No. 15-5051
ORAL ARGUMENT NOT YET SCHEDULED

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

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,

Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS; AND UNITED STATES DEPARTMENT OF JUSTICE,

Appellees.

On Appeal From the United States District Court
for the District of Columbia (No. 14-269 (CKK))

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL, AND ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF APPELLANT AND URGING REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

LIST OF PARTIES

Appellant is the National Association of Criminal Defense Lawyers. Appellees are the Executive Office for United States Attorneys and the United States Department of Justice. *Amici Curiae* submitting this brief are the American Civil Liberties Union, the American Civil Liberties Union of the Nation's Capital, and the Electronic Frontier Foundation. Other *amici curiae* participating include the Constitution Project and the Innocence Project.

RULING UNDER REVIEW

The district court ruling under appeal is the Honorable Colleen Kollar-Kotelly's December 18, 2014 order granting the appellees' motion for summary judgment.

RELATED CASES

Amici are not aware of any pending related cases.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel for amici states that the American Civil Liberties Union, the American Civil Liberties Union of the Nation's Capital, and the Electronic Frontier Foundation are non-profit corporations, have no parent corporations, and no publicly held company has a 10 percent or greater ownership interest in any group.

STATEMENT REGARDING CONSENT TO FILE

All parties have consented to the filing of this *amici curiae* brief by the American Civil Liberties Union, American Civil Liberties Union of the Nation's Capital, and the Electronic Frontier Foundation.

CORPORATE DISCLOSURE STATEMENT

Under Fed. R. App. P. 26.1, *amici* state that they are not publicly-held corporations, they do not have parent corporations, and they do not issue stock.

/s/ John D. Cline
John D. Cline
Counsel for Amici Curiae

Dated: July 22, 2015

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The American Civil Liberties Union of the Nation's Capital is the Washington, D.C. affiliate of the ACLU. Both organizations have appeared before the federal courts in many cases involving the Freedom of Information Act, including cases where the Department of Justice has refused to disclose controlling interpretations of the government's legal authority or obligations. *See, e.g.*, *ACLU v. DOJ*, 655 F.3d 1 (D.C. Cir. 2011) (seeking Department of Justice policies concerning the use of warrantless location tracking in criminal investigations); *New York Times Co. v. DOJ*, No. 14-4432-cv (2d Cir.) (seeking Office of Legal Counsel memoranda concerning targeted killing program); *ACLU v. DOJ*, No. 13-cv-7347 (S.D.N.Y.) (seeking Department of Justice policies concerning the provision of notice to criminal defendants). Because of their longstanding commitment to government transparency and accountability, *amici* have a significant interest in how the Court interprets FOIA's disclosure requirements in this case.

The Electronic Frontier Foundation is a not-for-profit membership organization with offices in San Francisco, California and Washington, D.C. EFF

works to inform policymakers and the general public about civil liberties and privacy issues related to technology, and to act as a defender of those rights and liberties. In support of its mission, EFF frequently files Freedom of Information Act requests to access and make available to the public government documents that reflect on, or relate to, the government's use of technology and the legal rationale behind those uses. EFF has sought, and has litigated cases, involving the withholding of final, authoritative interpretations of law issued by the Department of Justice and withheld under FOIA's Exemption 5.

Amici submit this brief to highlight the district court's deviation from the strong policy of disclosure that FOIA embodies, particularly with respect to an agency's "working law." This brief provides a review of the proper application of FOIA's Exemption 5 to the document at issue in this case and, based on that analysis, it underscores the broad impact on the public's access to crucial information about government conduct that the district court's decision would have if permitted to stand.[1]

[1] Under Fed. R. App. P. 29(a), *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution toward its preparation or submission.

SUMMARY OF ARGUMENT

1. FOIA creates a strong presumption favoring disclosure of government documents. In keeping with this presumption, the exemptions from disclosure must be narrowly construed. These core FOIA principles--the presumption of disclosure and the narrow construction of exemptions, including Exemption 5--guide this Court's analysis of the government's effort to withhold the Blue Book from the public.

