No. 19-1273

In the Supreme Court of the United States

ASSASSINATION ARCHIVES AND RESEARCH CENTER,
PETITIONER

v.

CENTRAL INTELLIGENCE AGENCY

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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QUESTIONS PRESENTED

1. Whether predecisional intra-agency communications relating to a search for records under the Freedom of Information Act (FOIA) by the Central Intelligence Agency (CIA) are exempt from mandatory disclosure under FOIA Exemption 5, 5 U.S.C. 552(b)(5), which incorporates the deliberative-process privilege.

2. Whether the CIA sufficiently justified the reasonableness of its search for records responsive to petitioner's FOIA requests.

3. Whether the court of appeals' observation that the CIA's Chief Historian had opined that any records responsive to petitioner's FOIA requests would likely be found at the National Archives and Records Administration is inconsistent with *United States Department of Justice* v. *Tax Analysts*, 492 U.S. 136 (1989).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.D.C.):

Assassination Archives & Research Ctr., Inc. v. *Central Intelligence Agency*, No. 1:17-cv-160 (July 17, 2018) (summary-judgment order)

Assassination Archives & Research Ctr., Inc. v. *Central Intelligence Agency*, No. 1:17-cv-160 (Apr. 4, 2019) (attorney's-fees order)

United States Court of Appeals (D.C. Cir.):

Assassination Archives & Research Ctr. v. *Central Intelligence Agency*, No. 18-5280 (Oct. 11, 2019) (merits appeal)

Assassination Archives & Research Ctr. v. *Central Intelligence Agency*, No. 19-5165 (Sept. 6, 2019) (fee appeal)

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1-4) is not published in the Federal Reporter but is reprinted at 781 Fed. Appx. 11. The order of the court of appeals (Pet. App. 5-6) is not published in the Federal Reporter but is available at 2019 WL 691517. The opinion of the district court (Pet. App. 7-19) is reported at 317 F. Supp. 3d 394.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 2019. A petition for rehearing was denied on December 10, 2019 (Pet. App. 20-21). On March 13, 2020, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 8, 2020, and the petition was filed on April 28, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a non-profit corporation that conducts research into, and makes publicly available information relating to, political assassinations and related subjects. Pet. 11. In August 2012, petitioner submitted a request to the Central Intelligence Agency (CIA) under the Freedom of Information Act (FOIA), 5 U.S.C. 552, seeking records related to the CIA's study in 1963 of plots to assassinate Adolf Hitler. Pet. App. 9. The CIA informed petitioner that it was unable to locate any responsive records in its files. *Ibid.*

In October 2012, petitioner submitted to the CIA an amended FOIA request that sought an expanded category of records pertaining to plots to assassinate Hitler and, as particularly relevant here, all "records reflecting the search for records responsive" to petitioner's August and October 2012 FOIA requests. Pet. App. 8 (citation omitted). The CIA initially responded by stating that it had failed to locate any records responsive to petitioner's FOIA requests, C.A. App. 29, but later informed petitioner that its initial response had been sent in error and that the matter was "still under review," *id.* at 30. See Pet. App. 8. In April 2016, the CIA informed petitioner that its initial response was unchanged. C.A. App. 31. Petitioner then filed this FOIA action.

While this action was pending, the CIA consulted with its history staff having subject-matter expertise, including the CIA's Chief Historian, and conducted a supplemental search. See C.A. App. 352-353; Gov't C.A. Mot. for Summ. Affirmance 3. The agency's searches of its records included searches of "the files of eight different CIA sub-offices that the agency identified as 'the locations reasonably expected to contain' the requested

materials" and, within each such office, agency personnel conducted searches within "'all relevant office databases, Agency share drives, and archival records.'" Pet. App. 2 (citations omitted); see *id.* at 10-11. CIA personnel "reviewed each document uncovered by the searches and determined whether it was responsive" to the FOIA requests. *Id.* at 2.

In the course of searching for responsive records, the CIA's Chief Historian concluded that, "due to the age of the subject matter and narrow scope of [petitioner's] request focusing on anti-Hitler plots, there would not be many responsive documents" and that "anything related to assassination studies would likely be found at the National Archives [and Records Administration (NARA)]." Pet. App. 11 (citation omitted). The CIA's information-management professionals also "noted that these types of records ha[d] likely been accessioned to [NARA]." *Ibid.* (citation omitted).

