**[ORAL ARGUMENT HELD DECEMBER 4, 2018]**

**No. 18-5116**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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CITIZENS FOR RESPONSIBILITY & ETHICS IN WASHINGTON,

Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant-Appellee.

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On Appeal from the United States District Court
for the District of Columbia

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# OPPOSITION TO PETITION FOR REHEARING EN BANC

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## INTRODUCTION AND SUMMARY

The complaint in this case alleges that all formal written opinions of the Office of Legal Counsel (OLC) at the Department of Justice are subject to mandatory disclosure under the Freedom of Information Act's so-called "reading-room provision," which provides for publication of "statements of policy and interpretations which have been adopted by the agency" and "final opinions . . . as well as orders, made in the adjudication of cases." 5 U.S.C. § 552(a)(2). The complaint asserts that OLC opinions are subject to mandatory disclosure because they are "controlling," "authoritative," and "binding." *See* Op. 8-9. That complaint does not state a plausible claim for relief because this Court has already held that an OLC opinion with these properties did not constitute a final decision of an agency. *See Electronic Frontier Found. v. U.S. Dep't of Justice*, 739 F.3d 1 (D.C. Cir. 2014). Because the complaint contained only these allegations and nothing more, it was properly dismissed.

The dissenting judge agreed that, at a minimum, this Court's decision in *Electronic Frontier Foundation* demonstrates the existence of "a subcategory of opinions (encompassing at least one, and likely many more) that need not be disclosed under the reading-room provision." Dissent 4. But the dissent read the complaint differently from the majority, suggesting both that it should be read to encompass a claim that some, but not all, of OLC's opinions are subject to mandatory disclosure, and that it should be understood to rely on properties of certain subcategories of

opinions to support that conclusion. This factbound dispute about the proper construction of the complaint presents no issue warranting review by the full Court.

## STATEMENT

Citizens for Responsibility and Ethics in Washington (CREW) filed this suit in 2017, asserting that the Department of Justice improperly fails to make public certain OLC opinions in violation of FOIA's "reading-room" provision. 5 U.S.C. § 552(a)(2). The reading-room provision requires that agencies make available to the public certain categories of documents, including "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases," and "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register." *Id.* § 552(a)(2)(A), (B). The provision also requires agencies to provide "current indexes" of such records. *Id.* § 552(a)(2).

CREW's complaint did not identify any particular OLC opinions that it believed met the criteria of § 552(a)(2). Instead, it asserted that the Department must provide "all formal written opinions OLC has created and will create in the future," App. 11, as well as "all past and future indices of all formal written opinions," App. 12. This assertion was premised on CREW's belief that all such OLC opinions are "controlling," "authoritative," and "binding by custom and practice in the executive branch," and that these characteristics made them "working law" subject to mandatory disclosure under the reading-room provision. App. 9 (quotation marks omitted).

The district court dismissed CREW's complaint, observing that "CREW's suit is premised on a universal claim: 'all existing and future OLC formal written opinions' and indices thereof are subject to mandatory disclosure." App. 27 (quoting App. 13). The district court rejected CREW's contention that all OLC opinions are "working law" documents that must be disclosed under § 552(a)(2). The district court observed that the characteristics that CREW alleged made OLC opinions subject to mandatory disclosure under § 552(a)(2)—their purportedly "binding," "precedential," and "controlling" nature—were identical to the characteristics of a formal written OLC opinion that this Court held was not "working law" in *Electronic Frontier Foundation*. App. 27-28. The district court gave CREW the opportunity to amend its complaint to identify "some specific subset of OLC's formal, written opinions" that might plausibly be subject to the requirements of § 552(a)(2). App. 29; *see* App. 32. Rather than amend its complaint, CREW appealed.

The panel affirmed. The panel explained that CREW alleged "only that the OLC's formal written opinions are 'controlling,' 'authoritative,' and 'binding,'" and that this Court's opinion in *Electronic Frontier Foundation* established that "these descriptors alone are insufficient to render an OLC opinion the 'working law' of an agency." Op. 8 (citing *Electronic Frontier Found.*, 739 F.3d at 9). And CREW did "not allege that all of OLC's formal written opinions have been adopted by any agency as its own." Op. 9. Thus, because CREW "fail[ed] to allege the additional facts necessary to render an OLC opinion the 'working law' of an agency, CREW's claim

that *all* of the OLC's formal written opinions are subject to disclosure under FOIA's reading-room provision fails as a matter of law." *Id.*