2. FOIA expressly mandates disclosure of an agency's "working law"--"binding agency opinions and interpretations that the agency actually applies in cases before it." *Electronic Frontier Foundation v. DOJ*, 739 F.3d 1, 7 (D.C. Cir.) (quotations omitted), *cert. denied*, 135 S. Ct. 356 (2014); *see* 5 U.S.C. § 552(a)(1)(B)-(C) (mandating disclosure of "rules of procedure" and "statements of general policy or interpretations of general applicability"). The "working law" doctrine prevents an agency from "develop[ing] a body of secret law, used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege because it is not designated as 'formal,' 'binding,' or 'final.'" *Electronic Frontier Foundation*, 739 F.3d at 7 (quotations omitted).

3. The Blue Book constitutes classic "working law." As DOJ told Congress, the Blue Book "comprehensively covers the law, policy, and practice of prosecutors' disclosure obligations." JA 60, 67. DOJ uses the Blue Book "in the

discharge of its regulatory duties"--the prosecution of alleged wrongdoers--and in "its dealings with the public"--criminal defendants and their counsel. The Blue Book constitutes binding DOJ policy that DOJ prosecutors "actually appl[y] in cases before [them]." *Electronic Frontier Foundation*, 739 F.3d at 7 (quotations omitted). As "working law," the Blue Book must be disclosed under FOIA.

4. Even if the Blue Book were not working law, the government could not withhold this official DOJ manual under FOIA because it is not attorney work product. DOJ did not create the Blue Book in anticipation of litigation concerning any specific claim, nor was it created by DOJ lawyers to assist the agency in defending against possible challenges to government programs or policies.

5. If permitted to stand, the district court's sweeping expansion of the work-product doctrine will not merely block disclosure of the government's criminal discovery policy, as important as that is; it threatens also to block disclosure of other policy documents prepared by lawyers, including (for example) opinions prepared by DOJ's Office of Legal Counsel and controlling legal interpretations that affect the privacy rights and other constitutionally protected interests of Americans. Disclosure of such documents fulfills FOIA's purpose of "ensur[ing] an informed citizenry, vital to the functioning of a democratic society." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

ARGUMENT

I. FOIA EMBODIES A PRESUMPTION OF DISCLOSURE AND REQUIRES NARROW CONSTRUCTION OF ITS EXEMPTIONS.

FOIA reflects "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360 (1976) (internal quotations and citation omitted); *see, e.g., Public Citizen, Inc. v. OMB*, 598 F.3d 865, 869 (D.C. Cir. 2009) (same). The statute's "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S. at 361. Indeed, FOIA "places emphasis on the fullest responsible disclosure," *id.*at 362 (internal quotation marks and citation omitted), and "[w]here there is a balance to be struck, Congress and the courts have stacked the scales in favor of disclosure and against exemption." *Mead Data Central, Inc. v. Dep't of the Air Force*, 566 F.2d 242, 259 (D.C. Cir. 1977).

Consistent with its purpose of "ensur[ing] an informed citizenry, vital to the functioning of a democratic society," *Robbins Tire & Rubber Co.*, 437 U.S. at 242, FOIA embodies a presumption that government documents should be available to the public, not hidden from scrutiny. FOIA's exemptions are narrowly construed, and courts must be vigilant about ensuring that the government does not conceal documents just because lawyers authored them. *See, e.g., Public Citizen*, 598 F.3d

at 869 (FOIA's exemptions "are construed narrowly in keeping with [the statute's] presumption in favor of disclosure").

These core FOIA principles--the strong presumption of disclosure and the narrow construction of exemptions, including Exemption 5--guide this Court's analysis of the government's effort to withhold the Blue Book from the public.

