19–2896

United States Court of Appeals for the Second Circuit

NATURAL RESOURCES DEFENSE COUNCIL AND ENVIRONMENTAL DEFENSE FUND,

Plaintiffs-Appellants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendant-Appellee.

On Appeal from the United States District Court
Southern District of New York
Case No. 1:18-cv-11227-PKC (Hon. P. Kevin Castel)

OPENING BRIEF FOR PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1:

Plaintiff-Appellant Natural Resources Defense Council, Inc., certifies that it is a non-profit environmental and public health membership organization that has no publicly held corporate parents, affiliates, and/or subsidiaries.

Plaintiff-Appellant Environmental Defense Fund certifies that it is a non-profit environmental and public health membership organization that has no publicly held corporate parents, affiliates, and/or subsidiaries.

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PRELIMINARY STATEMENT

Plaintiffs seek disclosure under the Freedom of Information Act ("FOIA") of a computer program in the possession of the U.S. Environmental Protection Agency ("EPA"). The program is one component of a multi-component computer model called "OMEGA": the Optimization Model for Reducing Greenhouse Gas Emissions from Automobiles. The overall model, OMEGA, can be used to calculate data about the cost to automakers of complying with EPA pollution-control standards.

EPA historically has disclosed all components of prior versions of this model. And EPA has released the other requested components of this version of OMEGA to Plaintiffs without claiming exemption under FOIA. But EPA now asserts that the computer program—also known as the "core" model—is exempt and refuses to disclose it. The computer program is the sole object of this appeal, and it is essential to using OMEGA. Without it, the public cannot use OMEGA-calculated data to evaluate EPA's pending and controversial proposal to weaken its pollution-control standards for automobiles.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B), and it entered final judgment on August 23, 2019. JA215. Plaintiffs timely appealed on September 9, 2019. *See* Fed. R. App. P. 4(a)(1)(B); JA216-17. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

Plaintiffs present four questions of law, the first three of which provide independent grounds for reversal and an order compelling full disclosure. The fourth issue addresses whether EPA must, at a minimum, disclose *some* portion of the withheld computer program. The issues presented are:

1. Whether the OMEGA computer program is an "inter-agency or intra-agency memorandum[] or letter[]," 5 U.S.C. § 552(b)(5).
2. Whether the requested version of the OMEGA computer program falls under the deliberative-process privilege incorporated into 5 U.S.C. § 552(b)(5).
3. Whether EPA carried its burden to show that disclosing the requested version of the OMEGA computer program will cause

"reasonably foresee[able] … harm," 5 U.S.C. § 552(a)(8)(A)(i)(I), to an interest protected by 5 U.S.C. § 552(b)(5).

4. Whether any "reasonably segregable" portion of the requested version of the OMEGA computer program must be disclosed. 5 U.S.C. § 552(a)(8)(A)(ii)(II), (b).

STATEMENT OF THE CASE

The parties cross-moved for summary judgment below on the issue of whether FOIA requires EPA to disclose the latest version of the OMEGA computer program. The Honorable P. Kevin Castel of the Southern District of New York granted EPA summary judgment on that issue. *NRDC v. EPA*, No. 18-cv-11227, 2019 WL 3959992 (Aug. 22, 2019).

A. Factual Background

1. EPA's Vehicular Emission Standards

EPA has determined that emissions of greenhouse gases from new motor vehicles cause or contribute to air-pollutant emissions "which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). The Clean Air Act therefore requires EPA to limit those emissions. *Id*. Starting in 2009, EPA began setting standards by model year requiring automakers to meet average

greenhouse-gas emission levels across their fleets. *E.g.* 75 Fed. Reg. 25,324 (May 7, 2010). Current standards require manufacturers to reduce fleetwide average emissions approximately 5% in each succeeding model year through 2025. *See* 77 Fed. Reg. 62,624, at 62,638 (Oct. 15, 2012).

In 2017, EPA announced plans to reconsider its extant emission standards. 82 Fed. Reg. 14,671 (Mar. 22, 2017). In 2018, EPA proposed a series of actions including rolling back the standards and flatlining them at model year 2020 levels for each of the next six years.[1] *See The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks*, 83 Fed. Reg. 42,986 (Aug. 24, 2018) ("Proposed Rule").

In the Proposed Rule, EPA announced that it planned to use the "CAFE" model of the National Highway Traffic Safety Administration ("NHTSA") as the exclusive means of calculating the costs to

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[1] The National Highway Traffic Safety Administration concurrently proposed to set average fuel economy standards for the same model years pursuant to its "wholly independent … mandate to promote energy efficiency." *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007); *see* 49 U.S.C. § 32902.

automakers of complying with EPA emission standards. *Id*. at 43,000, 43,022. EPA's reliance on the CAFE model was unprecedented. As discussed further below, EPA had always used its own model, OMEGA, to calculate data about the cost for automakers to comply with any given fleetwide emission standard. JA48-52. Further, when EPA presented the Proposed Rule to the White House Office of Management and Budget, its documentation indicated that the data calculated by the OMEGA computer program undermined the agency's case for weakening emission standards. JA90, ¶27; JA95-119; JA132, ¶19.

