20-3837

To Be Argued By:
ELLEN BLAIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 20-3837

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY,

Plaintiff-Appellee,

—v.—

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, UNITED STATES DEPARTMENT OF STATE, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT,

Defendants-Appellants,

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS

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UNITED STATES DEPARTMENT OF HOMELAND SECURITY,
UNITED STATES DEPARTMENT OF JUSTICE,
UNITED STATES CUSTOMS AND BORDER PROTECTION,

Defendants.

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UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, UNITED STATES DEPARTMENT OF STATE, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT,

Defendants-Appellants,

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES CUSTOMS AND BORDER PROTECTION,

Defendants.

BRIEF FOR DEFENDANTS-APPELLANTS

Preliminary Statement

The requesters in this Freedom of Information Act ("FOIA") case seek documents concerning the government's application of provisions of the Immigration and Nationality Act ("INA"). The pertinent provisions

include terrorism-related inadmissibility grounds and exceptions that generally render foreign nationals "inadmissible" and therefore ineligible for entry or immigration benefits if they endorse or espouse terrorist activity, and foreign policy-based grounds applicable if their entry into the United States could have adverse consequences for U.S. foreign policy.

The State Department ("State") and U.S. Citizenship and Immigration Services ("USCIS") properly withheld portions of training materials and procedures provided to consular and immigration officers concerning how to evaluate such terrorism-related inadmissibility grounds when individuals seek to enter the country. State also withheld certain portions of guidance relating to aliens who are inadmissible because of foreign policy concerns. While both agencies released background material related to government officers' screening of applicants, they withheld descriptions of questions and techniques those officers may use to extract or identify the information necessary to determine an applicant's inadmissibility. Similarly, State and USCIS withheld procedures for considering an applicant's connection to terrorist activities and organizations, evaluating the veracity of an individual's answers, and cooperating with other agencies.

This information is essential to the agencies' enforcement of the INA, and falls squarely within FOIA's exemption for records that reveal law enforcement techniques and procedures. In ordering disclosure of this material, the district court overlooked or failed to credit the agencies' robust factual showing that disclosure would enable individuals to circumvent the

screening process and avoid detection for terrorism-related inadmissibility. This result is particularly troubling because releasing the information at issue would enhance the ability of terrorists and other criminals to evade U.S. law and could jeopardize the national security of the United States.

In addition, USCIS and Immigration and Customs Enforcement ("ICE") properly withheld portions of memoranda containing staff recommendations to senior management about how to evaluate and implement the INA's terrorism provisions. The deliberative process privilege applies to protect such predecisional advice, as disclosure would chill frank discussion among agency personnel and hamper the government's ability to effectively assess ways to protect national security. The district court's conclusion that the memoranda contain disclosable "working law" cannot be reconciled with this Court's recent clarifications that the working law doctrine does not apply where, as here, the documents bind neither the agency nor the public.

Accordingly, the district court's order should be reversed.

Jurisdictional Statement

The district court had jurisdiction over this action under 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B). On September 13, 2019, and September 23, 2019, the district court entered orders compelling disclosure of certain records under FOIA. (Special Appendix ("SPA") 1-56). On September 30, 2019, the government filed a timely motion for clarification and partial reconsideration (Joint Appendix ("JA") 17), and on September 13,

2020, the district court clarified, but declined to reconsider, the disclosure orders (SPA 57-73). On November 11, 2020, the government filed a timely notice of appeal. (JA 20, 574). Accordingly, this Court has jurisdiction over this appeal under 28 U.S.C. §§ 1291 and 1292(a)(1). *See Ferguson v. FBI*, 957 F.2d 1059, 1063 (2d Cir. 1992).

Issues Presented for Review

1. Whether State and USCIS properly withheld, under FOIA Exemption 7(E)'s protection of law enforcement techniques and procedures, materials that consular and immigration officers use to screen visa and asylum applicants.

2. Whether USCIS and ICE properly withheld, under FOIA Exemption 5 and the deliberative process privilege, memoranda recommending policy revisions that were prepared by agency employees and that are not binding on the agency or the public.

Statement of the Case

A. Procedural History

The Knight First Amendment Institute at Columbia University ("Institute") commenced this case on October 4, 2017, seeking to compel eight agencies and components to respond to the Institute's August 7, 2017, FOIA request.[1] (JA 3, 22). The FOIA request

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[1] Those agencies and components are the United States Department of Justice Office of Legal Counsel,

sought six categories of documents relating to the government's authority to exclude or remove individuals from the United States based on their speech, beliefs, or associations, as provided by the INA and Executive Order No. 13,780, 82 Fed. Reg. 13,209, 13,215 (Mar. 6, 2017). (JA 36-43). The Institute and ICE, State, and the Department of Justice's Office of Legal Counsel ("OLC") filed cross-motions for partial summary judgment regarding the adequacy of OLC's and ICE's searches for records, and the applicability of FOIA Exemptions 5 and 7(E) to information withheld in full or in part by State. (JA 12-15). In an opinion dated September 13, 2019, the district court (Andrew L. Carter, J.) granted in part and denied in part the parties' cross-motions. (SPA 1); 407 F. Supp. 3d 311 (S.D.N.Y. 2019).

The Institute, as well as ICE and USCIS, also filed cross-motions for partial summary judgment regarding the applicability of FOIA Exemptions 5 and 7(E) to information withheld in full or in part by ICE and USCIS. (JA 13-15). In an opinion dated September 23, 2019, the district court granted in part and denied in part the parties' cross-motions. (SPA 30); 407 F. Supp. 3d 334 (S.D.N.Y. 2019).

Office of Public Affairs, and Office of Information Policy; the Department of Homeland Security; Customs and Border Protection, the State Department, ICE, and USCIS.

On September 30, 2019, the government filed a timely motion for clarification and partial reconsideration of the two decisions. (JA 17). On September 14, 2020, the district court clarified the orders, declined to reconsider the disclosure orders or permit State and USCIS to supplement the record, and directed ICE, State, and USCIS to produce certain records that the 2019 decisions held were not exempt from disclosure under FOIA. (SPA 57). On November 11, 2020, the government filed a timely notice of appeal. (JA 20, 574).

B. The INA's Inadmissibility Provisions

Section 212 of the INA, 8 U.S.C. § 1182, identifies categories of inadmissible aliens, two of which were identified in the FOIA request: sections 212(a)(3)(B)(i)(IV)(bb) and (a)(3)(B)(i)(VII) (the "endorse or espouse provisions") and section 212(a)(3)(C) (the "foreign policy provision"). (JA 38).

Section 212(a)(3)(B) precludes the admission of aliens engaged in or likely to engage in various forms of "terrorist activity"; defines "terrorist activity," "engage in terrorist activity," "representative" of a terrorist organization, and "terrorist organization"; and identifies exceptions to inadmissibility for a spouse or child under certain circumstances. 8 U.S.C. § 1182(a)(3)(B)(i)-(vi). Particularly relevant here, an individual who "endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization" is inadmissible to the United States. 8 U.S.C. § 1182(a)(3)(B)(i)(VII).

Section 212(a)(3)(C) provides that an alien is inadmissible when "the Secretary of State has reasonable ground to believe [admission] would have potentially serious adverse foreign policy consequences for the United States," and excepts foreign officials from inadmissibility under this ground based on "past, current, or expected beliefs, statements, or associations . . . [that] would be lawful within the United States." 8 U.S.C. § 1182(a)(3)(C)(i)-(ii). Section 212(a)(3)(C) further provides that aliens who are not government officials are not excludable under this ground for beliefs, statements, or associations that are lawful in the United States "unless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest," and notifies congressional committees "of the identity of the alien and the reasons for the determination." 8 U.S.C. § 1182(a)(3)(C)(iii)-(iv).

C. The Knight Institute's FOIA Request

Item 1 of the Institute's FOIA request seeks "communications sent by the White House to any federal agency since January 19, 2017, regarding consideration of individuals' speech, beliefs, or associations in connection with immigration determinations, including decisions to exclude or remove individuals from the United States." (JA 38-39). Items 2 through 4 seek documents created since May 11, 2005, concerning the evaluation, application, or waiver of the INA endorse or espouse provisions and foreign policy provision. (JA 39). Item 5 seeks sections of the State Department's Foreign Affairs Manual created since May 11, 2005, concerning those two INA provisions. (JA 39).