II. FOIA REQUIRES DISCLOSURE OF AN AGENCY'S "WORKING LAW" AND PROHIBITS SECRET AGENCY LAW.

FOIA prohibits the use of Exemption 5 to keep secret an agency's "working law"--"binding agency opinions and interpretations that the agency actually applies in cases before it." *Electronic Frontier Foundation*, 739 F.3d at 7 (quotations omitted); *see, e.g. Tax Analysts v. IRS*, 117 F.3d 607, 609, 618 (D.C. Cir. 1997) (rejecting Exemption 5 deliberative process claim for advice memoranda from the IRS Office of Chief Counsel to field personnel concerning specific taxpayers); *Schlefer v. United States*, 702 F.2d 233, 244 (D.C. Cir. 1983) (rejecting Exemption 5 deliberative process claim for opinions of the Chief Counsel of the Maritime Administration interpreting statutes the agency administers). The "working law" doctrine prevents an agency from "develop[ing] a body of secret law, used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege because it is not designated as 'formal,' 'binding,' or 'final.'" *Electronic Frontier Foundation*, 739 F.3d at 7 (quotations omitted).

Congress rooted the requirement that an agency disclose its "working law" in the language of FOIA itself. FOIA's affirmative disclosure provisions require release to the public of "'final opinions,' 'statements of policy and interpretations which have been adopted by the agency,' and 'instructions to staff that affect a member of the public.'" *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975) (quoting 5 U.S.C. § 552(a)(2)). That statutory language "represents a strong congressional aversion to secret agency law, and represents an affirmative congressional purpose to require disclosure of documents which have the 'force and effect of law.'" *Id*. (quoting H. Rep. 1497 at 7, *reprinted in* 1966 U.S. Code Cong. & Ad. News 2424); *see also, e.g., Jordan v. DOJ*, 591 F.2d 753, 781 (D.C. Cir. 1978) (Bazelon, J., concurring) ("One of the principal purposes of the Freedom of Information Act is to eliminate secret law.").

DOJ seeks here to thwart that "congressional purpose." As it told Congress, the Blue Book "comprehensively covers the law, policy, and practice of prosecutors' disclosure obligations." JA 60, 67. DOJ uses the Blue Book "in the discharge of its regulatory duties"--the prosecution of alleged wrongdoers--and in "its dealings with the public"--criminal defendants and their counsel. *Electronic Frontier Foundation*, 739 F.3d at 7 (quotations omitted). Indeed, DOJ has pointed to the Blue Book as a direct substitute for congressional legislation concerning its criminal discovery obligations. JA 57-72. Regardless of how DOJ describes the

Blue Book for purposes of this litigation, it constitutes binding DOJ policy that DOJ prosecutors "actually appl[y] in cases before [them]." *Electronic Frontier Foundation*, 739 F.3d at 7 (quotations omitted). The Blue Book is classic "working law" and must be disclosed. *See, e.g., Public Citizen*, 598 F.3d at 875 ("Documents reflecting OMB's formal or informal policy on how it carries out its responsibilities fit comfortably within the working law framework.").

The working law doctrine requires disclosure under FOIA even where documents might otherwise have been privileged. Here, DOJ points to Exemption 5 as a basis for withholding the Blue Book in full. But the Supreme Court has made clear that when legal analysis and policy conclusions become an agency's working law, they lose any privileged status they might have had. *Sears, Roebuck*, 421 U.S. at 153 ("Exemption 5, properly construed, calls for 'disclosure of *all* opinions and interpretations which embody the agency's effective law and policy.'") (emphasis added; internal quotation marks omitted); *see also Brennan Center for Justice v. DOJ*, 697 F.3d 184, 194-95 (2d Cir. 2012) ("[W]hen what would otherwise be an exempt memorandum becomes non-exempt because of its status as 'working law' . . . for all practical purposes it falls outside of Exemption 5."). Thus, even if a document was privileged at the time it was created, subsequent reliance on it as agency law or policy pierces any privilege and requires disclosure under FOIA. *See id*. at 199-200 & n.12.

Because the Blue Book constitutes "working law," FOIA compels its disclosure.

III. THE BLUE BOOK IS NOT ATTORNEY WORK-PRODUCT.

Even if the Blue Book were not working law, its withholding would not be justified because the manual does not constitute attorney work product.

