court of the United States

BLUE MOUNTAINS BIODIVERSITY PROJECT, PETITIONER

v.

SHANE JEFFRIES, IN HIS OFFICIAL CAPACITY AS OCHOCO NATIONAL FOREST SUPERVISOR, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether deliberative materials—predecisional, non-final materials reflecting the agency's internal deliberations—are part of the administrative record in an action under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.*, such that an agency must prepare a privilege log describing each deliberative document that it does not provide.

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OPINIONS BELOW

The Ninth Circuit's amended opinion and order denying rehearing en banc (Pet. App. 1a-40a) is reported at 99 F.4th 438. The Ninth Circuit's original opinion (Pet. App. 41a-58a) is reported at 72 F.4th 991. The opinion of the district court (Pet. App. 59a-79a) is available at 2022 WL 4466928. The opinion of the magistrate judge (Pet. App. 82a-96a) is available at 2021 WL 3683879.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 2023. The court amended the judgment and denied a petition for rehearing en banc on April 16, 2024 (Pet. App. 1a-40a). On July 10, 2024, Justice Kagan

extended the time within which to file a petition for a writ of certiorari to and including September 13, 2024, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Walton Lake is a popular, developed recreation site in the Ochoco National Forest in central Oregon. Some tree species in the area are infested with laminated root rot, a disease that kills trees and causes them to fall unexpectedly. See Pet. App. 8a; C.A. E.R. 733-734. As a result, a 35-acre portion of the recreation area had to be closed for several years for public safety. C.A. E.R. 734, 930; C.A. S.E.R. 31-37. In order to promote public safety and forest health, the U.S. Forest Service developed the challenged Walton Lake Restoration Project. C.A. E.R. 733, 736-737. The Project will replace stricken trees with disease-resistant ones and will also thin other overgrown parts of the area, reducing the risks of catastrophic wildfire and bark beetle spread. *Id.* at 745-747, 752-754. In 2020, after years of litigation, public participation, and different administrative processes, the Service published a lengthy Environmental Assessment and a Finding of No Significant Impact for the Project under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* See C.A. E.R. 647-727, 729-927.

2. Petitioner filed suit under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.*, challenging the Service's decision to proceed with the Project, its NEPA process, and its Finding of No Significant Impact as inconsistent with NEPA and the National Forest Management Act of 1976, 16 U.S.C. 1600 *et seq.* The Service filed the administrative record with the court and certified that the record was complete.

C.A. E.R. 550-554; see Pet. App. 87a. Petitioner moved for an order compelling the Service to complete the administrative record or, in the alternative, to prepare a privilege log listing all deliberative materials withheld from the record. See Pet. App. 85a.

The magistrate judge recommended denying petitioner's motion. See Pet. App. 82a-95a. She explained the Service's certification that it produced the complete record is "entitled to a presumption of regularity" and explained that petitioner "failed to overcome that presumption." *Id.* at 88a. The magistrate judge rejected petitioner's argument that approximately "1,200 pages of material" that petitioner had acquired pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552, should have been included in the administrative record, observing that petitioner had "provide[d] little in the way of specific argument" concerning those documents. Pet. App. 93a. Based on her own review, the magistrate judge determined that the 1200 pages "are largely deliberative materials consisting of email discussions between agency staff, proposed drafts, and other similar documents." *Id.* at 94a. She observed that "[t]he D.C. Circuit has consistently held that, absent a showing of bad faith or improper behavior, deliberative documents are not part of the administrative record." *Id.* at 91a (citing *Oceana, Inc.* v. *Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019) (internal quotation marks and some citations omitted). "[C]oncur[ring] with the reasoning" of the D.C. Circuit, the magistrate judge emphasized that APA review seeks "to assess the lawfulness of the agency's action based on the reasons offered by the agency," rather than "prob[ing] the mental processes of agency decision-makers." *Id.* at 92a (citation omitted). The magistrate judge further determined that a privilege

log of the agency's deliberative documents "would be without useful purpose and would undermine the limited scope of the Court's APA review." *Id.* at 95a.