Once this litigation began, the district court endorsed the parties' agreement to limit the scope of these categories. (Dist. Ct. ECF No. 48 at ¶ 2). All eight agencies or components searched for and produced responsive, non-exempt records—a collective total of approximately 6,000 pages—by August 2018.[2] (Dist. Ct. ECF No. 78).

1. The State Department's Productions

State determined that 243 documents, totaling 1,719 pages, were responsive to the narrowed request, and withheld information under various FOIA exemptions. (JA 47).

At issue here is information State withheld under Exemption 7(E): law-enforcement information contained in versions of three sections of the Foreign Affairs Manual ("FAM")—9 FAM 302.6, 9 FAM 40.32, and 9 FAM 302.14—totaling 108 pages. The withheld sections of the FAM concern State's enforcement of the INA—specifically, its responsibilities to process visa applications. (JA 166). As the State Department affirmed, State "is on the front line of enforcing the U.S. Government's immigration laws and regulations"; it "interprets and applies immigration laws and regulations"; "acts as a point of contact for the public"; liaises with other government agencies; and "routinely uses

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[2] Under a later agreement between the parties, all agencies and components except OLC are currently conducting supplemental searches for non-exempt information responsive to Item 1 of the Request. (Dist. Ct. ECF No. 146 at 3-4).

nonpublic law enforcement databases to support its core duties of enforcing U.S. immigration laws." (JA 63-64).

The withheld information contains "certain techniques used to investigate visa applicants, details regarding the use of certain law enforcement databases used to assist the Department in issuing or denying visas, codes used in connection with investigating potential security threats, and procedures for finding and evaluating sources of information." (JA 64). In particular, the information "details investigation techniques used to assess the core national security concerns that arise in processing visa applications, such as triggers for further security investigations or checking for terrorism ineligibilities." (JA 64). State explained that public release of the information "at issue in this case could enable terrorists and other bad actors to avoid detection or develop countermeasures to circumvent the ability of the Department to effectively use these important law enforcement techniques, thereby allowing circumvention of the law." (JA 64).[3]

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[3] For example, 9 FAM 302.6-2(B)(4)c.(4) "provides details about the conditions under which to apply a presumption of inadmissibility due to involvement in terrorist activity" (JA 67); 9 FAM 302.6-2(B)(4)d.(3)-(5) "provides information about the Palestine Liberation Organization that is used as a guideline for determining whether an applicant is associated with the organization and therefore inadmissible" (JA 67); and 9

2. USCIS Productions

USCIS determined that documents responsive to the narrowed request would similarly include records related to the agency's enforcement of the INA, particularly its provisions on terrorism-related inadmissibility grounds ("TRIG"), codified in INA section 212(a)(3)(B). (JA 172). USCIS produced a total of approximately 1,200 pages, applying FOIA Exemptions 5 and 7(E). (JA 172-87).

At issue in this appeal are two USCIS documents withheld in part pursuant to Exemption 5 and the deliberative process privilege, and information in 256 pages and 33 presentation slides withheld in part under Exemption 7(E).

Pursuant to Exemption 7(E), USCIS withheld in part various presentation slides and training manuals prepared by the Refugee, Asylum and International Operations Directorate and provided to immigration officers to use to screen applicants for terrorism ties. (JA 174-87). The materials include specific TRIG questions and possible follow-up questions that agents may

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FAM 40.32, section N2.3 provides "guidelines for identifying material support" for terrorist groups (JA 66). Similarly, 9 FAM 302.14-3(B)(3)(f) provides "procedures for investigating a visa that is flagged and may need to be revoked" (JA 68); and 9 FAM 40.32, sections N1.1.c and N2.1.c outline "interagency cooperation procedures during the process of checking for [visa] ineligibilities" (JA 68).

ask applicants during the screening process to determine whether an individual is subject to a TRIG bar, or subject to an exemption from such a TRIG bar. (JA 174-87, 352-549, 552-53). Further, the material contains examples of factual scenarios where an applicant has sufficiently demonstrated an entitlement to a TRIG exemption. (JA 174-87, 352-549, 552-53).

As USCIS indicated, these materials "reflect specialized methods that USCIS has refined through its decades of enforcing United States immigration laws," containing "calculated techniques used to screen for terrorist ties or exceptions to apply to potential terrorist ties," as well as ways to "elicit information that would shed light on terrorist organizations' activities." (JA 552-53). Disclosing such information could permit "future applicants to tailor their testimony and applications when seeking immigration benefits so they could hide possible terrorism ties, avoid government detection, and gain admission to the U.S., illegally obtain immigration benefits, and illegally remain in the U.S., thus posing a risk to national security." (JA 185).

Pursuant to Exemption 5, USCIS withheld in part a "Briefing Memo for the Acting Director: Recommendations to Eliminate the USCIS Terrorism-Related Inadmissibility Grounds (TRIG)," which includes a draft of a proposed new USCIS policy entitled "Policy Memorandum: Revised Guidance for Processing Cases Involving Terrorism-Related Inadmissibility Grounds and Elimination of the Hold Policy for Such Cases" (together, the "Acting Director Memo"). (JA 175, 551). The memo contains "discussions and recommendations from USCIS staff to senior agency management

regarding the current and future posture of the USCIS TRIG Hold Policy," a proposed revision to the policy, and a "review of relevant considerations for determining whether [current] cases should continue to be held or released for adjudication." (JA 175, 551). The recommendations "do not reflect positions that are or became binding on the agency." (JA 551).

USCIS also withheld in part pursuant to Exemption 5 a "Senior Policy Council-Briefing Paper: TRIG Exemptions & INA § 318" ("Senior Policy Council Paper"). (JA 175-76, 551). The Senior Policy Council Paper is an "internal agency briefing paper" that was prepared "by agency personnel for senior agency management and discussed specific TRIG exemptions and how they could be interpreted and applied to specific types of applicants." (JA 175-76, 551). It includes "various scenarios," presents "options for action by senior management," and concludes with "a specific course of action recommended by the drafters." (JA 175-76, 551). USCIS explained that the document "do[es] not reflect positions that bound the agency, but rather, contains legal analysis and a recommendation regarding what the agency policy should be." (JA 551).

3. ICE Productions

ICE produced a total of 2,574 pages, and withheld information under FOIA Exemptions 5, 6, 7(C), and 7(E). (JA 193, 204-49). ICE then re-reviewed the remaining documents to identify materials responsive to the narrowed FOIA request and determined that ninety-nine pages of documents were responsive; ICE

produced those pages in full or in part, applying Exemptions 5, 6, 7(C), and 7(E). (Dist. Ct. ECF Nos. 64 & 77; JA 192-93).

At issue in this appeal is one ICE document: an informal draft memorandum entitled "ICE ability to use 212(a)(3)(C) Foreign Policy Charge"—referred to here as the "Foreign Policy Memo"—which, except for the title, ICE withheld in full under Exemption 5 and the deliberative process privilege. (JA 248-49, 563). The Foreign Policy Memo was drafted by an attorney in the ICE Office of the Principal Legal Advisor and contains "a brief summary with notes and quotes for determining whether section 212(a)(3)(C) can be used by the Secretary of State as grounds for inadmissibility." (JA 248-49, 563). It "is not organized like typical ICE memoranda," and it "is not signed by or formally addressed to ICE leadership." (JA 248-49, 563). The Memo reflects "opinions, analysis, guidance and legal advice provided by" the attorney, provides "factors for consideration," and includes "notes supporting the employee's opinions." (JA 248-49, 563).[4]

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[4] ICE initially withheld this document under exemption 5 and the attorney-client privilege as well, but withdrew its assertion of that privilege during summary judgment proceedings. (Dist. Ct. ECF No. 118 at 2).