A document cannot be protected as attorney work product unless it is prepared "in anticipation of litigation." *Jordan*, 591 F.2d at 775. Although DOJ's primary function is to enforce federal law by prosecuting suspected wrongdoers or engaging in other forms of litigation, that does not mean that all of the documents its attorneys generate can be broadly characterized as "in anticipation of litigation." The work-product doctrine is not so expansive in scope. This Court has cautioned that when *prosecutors* lay claim to the privilege, that claim must be scrutinized especially carefully to ensure that FOIA's disclosure policy is not improperly evaded: "We are mindful of the fact that 'the prospect of future litigation touches virtually any object of' a prosecutor's attention, and that the work-product exemption, read over-broadly, could preclude almost all disclosure from an agency with substantial responsibilities for law enforcement." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1203 (D.C. Cir. 1991) (quoting *Senate of Puerto Rico v. DOJ*, 823 F.2d 574, 587 (D.C. Cir. 1987)). As *SafeCard* makes clear, the Court must

scrutinize DOJ's work-product claims carefully to avoid eviscerating FOIA's presumption of disclosure with respect to that agency.

This Court recognizes two grounds on which the government may withhold documents as work product under Exemption 5. First, when government lawyers act as investigators or prosecutors of potentially criminal activities, the documents they draft may be deemed work product only if they relate to a specific claim--pending or anticipated--that has arisen. Second, documents created by government lawyers may qualify as work product under Exemption 5 when those lawyers act as counsel to assist their agencies in defending against possible challenges to government programs or policies. As discussed below, the Blue Book does not constitute work product under either standard.

A. The Government Must Demonstrate a "Specific Claim" When Its Attorneys Act as Prosecutors.

When government attorneys act as prosecutors or investigators of wrongdoing, the government can satisfy the "in anticipation of litigation" requirement only by showing that the documents in question are tethered to an existing or anticipated claim that has arisen. This "specific-claim" test has long been applied by this Court. In *Jordan*, for instance, the Court held that a manual containing "guidelines and criteria" governing how federal prosecutors should exercise their discretion in deciding which cases and charges to file was not work

product. 591 F.2d at 757. The Court explained that the manual was completely unconnected to any specific litigation and therefore was not prepared in anticipation of litigation in the way that the work-product privilege requires: "The guidelines and instructions set forth in these documents do not relate to the conduct of either on-going or prospective trials; they do not include factual information, mental impressions, conclusions, opinions, legal theories or legal strategies *relevant to any on-going or prospective trial*." *Id.* at 775-76 (emphasis added). Public release of the manual therefore "could have no conceivable effect" on any pending or anticipated case. *Id.*

Similarly, the Court has held that legal memoranda drafted to advise IRS field auditors how to apply IRS regulations in specific factual contexts were protected only to the extent "some articulable claim, likely to lead to litigation [has] arisen." *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 865 (D.C. Cir. 1980). Thus, if the memos were tethered to "a specific charge or allegation . . . under investigation," they were protected from disclosure. But if they were drafted merely in response to auditors' questions, where no specific claim had taken shape, they were not protected. *Id.* Likewise, in *Safecard*, the Court held that documents created during the course of active investigations into possible wrongdoing that target specific individuals and specific violations fall within the work product doctrine, because an investigation of such a nature "is strong circumstantial

evidence that the agency lawyer prepared the document with future litigation in mind." 926 F.2d at 1202 (internal quotation omitted).

The second way the government can satisfy Exemption 5 is by showing that a document was drafted by a government attorney to advise her agency about the lawfulness of a particular program or policy and how to defend against possible attacks. In *Delaney, Migdail & Young v. IRS*, 826 F.2d 124 (D.C. Cir. 1987), for example, the IRS adopted a program of statistically sampling certain large taxpayer accounts. IRS lawyers drafted two memoranda assessing the program's legality, in which they "advise[d] the agency of the types of legal challenges likely to be mounted against [the] program, potential defenses available to the agency, [and] the likely outcome." *Id.* at 127. This Court acknowledged that no specific claim against the program had emerged, but it held that this was not fatal to the government's right to withhold the documents under Exemption 5. Rather, the Court reasoned that the advisory role the government lawyers had played in assessing the legal viability of the program qualified their memoranda as work product. Five years later in *Schiller v. NLRB*, 964 F.2d 1205 (D.C. Cir. 1992), the Court followed *Delaney*, holding that documents created by lawyers for the National Labor Relations Board were subject to Exemption 5 because they consisted of advice for defending against attorney-fee claims brought by prevailing

private parties against the NLRB under the Equal Access to Justice Act. *See id*. at 1208.