Plaintiffs accordingly requested disclosure under FOIA of the most recent version of OMEGA, including its "core" computer program, in order to independently assess the proposed standards. JA128. But, despite EPA's averment that it had not used OMEGA to develop the Proposed Rule, and despite its historical practice, discussed below, of releasing current versions of the OMEGA computer program, EPA claimed in response to Plaintiffs' FOIA request that *this version* of the computer program was "pre-decisional" and "deliberative" and "would harm agency decision making if released." JA57.

2. Background on OMEGA: Public Development

EPA's Office of Transportation and Air Quality ("OTAQ") developed OMEGA to calculate data that could be used in setting emission standards. JA73, ¶8. Rather than set per-vehicle standards, EPA requires manufacturers to meet average standards across their new vehicle fleets in a given model year. *E.g.*, 77 Fed. Reg. at 62,627. Manufacturers can choose from an array of emission control technologies, including engine technologies, transmission options, tires, and hybrid and electric-vehicle options. JA87, ¶18. Individual technologies vary in terms of cost and effectiveness. JA82, ¶9; JA73, ¶7.

The cost and effectiveness of these technologies is an important underpinning of the feasibility of potential emission standards. 75 Fed. Reg. 25,324, at 25,329 (May 7, 2010). But EPA allows each manufacturer to choose what control technologies to use and on which vehicles to use them. *See, e.g. id.* at 25,408. For any given fleetwide emission standard, then, manufacturers have an enormous number of possible options to achieve the standards. JA82, ¶9; JA73, ¶7. As a practical matter, manufacturers will attempt to comply with standards in the most cost-effective manner by prioritizing the application of

lower-cost, higher-efficiency technologies optimally across their new vehicle fleets. JA76, ¶19; JA130, ¶9. To investigate the most cost-effective path to compliance, OTAQ in 2009 developed the OMEGA model. JA73, ¶5, ¶8.

Plaintiffs' affiant Margo Oge was Director of OTAQ at the time. JA72. She oversaw the development of OMEGA in "a collaborative and open process" with stakeholders outside EPA. JA74. OTAQ "intentionally designed" OMEGA "to be transparent and publicly accessible." JA74. OMEGA was "designed not to incorporate or rely on confidential information from manufacturers or any other business." JA74. OTAQ "intentionally" programmed OMEGA using an "open-source" computer programming code. JA74. OTAQ staff also submitted OMEGA to a rigorous peer-review process, and the agency received and responded to comments on OMEGA from automobile manufacturers and other outside stakeholders. JA74.

When EPA proposed greenhouse-gas emission standards for new motor vehicles in September 2009, it concurrently posted OMEGA and related files on an agency webpage. JA48-52; JA137, ¶10. From this webpage, the public could also download the version 1.0 model

documentation. JA52. The documentation contained detailed descriptions of the program algorithms along with the general modeling methodology, and stated that "[p]eriodic updates of both the model and this documentation will also be available to be downloaded." JA52; EPA, *OMEGA Model Documentation 1.0* at 4, Doc. No. EPA-420-B-09-035 (October 2009), available at https://www.epa.gov/regulations-emissions-vehicles-and-engines/optimization-model-reducing-emissions-greenhouse-gases. Then-Director Oge "expected that the model and the files needed to use it would continue to be released to the public, so that the model could continue to be refined using public comments." JA139.

3. Background on OMEGA: Components and Function

The overall model, OMEGA, consists of several components, including: input data, data "pre-processors," the "core" model computer program, and data "post-processors." JA130. EPA has released the latest versions of all these components, except the "core" model computer program that is the exclusive subject of this appeal. JA54-55. As explained below, the core computer program converts the supplied inputs into outputs through a series of pre-set, rote calculations. *See* JA86 (graphical representation of components).

The OMEGA inputs consist of raw quantitative data, including data about specific vehicle models on the market ("market" inputs), available emission-reduction technologies and their relative cost and effectiveness ("technology" inputs), hypothetical emission targets for manufacturers ("scenario" inputs), and other relevant data such as fuel costs. JA83-85. The "pre-processors" convert the raw input data into a form that can be processed by the "core" model computer program. JA83-84.

The "core" model is an executable computer program written in C# programming code. *See* JA62-71 (excerpt of code from 2016 version of OMEGA). The program consists of a sequence of mathematical algorithms that are applied to the input data. JA87.

When a user "runs" the program, the program first loads the market, technology, and scenario inputs. It then reads from the loaded input data and performs a chain of many thousands of rote calculations. JA87. For each manufacturer, the program sequentially adds emission-reduction technologies to specific vehicles; after each addition, the program calculates whether that manufacturer's vehicle fleet now meets the given "scenario" emission standard. *Id.* The program stops

when the manufacturer's fleet meets that proposed standard (or available technology runs out). *Id.* These calculations automatically optimize the addition of technology, determining the most cost-effective pathway to compliance. *Id.*; JA131.