D. The District Court's 2019 Disclosure Orders

1. The September 13, 2019, Order

In its September 13, 2019, order, the district court concluded, as relevant here, that the State Department failed to logically and plausibly justify withholding the FAM sections under exemption 7(E).[5]

The district court noted as a threshold matter that "it is not clear that the FAM was 'compiled for law enforcement purposes,' even if some sections of the FAM may serve those purposes." (SPA 26). Noting that all of the redacted information is contained within the "background" sections, the district court inferred that such information "appear[s] to contain 'recitations of statutes and background' not subject to Exemption 7(E)." (SPA 26-27).

The district court reached that conclusion, first, by noting that the State Department released, in 9 FAM 302.6-2(B)(3), a list of nine examples of material support for terrorism that also appear in the INA, 8 U.S.C. § 1182(a)(3)(B)(iv)(VI), but that State withheld the paragraph preceding the list. (SPA 27). The district court did not acknowledge State's explanation that the

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[5] In the September 13, 2019, order, the district court also granted OLC's motion concerning the adequacy of its search; ordered ICE to conduct a supplemental search; and concluded that State had adequately justified its exemption 5 withholdings as to four documents. Those rulings are not at issue in this appeal.

withheld paragraph "identif[ies] the situations that trigger the process of checking for terrorism-related ineligibilities and reveal[s] the techniques used during that process" (JA 68), but rather concluded (without reviewing the withheld material) that "[t]he similarity between the withheld information and the INA's text . . . suggests Exemption 7(E) does not apply [to the withheld paragraph]" (SPA 27).

Second, the district court determined that State failed to demonstrate that the withheld information contains more than recitations of policy, by not identifying " 'proactive steps' for preventing criminal activity and maintaining security." (SPA 28).

Third, the district court rejected the State Department's explanation that releasing guidelines to evaluate "situations in which an individual may cease to be inadmissible" could enable "terrorists and other bad actors . . . to conceal derogatory information, provide fraudulent information, or otherwise circumvent the security checks put in place to ensure that terrorists and other bad actors cannot gain visas to enter into the United States." (JA 67). The district court concluded that "it is unclear how explaining to the public what may constitute grounds for inadmissibility—essentially a legal interpretation—may potentially help an individual circumvent the law." (SPA 28).

Accordingly, the district court ordered State to "turnover these categories of documents." (SPA 28).

2. The September 23, 2019, Order

In the September 23, 2019, order, the district court determined that USCIS failed to logically and plausibly justify withholding information in the TRIG materials, and ordered USCIS to disclose information within the TRIG materials that the district court defined as "TRIG Questions." (SPA 30). The district court also ordered UCSIS and ICE to segregate and release "working law" in, as relevant here, three documents withheld in part under Exemption 5. (SPA 38).

a. Exemption 5 Determinations

Regarding ICE's Foreign Policy Memo, the district court concluded that the agency failed to demonstrate that it was predecisional, deliberative material protected under Exemption 5. First, the district court concluded that it is not predecisional because the "record does not indicate that the memo 'formed an essential link in a specific consultative process, reflects the personal opinions of the writer rather than the policy of the agency, [or] if released, would inaccurately reflect or prematurely disclose the views of the agency.'" (SPA 38). Second, without acknowledging that the Foreign Policy Memo includes "notes supporting the employee's opinions" about when the Secretary may apply section 212(a)(3)(C) (JA 563), the district court concluded that the Foreign Policy Memo is not deliberative because "the withheld portions of the memo do not seem to contain the 'personal opinions' or deliberative material the law seeks to keep out of the public eye." (SPA 38 (quotation marks omitted)). The district court ordered ICE to "disclose reasonably segregable

portions of the Foreign Policy Provision Memo that reflect current immigration policy." (SPA 39).

Regarding USCIS's Exemption 5 materials, the district court concluded that some withheld information in the Acting Director Memo and Senior Policy Council Paper "appears to be . . . information that 'is more properly characterized as an opinion or interpretation which embodies the agency's effective law and policy' and thus constitutes the agency's 'working law.'" (SPA 44 (citation omitted)). Specifically, the district court noted that USCIS described the Acting Director Memo as "contain[ing] discussions and recommendations from USCIS staff to senior agency management regarding the *current* and future posture of the USCIS TRIG Hold Policy." (SPA 45 (quoting JA 175; emphasis in order)). The district court further noted that the Senior Policy Council Paper "likewise" discusses "'specific TRIG exemptions and how they could be interpreted and applied to specific types of applicants who seek immigration benefits from USCIS.'" (SPA 45 (quoting Dkt. No. 97 at ¶ 24)). The district court concluded that to the extent "the records contain explanations of USCIS's current policies and approaches to immigration decisions, the records contain 'working law.'" (SPA 45). The district court ordered USCIS to "release the reasonably segregable sections of these records reflecting USCIS current immigration policy." (SPA 45).

b. Exemption 7(E) Determinations

Regarding the TRIG training material, the district court distinguished between "TRIG Questions," which

the district court determined were not properly withheld under Exemption 7(E), and "TRIG Exemptions," which the district court determined were properly withheld under Exemption 7(E). (SPA 51-53).

The district court concluded that USCIS's questions posed to immigration applicants to determine terrorism ties (which the district court called "TRIG Questions") are not specialized techniques or procedures. (SPA 51). The court concluded that USCIS's "screening questions are susceptible to widespread dissemination" because "it is safe to assume immigration applicants will remember and report questions related to terrorism to other people." (SPA 53). Accordingly, the district court ordered USCIS to release the TRIG Questions.

On the other hand, the district court concluded that USCIS properly withheld information about exemption qualifications, calling such information "TRIG Exemptions." (SPA 53). The district court noted that this material includes criteria "applied on a discretionary basis" and that their release "would enable applicants to tailor their answers to meet such criteria—criteria which is not otherwise available and known to the public." (SPA 53-54 (quotation marks omitted)).

E. The District Court's Ruling on the Agencies' Motion for Clarification and Partial Reconsideration

In its motion for reconsideration, USCIS requested that the district court clarify the distinction between information it referred to as "TRIG Questions," which the district court ordered disclosed, and information it

called "TRIG Exemptions," which the district court determined was properly withheld. (Dist. Ct. ECF No. 144 at 11-12). USCIS noted that it did not distinguish information in the documents on that basis. (Dist. Ct. ECF No. 144 at 11-12). Instead, USCIS explained that information in these categories is intertwined, as the withheld information concerns guidance provided to immigration officers to determine the existence, extent, and nature of an applicant's terrorist ties, and whether a TRIG exemption applies to those circumstances. (Dist. Ct. ECF No. 144 at 11-12).

On September 14, 2020, the district court clarified its rulings. (SPA 57). The court explained the distinction between "TRIG Questions" and "TRIG Exemptions" as follows:

> I understand TRIG Questions to be "the questions and follow-ups" "designed to *elicit*" information from applicants "that would shed light on . . . whether the applicant[s] ha[ve] any ties to terrorist organizations and activities." . . . TRIG Exemptions, by contrast, are the criteria USCIS uses to *evaluate* applicants' answers. The latter material is internal to the agency and protectable, whereas the former material is, by definition shared, specifically with applicants.

(SPA 71). The district court also denied reconsideration and declined to accept supplemental submissions from State and USCIS providing further information to justify the exemption 7(E) withholdings. (SPA 72).

Upon conducting a further segregability review in accordance with the 2019 decisions, USCIS and ICE determined that the documents neither constitute nor contain working law. Nevertheless, USCIS made a discretionary release of limited portions of the Acting Director Memo and the Senior Policy Council Paper reflecting a generic discussion of the TRIG Hold Policy and INA section 318, respectively.

Summary of Argument

The district court's orders should be reversed. First, documents withheld by State and USCIS are protected from disclosure by FOIA Exemption 7(E), which applies to records compiled for law enforcement purposes that would disclose law enforcement techniques, procedures, and guidelines. The State Department withheld provisions of the FAM that govern its enforcement of immigration laws in considering visa applications. The FAM provisions reflect law enforcement techniques and procedures as they explain how the agency goes about assessing whether applicants may have terrorism ties that would render them inadmissible. As the State Department logically and plausibly explained, the FAM provisions set forth, for example, situations and circumstances that trigger processes and techniques State uses to vet and screen visa applicants for possible ties to terrorist activity or terrorist organizations. Revealing this information would allow applicants who pose national security threats to avoid detection and thereby thwart State's enforcement of the law, specifically the terrorism-related in-

admissibility grounds. State thus correctly applied Exemption 7(E) to protect this material. *See infra* Point I.B.