In *In re Sealed Case*, 146 F.3d 881, 885-86 (D.C. Cir. 1998), this Court emphasized that the rule applied in *Delaney* and *Schiller* operates to ensure that the ability of attorneys to give *pre-claim* legal advice to their clients--i.e., advice on the lawfulness of a particular course of action *before* a pending or anticipated claim becomes apparent--is not chilled. There, a grand jury subpoenaed materials drafted by a lawyer who advised the Republican National Committee about its vulnerability to litigation in connection with an unusual loan transaction. *Id.* at 882-83, 886. This Court reversed the district court's decision that the documents were not work-product, and remanded for *in camera* review. *Id.* at 885, 887-88. The work-product doctrine might well apply, reasoned the Court, because the RNC's lawyer "rendered legal advice to protect the client from future litigation about a particular transaction, even though neither the [Federal Election Commission nor the Democratic National Committee] had made any specific claim." *Id.* at 885. Maintaining the confidentiality of such pre-claim legal advice is important because it is often at that early stage that "lawyers are best equipped either to help clients avoid litigation or to strengthen available defenses should litigation occur." *Id.* at 886.

In re Sealed Case reconciled the surface inconsistency between *Delaney* and *Schiller* on the one hand and the earlier line of cases applying the specific-claim test, holding that the test controls where "government lawyers . . . acted as prosecutors or investigators of suspected wrongdoers." 146 F.3d at 885. In *Delaney* and *Schiller*, by contrast, the attorneys were "protecting their agency clients from the possibility of future litigation." *Id*. Thus, a different work-product analysis applies depending on whether the government lawyer is acting as prosecutor or as legal defense counsel. As described below, the government has not carried its burden of establishing the protected nature of the Blue Book under this Court's precedent, and the district court erred in concluding otherwise.

B. The District Court Erred in Its Work Product Analysis.

The district court declined to apply the government as prosecutor rule and reasoned that the Blue Book constitutes work product because it consists, in part, of "guidelines and strategies" for prosecutors when complying with their discovery obligations and litigating discovery motions. JA 118. The court erred in this conclusion.

First, the district court should have applied the specific-claim test. That rule governs when government lawyers act "as prosecutors or investigators of suspected wrongdoers"--exactly the role occupied by the DOJ lawyers who compiled the Blue Book and to whom it applies. *In re Sealed Case*, 146 F.3d at 885; *see also*

SafeCard, 926 F.2d at 1202 (applying specific claim rule where SEC lawyers investigated potentially unlawful stock trades). The district court erred in finding that the documents were instead "prepared in anticipation of foreseeable litigation *against the agency*." JA 116 (emphasis added). The Blue Book is a training manual that instructs federal prosecutors about their disclosure obligations when prosecuting criminal cases. JA 60, 67. While DOJ employs lawyers who act in a variety of capacities on behalf of the federal government, a manual discussing *prosecutors'* disclosure obligations pertains to government lawyers who are acting as "prosecutors," not defending suits against the government.

Under the specific-claim test, the Blue Book clearly does not constitute work product. It was not drafted with an eye toward any specific claim, case, or investigation, pending or anticipated. Rather, it is a *generic* manual that provides instruction to line prosecutors on "the law, policy, and practice of prosecutors' disclosure obligations." JA 60, 67. The attorneys who prepared the Blue Book were not engaged in the core activities that the work-product doctrine is meant to safeguard, like "assembling information, sifting through facts, preparing legal theories, or planning strategy" as part of litigating any case. There is thus no risk that the Blue Book's disclosure will reveal the "mental impressions, conclusions, opinions, legal theories or legal strategies [of any prosecutor] relevant to any ongoing or prospective trial." *Jordan*, 591 F.2d at 775-76.