This optimization process—the "O" in OMEGA—yields quantitative data, including the per-vehicle cost to each manufacturer to apply the technology necessary to bring its fleet into compliance with a given emission standard. JA84. Data "post-processors" convert the raw output data into readable and usable datasets. *Id.* EPA can then use these datasets in setting annual vehicle emission standards. JA76-77.

The overall model, OMEGA, relies heavily on the input files. *OMEGA Model Documentation 1.0* at 4. The "core" computer program—the only component of OMEGA at issue here—is easy to use; the program's user interface is "simple" because "all of the information needed to run the model is contained in the input files" *id.* at 51; *see* JA189-90 (user interface from 2016 version of OMEGA). Running the computer program is a matter of selecting the desired scenario input file

and simply "clicking on the green car button." EPA, *OMEGA Core Model Version 1.4.56*, at 47, Doc. EPA-420-B-16-064 (July 2016).

The overall model, OMEGA, can investigate different regulatory scenarios, but this flexibility is achieved through user modification of the inputs. *Id*. at 7; JA88. Running the computer program twice with the same inputs will simply produce the same outputs. JA75-76. To investigate different regulatory scenarios, the user instead adjusts the input data. *Id*. In particular, to determine the optimized costs associated with different hypothetical emissions standards, modelers update the emission standard information in the input "scenario" data—no change is made to the computer program that performs the optimization calculations. JA85-88.

4. Background on OMEGA: Public Release of Updates

OTAQ staff would update OMEGA inputs to reflect real-world changes in vehicles and vehicle technologies over time. JA136. Less frequently, OTAQ staff would update the core computer program. *Id*. Neither Director Oge nor the EPA Assistant Administrators she reported to "ever worked with technical staff to make substantive analytical changes" to the core computer program. JA135. When OTAQ

staff produced a new, functional version of the computer program, they assigned it a new version number. JA136. Each version was "final" until the next revision. *Id*.

EPA has published at least five different iterations of OMEGA, along with voluminous documentation and associated materials. JA48-52. Updates were affirmatively posted on EPA's website "when it was most likely that public stakeholders would utilize the model"—such as to inform public comments on a proposal, draft technical report, or agency rulemaking. JA138. Director Oge empowered OTAQ staff "to share information about the model with stakeholders at all other times." *Id*. There was "no process for scrubbing the OMEGA core model to prepare it for public release," "no formal or informal policy to only release the OMEGA model" with final regulatory decisions, and OTAQ staff did not need the Director's permission to release new versions to the public. *Id*. As was typical of OTAQ models, OMEGA was primarily "an accounting model"—a "specialized calculator"—that did not "attempt or purport to balance the statutory or regulatory factors EPA must consider when establishing standards." JA75, JA137. OTAQ staff "never expressed any concern" to Director Oge "about release of

OMEGA model versions chilling their development or discussion of the model": "Everyone was aware that any new versions of OMEGA could be made available to the public for review and comment." JA139.

This practice continued after Director Oge retired in 2012. EPA continued to release updates to OMEGA and discuss details of its modeling with the public. EPA published the then-current version of the "core" OMEGA program, version 1.4.56, in July 2016, along with a draft technical report—not a final action—prepared by EPA and other entities including the California Air Resources Board. JA48-49. As with the prior releases, the published model documentation for that OMEGA version stated that "[p]eriodic updates of both the model and this documentation will be available to be downloaded" and encouraged "[t]hose interested in using the model . . . to periodically check this website for these updates." *OMEGA Core Model Version 1.4.56*, at 3.

In November 2016, EPA released additional OMEGA updates alongside a proposed determination that EPA's existing model year 2022-2025 standards remained "appropriate." JA48-49; 81 Fed. Reg. 87,927 (Dec. 6, 2016). OTAQ staff also continued to discuss modeling details with the public, JA142-62, give presentations on EPA's modeling

work, JA164-182, and prepare and publish technical papers discussing details of modeling, *e.g.*, Moskalik, A., SAE Tech. Paper (Apr. 3, 2018), https://www.epa.gov/sites/production/files/2018-10/documents/sae-paper-2018-01-1273.pdf.

5. EPA Uses CAFE in Lieu of OMEGA

As previously discussed, in 2017 EPA announced its intent to consider revisiting its existing emission standards. 82 Fed. Reg. 14,671 (Mar. 22, 2017). On March 8, 2018, NHTSA provided a version of its CAFE model to EPA. JA96. EPA staff compared the outputs of CAFE to the outputs of the then-current version of OMEGA (version 1.4.59, the same version at issue in this case) and found "dramatically" different results for the cost of compliance with existing EPA emission standards. JA90; JA113. EPA shared those results with the White House Office of Management and Budget. JA132, ¶19.