Similarly, USCIS correctly withheld information under Exemption 7(E), namely, questions and training materials it uses to determine if individuals are subject to terrorism-related inadmissibility grounds. These materials describe calculated techniques that USCIS has refined through its decades of enforcing federal immigration laws, and their release would allow applicants to evade law enforcement by planning their answers in advance. Nor are they already generally known to the public. Although some subset of questions may be posed to interviewees, there is nothing in the record to suggest that the questions have been or could be widely disseminated, much less in a manner that reveals the reason why each question is asked. Exemption 7(E) applies because disclosure would appreciably diminish the effectiveness of USCIS's law enforcement techniques and procedures. USCIS was therefore correct in withholding these records under Exemption 7(E). *See infra* Point I.C.

Finally, USCIS and ICE properly withheld materials under Exemption 5 and the deliberative process privilege. These documents fall within the heart of the privilege: they were prepared by agency employees to propose revisions to agency policy, and they do not embody a binding agency position but instead an employee's personal views. Disclosure of these materials would curtail the open and frank discussion that the deliberative process privilege is designed to promote.

The district court misapplied the "working law" doctrine in ordering production of those portions of the memo that describe current policy. The proper working law inquiry examines whether the document is binding on the agency and the public—and the record makes clear that is not the case here. *See infra* Point II.B, II.C.

Accordingly, the district court's disclosure orders should be reversed.

ARGUMENT

Standard of Review

This Court reviews a district court's grant of summary judgment in a FOIA case *de novo*, including a partial disclosure order. *National Council of La Raza v. DOJ*, 411 F.3d 350, 355 (2d Cir. 2005). In a FOIA case, "the defending agency has the burden of showing that . . . any withheld documents fall within an exemption to the FOIA." *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). "Affidavits or declarations . . . giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden," and are "accorded a presumption of good faith." *Id.* (footnote and quotation marks omitted). Ultimately, "the agency's justification is sufficient if it appears logical and plausible." *ACLU v. DoD*, 901 F.3d 125, 133 (2d Cir. 2018).

POINT I

The State Department and USCIS Correctly Withheld Information Revealing Law Enforcement Techniques and Procedures Pursuant to FOIA Exemption 7(E)

A. Exemption 7(E)

Exemption 7(E) exempts from disclosure "records or information compiled for law enforcement purposes" that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). "Techniques and procedures" are categorically exempt from disclosure, without any need to inquire into the harm that would result from their disclosure, while to withhold a "guideline" an agency must show a risk of circumvention of the law. *Allard K. Lowenstein Int'l Human Rights Project v. DHS*, 626 F.3d 678, 681 (2d Cir. 2010). "Techniques and procedures" refers to "how law enforcement officials go about investigating a crime," while "guidelines" "generally refers in the context of Exemption 7(E) to resource allocation." *Id.* at 682.

B. The State Department Correctly Withheld Portions of the Foreign Affairs Manual Under Exemption 7(E)

State logically and plausibly demonstrated that the withheld FAM provisions constitute law-enforcement

information that falls under Exemption 7(E). *See ACLU v. DoD*, 901 F.3d at 133.[6]

As a preliminary matter, State has easily satisfied Exemption 7's threshold requirement that the material at issue be "compiled for law enforcement purposes." *See FBI v. Abramson*, 456 U.S. 615, 624 (1982) (explaining that "[t]he threshold requirement for qualifying under Exemption 7 turns on the purpose for which the document sought to be withheld was prepared"). Where an agency, like State, "has a 'mixed' function, encompassing both administrative and law enforcement functions," courts of appeals have held that the agency "must demonstrate that it had a purpose falling within its sphere of enforcement authority in compiling the particular document." *Church of Scientology of California v. Dep't of Army*, 611 F.2d 738, 748 (9th Cir. 1979), *overruled on other grounds by Animal Legal Defense Fund v. FDA*, 836 F.3d 987 (9th Cir. 2016); *accord Tax Analysts v. IRS*, 294 F.3d 71, 77 (D.C. Cir. 2002).

State has made that showing. As the agency explained, all of the information at issue is in volume 9 of the FAM, which concerns State's application of immigration laws and regulations in processing visa applications. (JA 66-70). Ensuring compliance with the

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[6] While State is appealing the bulk of the district court's order to disclose the FAM provisions at issue, the agency has re-reviewed all the provisions and elected not to appeal with respect to a subset, which will be disclosed to the Institute.

federal immigration laws falls "squarely within the Department's law enforcement functions." (JA 166). Numerous provisions of the INA grant "consular officers"—who are designated State Department employees—authority to enforce the immigration laws by determining an applicant's immigration eligibility or inadmissibility. 8 U.S.C. §§ 1182, 1201, 1361. Because the records at issue involve enforcement of U.S. law pursuant to statutes within State's enforcement authority, the agency has satisfied Exemption 7's threshold requirement. *See Cooper Cameron Corp. v. OSHA*, 280 F.3d 539, 545-46 (5th Cir. 2002) (threshold met where agency documented "specific violations of the law" within "its statutory mandate"); *Lewis v. IRS*, 823 F.2d 375, 379 (9th Cir. 1987) (threshold met when agency "had a purpose falling within its sphere of enforcement authority in compiling particular document[s]" (quotation marks omitted)); *Birch v. U.S. Postal Service*, 803 F.2d 1206, 1211 (D.C. Cir. 1986) (threshold met where agency had "statutory authority to investigate and enforce laws" at issue).

Put differently, the pertinent FAM provisions consist of "information used to fulfill [State's] official security and crime prevention duties"—in particular, "steps by law enforcement officers to prevent terrorism"—and are therefore encompassed by the phrase "compiled for law enforcement purposes." *Milner v. Department of the Navy*, 562 U.S. 562, 582-83 (2011) (Alito, J., concurring). As State's declarant explained, the withheld material describes the agency's affirmative efforts to assess "core national security concerns" and ensure that "criminals, terrorists, and other bad actors" do not enter the country. (JA 166). And the fact

that, as described in more detail below, the FAM provisions at issue set forth investigatory techniques confirms the underlying law enforcement purpose. *See Morley v. CIA*, 508 F.3d 1108, 1129 (D.C. Cir. 2007) (certain types of materials "inherently relate to law enforcement"); *cf. Abramson*, 456 U.S. at 627-28 (Congress enumerated "undesirable consequences" of disclosure of law enforcement records in the six subcategories of Exemption 7). The agency has therefore demonstrated that the threshold requirement of Exemption 7 has been met.

Further, the withheld information reflects law enforcement techniques and procedures contemplated by Exemption 7(E) because it "details investigation techniques used to assess the core national security concerns that arise in processing visa applications, such as triggers for further security investigations or checking for terrorism ineligibilities." (JA 166). For example, subsections b.(3), c.(2), d., e.(5)-(6), and i.(1)(c)(i)-(ii) of 9 FAM 302.6-2(B)(3) "identify the situations that trigger the process of checking for terrorism-related ineligibilities and reveal the techniques used during that process to determine whether an individual is ineligible to receive visas because of their involvement with terrorist activities" (JA 66); 9 FAM 302.6-2(E) "provides procedures for flagging certain ineligibilities or potential ineligibilities in a database" (JA 67); 9 FAM 302.6-3(B)(2)b.(5) "lists credible sources of evidence that may be used in recommending a finding, including sources that are not public knowledge" (JA 67); 9 FAM 40.32 N2.4.e-f provides "procedures for investigating whether an applicant is a member of a terrorist

organization" (JA 68); 9 FAM 302.14-3(B)(3)(f) provides "procedures for investigating a visa that is flagged and may need to be revoked" (JA 69); and 9 FAM 40.32, Sections N1.1.c and N2.1.c outline "interagency cooperation procedures during the process of checking for [visa] ineligibilities" (JA 68). In short, the information in the FAM specifies how the State Department "go[es] about investigating" whether or not a visa applicant is inadmissible under the INA. *Allard K. Lowenstein*, 626 F.3d at 682.