3. The district court adopted the magistrate judge's reasoning and denied petitioner's motion to compel. See Pet. App. 80a-81a. The district court later granted the Service summary judgment on all but one of petitioner's claims. See *id.* at 59a-79a; C.A. E.R. 9-12, 43, 54.

4. The court of appeals affirmed. See Pet. App. 41a-58a; see *id.* at 1a-21a (amended opinion).

As relevant here, the court of appeals affirmed the district court's denial of petitioner's motion to compel. Pet. App. 11a-17a. The court explained that the administrative record is normally "the record the agency presents." *Id.* at 11a (quoting *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 743-744 (1985)). It also observed that the agency's compilation of the record is "subject to a presumption of regularity." *Ibid.* (citation omitted). The court agreed with the D.C. Circuit that deliberative materials, "which are prepared to aid the decisionmaker in arriving at a decision" are "ordinarily not relevant" when assessing the lawfulness of agency action. *Id.* at 12a (citing *Oceana*, 920 F.3d at 865). And it concluded that those materials "'are not part of the administrative record to begin with.'" *Ibid.* Thus, the Ninth Circuit agreed with the D.C. Circuit that—other than in cases of asserted "impropriety or bad faith by the agency"—"deliberative materials are generally not part of the [administrative record]." *Id.* at 11a.

The court of appeals noted that "whether materials are in fact deliberative is subject to judicial review," providing that "in appropriate circumstances district courts may order a privilege log to aid in that analysis."

Pet. App. 12a. But it explained that in this case, petitioner "does not assert any misconduct by the Service" or "contend that specific documents were improperly classified as deliberative." *Id*. at 13a. For that reason, the court determined that the district court "did not abuse its discretion by declining to [order the production of a privilege log] in this case." *Ibid.* Accordingly, the court "le[ft] for another day a detailed exploration of the precise circumstances under which a district court can order the production of a privilege log." *Ibid.*

5. Petitioner sought panel rehearing and rehearing en banc. The panel issued an amended opinion, but otherwise denied the petition for panel rehearing. See Pet. App. 6a-7a.

The court of appeals denied the petition for rehearing en banc. See Pet. App. 7a. Judge Berzon issued a statement respecting the denial. *Id.* at 22a-40a. Judge Berzon would have held that "'the whole record' includes *everything* that was before the agency pertaining to the merits of its decision,'" including deliberative materials. *Id.* at 26a (brackets and citation omitted). In Judge Berzon's view, this Court's statements rejecting the relevance of an agency's mental processes address only "the propriety of *post-decisional* testimony of administrative decisionmakers." *Id.* at 32a; see *id.* at 30a-32a. And Judge Berzon was not persuaded by the D.C. Circuit's holding that deliberative materials are not part of the administrative record, taking the view that the D.C. Circuit misinterpreted its own past precedent in reaching that conclusion. See *id.* at 32a-33a. Judge Berzon also expressed the view that, "[w]ithout a privilege log" listing all the deliberative documents, "governmental mistakes or misconduct are unlikely to come to light." *Id.* at 34a.

ARGUMENT

Petitioner challenges the court of appeals' denial of its motion to supplement the administrative record in this Administrative Procedure Act (APA) case. The court of appeals correctly rejected petitioner's argument that all deliberative documents are part of the administrative record and must either be provided to petitioner or included on a privilege log, agreeing with the D.C. Circuit's longstanding precedent about what constitutes an administrative record. That decision does not conflict with any precedential decision from another court of appeals or otherwise satisfy this Court's criteria for review. The petition for a writ of certiorari should be denied.