In March 2018, Plaintiffs wrote to then-EPA Assistant Administrator William Wehrum and asked him to publish the current version of OMEGA. He did not respond. JA33, ¶44. In April 2018, EPA announced that it "w[ould] initiate a notice and comment rulemaking in a forthcoming Federal Register notice to further consider appropriate

standards for model years 2022-2025." 83 Fed. Reg. 16,077 (Apr. 13, 2018). The notice did not mention EPA using OMEGA as part of this upcoming rulemaking, or address the discrepancy between CAFE and OMEGA outputs. *Id.* EPA stated that it had determined to use the CAFE model for its analysis of regulatory alternatives in an upcoming rulemaking to revise EPA's standards. *E.g.* 83 Fed. Reg. 42,986, at 43,000. That proposal remains pending.[2]

B. Procedural History

1. EPA Claims This Version of OMEGA "Would Harm Agency Decision Making if Released" under FOIA

Plaintiffs submitted an expedited FOIA request to EPA on August 10, 2018, seeking all unreleased updates to OMEGA, including the latest full version. JA128. In September, Plaintiffs wrote another letter to then-Assistant Administrator Wehrum seeking the records; again, he did not respond. JA36, ¶57. The statutory deadline for EPA's response lapsed, and the comment period for the Proposed Rule closed on October 26, 2018. JA36, ¶59.

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[2] On September 27, 2019, EPA and NHTSA published notice of final actions on parts of the Proposed Rule, but not on revisions to EPA's emission standards. 84 Fed. Reg. 51,310.

On December 3, 2018, Plaintiffs sued to compel EPA to respond to the FOIA request. JA8 EPA eventually released the current OMEGA version (v.1.4.59) inputs, "pre-processors," and "post-processors" without claiming an exemption from disclosure. JA54. But EPA withheld the "latest full version of the OMEGA model itself"—a term it equated with the "core" computer program—declaring it exempt from disclosure under Exemption 5 of FOIA. JA57. Although EPA publicly had stated that OMEGA "w[as] not used to develop the proposed rule," JA60, EPA asserted in its FOIA response that this version of the OMEGA computer program was "pre-decisional," "deliberative," and "would harm agency decision making if released." JA57.

At summary judgment, EPA relied on declarations from Wehrum and career official William Charmley, the Director for the Assessment and Standards Division within OTAQ.[3] Wehrum averred that the

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[3] Wehrum is EPA's principal affiant in this case. He resigned from EPA in June 2019. *See* J. Eilperin & B. Dennis, *Top EPA Official Resigns Amid Scrutiny Over Possible Ethics Violations*, Washington Post (June 26, 2019), https://www.washingtonpost.com/climate-environment/2019/06/26/epas-top-air-policy-official-steps-down-amid-scrutiny-over-possible-ethics-violations/. A report issued by the ranking

"regulatory development process and the process of making upgrades to the OMEGA model have traditionally proceeded in parallel"; that high-level policymakers "may realize" they need a different type of analytical option within OMEGA and "weigh[] in with their final opinions"; that OMEGA "only becomes final and appropriate for public release, and has only been publicly released in the past, when the regulatory development process has become similarly final"; and that disclosure of this version of OMEGA would "chill free and open discussions of EPA staff." JA123-25. Charmley, a member of that staff, did not similarly aver. JA127-34.

Plaintiffs submitted declarations from former OTAQ Director Oge, JA72, JA135, among others, JA79 (Dr. Lutsey); JA183 (Dr. Cooke). Oge specifically averred that "neither I nor the Assistant Administrator ever worked with technical staff to make 'substantive analytical changes'";

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members of two Senate committees concluded that, among other ethical lapses, Wehrum improperly failed to disclose former clients including an automaker trade association with whom he met at least six times between November 2017 and July 2018. *See* Sen. Carper & Sen. Whitehouse, *Redefining Air* at 33-34, https://www.epw.senate.gov/public/_cache/files/2/d/2d7a4d97-5260-4be1-92bf-152ac5d7cd21/020F44F63FF7BAC62FBDC77C0C55D82F.epw-report-carper-whitehouse-redefining-air-wehrum-7-2019.pdf.

that updates to the computer program "were not reviewed or approved by me or upper-level management at EPA"; that agency policymakers "did not make any decisions about the internal workings of the OMEGA model"; that OTAQ staff independently updated the model and assigned version numbers, at which point OMEGA was as "final" as it would ever be; that "there was no formal or informal policy to only release" OMEGA "when the regulatory development process has become similarly final"; and that OTAQ staff "never expressed any concern to me about release of OMEGA model versions chilling their development or discussion," that "[e]veryone was aware that any new versions of OMEGA could be made available to the public," and that disclosure "*improved* EPA's decision making" during her tenure. JA135-38; JA78.