Similarly, the FAM contains other provisions that meet this Court's definition of "techniques and procedures." In particular, 9 FAM 302.6-2(B)(4)c.(4) "provides details about the conditions under which to apply a presumption of inadmissibility due to involvement in terrorist activity" (JA 67); 9 FAM 302.6-2(B)(4)d.(3)-(5) "provides information about the Palestine Liberation Organization that is used as a guideline for determining whether an applicant is associated with the organization and therefore inadmissible" (JA 67); section 302.14-7(B)(3)(1) provides "guidelines for evaluating/investigating coursework and intent to return to Iran" (JA 69); and 9 FAM 40.32, Section N2.3 provides "guidelines for identifying material support" for terrorist groups (JA 68). While several of these provisions refer to "guidelines," they use that term in a different sense than Exemption 7(E): they do not focus on "resource allocation" in making law enforcement decisions, as this Court has stated is the general meaning of "guideline" in Exemption 7(E), but instead specify how the agency is to enforce the law and therefore con-

stitute "techniques and procedures" that may be withheld even without a showing of harm to law enforcement. *Allard K. Lowenstein*, 626 F.3d at 682.

Regardless, State has attested that public release of the information "could enable terrorists and other bad actors to avoid detection or develop countermeasures to circumvent the ability of the Department to effectively use these important law enforcement techniques, thereby allowing circumvention of the law." (JA 64). Guidance given to law enforcement officials regarding which questions to pose and what information to look for would, if disclosed, enable an applicant to plan answers and thus circumvent the agency's screening process. *See, e.g.*, *Heartland Alliance Nat'l Immigrant Justice Ctr. v. DHS*, 840 F.3d 419 (7th Cir. 2016) (releasing names of organizations that USCIS categorized as Tier III terrorist organizations would allow immigration applicants to tailor testimony and circumvent detection); *Ibrahim v. Dep't of State*, 311 F. Supp. 3d 134, 143 (D.D.C. 2018) (exemption 7(E) applied to "USCIS's Refugee Application Assessment" because its disclosure "could reasonably be expected to risk circumvention of the law by enabling applicants for refugee status to plan strategic but inaccurate answers"); *Techserve Alliance v. Napolitano*, 803 F. Supp. 2d 16, 29 (D.D.C. 2011) (disclosure would reveal the selection criteria "to prevent immigration fraud," "fraud indicators, and investigative process that USCIS and other agencies use in fraud investigations," which "would potentially enable the circumvention of law"). Exemption 7(E) therefore shields the subsections of the FAM, whether they are regarded as "techniques and procedures" or "guidelines."

The district court erred in disregarding the agency's logical and plausible explanation, and in instead accepting the Institute's invitation to speculate about what appears in the FAM. Indeed, the record flatly contradicts the suggestion that portions of the FAM contain only "recitations of statutes and background" not subject to exemption 7(E). (SPA 27). The district court correctly stated that State released, in 9 FAM 302.6-2(B)(3), a list of nine examples of material support for terrorism that also appear in the INA, 8 U.S.C. § 1182(a)(3)(B)(iv)(VI), but withheld the paragraph preceding that list. However, there is no logical or factual basis to infer a "similarity between" the preceding paragraph and the statutory text simply because they appear together in a "definitions" section. (SPA 27). To the contrary, State explained that the withheld paragraph, unlike the publicly available statute, "identif[ies] the situations that trigger the process of checking for terrorism-related ineligibilities and reveal[s] the techniques used during that process." (JA 66). State also expressly stated that "[t]he information that is redacted . . . does not appear unredacted elsewhere, and is more specific and technical than information that was released." (JA 166). In short, the withheld information does more than recite statutory language—it describes techniques and procedures for determining whether the statutory text is triggered in a particular case. The Institute's unsupported conjecture about the content of the withheld information cannot override State's detailed explanation. *See Carney*, 19 F.3d at 812 (agency affidavits are entitled to a presumption of good faith).

The district court also incorrectly characterized the withheld information as "policy" rather than as techniques and criteria used to prevent violations of the law, despite State's uncontroverted descriptions. For example, the court agreed with the Institute's claim that the material constitutes "policy" that does not "describe 'proactive steps' for preventing criminal activity and maintaining security." (SPA 27-28) (quoting *Milner*, 562 U.S. at 582 (Alito, J., concurring)).[7] But

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[7] The district court stated that "[State] admits the FAM generally consists of 'policy.'" (SPA 27). But the court cited nothing to support that claim, and State made no such admission concerning anything at issue on this appeal. The district court may have been persuaded by the Institute's citation of a State Department website that says "The Foreign Affairs Manual (FAM) and associated Handbooks (FAHs) [comprise] the Department's organization structures, policies, and procedures that govern the operations of the State Department," and that "[t]he FAM (generally policy) and the FAHs (generally procedures) together convey codified information to Department staff and contractors so they can carry out their responsibilities in accordance with statutory, executive and Department mandates." (Dist. Ct. ECF 101 at 28-29, citing https://fam.state.gov/). But even if the FAM as a whole "generally" recites policy, that does not mean that the particular sections that include law enforcement techniques and procedures lose the protection of Exemption 7(E). The district court was obliged to presume that State's descriptions of the particular sections at

State's declarant could not have been clearer in explaining that the relevant FAM sections in fact describe "the proactive steps consular officers take to prevent criminals, terrorists, and other bad actors from entering the United States." (JA 166). The content of specific manual sections confirms this point. In general, the FAM provisions at issue detail specific steps outlining techniques consular officers may use to screen for terrorism-related ineligibilities and liaise with other law enforcement agencies. (JA 66-70 ("identify[ing] the situations that trigger the process of checking for terrorism-related ineligibilities and . . . the techniques used during that process to determine whether an individual is ineligible to receive visas because of their involvement with terrorist activities")). Among other things, they provide criteria for consular officers to use in looking for relevant ties to terrorist activity, identify factual situations that may trigger visa revocation, specify sources of evidence that are not public knowledge, and offer guidance to assess whether a visa applicant is associated with certain organizations. (JA 66-70 (providing "procedures for flagging certain ineligibilities or potential ineligibilities in a database"; listing "credible sources of evidence that may be used in recommending a finding, including sources that are not public knowledge"; outlining "interagency cooperation procedures during the process of checking for [visa] ineligibilities")).

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issue were accurate absent evidence to the contrary. *Carney*, 19 F.3d at 812; *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009).

Likewise, the district court incorrectly rejected State's logical and plausible assessment that releasing "guidelines for situations in which an individual may cease to be inadmissible" (JA 67) would "potentially help an individual circumvent the law" (SPA 28). The court deemed this "essentially a legal interpretation." (SPA 28). But the withheld material does more than recite the law—it provides criteria for consular officers to use in looking for relevant ties to terrorist activity, identifies factual situations that may trigger visa revocation, specifies sources of evidence that are not public knowledge, and identifies guidelines to assess whether a visa applicant is associated with certain organizations. (JA 66-70). While an agency is not required to show that the law may be circumvented if "techniques and procedures" are disclosed, *Allard K. Lowenstein*, 626 F.3d at 681, here State has demonstrated that releasing these criteria and procedures for screening visa applicants would enable individuals to skirt important security protections and undermine the efficacy of the process. (JA 68); *Heartland Alliance*, 840 F.3d at 421 (Exemption 7(E) protects information that would allow immigrant applicants to prepare for questions posed by USCIS officers); *see Ibrahim*, 311 F. Supp. 3d at 143-44 (concluding that Exemption 7(E) protects "steps that USCIS took or considered taking to evaluate [plaintiff's] application," as well as "lines of questioning," because they "highlight circumstances that would have raised national security and public safety concerns, reflect why doubts arose over [applicant's] credibility, and illustrate lines of questioning that law enforcement officials use to probe possible concerns for credibility, national security, and public

safety"); *Techserve Alliance*, 803 F. Supp. 2d at 29 (Exemption 7(E) applies to "selection criteria" "to prevent immigration fraud").