The CIA's searches ultimately located in CIA records only one document that was responsive to petitioner's Hitler-assassination-document requests. Pet. App. 8. The CIA released that document to petitioner with redactions, *id.* at 8-9, which petitioner does not contest in this Court. See Pet. 2.

In addition, the CIA produced to petitioner five other CIA documents (C.A. App. 296-305) containing internal agency communications concerning the agency's search in response to petitioner's FOIA requests, which the CIA redacted to protect information that it determined was protected by various FOIA exemptions. Pet. App. 9. As relevant here, the agency redacted from the five documents material protected by FOIA Exemption 5, *id.* at 16, which exempts from mandatory disclosure "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).

Exemption 5 "incorporat[es] civil discovery privileges" available to an agency, including the deliberative-process privilege. *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (*Klamath*); see *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149-154 (1975) (*Sears*). The deliberative-process privilege, in turn, protects from disclosure "recommendations and deliberations comprising part of a process by which governmental decisions * * * are formulated." *Klamath*, 532 U.S. at 8 (quoting *Sears*, 421 U.S. at 150). Invoking the deliberative-process privilege, the CIA redacted from the five agency documents the substance of the "intra-agency communication 'authored by the [CIA] component employee tasked with the [FOIA] search' for the benefit of the agency official directing the CIA's internal records search," because disclosure of that material would "reveal the decision-making process behind [the CIA's] final response to [petitioner's] FOIA request." Pet. App. 3 (citation and brackets omitted).

2. The district court granted summary judgment to the CIA. Pet. App. 7-13. The court rejected petitioner's challenge to the adequacy of the CIA's search for responsive records, *id.* at 10-13, based on its determination that the CIA "established the adequacy of its search beyond any genuine dispute" by showing that the agency had undertaken an "exhaustive search" with evidence "demonstrating a systematic good faith search effort." *Id.* at 10, 13; see *id.* at 10-13. The court further held that "the CIA properly applied Exemption 5" in

"redact[ing] parts of internal communications regarding [its] FOIA search" under the deliberative-process privilege. *Id.* at 16.

3. The court of appeals affirmed in two unpublished dispositions. Pet. App. 1-4; *id.* at 5-6.

First, as relevant here, the court of appeals summarily affirmed the district court's judgment with respect to the adequacy of the CIA's search, based on its conclusion that the merits of the issue were "so clear as to warrant summary action." Pet. App. 5-6; see *id.* at 2.

Second, the court of appeals separately affirmed the district court's Exemption 5 ruling. Pet. App. 1-4. The court held that the CIA had permissibly redacted material from the five intra-agency communications relating to its FOIA search under the deliberative-process privilege. *Id.* at 2-3. The court concluded that the redacted material was both "'predecisional' and 'deliberative'" because each communication "indisputably precede[d] the CIA's decision to release records to [petitioner]" and "'reflect[ed] the give-and-take' of a 'consultative process' through which the agency sought to identify records within its possession [that would be] potentially responsive to [petitioner's] requests." *Id.* at 3 (citations omitted).

The court of appeals rejected petitioner's contention that the deliberative-process privilege was inapplicable based on petitioner's assertion that the redacted "information at issue [was] purely factual, reporting what the CIA found in its searches." Pet. App. 2. The court explained that the privilege applies to "factual material" that is "assembled [by agency personnel] through an exercise of judgment in extracting pertinent material from a vast number of documents for the benefit of an official called upon to take discretionary action." *Id.* at

3 (quoting *Mapother* v. *Department of Justice*, 3 F.3d 1533, 1539 (D.C. Cir. 1993)). And in this context, the court explained, it was "sufficiently apparent" that "the redacted text describes the efforts of staff 'in extracting pertinent material' and any issues they encountered along the way." *Ibid.* The court accordingly determined that the deliberative-process privilege protected such "predecisional communications from staff made for the purpose of informing the agency's ultimate decision as to what the law required of the [CIA] in response to [petitioner's] FOIA request." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 15-19) that the court of appeals' conclusion that the deliberative-process privilege applies to the intra-agency records in this case concerning the CIA's processing of petitioner's FOIA requests is erroneous and conflicts with *EPA* v. *Mink*, 410 U.S. 73 (1973), and decisions of the Second and Ninth Circuits. Petitioner separately contends (Pet. 20-25) that the court of appeals erred in summarily affirming the reasonableness of the agency's search because, in petitioner's view, the CIA's evidence at summary judgment on that point was insufficient. Finally, petitioner contends (Pet. 19) that the court of appeals erred in observing that the CIA's Chief Historian had advised that "anything related to [Hitler] assassination studies would likely be found at [NARA]," Pet. App. 2, which petitioner views as in conflict with *United States Department of Justice* v. *Tax Analysts*, 492 U.S. 136 (1989). The decisions of the court of appeals are correct and do not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. a. The court of appeals correctly concluded that portions of five intra-agency communications pertaining to the CIA's internal FOIA search process are exempt under Exemption 5 and the deliberative-process privilege. Pet. App. 3. The deliberative-process privilege covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions * * * are formulated." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (internal quotation marks omitted). That privilege covers the relevant internal CIA communications in this case. Each communication preceded the ultimate decision to release records to petitioner and was prepared by CIA staff for submission to the CIA official directing the agency's search, in order to inform the agency's decisionmaking on how the CIA should process petitioner's FOIA requests. See Pet. App. 3.

