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.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTRODUCTION

This case presents the question of whether agencies may unilaterally exclude documents they deem "deliberative" from the "whole record" that the APA requires agencies to provide to a reviewing court. The government devotes the bulk of its brief in opposition, BIO 6-15, to defending the merits of that practice. But the government is wrong, and the issue is one of great importance that deserves this Court's review.

The crux of the government's position is that deliberative documents cannot aid a court in assessing the agency's stated reasons for its decision. But deliberative documents inform bread-and-butter questions of APA review. If an agency gives a reason for taking a particular action—*e.g.*, that the regulation will have a minimal effect on small businesses—then it is surely relevant whether the agency had before it a memorandum or other deliberative document concluding precisely the opposite. So too if the agency decision fails to discuss an issue where it has memoranda before it concluding that the issue is important. Deliberative documents can and do speak to whether the agency took a hard look at the problem, whether the agency considered appropriate factors, and to other core questions that illuminate whether the agency acted arbitrarily and capriciously.

The question is also one of great significance. Not only is it present in the vast majority of APA review cases, but it goes to the integrity of the judicial review process. A rule that permits the agency to include deliberative documents if it wishes to do so is a rule that

permits a skewed administrative record, and not the "whole record" that the APA commands. The government's brief speaks to this problem when the government acknowledges that deliberative documents that set out "the reasons supporting" a final decision can and should be included in the administrative record, while "documents that reflect the deliberations themselves" that present "contrary" evidence need not. BIO 13-14. Giving agencies such power over the scope of judicial review "place[s] a finger on the scales of justice in favor of the most powerful of litigants, the federal government." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2285 (2024) (Gorsuch, J., concurring).

The question presented is also ripe for this Court's review. A large number of lower courts have addressed it, with the majority disagreeing with the rule adopted below. No further percolation is needed with influential circuit court decisions on both sides of the issue fueling what is now a substantial debate.

This Court should take up this important question and grant the petition.

ARGUMENT

A. The Question Presented Has Divided The Lower Courts.

The decision below goes against the "growing consensus" in the lower courts holding that an agency must "submit a log if it withholds from the administrative record any deliberative process information or documents." *Sierra Club v. United States*

Army Corps of Eng'rs, No. 2:20-CV-00396, 2022 WL 2953075, at *3 (D. Me. July 26, 2022) (collecting cases). The Ninth Circuit decision adopts the D.C. Circuit's misguided view and conflicts with the influential Second and Fourth Circuit non-precedential decisions on the issue. Pet. 10-13.

While the government attempts to downplay the extent of disagreement, BIO 15-19, it does not contest that there is a deepening split among the dozens of lower courts to have considered the issue. *See Nat'l Council of Negro Women v. Buttigieg*, No. 1:22-CV-314, 2024 WL 1287611, at *4-5 (S.D. Miss. Mar. 26, 2024) (collecting cases); *Save the Colo. v. Spellmon*, No. 18-CV-03258, 2023 WL 2402923, at *4-5 (D. Colo. Mar. 7, 2023) (same). Nor does it contest that most courts have rejected the Ninth Circuit's approach and concluded that the APA's "whole record" requirement means what it says. *See Spellmon*, 2023 WL 2402923, at *4-5.

Two circuit courts, the Second and Fourth, serve as the anchor of that growing consensus. *See In re Nielsen*, No. 17-3345, slip op. at 2-3 (2d Cir. Dec. 27, 2017), ECF No. 171; *Defenders of Wildlife v. U.S. Dep't of the Interior*, No. 18-2090, Order (4th Cir. Feb. 5, 2019), ECF No. 70. The government notes that the decisions from those courts are non-precedential, but that has not prevented those decisions from being influential. Many courts have cited the Second and Fourth Circuit decisions in holding that an agency cannot silently withhold documents on the ground that it deems them deliberative. Pet. 12 (collecting cases within and outside the Second and Fourth Circuits); *see, e.g.*, *S.C. Coastal*

Conservation League v. Ross, 431 F. Supp. 3d 719, 725 (D.S.C. 2020) (relying on both cases); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, No. 2:19-CV-14243, 2020 WL 2732340, at *4 (S.D. Fla. May 26, 2020) (same); *State v. U.S. Immigr. & Customs Enf't*, 438 F. Supp. 3d 216, 218-19 (S.D.N.Y. 2020) (citing and adopting the rule of *In re Nielsen*); *New York v. Wolf*, No. 20-CV-1127, 2020 WL 2049187, at *2 (S.D.N.Y. Apr. 29, 2020) (same).