The panel rejected CREW's contention that FOIA's requirement that an agency must sustain its action in response to a FOIA suit, 5 U.S.C. § 552(a)(4)(B), relieved CREW of its obligation to plead a plausible claim. As in any civil action, CREW had a threshold obligation to "allege factual matter supporting a plausible claim that the OLC 'improperly' withheld its formal written opinions." Op. 10. The same principle applies to a FOIA request for records under § 552(a)(3), requiring a plaintiff to first "allege[] that it has made a procedurally compliant request" before triggering the government's burden to sustain its action. Op. 10-11. In the context of a request made under § 552(a)(2), a plaintiff must therefore "allege sufficient factual material about the opinions that—if taken as true—would place them into one of § 552(a)(2)'s enumerated categories." Op. 11. Because CREW had "alleged only that the OLC's formal written opinions are 'controlling,' 'authoritative,' and 'binding'"—characteristics "insufficient to support a plausible claim" that they fall within § 552(a)(2)—CREW's complaint failed. *Id.*

The panel also explained that this approach does not require "CREW to plead around potential FOIA exemptions." Op. 12. Instead, the conclusion "that an OLC formal written opinion is not the working law of an agency means that it does not fall within one of the reading-room's enumerated categories and therefore is not subject to disclosure even absent an exemption." *Id.* As a result, CREW needed to "plead

more than that the OLC's formal written opinions are 'controlling' to make out a plausible claim" in light of this Court's opinion in *Electronic Frontier Foundation*. Op. 12-13.

The panel also rejected CREW's argument that requiring it to plead a narrower claim was "unfair." Op. 13. As the panel observed, "the purported unfairness CREW faces is self-inflicted," as CREW "declined to avail itself" of either the district court's invitation to amend its complaint or the opportunity to submit a FOIA request under 5 U.S.C. § 552(a)(3) for the documents it seeks. *Id.*

Judge Pillard dissented. In her view, the question before the Court was "whether any of OLC's work product is covered by the reading-room disclosure requirement of Section 552(a)(2)." Dissent 1. From this premise, Judge Pillard concluded that CREW had advanced a claim that OLC opinions that decide "disputes between and among entities within the executive branch" may be "final opinions . . . made in the adjudication of cases." Dissent 2. In addition, Judge Pillard concluded that CREW had made the claim "that OLC renders 'interpretations which have been adopted by the agency' within the meaning of Section 552(a)(2)" by contending that OLC provides "legal advice that is 'authoritative' and 'binding by custom and practice in the executive branch.'" *Id.* (quoting App. 9). Judge Pillard acknowledged that *Electronic Frontier Foundation* "shows that there is a subcategory of opinions (encompassing at least one, and likely many more) that need not be disclosed under the reading-room provision," but believed that this was only relevant "if we were

certain that every one of [OLC]'s opinions would be shielded from disclosure for the reasons that were dispositive" in that case. Dissent 4. Instead, Judge Pillard asserted that the possibility that some OLC opinions are subject to disclosure under the reading-room provision "should be enough, in light of the government's affirmative legal obligation . . . to entitle the claim to proceed." Dissent 5. Finally, Judge Pillard suggested that the panel's holding "forces CREW to anticipate and plead around any FOIA-exemption defense the government might raise." *Id.*

## ARGUMENT

The petition for rehearing en banc should be denied. The panel correctly applied the Rule 12(b)(6) pleading standard and this Court's decision in *Electronic Frontier Foundation* in concluding that CREW failed to state a claim.

CREW's complaint alleged that the Department was disregarding its obligations under FOIA's reading-room provision by failing to disclose all "formal written opinions" of the Office of Legal Counsel. App. 5. CREW described the opinions that the Department has failed to disclose as "controlling," "authoritative," and "binding by custom and practice in the executive branch." App. 9. Yet, as the panel observed, those precise characteristics were true of the OLC opinion at issue in *Electronic Frontier Foundation*, and there this Court held that the understanding "that OLC opinions are 'controlling (insofar as agencies customarily follow OLC advice that they request), precedential, and can be withdrawn'" does not render them the "working law" of any agency. Op. 8 (quoting *Electronic Frontier Found.*, 739 F.3d at 9).