1. Deliberative materials generally include opinions, recommendations, and other internal materials reflecting the deliberations comprising part of a process by which the government formulates its decisions. See *United States Fish & Wildlife Serv.* v. *Sierra Club, Inc.*, 592 U.S. 261, 267 (2021). They "help the agency formulate its position," and are distinct from "documents reflecting a final agency decision and the reasons supporting it." *Id.* at 268. Petitioner contends (Pet. 14-22) that deliberative documents—even internal emails and memoranda reflecting the writer's personal views and drafts of the final agency decision—are part of the administrative record and that all deliberative documents must be listed on a privilege log if they are not provided to an APA challenger. The court of appeals correctly rejected that argument. See Pet. App. 10a-13a.

a. When reviewing formal or informal agency action under the APA, a court "shall review the whole record or those parts of it cited by a party." 5 U.S.C. 706. See *Citizens to Pres. Overton Park, Inc.* v. *Volpe*, 401 U.S.

402, 420 (1971) (explaining that APA review "is to be based on the full administrative record"). The requirement of review of the "whole record" instructs courts to consider information both favorable and unfavorable to the agency, rejecting the pre-APA practice under which courts sometimes upheld agency action as long as any favorable evidence appeared in the record. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 482 n.15, 485 n.21, 486 n.22, 488 (1951).

The APA does not specify the contents of the administrative record for informal agency action, like the decision approving the Project at issue here. But statutory context indicates that deliberative materials are not part of the record. First, for formal agency hearings, the APA provides that the "exclusive record for decision" consists of "[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding." 5 U.S.C. 556(e). The administrative record therefore does not include materials that are not "filed in the proceeding" pursuant to the agency's procedures, such as internal agency documents regarding the agency's deliberations in reaching a final decision. *Ibid.* Second, when an agency order is subject to direct review in a court of appeals, the "record to be filed in the court of appeals in such a proceeding shall consist of the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before" the agency. 28 U.S.C. 2112(b); see Fed. R. App. P. 16 (setting out the record on review of an agency order). Predecisional and deliberative materials thus are not part of the record in direct review cases. That is hardly surprising: bench memoranda and preliminary drafts of district court opinions are not part of the record in non-agency

appeals from the district court. See Fed. R. App. P. 16 advisory committee's note (1967 Amendment) (explaining that "[t]he record in agency cases is * * * the same as that in appeals from the district court").

Nothing in the text of the APA supports changing the scope of the administrative record when informal agency action is at issue to include preliminary, deliberative documents that reflect an agency's decision-making process. Treating deliberative materials as part of the record in informal agency proceedings would render judicial review of those proceedings substantially more expansive and of a fundamentally different character than review of formal proceedings. That result would also be peculiar, particularly because the informal character of the proceedings gives the agency more, rather than less, latitude in deciding what materials belong in the record. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543-549 (1978) (describing the flexibility agencies have to fashion their procedures for informal proceedings).

Nor would considering deliberative materials to be part of the administrative record serve judicial review of the agency's decision in typical cases. Under the APA, "[t]he task of the reviewing court is to apply the appropriate APA standard of review * * * to the agency decision based on the record the agency presents to the reviewing court." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 743-744 (1985). "[I]n reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record." *Biden* v. *Texas*, 597 U.S. 785, 811 (2022) (quoting *Department of Commerce* v. *New York*, 588 U.S. 752, 780 (2019)). The court's review must be based on the reasons "articulated by the

agency itself," and the agency's action "must be upheld, if at all, on th[at] basis." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). A reviewing court's task is an objective one, to determine the sufficiency of the evidence in the record and the agency's explanation of its action, including whether the agency's written decision relied on appropriate factors and considered the important aspects of the problem on the basis of the evidence presented. See *id.* at 43. Internal predecisional deliberative materials are not evidence or the agency's explanation for its decision, and are not relevant to a court's task in reviewing the agency's decision on the basis of evidence presented in the record.