Nor is the government correct to suggest, BIO 16-18, that the Second and Fourth Circuit decisions are not squarely opposed to the rule adopted below. The Fourth Circuit's order expressly required the agency to submit a privilege log if it "withholds *any* documents under the guise of the deliberative process privilege." *Defenders of Wildlife*, No. 18-2090, ECF No. 70 (order granting motion to compel completion of administrative record) (emphasis added). And the Second Circuit required a privilege log, stating that agencies cannot "unilaterally" decide what record to present for review because "the possibility that some documents not included in the record may be deliberative does not necessarily mean that they were properly excluded[,]" and "without a privilege log, the District Court would be unable to evaluate the Government's assertions of privilege." *In re Nielsen*, No. 17-3345, slip op. at 2-3, ECF No. 171.

B. The Decision Below Is Incorrect.

1. The government contends that deliberative materials are "irrelevant to APA review absent a strong showing of impropriety," BIO 10, because they do not "serve judicial review of the agency's decision in typical

cases," BIO 8. The government is wrong. Deliberative materials are relevant to core questions of judicial review under the APA.

a. The central thrust of the government's argument is that consideration of deliberative materials would not aid a court's review of an agency's "final" decision. BIO 10. And no doubt, "[t]he court's review must be based on the reasons 'articulated by the agency itself.'" BIO 8-9 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983)). But those stated reasons must be judged against the "whole record," 5 U.S.C. § 706, which could show they are arbitrary, such as where an agency fails to consider an issue raised in a deliberative memorandum.

As the government acknowledges, APA review requires a court to assess, among other things, whether the agency's decision "relied on appropriate factors and considered important aspects of the problem on the basis of the evidence presented." BIO 9. Deliberative documents plainly can inform that inquiry. An agency, for example, might justify a rule on the ground that it is unlikely to increase administrative expenses for regulated entities. If the agency had reports, memoranda, and emails before it that concluded precisely the opposite, that would call into question whether the agency actually "consider[ed] an important aspect of the problem[or] offered an explanation for its decision that runs counter to the evidence before [it]." *State Farm*, 463 U.S. at 43. Likewise, if those materials concluded that the agency had not in fact assessed—or assessed in cursory fashion—the issue of administrative

costs, that would be relevant to whether the agency had actually taken a "hard look" at the issue it purported to resolve.

In short, deliberate materials "may go to the heart of the question of whether an agency action was arbitrary and capricious." *Desert Survivors v. U.S. Dep't of the Interior*, 231 F. Supp. 3d 368, 382 (N.D. Cal. 2017) (collecting cases); *see, e.g.*, *Inst. for Fisheries Res. v. Burwell*, No. 16-CV-01574, 2017 WL 89003, at *1 (N.D. Cal. Jan. 10, 2017) ("It is obvious that in many cases internal comments, draft reports, inter- or intra-agency emails, revisions, memoranda, or meeting notes will inform an agency's final decision.").

b. The government is equally incorrect when it makes the related argument that review of deliberative materials would impermissibly probe the "mental processes" of decision-makers. BIO 9-10. That argument confuses review of materials that were actually before the agency when it made its decision with ex post inquiries via deposition and the like. As Justice Breyer explained: "Probing a decisionmaker's subjective mental reasoning ... is distinct from the ordinary judicial task of evaluating whether the decision itself was objectively valid, considering all of the materials before the decisionmaker at the time he made the decision." *In re United States*, 583 U.S. 1029, 1031-32 (2017) (Breyer, J., dissenting).