That is because when OLC provides legal advice to other Executive Branch agencies, it "does not speak with authority on the [agency's] policy," and an agency must therefore adopt OLC's opinion as its own "to render an OLC opinion the 'working law' of an agency." Op. 8-9 (quoting *Electronic Frontier Found.*, 739 F.3d at 9). In *Electronic Frontier Foundation*, this conclusion caused this Court to uphold the government's invocation of the deliberative process privilege, which applies only to predecisional material, but the same reasoning compels the conclusion that OLC's legal advice is not a "statement[] of policy . . . adopted by the agency" subject to mandatory disclosure under 5 U.S.C. § 552(a)(2). *See National Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 153-54, 154 n.21 (1975).

Despite accusing the panel of "relying on only selective quotes" from the complaint, Pet. 10, CREW identifies nothing in its complaint distinguishing the documents it seeks from the document at issue in *Electronic Frontier Foundation*—in other words, alleging "more than that the OLC's formal written opinions are 'controlling.'" Op. 12. CREW's only effort to show that its complaint meets the pleading standard merely repeats the suggestion that because OLC opinions are "authoritative," they must necessarily be subject to the reading-room provision. Pet. 12. The panel broke no new ground in concluding that OLC opinions like the one in *Electronic Frontier Foundation* are not subject to the reading-room provision: the panel majority and the dissent agreed (and CREW now concedes, *see* Pet. 13) that, at a minimum, this Court's decision in *Electronic Frontier Foundation* demonstrates the

existence of "a subcategory of opinions (encompassing at least one, and likely many more) that need not be disclosed under the reading-room provision." Dissent 4; *see* Op. 8-9.

The panel majority and the dissent differed primarily in their treatment of CREW's complaint. The panel construed the complaint to assert that all of OLC's opinions were subject to the reading-room provision because they were controlling, authoritative, and binding, and properly rejected that contention. The dissent construed the complaint to encompass allegations that some subsets of OLC's opinions are subject to the reading-room provision for reasons not expressly articulated in the complaint. Particularly in light of CREW's refusal to amend its complaint despite being expressly invited to do so by the district court, the majority's construction is the better one, but in any event this factbound dispute about CREW's complaint plainly does not warrant review by the full Court.

CREW mistakenly suggests that the panel's opinion somehow "eviscerates" or "clos[es] off" § 552(a)(2), rendering it "a nullity" and "functionally inoperative." Pet. 2, 8, 10, 12, 13. CREW's rhetoric does not match the reality. The panel did not decide that every OLC opinion is exempt from § 552(a)(2), and pointedly did "not address the merits" of a narrower complaint targeting specific categories of OLC opinions filed by a different plaintiff. Op. 13 & n.5. Instead, the panel made clear that, in light of *Electronic Frontier Foundation*, a plaintiff needs to plead more than that "OLC's formal written opinions are 'controlling,' 'authoritative,' and 'binding'" to

state a plausible claim for relief under § 552(a)(2), particularly where the complaint seeks the disclosure of all such opinions. Op. 12. Nothing in the panel opinion prevents a plaintiff from actually pleading sufficient facts to state a claim that an agency is improperly withholding records that ought to be released under the reading-room provision. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 846 F.3d 1235, 1243-44 (D.C. Cir. 2017).

For similar reasons, CREW's assertion that attempting to amend its complaint is an "illusory" option, Pet. 9, is belied by the fact that another plaintiff in a separate proceeding was able to narrow its complaint from seeking all formal written OLC opinions to seeking only defined subcategories of such opinions. *See* Op. 13. Although CREW claims (Pet. 9) that its blanket request is no different from the categories identified in that complaint, CREW's complaint contains no reference to those categories, and it declined to amend its complaint to identify the narrower categories of opinions that CREW now believes are subject to disclosure. Unlike the complaint here, the complaint in the other case—though also meritless—squarely presented the question whether those specific categories of opinions have characteristics that make them "subject to publication under the reading-room provision." Dissent 6. Here, by contrast, CREW asks this Court to permit a wide-ranging claim seeking *all* formal written OLC opinions to proceed because of CREW's belief that some unidentified subset of opinions may be subject to the reading-room provision.

CREW's petition also offers a more radical suggestion: that under FOIA it should have no threshold burden of pleading at all. CREW contends that because FOIA places the burden on the government "to sustain its action" in a FOIA suit, 5 U.S.C. § 552(a)(4)(B), the panel erred by requiring CREW to plead sufficient factual matter to support a plausible claim. Pet. 11. As the panel explained, FOIA litigants are not entirely excused from pleading standards. In the more familiar context of claims premised on requests made under 5 U.S.C. § 552(a)(3), plaintiffs must establish that § 552(a)(3) applies to the documents at issue by showing that they made a valid request for the documents—a burden plaintiffs typically overcome without difficulty. Op. 10-11. Because CREW elected instead to rely on 5 U.S.C. § 552(a)(2), it must establish that § 552(a)(2) applies by plausibly alleging that the documents at issue fall in the categories set out in that provision.