2. The District Court's Decision

The parties cross-moved for summary judgment on the sole issue of whether EPA could withhold the OMEGA "core" computer program pursuant to Exemption 5 of FOIA. JA193. Exemption 5 applies to "intra-agency memorandums or letters that would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). Plaintiffs argued that this computer program is not a "memorandum or

letter." Without meaningfully addressing the statutory text, the district court held that "counterexamples" and "policy considerations" made the exemption applicable here. JA200-02. The district court then concluded that this version of the computer program would not be available "in litigation with the agency," because it is covered by the deliberative-process privilege. JA204-10. Although, per "[EPA's] admission, [the program] was not used to develop" the Proposed Rule, the district court still deemed the program "pre-decisional" and "deliberative." *Id*. The district court, relying solely on the Wehrum affidavit and not discussing any other record evidence, held that EPA had carried its burden to explain how release would "harm" an interest protected by the deliberative-process privilege. JA210-11. Concluding that no portion of the computer program is non-exempt or reasonably segregable for release, the district court held that EPA could withhold the program and granted summary judgment to the agency. JA213-14.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's grant of summary judgment in a FOIA action. *ACLU v. Nat'l Sec. Agency*, 925 F.3d 576, 588 (2d Cir. 2019); *Halpern v. FBI*, 181 F.3d 279, 287 (2d Cir. 1999). An

agency's decision that information is exempt from disclosure receives no deference, and all doubts are resolved in favor of disclosure. *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 147 (2d Cir. 2010). An agency must always provide a reasonably detailed explanation for why material was withheld: "Absent a sufficiently specific explanation from an agency, a court's *de novo* review is not possible and the adversary process envisioned in FOIA litigation cannot function." *Halpern*, 181 F.3d at 295.

SUMMARY OF ARGUMENT

FOIA "adopts as its most basic premise a policy strongly favoring public disclosure of information in the possession of federal agencies." *Halpern*, 181 F.3d at 286. The text of the statute effectuates that premise: first, by mandating prompt disclosure of records outside of enumerated and strictly-construed exemptions; next, by mandating disclosure even of "exempt" records whose release would not harm specific interests protected by the exemption; and finally, by mandating that an agency segregate and disclose portions of exempt records that are either not exempt or not harmful. EPA violated all those mandates

when it refused to disclose the latest version of the OMEGA computer program.

1. EPA erroneously classified the computer program as an intra-agency "memorandum[] or letter[]." 5 U.S.C. § 552(b)(5). The ordinary meaning of "memorandums or letters" excludes the computer program at issue here. And the statutory context and familiar canons of interpretation preclude construing "memorandums or letters" to reach every agency "record," FOIA's catchall term. Yet the district court decided the terms were coextensive, based on a selective tour of legislative history and outmoded, out-of-circuit caselaw. This Court should give Exemption 5 the reach Congress intended, "through the simple device of confining the provision's meaning to its words." *Milner v. Dep't of the Navy*, 562 U.S. 562, 572 (2011) (citation omitted).

2. EPA did not establish that this version of the OMEGA computer program is shielded by the deliberative-process privilege incorporated into Exemption 5. That privilege covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 16

(2001) (*Klamath*). First, this version of the program is not "predecisional." EPA disavowed that it used this version in its pending rulemaking to weaken emission standards, and the agency did not identify any specific future decision that this version may inform. It is not enough to observe that EPA continually evaluates emission standards, and that some unknown version of the OMEGA program could be used in the future.

Second, the program at issue is not "deliberative." The OMEGA computer program—the only requested component of OMEGA that EPA withheld—is a specialized calculator that does not embody or expose any policy deliberations. Plaintiffs' uncontroverted evidence shows that the computer program is a factual, investigative tool that takes input data (which EPA disclosed without claiming an exemption) and *calculates* the most cost-effective means for automakers to comply with any given hypothetical emission standard. The computer program is just a calculational tool driven by mathematics, not subjective policy judgment, and it is not privileged.

3. Independent of whether Exemption 5 encompasses this version of the OMEGA computer program, EPA did not show that disclosure

would cause a "reasonably foresee[able] … harm" to "an interest protected by" that exemption. 5 U.S.C. § 552(a)(8)(A)(i). The agency relied exclusively on the affidavit of then-Assistant Administrator William Wehrum to make that showing, but his conclusory recitation of purposes for the deliberative-process privilege do not carry EPA's burden. Nor did Wehrum rebut the specific evidence submitted by Plaintiffs' affiant Margo Oge, the former OTAQ Director who oversaw the initial development and public release of multiple versions of the OMEGA computer program. EPA's history of disclosing the full OMEGA model, including the core computer program, to solicit public input, *before* final actions were taken, is strong evidence that releasing yet another anonymous technical update will not chill the agency's policy deliberations. Last but not least, EPA has not alleged that the withheld version of the computer program includes *any* significant, non-ministerial change from the version that EPA released in 2016. FOIA's foreseeable-harm requirement prohibits EPA from withholding a record that in fact will not reveal any ongoing policy deliberations simply because the agency could have, in theory, added deliberative material to that record.

4. Finally, EPA violated FOIA's mandate to release all reasonably-segregable portions of the computer program that are nonexempt or whose disclosure would not cause reasonably foreseeable harm to an interest protected by Exemption 5. Specifically, the unintelligible machine code used to execute the OMEGA computer program is not a memorandum or letter, nor does it reveal subjective policy deliberations. EPA averred that this executable code is "functionally" equivalent to the entire computer program. But equivalence in function is not equivalence in content, and EPA did not deny that the machine code is reasonably segregable.