Accordingly, State logically and plausibly justified applying Exemption 7(E) to withhold portions of the FAM.

C. USCIS Correctly Withheld Training Materials for Screening Applicants Pursuant to FOIA Exemption 7(E)

Similarly, USCIS logically and plausibly explained that Exemption 7(E) applies to the materials the district court termed "TRIG Questions."

The training materials containing the so-called "TRIG Questions" are used by USCIS immigration officers during a wide variety of immigration adjudications to determine whether an individual is subject to a bar for terrorism-related inadmissibility grounds under section 212(a)(3)(B)(i)-(vi), and, if subject to the bar, whether the applicant may be eligible for an exemption from such a TRIG bar under sections 212(a)(3)(B)(ii) or 212(d)(3)(B).[8] (JA 172, 174-86; JA 361-63 (USCIS training guide outlining TRIG application to various immigration benefits)). In effect,

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[8] TRIG examinations are conducted in several USCIS immigration adjudications, including asylum, adjustment of status to lawful permanent residency, naturalization, or temporary protected status. (JA 361-63).

just as with the FAM materials withheld by State, these materials reveal USCIS's playbook for determining whether an individual seeking immigration status is a national security threat. They are thus protected "techniques and procedures."[9]

At the outset, the district court drew an erroneous distinction between "TRIG Questions" and "TRIG Exemptions." (SPA 51-53). According to the court, the former refers to "the questions and follow-ups designed to *elicit* information from applicants," and the latter refers to "the criteria USCIS uses to *evaluate* applicants' answers." (SPA 71). That distinction is unsustainable. Both categories consist of materials used to determine if an applicant may be admitted to the United States.

Generally, any individual who is a member of a "terrorist organization" or who has engaged or engages in terrorism-related activity—defined broadly by the INA—is "inadmissible" to the United States and is ineligible for most immigration benefits. (JA 361-65). Congress has created a statutory exemption provision through which the Secretaries of Homeland Security and State may exempt individuals from the TRIG grounds of inadmissibility. 8 U.S.C. § 1182(d)(3)(B); *Terrorism-Related Inadmissibility Grounds (TRIG)*,

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[9] Although the district court did not address this issue, these materials satisfy Exemption 7's threshold requirement that the material at issue be "compiled for law enforcement purposes" for the same reasons described above regarding State.

https://go.usa.gov/xsB8x (accessed February 22, 2021). The grant of such a TRIG exemption is thus an immigration benefit to the applicant. (JA 450).[10]

Determining whether such an exemption applies requires a separate line of questioning posed by USCIS immigration officers once they determine an applicant is subject to the TRIG bar. (JA 386-404). The suggested questions contained in the training material are designed to elicit information that allows an officer to determine the applicability of any TRIG bar and exemption—the two are connected in the evaluative process. There is therefore no distinction between "TRIG Questions" and "TRIG Exemptions" material to this case, other than the fact that some of the questions may be asked of individual applicants seeking admission or other immigration benefits from USCIS, which as explained below does not defeat the applicability of Exemption 7(E). The district court properly concluded that what it called "TRIG Exemptions" are protected by Exemption 7(E), but failed to apply the same logic

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[10] Multiple TRIG exemptions may be available depending on the facts of each applicant's case. There are eight "situational" TRIG exemptions (*e.g.*, the applicant provided support to the terrorist group while under duress) and twenty-six "group-based" TRIG exemptions (*e.g.*, the applicant was a member of one of the listed exempted groups at the time of the applicant's activities with the group). *See Terrorism-Related Inadmissibility Grounds Exemptions*, https://go.usa.gov/xsB8Y (accessed February 22, 2021); (JA 386-97).

to the "TRIG Questions," even though both serve the function of aiding USCIS to determine if an applicant is admissible.

Like the "TRIG Exemptions" material that the district court deemed protected, the TRIG Questions serve the vital purpose of assisting USCIS, a law enforcement agency, in screening applicants seeking admission to the United States for terrorism ties. As USCIS logically and plausibly explained, the TRIG Questions "reflect specialized methods that USCIS has refined through its decades of enforcing United States immigration laws," and reflect "calculated techniques used to screen for terrorist ties or exceptions to apply to potential terrorist ties." (JA 552). The "particular information the questions and follow-ups were designed to elicit includes information that would shed light on terrorist organizations' activities and help determine whether the applicant had any ties to such terrorist organizations and activities." (JA 552-53). Disclosing the questions would impair USCIS officers' ability to vet applicants and thus create a national security and public safety risk by allowing dangerous individuals to plan their answers to avoid detection of their unlawful activities.

For example, the USCIS Academy Training Center, TRIG Instructor Guide dated May 2017 (JA 352-447), includes training for recognizing each of the TRIG-related exemptions provided by INA section 212(a)(3)(B)(i)-(vi) and exceptions to those bars to admission. The Guide explains that its objective is to instruct immigration officers "to identify the TRIG grounds of inadmissibility and determine whether

these grounds apply when adjudicating an application for an immigration benefit," and if so, to "be able to determine if an exemption is available, and [to] be able to apply the relevant inadmissibility ground(s) and USCIS policy to adjudicate the exemption(s)." (JA 357). The Guide instructs immigration officers to first determine whether an inadmissibility ground applies as outlined in section 212, such as whether an individual "has engaged in terrorist activity," "is likely to engage after entry in terrorist activity," or is "a member of a [designated or undesignated] terrorist organization," and includes suggestions for how to determine whether such a ground applies, such as "key words to look for" to "spot[ ] Tier III terrorist organizations," and questions to pose to "determine as much as possible about the group." (JA 358-85; *see* JA 384 (including "[p]ossible material support questions to address in an interview" to determine if applicant is subject to an inadmissibility bar under Section 212(a)(3)(B)(iv)(VI))). The Guide further explains that once an immigration officer has identified a TRIG bar, the officer will examine whether the applicant is nevertheless entitled to an exception. (JA 384-406). The material includes "processing steps" and "criteria" to examine whether an applicant is entitled to an exception, such as whether the applicant conducted "military-type training under duress," provided "voluntary medical care" to terrorist actors, or participated in the "Iraqi uprisings" "against the government of Saddam Hussein." (JA 384-404). USCIS released criteria to examine whether a TRIG bar or TRIG exception applies (JA 400-01 (explaining that "[i]n general, the duress-

based exemptions all required consideration of the following issues" and listing considerations, such as the "severity and type of harm threatened")), but withheld sample questions designed to elicit answers that would illuminate whether a particular TRIG bar or TRIG exception applies (JA 401 (withholding "[a]dditional questions to consider [in the context of duress] with respect to when the applicant encountered the group")).

The release of these materials would enable applicants to tailor their answers and avoid detection. *See, e.g.*, *Heartland Alliance*, 840 F.3d at 421 (names of organizations that USCIS categorized as Tier III terrorist organizations were properly withheld pursuant to Exemption 7(E); rejecting argument that "the government w[ould] learn nothing less from its questioning of aliens if the names were publicized"); *see also Bishop v. DHS*, 45 F. Supp. 3d 380, 391 (S.D.N.Y. 2014) ("courts have acknowledged that 'Exemption 7(E) applies even when the identity of the techniques has been disclosed, but the manner and circumstances of the techniques are not generally known, or the disclosure of additional details could reduce their effectiveness'"). Other courts have withheld similar questions posed during agency investigations. *E.g.*, *Barouch v. DOJ*, 87 F. Supp. 3d 10, 30 n.13 (D.D.C. 2015) (upholding application of Exemption 7(E) to portions of a law enforcement interview related to "questioning techniques," disclosure of which would reveal "how law enforcement agents and officers question suspects and the tactics they use [and] could lead to criminals using maneuvers to circumvent the law enforcement measures" and would "permit[ ] individuals to prepare responses to counter these law enforcement strategies"

and thereby "hinder future use of these tactics" (quotation marks omitted));[11] *Rosenberg v. ICE*, 13 F. Supp. 3d 92, 113-14 (D.D.C. 2014) (upholding application of Exemption 7(E) to FBI questionnaire containing "specific questions, the rationale for a particular question, and recommendations to be followed by [agents] conducting the interrogation," as "[r]elease of the redacted questions would disclose what the FBI deems relevant to investigating" because "the redacted information includes the FBI's rationale for one particular question as well as recommendations of follow-up questions" and thus "would allow criminals to 'adjust their responses and behavior to circumvent the law' ").