b. Petitioner's arguments concerning the application of the deliberative-process privilege to this case are incorrect and present no issue warranting review.

i. Petitioner primarily contends (Pet. 16-18) that the court of appeals erred in applying the deliberative-process privilege to certain factual material, which petitioner asserts is inconsistent with this Court's decision in *Mink*, *supra*. *Mink* indicates that the deliberative-process privilege does not apply to "purely factual material contained in deliberative memoranda and severable from its context." 410 U.S. at 87-88. But protected deliberative communications can involve factual matters that do not constitute such "purely factual" information that can be adequately "sever[ed] from its context," *id.* at 88. *Mink* accordingly emphasized that while the deliberative-process privilege does not pro-

tect "purely factual material appearing in [agency] documents *in a form that is severable without compromising* the private remainder" of deliberative communications, that principle requires disclosure of only "such factual material that is not 'intertwined'" with internal deliberative communications and that "may safely be disclosed 'without impinging on the [government's] decisional processes.'" *Id.* at 91-92 (emphasis added). *Mink's* teachings are thus fully consistent with the court of appeals' Exemption 5 decision here, which simply explains that the disputed redactions themselves embody the "predecisional agency give-and-take" that was part of the agency's internal decision-making process. Pet. App. 3.

Petitioner contends (Pet. 17-18) that the court of appeals erred in failing to order the disclosure of any segregable factual material within the agency communications, and that the district court erred in failing to make an express finding on segregability. But as the court of appeals explained, it had no occasion to consider that issue because petitioner failed to "challenge the CIA's segregation efforts" on appeal. Pet. App. 3. That disposition, based on petitioner's own forfeiture, provides no basis for review. This Court's "traditional rule * * * precludes a grant of certiorari" where, as here, the relevant question "'was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). Petitioner has neither provided any basis for excusing its appellate forfeiture nor identified a reason for this Court to depart from its settled practice of declining review in analogous contexts.[*]

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[*] In any event, the district court permissibly credited the CIA's description of the redacted materials and the declaration of the CIA's Information Review Officer, see Pet. App. 16, who explained

Petitioner suggests (Pet. 18) that this Court should itself conduct an *in camera* inspection of the relevant records or remand this case to the court of appeals for it to do so. But it is well-established that *in camera* review is not "automatic" in FOIA cases and that an "agency may demonstrate, by surrounding circumstances, that particular documents * * * contain no separable, factual information." *Mink*, 410 U.S. at 93. A federal court accordingly possesses "'broad discretion' [to] declin[e] to conduct [*in camera*] review" where it has determined such review is unnecessary to resolve the case. *Juarez* v. *Department of Justice*, 518 F.3d 54, 60 (D.C. Cir. 2008) (citation omitted). Given the CIA's ample evidentiary showing, see C.A. App. 195-197, 357-358, and the actual filing of the disputed records with redactions, *id.* at 296-305, petitioner has failed to show that the courts below abused their discretion by resolving this case without reviewing the unredacted documents *in camera*, much less a showing sufficient to warrant this Court's review of that fact-bound discretionary determination.

ii. Petitioner contends (Pet. 15-16, 19) that the court of appeals' deliberative-process-privilege decision conflicts with decisions of the Second and Ninth Circuits and that review in this case is warranted because this Court has granted certiorari in the Ninth Circuit case that, in petitioner's view, presents a "closely similar" is-

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that "to the extent there is any factual material" in the redactions, "it is part and parcel of the deliberations and cannot be segregated" because its disclosure "would reveal the nature of the preliminary recommendations and opinions preceding the [agency's] final determination regarding completed searches" performed in processing petitioner's FOIA requests, C.A. App. 196; see *id.* at 357.