ARGUMENT

I. THE OMEGA COMPUTER PROGRAM IS NOT A "MEMORANDUM OR LETTER"

FOIA requires the government to make agency "records" available to the public upon request, 5 U.S.C. § 552(a)(3)(A), subject to limited exemptions for "specific categories of material," *Milner*, 562 U.S. at 564. There is no dispute that the OMEGA computer program is an agency "record" for FOIA purposes. *See, e.g.*, 5 U.S.C. § 552(f)(2)(A). EPA must therefore release the program unless it falls within the terms of Exemption 5. *DOJ v. Tax Analysts*, 492 U.S. 136, 151 (1989).

The district court erred when it did not meaningfully address the actual words of the exemption. Exemption 5 applies only to certain agency "memorandums or letters." 5 U.S.C. § 552(b). A computer program is not a memorandum or letter under any natural reading of those terms, and nothing in the text or structure of FOIA permits expanding those terms to encompass the program. EPA thus cannot withhold the OMEGA v.1.4.59 computer program under Exemption 5.

A. Not All Agency Records are Memorandums or Letters

Consideration of the scope of Exemption 5 "starts with its text." *Milner*, 562 U.S. at 569; *see also Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019) ("*FMI*"). Exemption 5 permits withholding only "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). By its plain terms, the exemption encompasses only "memorandums or letters." *Id.*

A computer program like OMEGA is not a memorandum or letter as those terms are naturally understood. *Cf. Milner*, 562 U.S. at 572 ("By no stretch of imagination" does the natural understanding of the terms "personnel rules and practices" include "data and maps."). FOIA

does not define "memorandum" or "letter," and so those terms are given their "ordinary, contemporary, common meaning" at the time "Congress enacted FOIA in 1966." *FMI*, 139 S. Ct. at 2362 (citation omitted). Then, as now, memorandums and letters denote documents used for interpersonal communication.[4] But the OMEGA "core" computer program is not used to communicate among agency personnel. The Supreme Court has "insisted" that FOIA exemptions "be read strictly," *Klamath*, 532 U.S. at 16, and nothing in the structure or purpose of FOIA compels expanding "memorandum" or "letter" beyond its ordinary meaning.

In contrast to Exemption 5, other FOIA exemptions do apply more broadly to "records or information," 5 U.S.C. § 552(b)(7), or to "information and data," *id.* § 552(b)(9). If Congress intended any agency record or information to be eligible for potential withholding under Exemption 5, it clearly knew how to so specify. Instead, Congress made

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[4] *See, e.g.*, Webster's New World Dictionary of the American Language 918 (Coll. Ed. 1966) (defining memorandum as "an informal written communication, as from one department to another in a business office"); *id.* at 840 (defining letter as "a written or printed personal or business message, usually sent by mail in an envelope").

Exemption 5 more narrowly applicable only to "memorandums or letters." *See Rojas v. Fed. Aviation Admin.*, 927 F.3d 1046, 1055 (9th Cir. 2019) ("[I]f Congress intended Exemption 5 to extend to all 'agency records,' it would have used that term, *see* 5 U.S.C. § 552(f)(1), (2), rather than the narrower 'inter-agency or intra-agency memorandums or letters,' § 552(b)(5).").

Nor can the "memorandums or letters" requirement casually be presumed superfluous. *Milner*, 562 U.S. at 575. There is no textual justification for treating them as anything other than terms with "independent vitality." *Klamath*, 532 U.S. at 12. Both ordinary meaning, and the contrast to broader terms in adjacent provisions, confirm that not all agency records are "memorandums or letters."

B. The District Court Impermissibly Expanded Exemption 5 Beyond its Terms

The district court did not meaningfully engage with the text of Exemption 5, or even proffer a different ordinary meaning for "memorandums or letters." Instead, the district court rejected the ordinary meaning based solely on "counterexamples and the policy considerations underlying Exemption 5." JA202. This was error.

1. Policy considerations do not trump statutory text

Any policy concern that Exemption 5 *should* reach records beyond intra-agency communications provides no license to expand the meaning of "memorandums or letters." *See Milner*, 562 U.S. at 580. To be sure, FOIA exemptions must be given fair reach consistent with their terms. *FMI*, 139 S. Ct. at 2366. But, at the same time, "disclosure, not secrecy, is the dominant objective of the Act." *Klamath*, 532 U.S. at 8. FOIA's purposes are properly served by enforcing exemptions according to their terms. *FMI*, 139 S. Ct. at 2366. Here, the plain terms of Exemption 5 do not encompass the OMEGA v.1.4.59 computer program.

The Supreme Court has repeatedly rejected policy-based constructions of FOIA exemptions not grounded in the text. *First*, in *Klamath*, a unanimous Court held that requested communications between the federal government and tribal governments could not be withheld under Exemption 5. *See* 532 U.S. at 6. The Court recognized "that the candor of tribal communications with the Bureau would be eroded," *id.* at 11, but rejected the government's argument that "this interest in frank communication" alone was sufficient to justify

withholding, because that argument ignored the *textual* condition "that the communication be 'intra-agency or inter-agency.'" *Id.* at 11-12.