For the same reason, CREW's reliance on FOIA's burden-shifting provision to assert that the panel's opinion requires it to anticipate and plead around exemptions (Pet. 12-13) confuses the elements of its claim with the government's burden of establishing the applicability of an exemption. As the panel explained, whether or not a document is covered by § 552(a)(2) must be analyzed separately from the question whether a document is protected by a FOIA exemption (even if the two issues sometimes turn on similar questions). Thus, "[i]n the context of FOIA's reading-room provision, that an OLC formal written opinion is not the working law of an agency means that it does not fall within one of the reading-room's enumerated

categories and therefore is not subject to disclosure even absent an exemption." Op. 12. CREW thus need not anticipate any exemptions; it need only plead sufficient factual matter to make out a claim that the documents it seeks are in fact subject to the reading-room provision.

CREW's various other complaints about the panel opinion fare no better. That CREW might be able to receive "non-exempt portions" of certain OLC opinions if it filed a request under § 552(a)(3), Pet. 11, merely reflects that it is easier for a plaintiff to satisfy § 552(a)(3), which requires only that documents have been the subject of a valid request rather than that they are statements of policy that have been adopted by the agency. That a requester could always seek government documents not subject to the reading-room requirement is a feature of FOIA's design, not an "irony." Pet. 11. CREW may prefer to rely on § 552(a)(2), but it must plausibly allege that the documents in question are subject to that provision. Its objection that it lacks "access to indexes of OLC's opinions" with which to fashion a request, Pet. 10, merely describes the position of most FOIA requesters, who rarely have a preexisting catalog of government documents to choose from. The indexing requirement is only triggered if documents are subject to § 552(a)(2), which CREW has failed to establish.

CREW's suggestion that the panel decision conflicts with existing precedent (Pet. 13-16), essentially seeks to relitigate issues that were resolved in *Electronic Frontier Foundation*. CREW contends that the panel inappropriately employed "a narrow 'adoption' standard" for determining whether a particular OLC advice document is

"working law," Pet. 15, but this Court held in *Electronic Frontier Foundation* that, insofar as OLC lacks the authority to set the policy of other Executive Branch agencies, OLC's advice "qualifies as the 'working law' of an agency only if the agency has 'adopted' the opinion as its own." Op. 8 (quoting *Electronic Frontier Found.*, 739 F.3d at 9). This standard is entirely consistent with the reading-room provision itself, which requires the disclosure of "statements of policy and interpretations" an agency has "adopted." 5 U.S.C. § 552(a)(2)(B). And that "the opinions sought here constitute a uniform system with precedential effect," Pet. 15, is irrelevant; *Electronic Frontier Foundation* explicitly holds that the "precedential" nature of an OLC opinion "does not overcome the fact that OLC does not speak with authority on the [agency's] policy; therefore, the OLC Opinion could not be the 'working law' of the [agency] unless the [agency] 'adopted' what OLC offered," 739 F.3d at 9; *see* Op. 8.

Similarly, CREW's reliance on cases addressing whether documents internal to an agency are the "working law" of that agency is misplaced. *See Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 859 (D.C. Cir. 1980) (legal memoranda from Department of Energy legal counsel to Department of Energy auditors); *Tax Analysts v. IRS*, 117 F.3d 607, 609 (D.C. Cir. 1997) (advice memoranda prepared by IRS chief counsel for IRS field personnel addressing the situations of specific taxpayers). This line of cases—addressed and distinguished in *Electronic Frontier Foundation*—demonstrates that an agency with the ability to set its own policy may

create internal documents that constitute "working law." 739 F.3d at 8-9. As the panel here explained, OLC lacks the power to set the policy of other agencies. Op. 8.

## CONCLUSION

For the foregoing reasons, the petition for rehearing en banc should be denied.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This response complies with the Court's order of June 13, 2019, limiting appellee's response to 3,900 words, because it contains 3,134 words. This response was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

*s/ Brad Hinshelwood*
Brad Hinshelwood

**CERTIFICATE OF SERVICE**

I hereby certify that on July 12, 2019, I electronically filed the foregoing response with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

*s/ Brad Hinshelwood*
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