The government invokes *Morgan* and *Overton Park*, which rejected efforts to compel extra-record testimony from agency officials. *United States v. Morgan*, 313 U.S. 409, 422 (1941); *Citizens to Preserve Overton Park, Inc.*

v. Volpe, 401 U.S. 402, 420 (1971). Those cases do not bear on the inclusion of deliberative documents in the *pre-decisional* record that do not involve the creation of new evidence. Pet. 19; Pet. App. 30a-32a. And while the government contends in a footnote that pre-decisional documents also reveal mental processes, it does not identify authority that supports that proposition. BIO 14 n.1 (relying on *Morgan* and *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-68 & n.18 (1977), which examined the propriety of inquiring into legislative or executive motivations in equal-protection challenges).[1]

2. The government's position that deliberative materials are not and should not be part of the administrative record also suffers from the embarrassment that in practice such documents routinely *are* included the administrative record, including in courts that permit the agency to unilaterally exclude such materials. Pet. 15; *see Kent Cnty., Delaware Levy Ct. v. EPA*, 963 F.2d 391, 395-96 (D.C. Cir. 1992).

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[1] Equally unpersuasive is the government's reliance on *Oceana, Inc. v. Ross*, 920 F.3d 855 (D.C. Cir. 2019). BIO 11-12. In *Oceana*, the D.C. Circuit held that deliberative documents are not relevant to APA review, so no privilege log is required. 920 F.3d at 865. But the rule in *Oceana* is based on a significant alteration of an earlier D.C. Circuit case that states only that "[a]gency deliberations *not part of the record* are deemed immaterial." *In re Subpoena Duces Tecum Served on Off. of Comptroller of Currency*, 156 F.3d 1279, 1279 (D.C. Cir. 1998) (emphasis added).

The government is forced to acknowledge this reality, and it concedes that "letters, drafts, emails and other nonfinal materials … are not *invariably* deliberative or otherwise outside the administrative record." BIO 13 (emphasis added) (internal quotation marks omitted). But the government has no coherent explanation for when these "internal materials" should be deemed part of the administrative record.

The government contends that "emails that document the 'final agency decision and the reasons supporting it'" are properly included in the administrative record. BIO 13 (quoting *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 592 U.S. 261, 268 (2021)). That is surely correct, but the administrative record is not limited to only those documents which "support[]" the agency's decision. It includes everything that was before the agency, whether it supports the agency's decision or calls its reasoning into question. Again, the government appears to concede this point when it agrees that an "agency is required to include in the record evidentiary materials contrary to the government's decision." BIO 13 (internal quotation marks omitted). But in the next sentence the government immediately pulls back on that assertion and disputes that contrary "documents that reflect the deliberations themselves must be included." BIO 13-14.

That asymmetry is unjustified and an impediment to meaningful judicial review, which requires the court to "evaluat[e] the agency's contemporaneous explanation in light of the existing administrative record." *Dep't of Com. v. New York*, 588 U.S. 752, 780 (2019). Assume an

agency takes action after considering two memoranda. Memorandum A sets out why the agency action in question will not lead to higher consumer prices. Memorandum B explains why Memorandum A failed to account for certain factors that suggest the action will in fact lead to higher consumer prices. An administrative record that includes Memorandum A as "document[ing] … the reasons supporting" the decision but excludes Memorandum B as "deliberative" prevents the reviewing court from assessing whether the agency actually acted rationally rather than arbitrarily. Section 706 requires more—"the reviewing court [must] engage in a substantial inquiry" that includes "a thorough, probing, in-depth review" of the whole record. *Overton Park*, 401 U.S. at 415.

3. Nor is the government correct that the presumption of regularity justifies the exclusion of deliberative documents. BIO 10. The issue here is not whether agencies should be trusted to identify deliberative documents, but rather what rule should govern what goes into the "whole record" in the first instance. *See* Pet. App. 29a-30a. Under the rule below, an agency acts *properly* when it excludes deliberative materials it considered from the administrative record. This Court's review is needed to clarify what is and what is not "regular" agency action when it comes to the assembly of the administrative record.

