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December 2, 2021

Via ECF

Catherine O'Hagan Wolfe
Clerk of Court
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: ***Knight First Amendment Institute at Columbia University v. U.S. Citizenship and Immigration Services, et al.*, No. 20-3837**

Plaintiff–Appellee's Notice of Supplemental Authority

Dear Ms. Wolfe,

Pursuant to Federal Rule of Appellate Procedure 28(j), Plaintiff-Appellee writes to apprise the Court of *Natural Resources Defense Council v. United States Environmental Protection Agency* (*"NRDC"*), No. 20-422 (2d Cir. Nov. 29, 2021), attached as Exhibit A. In *NRDC*, this Court held that when invoking the deliberative process privilege, incorporated into FOIA Exemption Five, 5 U.S.C. § 552(b)(5), an agency need not connect the record to a specific agency *decision*; instead, it can also connect the record to a specific decision-making process. Ex. A at *25. The panel therefore vacated an order requiring an agency to produce records and remanded so the agency could provide additional explanation in light of the clarified standard. Id. at *27.

In this case, Plaintiff-Appellee argued for affirmance of the district court's holding that the Foreign Policy Provision Memo did not fall within the deliberative process privilege, in part because it was not pre-decisional. See Br. of Plaintiff-Appellee at 51–54. This argument relied on *Brennan Center for Justice v. DOJ*, 697 F.3d 184 (2d Cir. 2012), and *Tigue v. DOJ*, 312 F.3d 70 (2d Cir. 2002), for the proposition that the privilege applies only to records relating to an identifiable agency

decision. *NRDC* clarified that these cases should be read as allowing agencies to identify a specific decision as "a possible, but not the exclusive, way" for an agency to meet its burden. Ex. A at *27 n.16.

Nevertheless, Defendants have identified neither a specific decision nor a specific decision-making process, as *NRDC* requires. See JA 248–49; JA 563. Therefore, notwithstanding *NRDC*, the deliberative process privilege does not apply, and this Court should affirm the district court's order.

Respectfully submitted,

/s/ Catherine Crump

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