Next, in *Milner*, the Court held that "data and maps" could not be withheld under FOIA's Exemption 2 for material "related solely to the internal personnel rules and practices of an agency." 562 U.S. at 564-565. "No one staring at the [data and maps] and using ordinary language would describe them [as relating to personnel rules and practices]." *Id.* at 578. The Court rejected an argument, drawn from a longstanding D.C. Circuit interpretation that the exemption *should* cover materials whose "disclosure would significantly risk circumvention of federal agency functions," because that interpretation "suffers from a patent flaw: it is disconnected from Exemption 2's *text*." *Id.* at 573 (emphasis added).

Finally, *FMI* interpreted Exemption 4, applicable to "commercial or financial information obtained from a person and privileged or confidential." 139 S. Ct. at 2361. The Court rejected a longstanding D.C. Circuit interpretation that the term "confidential" incorporates a "substantial competitive harm" requirement, because such a requirement was "inconsistent with the terms of the statute." *Id.* at

2361, 2364. Urged to adopt the lower courts' construction "as a matter of policy," the Court reiterated that the policies behind FOIA are served best by enforcing the statutory *text*. *Id.* at 2366.

The district court's decision here to expand the text of Exemption 5 in favor of "policy considerations," JA202, runs squarely against *Klamath*, *Milner*, and *FMI*. *See also FCC v. AT&T*, 562 U.S. 397, 407 (2011) (rejecting expansion of FOIA exemption where "no sound reason in the statutory text or context [existed] to disregard [exemption's] ordinary meaning"). There is no basis to treat "memorandums or letters" as "purely conclusory term[s]," and no "textual justification for draining [them] of independent vitality." *See Klamath*, 532 U.S. at 12. "No one staring at the [OMEGA computer program] and using ordinary language would describe" it as a memorandum or letter. *See Milner*, 562 U.S. at 578; *cf.* JA62-71 (program code excerpt). And even if it might be desirable to allow EPA to withhold the program "as a matter of policy," courts "cannot properly expand [Exemption 5] beyond what its terms permit." *See FMI*, 139 S. Ct. at 2366 (emphasis omitted).

2. The district court's "counterexamples" are inapposite

The district court also cited "counterexamples" from caselaw, JA202, as a reason to reject applying the terms "memorandums" and "letters" consistent with their ordinary meaning. To the extent the district court concluded that precedent compelled it to expand Exemption 5 beyond its text, it was mistaken.

The interpretation of Exemption 5's "memorandums or letters" requirement is an issue of first impression in this Circuit. The district court relied on *Lead Industries Association v. OSHA*, 610 F.2d 70 (2d Cir. 1979), but in that case no party disputed that the records at issue were agency communications potentially within the scope of Exemption 5. The *Lead Industries* plaintiff sought communications between OSHA and expert consultants. *See id.* at 75 & n.5. The dispute was whether OSHA could withhold factual "excerpts" embedded in "otherwise exempt" written documents protected by the deliberative-process privilege, such as "draft reports," "summaries," and "studies and memoranda." *Id.* at 84-85. Without addressing the scope of *memorandums or letters*, the Court held that the factual excerpts were

"'inextricably intertwined' with policy making recommendations" in the protected communications. *Id.* at 85 (citation omitted).

The district court did not cite other binding precedent and erred in not following the Supreme Court's command to construe terms in FOIA consistent with the ordinary meaning. In any event, none of the non-binding cases relied on by the district court provide a basis to expand Exemption 5 beyond its terms.

First, most of those cases do not address the "memorandums or letters" requirement at all. The district court relied on several D.C. Circuit decisions. *See* JA200-02, JA201 n.1 (noting the Second Circuit's willingness to consider D.C. Circuit FOIA law). But all of those cases pre-date the D.C. Circuit's decision in *Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429 (1992) (*PIC*), where the Court made clear it had never construed "memorandums or letters" to reach records that were not agency communications. The government there sought to withhold "a magnetic computer tape" with information from "a computer databank" file. 976 F.2d at 1431-32. In an opinion written by then-Judge Ruth Bader Ginsburg, the Court *sua sponte* queried whether "the [computer] file qualifies as an 'inter-agency or intra-

agency memorandum.'" *Id.* at 1433 n.4. Because the plaintiff had not contested the point, the Court "assume[d] without deciding" that it qualified, *id.*, but, even so, held that the computer file was not deliberative. *Id.* at 1436. The reach of "memorandums or letters" was—and is—an open question in the D.C. Circuit, just as it is in this Circuit.

Second, the district court's elevation of stray legislative history, following *Chilivis v. SEC*, 673 F.2d 1205 (11th Cir. 1982), is inconsistent with the more recent Supreme Court decisions in *Klamath*, *Milner*, and *FMI*. *See* JA200-01. The records at issue in *Chilivis* were "depositions, statements, documents and memoranda" from an SEC investigation. *Id.* at 1207. In a footnote, the Court rejected the argument that a "computer printout"—presumably of one of the requested documents—was not a "memorandum or letter." *Id.* at 1212 n.15. Relying solely on a House committee report, *Chilivis* concluded that "Congress clearly intended to exempt any document connected with the agency's deliberative process, not just memoranda and letters." *Id.* (citing H. R. Rep. 89-1497 (1966)). The district court here likewise pointed to the same House Report. JA201.