sue, Pet. 15. Petitioner has identified decisions that involve the deliberative-process privilege, see *Natural Res. Def. Council* v. *United States EPA*, 954 F.3d 150 (2d Cir. 2020); *Sierra Club, Inc.* v. *United States Fish & Wildlife Serv.*, 925 F.3d 1000 (9th Cir. 2019), cert. granted, 140 S. Ct. 1262 (2020) (oral argument scheduled for Nov. 2, 2020), but neither has any bearing on the distinct issues presented in this case. They therefore do not reflect any conflict with the decision below. The deliberative-process-privilege question pending before this Court in *Sierra Club* likewise is unrelated to the issues resolved by the court of appeals in this case. As a result, no sound basis exists for this Court either to grant plenary review or to hold petitioner's case pending the Court's decision in *Sierra Club*.

The Second Circuit in *Natural Resources Defense Council*, *supra*, held that an EPA computer program was not deliberative, reasoning in part that the program did not "contain or expose the types of internal agency communications * * * such as advice, opinions, or recommendations" that the deliberative-process privilege is designed to protect. 954 F.3d at 158-159. Petitioner simply notes that decision and asserts that it conflicts with the approach of the D.C. Circuit in this case. Pet. 16, 19. *Natural Resources Defense Council*, however, addressed a distinct deliberative-process-privilege question arising in the particular context of an agency computer program that is unrelated to the more typical questions presented in this case, which involve actual predecisional agency communications—here, about how the agency should respond to petitioner's FOIA requests.

The Ninth Circuit in *Sierra Club*, *supra*, likewise resolved no issues relevant here. The court of appeals in

Sierra Club held that certain draft agency biological opinions were not protected by the deliberative-process privilege because it concluded that the drafts represented agencies' supposedly "final view" on the relevant issues. 925 F.3d at 1013, 1017. The court further opined that the drafts contained no materials "that expose any internal agency discussion" or "reflect[] input from lower level employees." *Id.* at 1017. The government therefore petitioned for a writ of certiorari, and this Court granted that writ, on the question whether the deliberative-process privilege protects "a federal agency's draft documents that were prepared as part of a formal interagency consultation process under Section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1536, and that concerned a proposed agency action that was later modified in the consultation process." Pet. at I, *Sierra Club*, *supra* (No. 19-547); see *Sierra Club*, 140 S. Ct. 1262 (granting the government's certiorari petition). The issues presented in *Sierra Club* are thus entirely distinct from those presented here. See pp. 7-9, *supra*. Petitioner's unelaborated identification (Pet. 15-16) of *Sierra Club* as a case involving the deliberative-process privilege plainly fails either to demonstrate a conflict of authority warranting this Court's review or that this Court should hold this case pending its decision in *Sierra Club*.

2. The court of appeals correctly determined that the CIA conducted an adequate search for records responsive to petitioner's FOIA requests. Pet. App. 2, 5. Petitioner's contention (Pet. 20-25) that the court erred in affirming summary judgment on that issue because the summary-judgment record was inadequate is both incorrect and fails to identify any issue warranting review. Petitioner cites (*ibid.*) only the D.C. Circuit's own

decisions as the relevant precedent, yet the D.C. Circuit in this case applied its precedent and concluded that the issue was "so clear" as to warrant summary affirmance, Pet. App. 5-6. As a result, petitioner appears to seek this Court's review of the fact-bound application of those precedents to this case, an issue that falls far short of the standard for this Court's plenary review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."); Sup. Ct. R. 10 (review is rarely warranted if "the asserted error consists of * * * misapplication of a properly stated rule of law").

In any event, the CIA amply demonstrated that it made the requisite "good faith effort to conduct a search . . . using methods which [were] reasonably expected to produce the information requested." *DiBacco* v. *United States Army*, 795 F.3d 178, 188 (D.C. Cir. 2015) (citation omitted). The summary-judgment evidence showed that the CIA conducted a search for responsive records "in the files of eight different CIA sub-offices that the agency identified as 'the locations reasonably expected to contain' the requested materials," and employed "a wide variety of [search] terms" to identify any responsive records. Pet. App. 2 (citation omitted). The agency's search was thoroughly documented in declarations from the CIA's Information Review Officer. See C.A. App. 189-190, 351-354; Pet. App. 10-11. The district court thus correctly determined on the basis of the agency's declarations and the remaining summary-judgment evidence that the agency's "exhaustive" search was "[a]dequate and [r]easonable." Pet. App. 10 (emphasis omitted); see *id.* at 12-13 (noting that purported agency errors did not rebut presumption of good faith or create genuine dispute as to adequacy of

search). The court of appeals likewise summarily affirmed that conclusion based on the summary-judgment record. See *id.* at 2, 5. That fact-bound determination, on which both courts below agreed, presents no issue that might warrant this Court's review. See *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980) (discussing this Court's "settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred").