The district court erred in disregarding USCIS's logical and plausible explanations. First, the district court incorrectly concluded that the TRIG Questions do not reflect specialized techniques, procedures, or guidelines. Relying on *ACLUF v. DHS*, 243 F. Supp. 3d 393 (S.D.N.Y. 2017), the district court determined that the questions were not "technical in nature." (SPA 52 (citing 243 F. Supp. 3d at 403)). But *ACLUF* involved "well-known law-enforcement arrest questions"; indeed, the agency there had "itself made available to anyone with television or internet access" the "filmed arrests and questioning," and provided copies

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[11] The district court rejected *Barouch* because in that case the plaintiffs failed to object to invocation of Exemption 7(E). (SPA 51). Regardless, the *Barouch* court expressly considered whether the government had made the required 7(E) showing and concluded that it had. 87 F. Supp. 3d at 30.

of interviews to the subjects' lawyers—in short, "the damage [had] been done, in large part on [the agency's] own initiative." 243 F. Supp. 3d at 404-05.

Here, by contrast, there is no evidence of any similar public disclosure of the TRIG Questions. *See Frank LLP v. Consumer Fin. Prot. Bureau*, 327 F. Supp. 3d 179, 184 (D.D.C. 2018) (distinguishing *ACLUF* on those grounds); *see also Schwartz v. DEA*, 692 F. App'x 73, 74 (2d Cir. 2017) (concluding that video footage of drug raid was not subject to Exemption 7(E) where agency Inspectors General issued a report of the raid that included screen shots and detailed "many, though not all, of the alleged law enforcement techniques and procedures" depicted in the video, and noting that other information "already appear[s] in other publicly available materials"). Exemption 7(E) only applies to "techniques and procedures not generally known to the public," *Doherty v. DOJ*, 775 F.2d 49, 52 & n.4 (2d Cir. 1985), and "the fact that immigration officers screen for terrorist ties is generally known to the public." (JA 552). But the record shows that these "specific questions and the actual questioning techniques are not generally known to the public." (JA 552-53).[12]

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[12] Moreover, many of the "TRIG Questions" at issue actually pertained to the TRIG exemption determination—they are questions USCIS officers are trained to ask after they determine an applicant may be subject to the TRIG bar, to determine whether the applicant may be eligible for a situational or group-based TRIG exemption from that bar. (JA 352-404); *see*

The district court appears to have disagreed based on supposition that the TRIG Questions are "susceptible to widespread dissemination," and that USCIS "submit[ted] no evidence suggesting its methods are so special that the interviewees cannot parrot them to whomever they choose." (SPA 53). But speculation that interview subjects could later recite the questions is a far cry from establishing that the details of the agency's techniques are "generally known to the public." *Doherty*, 775 F.2d at 52. USCIS's contrary explanations are well grounded: interview subjects may be asked different sets of questions, as the materials at issue are "model," "sample," or "suggested" questions for law enforcement officers (JA 552), and some questions are follow-ups that may be asked only if certain issues arise (JA 181-82, 383-404)—undermining the district court's conjecture that the questions could become "generally known to the public" through "parroting." And that conjecture rests further on the idea, contrary to common experience, that the subjects of questioning could accurately remember the wording of specific questions they were asked or could fully appreciate the reasons each question was asked. These facts undermine any conjecture that the agency's techniques have become generally known because interviewees can relay individual questions. *Cf. Inner City Press/Community on the Move v. Board of Governors*

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supra n.10. The court glossed over the interrelationship of the various aspects of the TRIG examination, each of which requires careful analysis by USCIS immigration officers.

of Federal Reserve Sys., 463 F.3d 239, 245 (2d Cir. 2006) ("[A] party who asserts that material is publicly available carries the burden of production on that issue." (quotation marks and emphasis omitted)). Here, there is no evidence of any instance in which excerpts of TRIG manuals used to train USCIS officers on how to screen applicants for terrorism-related inadmissibility grounds, or the questions and follow-up questions that USCIS suggests its officers ask, have been publicly disclosed.

Even if there had been some repetition of the questions by interviewees, Exemption 7(E) still applies. "[E]ven for well-known techniques or procedures, Exemption 7(E) protects information that would reveal facts about such techniques or their usefulness that are not generally known to the public, as well as other information when disclosure could reduce the effectiveness of such techniques." *Broward Bulldog, Inc. v. DOJ*, 939 F.3d 1164, 1191 (11th Cir. 2019); *see ACLU of Michigan v. FBI*, 734 F.3d 460, 466 (6th Cir. 2013) ("intelligence and law-enforcement agencies are awash in a sea of data, much of it public," but Exemption 7(A) protects "how the FBI uses" that data, as disclosure would allow targets "to avoid the FBI investigations"); *cf. DOJ v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 780 (1989) (noting "interest in maintaining the practical obscurity" of criminal rap sheet information requested under FOIA, even though information about individual criminal convictions was publicly available in other forms). It remains the case that disclosure of the USCIS materials here "could reasonably be expected to risk circumvention of the law by enabling applicants . . . to plan strategic but inaccurate

answers to questions." *Ibrahim*, 311 F. Supp. 3d at 143 (applying 7(E) to "lines of questioning that law enforcement officials use to probe possible concerns for . . . national security, and public safety").

For all those reasons, the material withheld by USCIS and State is protected from disclosure by Exemption 7(E).

POINT II

USCIS and ICE Correctly Withheld Deliberative Process Material Under FOIA Exemption 5

The three documents that USCIS and ICE withheld as privileged are properly subject to Exemption 5 and the deliberative process privilege. Contrary to the district court's conclusion, these records do not constitute non-exempt "working law" under this Court's precedent.

A. Exemption 5 and the Deliberative Process Privilege

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 "incorporate[s] into the FOIA all the normal civil discovery privileges," including the deliberative process privilege. *Hopkins v. HUD*, 929 F.2d 81, 84 (2d Cir. 1991).

The deliberative process privilege "protects the decisionmaking processes of the executive branch in or-

der to safeguard the quality and integrity of governmental decisions," *id.*, and the "process by which governmental decisions and policies are formulated," *Tigue v. DOJ*, 312 F.3d 70, 76 (2d Cir. 2002), by "preserving and encouraging candid discussion between officials," *La Raza*, 411 F.3d at 356; *accord NRDC v. EPA*, 954 F.3d 150, 155 (2d Cir. 2020) ("privilege is designed 'to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government'" (quoting *Dep't of the Interior v. Klamath Water Users*, 532 U.S. 1, 9 (2001))).

An agency record must satisfy two criteria to qualify for the deliberative process privilege: it "must be both 'predecisional' and 'deliberative.'" *Grand Central Partnership v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999). A document is "predecisional" when it is "prepared in order to assist an agency decisionmaker in arriving at his decision," *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975). The government, however, need not "identify a specific decision" made by the agency to establish a record's predecisional nature. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 n.18 (1975). "A document is 'deliberative' when it is actually related to the process by which policies are formulated," as when "it reflects the personal opinions of the writer rather than the policy of the agency." *Grand Central*, 166 F.3d at 482-83 (quotation marks and alterations omitted). Predecisional, deliberative documents include "documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental

decisions and policies are formulated.'" *Hopkins*, 929 F.2d at 84-85 (quoting *Sears*, 421 U.S. at 150).

While Exemption 5 protects "all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be," it "calls for disclosure of all opinions and interpretations which embody the agency's effective law and policy." *Sears*, 421 U.S. at 153 (quotation marks omitted). As this Court recently explained, "Exemption 5 ceases to apply when an intra-agency document comes to embody 'working law' that binds the agency and the public." *New York Times v. DOJ*, 939 F.3d. 479, 490 (2d Cir. 2019). In other words, a working law document "has operative effect—i.e., binding rather than persuasive power," making it "inherently post-decisional" and thus not privileged. *ACLU v. NSA*, 925 F.3d 576, 594 (2d Cir. 2019); *accord id.* at 599 (a document "embodies an agency's 'working law'" "when it operates as functionally *binding* authority on agency decision-makers").