In addition, "[t]he federal courts ordinarily are empowered to review only an agency's *final* action," and it makes no difference if the decisionmaker's assessment differs from those of his subordinates or if the agency modified its position during the administrative process. *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 659 (2007). "[I]nquiry into the mental processes of administrative decisionmakers is usually to be avoided." *Overton Park*, 401 U.S. at 420; see *United States* v. *Morgan*, 313 U.S. 409, 422 (1941) (explaining that "[j]ust as a judge cannot be subjected to * * * scrutiny" regarding the mental processes by which the judge reached a decision, "so the integrity of the administrative process must be equally respected"). In short, agencies "should be judged by what they decided, not for matters they considered before making up their minds." *National Security Archive* v. *CIA*, 752 F.3d 460, 462 (D.C. Cir. 2014) (Kavanaugh, J.) (citation omitted). Where, as here, an agency makes administrative findings contemporaneous with its decision and includes

them in the administrative record, inquiry into underlying mental processes is unwarranted absent "a strong showing of bad faith or improper behavior." *Overton Park*, 401 U.S. at 420.

Those considerations find further support in the "presumption of regularity that normally attends agency action." *Biden*, 597 U.S. at 811; see *United States Postal Service* v. *Gregory*, 534 U.S. 1, 10 (2001) ("[A] presumption of regularity attaches to the actions of Government agencies."); *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926). "This presumption reflects respect for a coordinate branch of government." *New York*, 588 U.S. at 792 (Thomas, J., concurring in part and dissenting in part). While an agency must " 'disclose the basis' " of its action, a court must generally accept "an agency's stated reasons for acting." *Id.* at 780-781 (majority opinion) (citation omitted). "[F]urther judicial inquiry into 'executive motivation' represents 'a substantial intrusion' into the workings of another branch of Government and should normally be avoided." *Id.* at 781 (citation omitted). A court may look behind an agency's stated reasons only in extraordinary cases involving a "strong showing of bad faith." *Ibid.* (citation omitted). The presumption of regularity both confirms that an agency's internal deliberations are irrelevant to APA review absent a strong showing of impropriety and provides reason to credit the agency's compilation of the relevant record and certification that the record is complete.

b. In light of those principles, the D.C. Circuit—the court of appeals that handles the largest share of the Nation's administrative law cases—has long recognized that deliberative materials are not ordinarily part of the administrative record. See *Norris & Hirshberg, Inc.* v.

SEC, 163 F.2d 689, 693 (D.C. Cir. 1947) ("[I]nternal memoranda made during the decisional process * * * are never included in a record."), cert. denied, 333 U.S. 867 (1948); *Kansas State Network, Inc.* v. *FCC*, 720 F.2d 185, 191 (D.C. Cir. 1983) (holding that documents reflecting the "predecisional process leading to an agency decision" should be struck from the record) (citation omitted); *San Luis Obispo Mothers for Peace* v. *United States Nuclear Regulatory Comm'n*, 789 F.2d 26, 45 (D.C. Cir.) (en banc) (plurality opinion) (declining to supplement the record with a transcript of an agency meeting because "cases where a court is warranted in examining the deliberative proceedings of the agency * * * must be the rare exception"), cert. denied, 479 U.S. 923 (1986); *id.* at 45-46 (Mikva, J., concurring in the result); *In re Subpoena Duces Tecum Served on the Off. of Comptroller of the Currency*, 156 F.3d 1279, 1279-1280 (D.C. Cir. 1998) (explaining that "[a]gency deliberations not part of the record are deemed immaterial * * * because the actual subjective motivation of agency decisionmakers is immaterial as a matter of law—unless there is a showing of bad faith or improper behavior").