Jordan controls here. Accepting the government's description of the Blue Book as accurate, the document consists not only of policies and neutral analyses of the law, but also of recommendations and strategies concerning how prosecutors should exercise their discretion in discovery matters. *See* Gerson Decl., ¶ 20 (asserting that the Blue Book offers advice "on how to handle scenarios and problems so that investigations and prosecutions are not compromised by discovery problems and litigation"). The manual at issue in *Jordan* likewise advised prosecutors on the exercise of their discretion, there on the analogous question of whether to file charges and if so, which ones. As the *Jordan* court explained, wholesale advice addressing how prosecutors should exercise their discretion is too far removed from any ongoing or prospective case to reveal the thought processes of any prosecutor preparing for trial. *See also Judicial Watch v. DHS*, 926 F. Supp. 2d 121, 142-43 (D.D.C. 2013) (declining to give Exemption 5 protection to documents containing instructions, advice, and direction to ICE attorneys about how to exercise their prosecutorial discretion in certain categories of cases). That is true whether the wholesale advice concerns a prosecutor's discretionary determinations in the discovery context (as here), or her discretionary determinations as to charging decisions (as in *Jordan*).

Second, the district court erred in applying the government as legal defense counsel rule because the prosecutors who drafted the Blue Book did not do so as

part of any effort to *defend* the DOJ in litigation filed *against* the DOJ. Rather, they drafted the Blue Book to further DOJ's mission in *initiating* criminal proceedings against members of the public--and to ensure criminal defendants receive the discovery that the Constitution and other laws guarantee them. This Court has applied the legal defense counsel rule only in the context of attorney advice targeted to protecting government interests from lawsuits filed to challenge those interests. It has never held that the rule applies when the government goes on the offense, as in a criminal prosecution. The district court's ruling thus expands the legal-advisor rule contrary to FOIA's overarching policy of disclosure.

Third, even if the government as legal defense counsel rule applied, the district court still erred in finding the Blue Book to be protected work product. Disclosure will not arm defendants and their counsel with any litigation strategy of the kind the work-product doctrine was intended to protect. To be sure, opposing counsel could obtain a tactical advantage through disclosure of a prosecutor's strategic analysis of how disclosure obligations apply to the unique facts and circumstances in a particular proceeding. But the Blue Book contains no such analysis. DOJ promulgated the Blue Book to ensure the integrity of criminal prosecutions following the collapse of the prosecution of Senator Ted Stevens under the weight of egregious *Brady* violations. Disclosure of the government's statement of its discovery obligations under the Constitution and the Federal Rules

of Criminal Procedure simply does not afford opposing counsel an unfair litigation advantage. Indeed, the "integrity of the adversary trial process," *Jordan,* 591 F.2d at 775, is enhanced, not harmed, when prosecutors, defense counsel, and the public alike share a common understanding of the government's discovery obligations.

For these reasons, the district court erred in holding that the Blue Book constitutes attorney work product.

IV. PERMITTING DOJ TO WITHHOLD THE BLUE BOOK WOULD INSULATE CONTROLLING LEGAL INTERPRETATIONS FROM THE PUBLIC AND WOULD BE AT ODDS WITH CONGRESS' INTENT TO ELIMINATE SECRET LAW.

Because of its role within the executive branch, DOJ frequently establishes effective law and policy for the government. Permitting DOJ to withhold a published policy manual like the Blue Book as attorney work-product would thus insulate many other statements of policy from disclosure and oversight by the public, Congress, and the courts. Indeed, a broad reading of the attorney work-product doctrine in this case would risk exempting most of what DOJ does from FOIA. *See Senate of the Com. of P.R. v. DOJ*, 823 F.2d 574, 586-87 (D.C. Cir. 1987) ("[I]f the agency were allowed 'to withhold any document prepared by any person in the Government with a law degree simply because litigation might someday occur, the policies of the FOIA would be largely defeated.'") (quoting *Coastal States Gas Corp.*, 617 F.2d at 865). Criminal discovery is one area where

transparency concerning the government's controlling legal interpretations is vitally necessary--but there are others, including DOJ interpretations of the government's authority to conduct surreptitious searches and to use lethal force, as well as DOJ Office of Legal Counsel opinions, which often have profound influence on government policy.