This Court has identified several "guiding principles" to inform the question whether a document is functionally binding under the working law doctrine, such as "whether agency officials feel free to disregard the document's instructions; whether an agency superior distributes the document to subordinates (rather than vice versa); whether agency superiors direct their subordinates to follow the document's instructions; whether the document is applied in the agency's dealings with the public; and whether failure to follow a document's instructions provides cause for professional sanction." *Id.* at 595 (footnotes omitted). These

factors "provide indications as to whether a document has become binding on agency officials and therefore represents an agency's 'effective law and policy.'" *Id.* (quoting *Sears*, 421 U.S. at 153).

B. USCIS's Acting Director Memo and Senior Policy Council Paper Are Privileged

USCIS properly withheld the Acting Director Memo and Senior Policy Council Paper under the deliberative process privilege because both documents provide predecisional advice as part of the agency's policy-forming process.

The Acting Director Memo contains a "Briefing Memo for the Acting Director: Recommendations to Eliminate the USCIS Terrorism-Related Inadmissibility Grounds (TRIG)," and a draft of a proposed new USCIS policy entitled "Policy Memorandum: Revised Guidance for Processing Cases Involving Terrorism-Related Inadmissibility Grounds and Elimination of the Hold Policy for Such Cases." (JA 175). This material consists of "discussions and recommendations from USCIS staff to senior agency management" and an accompanying proposal to revise agency policy, including a "review of relevant considerations for determining whether [current] cases should continue to be held or released for adjudication." (JA 551). USCIS attested that the recommendations "do not reflect positions that are or became binding on the agency." (JA 551).

Similarly, the Senior Policy Council Paper is an "internal agency briefing paper" which was "prepared by agency personnel for senior agency management."

(JA 551). It discusses "specific TRIG exemptions and how they could be interpreted and applied to specific types of applicants," includes "various scenarios and presented options for action by senior management," and concludes with "a specific course of action recommended by the drafters." (JA 175-76). USCIS explained that the document "do[es] not reflect positions that bound the agency, but rather, contains legal analysis and a recommendation regarding what the agency policy should be." (JA 551).

The district court nonetheless ordered production of any "current immigration policies" in these documents based on a misinterpretation of this Court's definition of "working law." The court concluded that if "the records contain explanations of USCIS's current policies and approaches to immigration decisions, the records contain 'working law.'" (SPA 45 (citing *Brennan Center for Justice v. DOJ*, 697 F.3d 184, 202 (2d Cir. 2012)). But the mere inclusion in a predecisional document of background information about existing agency policy, to inform senior officials' ongoing deliberations, does not remove the protection of Exemption 5. Instead, as this Court has made clear and recently reaffirmed, "a document embodies an agency's [non-exempt] 'working law' when the document binds agency officials or members of the public." *ACLU v. NSA*, 925 F.3d at 594; *see New York Times*, 939 F.3d at 493 (asking whether the document is "*binding*, both on the agency and on the public").

Here, the district court failed to analyze whether the documents set forth positions that agency officials are bound to follow—but the record definitively shows

that they do not. Indeed, USCIS specifically attested that neither document reflects positions that are or became binding on the agency. (JA 551). Both documents were prepared for senior agency management, and there is no indication that any "agency superior distribute[d] the document[s] to subordinates (rather than vice versa)" or "direct[ed] their subordinates to follow the document[s'] instructions." *ACLU v. NSA*, 925 F.3d at 595. Both documents contain specific policy recommendations and proposals—the Acting Director Memo contains a draft proposed policy and the Senior Policy Council Paper concludes with a specific recommendation regarding TRIG exemptions and INA section 318—with no indication that such recommendations were binding on the agency. *New York Times*, 939 F.3d at 493. Nor is there any evidence that any "agency superiors direct[ed] their subordinates to follow the document[s'] instructions," that the documents are "applied in the agency's dealings with the public," or that a "failure to follow [them] provides cause for professional sanction." *ACLU v. NSA*, 925 F.3d at 595. In the end, there are no indicia that USCIS "regard[s] [the requested documents] in practice as embodying the agency's 'working law' on an issue that binds the public." *New York Times*, 939 F.3d at 490.

Accordingly, USCIS logically and plausibly justified applying Exemption 5 to the Acting Director Memo and the Senior Policy Council Paper, and the district court erred in concluding that the documents include disclosable working law.

C. ICE's Foreign Policy Memo Is Privileged

ICE's Foreign Policy Memo is quintessentially privileged. Notably, it is a draft memorandum, not a final document. (JA 248-49, 563). Drafts are inherently predecisional and deliberative—by definition, drafts do not constitute a final agency determination but rather reflect an ongoing deliberation as to the contents of the document as well as, in many cases, the government policy itself. *See ACLU v. DOJ*, 844 F.3d 126, 133 (2d Cir. 2016) (concluding that two documents are drafts "and for that reason predecisional"); *National Security Archive v. CIA*, 752 F.3d 460, 463 (D.C. Cir. 2014) (draft deliberative materials that were never finalized were "still pre-decisional and deliberative"); *National Council of La Raza v. DOJ*, 339 F. Supp. 2d 572, 583 (S.D.N.Y. 2004) ("Drafts and comments on documents are quintessentially predecisional and deliberative."), *aff'd*, 411 F.3d 350 (2d Cir. 2005). And as the agency explained, the Memo is "not organized like a typical ICE memoranda and is not signed by or formally addressed to ICE leadership"—instead, it constitutes an "employee's opinions" regarding the use of a particular provision of the INA, and "did not bind the agency." (JA 563). It was thus covered by the deliberative process privilege.

In addition, the Memo is deliberative because it contains "notes supporting the employee's opinions" regarding "whether Section 212(a)(3)(C) can be used by the Secretary of State as grounds for inadmissibility," and "factors for consideration." (JA 248-49, 563). These non-binding recommendations constitute "the

personal opinions of [the] writer" rather than the policy of the agency. *Grand Central*, 166 F.3d at 482; *accord Providence Journal Co. v. U.S. Dep't of Army*, 981 F.2d 552, 559 (1st Cir. 1992) ("expressions of personal opinion generally render a document 'deliberative'") (cited in *Grand Central*); *see Hopkins*, 929 F.2d at 84 (the deliberative process privilege applies to "advisory opinions, recommendations and deliberations" (quotation marks omitted)). Absent protection for such internal proposals, agency employees would not "feel free to provide candid analysis," thus contravening the purpose of the privilege. *National Security Archive*, 752 F.3d at 463. ICE logically and plausibly justified the application of Exemption 5 to the Foreign Policy Memo.

The district court was wrong to conclude otherwise. The court did not meaningfully address the factual record discussed above before stating its conclusion that the Memo neither "reflects the personal opinions of the writer *rather than* the policy of the agency" nor "contain[s] the 'personal opinions' or deliberative material the law seeks to keep out of the public eye." (SPA 38 (quoting *Brennan Center*, 697 F.3d at 202, and *Sears*, 421 U.S. at 152-53, 161)). Nor is there any ground for the district court's suggestion that the "portions of the [Memo] that reflect current immigration policy" are not covered by the deliberative process privilege. (SPA 39-40). That description of current policy appears in a predecisional memorandum as background to inform the relevant deliberation. The court was mistaken in its apparent belief that the working law doctrine applies, as there is no evidence that "the document binds agency officials or members of the public."

ACLU v. NSA, 925 F.3d at 594; *accord New York Times v. DOJ*, 939 F.3d. at 490. Rather, ICE expressly indicated that the document is not binding and highlighted the features of the document underscoring that the agency does not functionally treat the document as binding. (JA 563); *see ACLU v. NSA*, 925 F.3d at 595. Accordingly, the district court should not have ordered ICE to release any portion of the Foreign Policy Memo.

CONCLUSION

The district court's orders should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 11,310 words in this brief.

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