In considering the question presented here, the D.C. Circuit has specifically held that "predecisional and deliberative documents are not part of the administrative record to begin with, so they do not need to be logged as withheld from the administrative record." *Oceana, Inc.* v. *Ross*, 920 F.3d 855, 865 (2019) (citation and internal quotation marks omitted). "[Because] predecisional documents are irrelevant," the court reasoned, "they are not required to be placed on a privilege log." *Ibid.* And it emphasized that requiring an agency to log deliberative materials is particularly unwarranted because

"the designation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity." *Id.* at 865 (citation omitted); see *Emuwa* v. *United States Dep't of Homeland Sec.*, 113 F.4th 1009, 1018 (D.C. Cir. 2024) ("[T]he 'record of proceedings' does not include internal recommendations to the decisionmaker: * * * just as a law clerk's bench memorandum would not be part of the record on which a judicial decision is based.") (citation omitted).

c. The court of appeals correctly applied those principles here. Following long-settled administrative law principles, it explained that the administrative record is normally "the record the agency presents." Pet. App. 11a (quoting *Florida Power*, 470 U.S. at 743-744). And it observed that the compilation of the record is "subject to a presumption of regularity." *Ibid.* (citation omitted). The court of appeals agreed with the D.C. Circuit that deliberative materials are "ordinarily not relevant" when assessing "the lawfulness of agency action." *Id.* at 12a (citing *Oceana*, 920 F.3d at 865). And it held that deliberative materials are "not part of the administrative record to begin with." *Ibid.* (quoting *Oceana*, 920 F.3d at 865). The court also correctly explained that "in appropriate circumstances" a district court could "order a privilege log." *Ibid.* But a privilege log was not required in this case because petitioner "d[id] not assert any misconduct by the Service" nor "contend that specific documents were improperly classified as deliberative." *Id.* at 12a-13a. For that reason, the court of appeals held that the district court "did not abuse its discretion by declining" to order a privilege log "in this case." *Id.* at 13a.

d. Petitioner's contrary arguments (see Pet. 14-22) are unavailing.

Petitioner primarily contends (Pet. 14-15) that the reference to judicial consideration of the "whole record" in Section 706 means that a court is required to "look[] at all the materials that were before the agency." Pet. 18; see Pet. 14-15. Petitioner is mistaken. The requirement that courts look at the "whole record" in Section 706 specifies the scope of judicial review, instructing courts to consider unfavorable as well as favorable evidentiary material in the record. See pp. 6-7, *supra*. But it does not further specify what categories of materials must be included. Tellingly, the "whole record" requirement in Section 706 applies to both formal and informal agency proceedings. And the APA elsewhere defines the administrative record for formal agency proceedings in a way that excludes deliberative materials. See 5 U.S.C. 556(e).

Petitioner contends that "in practice," courts regularly review "letters, drafts, emails, and other nonfinal materials." Pet. 15 (quoting Pet. App. 28a (Berzon, J., dissenting)). But internal materials of that type are not invariably deliberative or otherwise outside the administrative record. For example, emails that document the "final agency decision and the reasons supporting it," *United States Fish & Wildlife Serv.*, 592 U.S. at 268, are part of the administrative record. And the administrative record in this case included some internal materials, *e.g.*, Administrative Record (A.R.) 4846; A.R. 8697-8708. Similarly, while an agency is required to include in the record evidentiary "materials contrary to the government's decision," Pet. 14 (citing *In re United States*, 583 U.S. 1029, 1030-1031 (2017) (Breyer, J., dissenting)), it does not follow that documents that reflect

the deliberations themselves must be included. And including the latter would only assist "inquiry into the mental processes of administrative decisionmakers," which this Court has repeatedly directed courts to avoid in the typical case. *Overton Park*, 401 U.S. at 420; see *Morgan*, 313 U.S. at 422; pp. 9-10, *supra*.[1]