Significantly, an overbroad interpretation of the attorney work-product doctrine would impair the ability of courts and others to ascertain DOJ's effective law and policy on issues that have traditionally been difficult, if not impossible, for the courts and the public to monitor. That includes the government's compliance with crucial procedural protections--like *Brady* and the statutes and rules governing criminal discovery--which the government often interprets and applies behind closed doors. *See, e.g.*, *United States v. Olsen*, 737 F.3d 625, 627-28, 630-31 (9th Cir. 2013) (Kozinski, J., dissenting from denial of rehearing en banc) (highlighting courts' dependence on government representations concerning what constitutes exculpatory evidence and the resulting "epidemic" of *Brady* violations); Sara Gurwitch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Information to the Defense*, 50 Santa Clara L. Rev. 303, 306-07 (2010) (observing that establishing *Brady* violations is difficult because the evidence is withheld from both the defense and the court).

The same difficulties plague other areas of criminal procedure, where the government's failure to disclose its authoritative legal interpretations can conceal systemic problems for years. For example, the government has statutory and constitutional duties to notify criminal defendants when it has relied on surreptitious surveillance techniques in the course of an investigation. *See, e.g.*, 50 U.S.C. § 1806(c). But the government's compliance with these obligations is exceedingly difficult for courts to monitor in individual criminal cases, precisely because neither courts nor defendants will know if notice has been improperly withheld in the first place. *See* Patrick Toomey & Brett Max Kaufman, *The Notice Paradox: Secret Surveillance, Criminal Defendants, and the Right to Notice*, 54 Santa Clara L. Rev. 843, 865, 895-97 (2014). Due in part to the secrecy shrouding its legal interpretations, the government has been able to improperly withhold notice from criminal defendants for years at a time--thereby thwarting judicial review of the underlying surveillance. *See, e.g.*, Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. Times, Oct. 16, 2013, http://nyti.ms/1bAe7QZ (describing how DOJ lawyers adopted an interpretation of their notice obligations that could not be "justified legally"); Adam Liptak, *A Secret Surveillance Program Proves Challengeable in Theory Only*, N.Y. Times, July 15, 2013, http://nyti.ms/12ANzNM. In this context as in many others, disclosure of DOJ's overarching policies--its working law--is crucial to ensuring

that the government does not adopt internal legal interpretations at odds with its statutory or constitutional duties.

A broad ruling permitting DOJ to withhold the Blue Book as attorney work-product would also have severe consequences beyond the context of criminal prosecutions. It would shield from scrutiny government conduct that is difficult to detect and challenge even when it widely affects members of the public, especially activities implicating Americans' privacy rights. The increasing use of electronic location tracking equipment by law enforcement is one example. Because such "monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices." *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring). Without an opportunity for the public to examine government policies and legal interpretations concerning the circumstances in which such equipment may be used and the privacy protections in place, it may be impossible to know whether the government is adhering to the Fourth Amendment's requirements.

Indeed, under the government's expansive interpretation of Exemption 5, DOJ could withhold in perpetuity legal memoranda setting out the "legal requirements [and] procedures to be followed" by Assistant U.S. Attorneys "when seeking court-authorization to utilize different location tracking technologies for

wireless devices in various scenarios in particular criminal investigations." *ACLU of N. Cal. v. DOJ*, No. 13-cv-03127, 2015 WL 3793496, at *11 (N.D. Cal. June 17, 2015). But such memoranda, even though prepared by attorneys, "function[] more like an agency manual rather than revealing mental impressions," and therefore cannot be withheld as work product. *Id.* The public has an acute interest in knowing what type of judicial oversight the government believes is required for the surreptitious use of surveillance equipment by law enforcement. Because government applications for authority to conduct such surveillance are generally made ex parte and are often sealed indefinitely, access to policy-level documents through FOIA is particularly important. *See* Stephen Wm. Smith, *Kudzu in the Courthouse: Judgments Made in the Shade*, 3 Fed. Cts. L. Rev. 177, 209 (2009) ("[E]lectronic surveillance orders are typically issued ex parte upon the application of federal law enforcement as part of a criminal investigation. The application is invariably accompanied by a request that the application and order be sealed 'until otherwise ordered by the court.'"). The government's position in this case would endanger access to that type of basic, policy-level information.