Petitioner appears to argue (Pet. 21) that the government's summary-judgment showing was insufficient because the government redacted deliberative communications concerning its search from its release of the five agency records responsive to petitioner's second FOIA request. But petitioner fundamentally misapprehends and conflates two distinct inquiries. First, the government must show that it conducted a reasonable search for records, which it did here through agency declarations and other submissions at summary judgment. Second, the government's substantive obligations to release responsive agency records under FOIA is subject to Exemption 5, which exempts materials protected by the deliberative-process privilege. The government fully justified its redactions under Exemption 5, see pp. 7-8, *supra*, and nothing requires that the government disclose predecisional and deliberative records to show that it has conducted an adequate search of its records. Indeed, the D.C. Circuit authority cited by petitioner confirms that agencies may demonstrate the adequacy of a search for records through agency declarations. See, *e.g.*, *DiBacco*, 795 F.3d at 188.

3. Finally, petitioner argues (Pet. 19) that the D.C. Circuit erred in "not[ing]" that the "CIA pointed to

[NARA] as the location where responsive records were likely to be found," which petitioner contends conflicts with *Tax Analysts*, *supra*. That contention is meritless and does not warrant certiorari.

First, as petitioner appears to recognize, the D.C. Circuit merely "noted" (Pet. 19) that, after conducting a supplemental search of CIA records that found no additional responsive documents, the CIA's Chief Historian stated that "anything related to [Hitler] assassination studies would likely be found at [NARA]," Pet. App. 2. See Pet. 19 (citing Pet. App. 2). That observation tends to illustrate why no further responsive documents were found in CIA records, but it does not reflect a holding that would be subject to review. If the court of appeals' dictum on that point were excised from its unpublished, nonprecedential judgment, there would be no material change in the judgment. Cf. *Camreta* v. *Greene*, 563 U.S. 692, 704 (2011) (observing that the Court has "adhered with some rigor to the principle that '[t]his Court reviews judgments, not statements in opinions'") (citation omitted).

Second, nothing in *Tax Analysts* precludes making the observation that responsive records, if they were to exist, would likely be found at NARA, given the age and subject matter of documents relevant to petitioner's FOIA requests. *Tax Analysts* simply held that a federal agency (there, the Department of Justice) must disclose under FOIA copies of district court decisions responsive to a FOIA request, even though the agency did not create the records itself and even though the decisions were already publicly available from the courts that rendered the decisions, where the responsive materials were actually contained in the agency's files and were thus under agency control. *Tax Analysts*, 492 U.S.

at 138, 150, 155. But this case does not present the question whether the CIA must disclose responsive documents that it has located within its records. The CIA has reasonably searched its files and already disclosed (with appropriate redactions) all responsive records that it identified. The fact that agency personnel noted to petitioner that NARA might have relevant records, C.A. App. 353, does not reflect a refusal to release records in the CIA's possession and control. It simply reflects that any relevant documents formerly held by the CIA "have likely been accessioned to [NARA]," *ibid.* See 44 U.S.C. 2108(a) ("The Archivist shall be responsible for the custody, use, and withdrawal of records transferred to him."); 36 C.F.R. 1235.22; NARA, *Accessioning Guidance and Policy*, https://www.archives.gov/records-mgmt/accessioning ("Accessioning is the process of transferring physical and legal custody of permanent records from federal agencies to [NARA].").

To the extent petitioner suggests that the CIA must search for records formerly in its files that are now within the custody and control of NARA, that suggestion lacks merit. See *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150, 154-155 (1980) (holding that agency did not "improperly withhold[]" records under FOIA that had "been removed from the possession of the agency prior to the filing of the FOIA request"); *Chambers* v. *United States Dep't of the Interior*, 568 F.3d 998, 1004 (D.C. Cir. 2009) ("[A]n agency has no duty to retrieve and release documents it once possessed but that it legitimately disposed of prior to the date a FOIA request was received.") (citation and emphases omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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