Petitioner is also wrong to contend that, absent a privilege log of all deliberative materials, it would be difficult to "discover" "malfeasance" by the agency. Pet. 22. The court of appeals held, in accord with the D.C. Circuit, that a privilege log may be ordered "in appropriate circumstances," including upon "a showing of bad faith or improper behavior." Pet. App. 12a; see *Oceana*, 920 F.3d at 865. Defining the record in every case on the assumption that the agency might have engaged in malfeasance that could be "discover[ed]" through inclusion of such material would invert the presumption of regularity applicable to agency action and convert judicial review into a fishing expedition. See p. 10, *supra*. And here—despite obtaining over a thousand pages of additional documents under FOIA, see

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[1] Petitioner suggests that this Court's statements rejecting an inquiry into the mental processes of agency decisionmakers apply only to "*post-decisional* testimony," and are based on a concern with "the generation of new material" not before the agency. Pet. 19 (citation omitted). That is incorrect. This Court has explained that testimony about the predecisional "process by which [the agency decisionmaker] reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates," is improper because it undermines "the integrity of the administrative process." *Morgan*, 313 U.S. at 422; see, *e.g.*, *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977) ("[J]udicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government.").

Pet. App. 93a-94a—petitioner neither "assert[ed] any misconduct" by the agency nor identified any "specific documents" that it believed "were improperly classified as deliberative." *Id.* at 13a.

Petitioner also suggests (Pet. 19-21) that there is something improper about an agency facing disclosure obligations under FOIA that may be somewhat broader than the agency's obligation to provide a complete administrative record when sued under the APA. But that difference is a result of statutory text: FOIA specifically requires an agency to produce all agency "records," subject to certain exemptions. 5 U.S.C. 552(a)(3)(A). Section 706 contains no similar requirement, nor does it define the administrative record to include every email, memorandum, and reference that might qualify as an individual record under FOIA. See 5 U.S.C. 706. And the fact that, despite obtaining voluminous records in response to its FOIA request, see Pet. App. 93a-94a, petitioner has not identified a single specific document improperly classified as deliberative further supports the view of the court of appeals that a privilege log was not required in this case. See *id.* at 12a-13a.

2. Petitioner recognizes that "no circuit has issued a precedential decision" that conflicts with the decision below. Pet. 11. And it does not assert that the decision below conflicts with any decision of this Court, see Pet. 10-24. Accordingly, this case does not satisfy this Court's traditional certiorari standards. See Sup. Ct. R. 10.

a. Petitioner contends that review is warranted because the Second and Fourth Circuits have issued nonprecedential orders "adopting the rule" that "deliberative materials are part of the administrative record." Pet. 11. But those decisions do not create binding precedent,

meaning that the Second and Fourth Circuits will be free to address the question anew in a subsequent case.[2]

Nor, in any event, do those nonprecedential orders adopt the broad rule petitioner cites. The Second Circuit denied a mandamus petition that sought to stay a district court's order requiring the government to supplement the record in a case arising from the recission of the Deferred Action for Childhood Arrivals (DACA) policy. *In re Nielsen*, No. 17-3345, 2017 U.S. App. LEXIS 26821 (Dec. 27, 2017), ECF No. 171. The court of appeals did not announce a rule that all deliberative materials are included in the administrative record.

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[2] Petitioner contends that this Court "grant[s] certiorari where a nonprecedential opinion or order supplies the basis for a circuit divide." Pet. 13 n.1. But none of the examples it cites supports that proposition. In four of the cases, this Court granted review where the decision below was unpublished, but the petitioner had asserted a conflict between precedential, published decisions. See *Chen* v. *Mayor & City Council of Baltimore*, 574 U.S. 988, 988 (2014) (order granting certiorari in case where the district court relied on a binding, published Fourth Circuit decision that conflicted with the decisions of the Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits); Pet. at i, 10, *Eastern Associated Coal Corp.* v. *United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 61 (2000) (No. 99-1038) (asserting a 5-5 circuit conflict), *Lynce* v. *Mathis*, 519 U.S. 433, 436 (1997) (reviewing an unpublished order applying a binding, published Eleventh Circuit decision that conflicted with a published decision of the Tenth Circuit); *Burlington N. R.R. Co.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 460 (1987) (reviewing an unpublished order where the lower courts applied a binding, published Tenth Circuit decision that conflicted with a published Eighth Circuit decision). And in the remaining case, the petition also contended, and this Court ultimately concluded, that the decision below conflicted with a prior decision of this Court. *Lamps Plus, Inc.* v. *Varela*, 587 U.S. 176, 180, 185, 189 (2019); see *id.* at 180 (noting that an opinion below described the lower court's holding as a "palpable evasion" of Supreme Court precedent) (citation omitted).