The government's position would likewise bar access to DOJ Office of Legal Counsel memoranda that set government policy in areas of intense and consequential public concern. Those memoranda will often constitute working law, as "OLC's central function is to provide, pursuant to the Attorney General's

delegation, controlling legal advice to Executive Branch officials . . . ." Memorandum from David Barron, DOJ, Office of Legal Counsel, Memorandum for Attorneys of the Office, Re: Best Practices for OLC Legal Advice and Written Opinions 1 (July 16, 2010). The OLC's opinions are binding on the agency that requests them, and practically speaking the OLC's opinions are often the last word on the lawfulness of whatever action is being contemplated. *See, e.g.*, Frederick A. O. Schwartz & Aziz Z. Huq, *Unchecked And Unbalanced: Presidential Power In A Time Of Terror* 190 (2007) ("OLC issues legal rulings that are the *binding final word* for agencies within the federal government on contested issues of federal law.") (emphasis in original); *id.* ("OLC in effect often has the 'last word' in terms of what the Constitution or federal law demands."). Although *some* OLC memoranda may be covered by work-product or other privileges (and may be withholdable in whole or part under other FOIA exemptions, including those protecting classified information, *see* 5 U.S.C. § 552(b)(1), (3)), there is good reason to avoid a broad ruling in this case that would summarily sweep all such memoranda under the shield of Exemption 5.

Public access to the now-discredited "torture memos" written by OLC attorneys more than a decade ago provides one illustration of why an overbroad interpretation of Exemption 5's reach would be contrary to the public's interest and the intent of FOIA. Despite the fact that those memoranda set the government's

policy on whether torture was used, the government attempted to prevent their disclosure by invoking Exemption 5. *See* Fourth Decl. of Steven G. Bradbury, *ACLU v. DOD*, No. 1:04-cv-4151 (S.D.N.Y. Nov. 7, 2008). Amid a national debate about the legality and morality of the use of torture in the interrogation of terrorism suspects, the public interest in those memoranda was manifest, leading eventually to their release. *See President Obama's Statement on the Memos*, N.Y. Times, Apr. 16, 2009, http://nyti.ms/1Im2l12. An interpretation of Exemption 5 that shielded those controlling legal documents from scrutiny merely by virtue of their preparation by government attorneys would be counter to Congress' intent in enacting FOIA and would disserve the public interest in knowing whether its government is violating the law.

What is at stake in this case, in other words, is not just the Blue Book, but FOIA's continued vitality as an essential tool for "citizens to know what their Government is up to," which is "a structural necessity in a real democracy." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171-72 (2004) (internal quotation marks and citation omitted). Permitting DOJ to withhold its official policies as work product under Exemption 5 will cripple FOIA's indispensable function in "promot[ing] honest and open government and [] assur[ing] the existence of an informed citizenry [in order] to hold the governors accountable to the governed." *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 355 (2d Cir. 2005)

(internal quotation marks and citation omitted).

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the district court and order DOJ to disclose the Blue Book to NACDL.

Respectfully submitted,

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Dated: July 22, 2015

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5520 words, excluding the parts of the brief exempted by that Rule and D.C. Cir. R. 32(a)(1), as counted using the word-count function on Microsoft Word 2010 software.

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2015, I electronically filed the original of the foregoing document with the Clerk of this Court by using the CM/ECF system. I certify that the participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. Under this Court's Local Rules, I am causing eight copies of the foregoing document to be filed with the Clerk of this Court.

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