4. Finally, the government errs when it contends that the rule below, which permits the agency to exclude deliberative materials from the record on review in *informal* proceedings, is justified by the practice in

formal ones. The government correctly notes that Section 556(e) of the APA defines the "exclusive record for decision" to consist of the "transcript of testimony and exhibits, together with all papers and requests filed in the proceeding." 5 U.S.C. § 556(e). That definition does not include deliberative documents, but it is a non-sequitur to conclude that provision indicates that similar restrictions are in place for informal proceedings.

On the contrary, the natural inference is that the limits the APA imposes on the record for formal hearings *do not* apply outside that context. There, section 706's requirement to consider the "whole record" means "all documents and materials directly or *indirectly* considered by agency decision-makers." *In re United States*, 583 U.S. at 1031 (Breyer, J., dissenting) (quotation marks omitted). Nor is it surprising that the "whole record" would be broader for an informal action as compared to a formal one. In the latter, the materials before the agency are narrowly circumscribed and presented to the agency through defined procedures. *See* 5 U.S.C. §§ 556, 557. But in an informal agency action, the agency may consider a wide range of materials that informed the agency's decision, including deliberative materials, which inform judicial review. *E.g.*, *Suffolk Cnty. v. Sec'y of Interior*, 562 F.2d 1368, 1384 (2d Cir. 1977) ("[I]n the absence of formal administrative findings[,] [deliberative materials] may be considered by the court to determine the reasons for the decision-maker's choice."). While agencies have broad discretion to fashion informal procedures, that does not grant them unilateral power to decide the content of the record.

C. The Question Presented Is Important.

The question of whether an agency may unilaterally and silently excise deliberative materials from the administrative record is also one of great importance. A rule that permits the agency to choose which deliberative materials, if any, to include in the record is one that will necessarily lead to cherry-picking and concomitant impediments to judicial review.

The government contends that the deliberative process privilege automatically shields material from the administrative record. *See, e.g.*, BIO 9 (quoting *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 462 (D.C. Cir. 2014) (Kavanaugh, J.) (discussing the policies underlying the privilege in the FOIA context)). To be sure, the deliberative process privilege "shields documents that reflect an agency's preliminary thinking about a problem, as opposed to its final decision about it." *Sierra Club*, 592 U.S. at 266.

But like any other litigant, an agency cannot invoke a privilege silently—it must acknowledge and log the materials it intends to exclude on that basis. Without that requirement, an agency can withhold any document it deems deliberative "without providing any account to the court or the litigants of the basis for excluding those documents." Pet. App. 24a. That would convert a qualified privilege into an absolute one. *See Protect Democracy Project, Inc. v. Nat'l Sec. Agency*, 10 F.4th 879, 886 (D.C. Cir. 2021) (deliberative privilege "is qualified, not absolute"). While an agency may withhold privileged documents, "that is true only if the 'privilege was properly invoked,' and 'without a privilege log,' a

court is 'unable to evaluate the [g]overnment's assertions of privilege.'" *Wolf*, 2020 WL 2049187, at *1 (quoting *U.S. Immigr. & Customs Enf't*, 438 F. Supp. 3d at 218 and *In re Nielsen*, No. 17-3345, slip op. at 3, ECF No. 171).[2]

Nor does the potential exception for an agency's bad faith offer meaningful protection from the government's sweeping rule. BIO 14. The APA requires inclusion of deliberative documents into the "whole record" in the first instance, and the bad-faith exception inverts that textual presumption. Moreover, requiring a strong showing of bad faith to obtain a privilege log places litigants and courts in a catch-22: it may be that the only way to discover agency malfeasance—or even inadvertent omission—is documentation in a privilege log. *See* Pet. 22; Pet. App. 34a-35a.

CONCLUSION

The Court should grant the petition for certiorari.

[2] Not requiring a privilege log also creates tension with FOIA, where the burden is on the government to claim the deliberative process privilege and log withheld documents. Pet. 19-21. The government argues that FOIA is different because it requires an agency to produce all "records," subject to exemptions. BIO 15 (quoting 5 U.S.C. § 552(a)(3)(A). This ignores Section 706's "whole record" requirement.

Respectfully submitted,

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