Rather, the court observed that, in the particular circumstances of that case, plaintiffs "identified specific materials that appear to be missing from the record," such as specific evidence that supported a particular factual assertion. *Id.* at *11; see also *id.* at *12 (expressing skepticism that "a decision as important as whether to repeal DACA would be made based upon a factual record of little more than 56 pages"). The court's case-specific determination in that mandamus context does not conflict with the decision below, which determined that a privilege log is not required given petitioner's failure to identify any specific reason to doubt the completeness of the administrative record certified by the Service. See Pet. App. 12a-13a.

The Second Circuit also recognized that "review of deliberative memoranda reflecting an agency's mental process * * * is usually frowned upon," but explained that, "*in the absence of formal administrative findings*," those materials "may be considered by the court to determine the reasons for the decision-maker's choice." *Nielsen*, 2017 U.S. App. LEXIS 26821, at *13 (emphasis added; citation omitted). The court's view that some deliberative materials may be part of the record in *Nielsen* thus does not speak to the completeness of the record in this case, where the agency did make formal findings and provided a contemporaneous explanation necessary for judicial review. C.A. E.R. 647-727; see *Overton Park*, 401 U.S. at 420.

Petitioner also relies on an unpublished order from the Fourth Circuit. See Doc. No. 70, *Defenders of Wildlife* v. *Department of the Interior*, No. 18-2090 (Feb. 5, 2019). In that order, the Fourth Circuit granted a motion to complete an administrative record and required submission of a privilege log, but it provided no reasons

for its ruling. That unexplained disposition is not inconsistent with the decision of the court of appeals, which specifically recognized that a privilege log may be required in some circumstances, see Pet. App. 12a-13a. In any event, that the Fourth Circuit issued a one-page, unexplained order signed only by the Clerk of Court confirms that it intended to resolve the evidentiary dispute before it rather than announce a broader rule.

b. Petitioner also contends that district courts "are sharply divided on the question of whether deliberative documents are part of the administrative record." Pet. 10; see Pet. 10-13. But this Court ordinarily does not grant review to resolve conflicts among decisions of district courts. See Sup. Ct. R. 10; see also *Camreta* v. *Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.") (citation omitted).

What is more, petitioner overstates (Pet. 11) the extent of disagreement between the district court decisions petitioner invokes and the decision of the court of appeals in this case. See, *e.g.*, *State* v. *U.S. Immigration & Customs Enforcement*, 438 F. Supp. 3d 216, 219 (S.D.N.Y. 2020) (identifying "two case-specific factors * * * weighing in favor of compelling defendants to produce a privilege log"); *South Carolina Coastal Conservation League* v. *Ross*, 431 F. Supp. 3d 719, 725 (D.S.C. 2020) (agreeing with the D.C. Circuit's view that, because "deliberative materials go towards the subjective motivation of the decisionmakers, they are not considered part of the administrative record," but requiring a privilege log in the particular circumstances of that case). And again, the fact that a court orders the

production of a privilege log in particular circumstances is consistent with the decision below, which specifically left open "the precise circumstances under which a district court can order the production of a privilege log." Pet. App. 13a. In any event, given the consensus between the only two courts of appeals to address the question in precedential decisions and the longstanding view of the circuit with the greatest expertise on administrative law matters, contrary district court rulings would offer no persuasive reason for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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