The Supreme Court "has repeatedly refused to alter FOIA's plain terms on the strength only of arguments from legislative history." *FMI*, 139 S. Ct. at 2364. This alone is reason to reject *Chilivis*.[5]

Moreover, *Chilivis* highlights the dangers of "a selective tour through the legislative history." *FMI*, 139 S. Ct. at 2364. *Chilivis* and the district court here pointed only to the House Report, but the bill that became FOIA was introduced in the Senate, and the Senate Report is "the more reliable of the two." *Milner*, 562 U.S. at 574.

The Senate Report explains that the purpose of Exemption 5 "is to protect from disclosure only those agency memorandums and letters which would not be subject to discovery by a private party in litigation." S. Rep. No. 89-813, at 2 (1966). The Report acknowledges the "general proposition" that "it would be impossible to have any *frank discussion of legal or policy matters in writing* if all such writings were to be subjected to public scrutiny" but the Committee had "attempted to

[5] The district court also relied on *Hunton & Williams v. DOJ*, 590 F.3d 272 (4th Cir. 2010). JA201. But *Hunton* relies exclusively on *Chilivis*, and should be rejected for the same reasons.

delimit the exception *as narrowly as consistent with efficient Government operation*." *Id*. at 9 (emphases added).

The Senate Report supports what FOIA's plain language suggests: Exemption 5 applies only to "memorandums or letters"—which, after all, is where "frank discussion of legal or policy matters in writing" will invariably be found. Moreover, any differences in the Senate and House Reports further illustrate why Exemption 5 should be applied on its terms: "When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, [courts] must choose the language." *Milner*, 562 U.S. at 574.

Finally, the district court expressed concern that construing "memorandums" and "letters" consistent with their ordinary meaning would elevate form over substance. *See* JA201 (emphasizing that a court must focus of the *contents* of a document rather than its *form*). But Plaintiffs' construction does not turn on a document being labeled "MEMORANDUM"; indeed, Plaintiffs readily acknowledged below that documents from "emails" to "reports" all fall within the ordinary meaning of "memorandums or letters." (*See, e.g.* ECF 40, at 15; ECF 50, at 4.) Rather, Plaintiffs' construction turns on the substance: whether

the document is an inter-agency or intra-agency *communication*. *Cf. Klamath*, 532 U.S. at 9 (using "communication" as shorthand for "memorandum or letter"); *Tigue v. U.S. Dep't of Justice*, 312 F.3d 70, 77 (2d Cir. 2002) ("Exemption 5 protects only 'intra-agency' or 'inter-agency' communications.").

The results in nearly all the cases on which the district court relied are fully consistent with this ordinary meaning. For example, the "cost estimates" deemed exempt in *Quarles v. Department of the Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990), appeared in a written "report" that conveyed those estimates to agency decisionmakers, *id.* at 391. As another example, the "draft autopsy reports" in *Charles v. Office of the Armed Forces Medical Examiner*, 935 F. Supp. 2d 86 (D.D.C. 2013), were written documents that contained medical personnel's "tentative view of the meaning of evidence discovered during an autopsy," *id.* at 95. The result in *Charles* should be the same whether the medical examiner wrote her "tentative views" on an autopsy form, or in a document headed "Memorandum re: Preliminary Autopsy Results." It is the communicative nature of the record that matters, not its form.

Unlike reports, manuscripts, and emails, however, the OMEGA computer program here is not a medium to communicate among agency employees. The computer program is a series of mathematical algorithms, coded in C#, that instruct a computer to run calculations on input data. *See* JA62-71. It is not a "memorandum" or "letter" under the ordinary meaning—or any plausible meaning—of those terms. Indeed few—if any—agency records could be farther from the ordinary meaning of a "memorandum" or "letter," and expanding those terms to encompass the OMEGA computer program impermissibly reads language out of the statute.

II. THIS VERSION OF THE OMEGA COMPUTER PROGRAM IS NOT PROTECTED BY THE DELIBERATIVE-PROCESS PRIVILEGE

Exemption 5 also requires that an agency record "not be available by law to a party . . . in litigation with the agency," 5 U.S.C. § 552(b)(5), a clause held to incorporate the deliberative-process privilege, *see Klamath*, 532 U.S. at 8. That privilege covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Id.* (citation omitted). As incorporated into Exemption 5, it

protects only records that are both "predecisional" and "deliberative." *See Tigue*, 312 F.3d at 76. A record is predecisional if it was prepared to assist an agency official in arriving at a specific agency decision. *Id.* at 80. It is deliberative if its release would reveal "the formulation or exercise of agency policy-oriented judgment." *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (citation omitted). As a general rule, the privilege does not cover "purely factual, investigative materials." *EPA v. Mink*, 410 U.S. 73, 89 (1973).

The OMEGA computer program is not privileged. *First*, the program is not predecisional because EPA failed to identify any specific agency policy decision for which the current version of the program was or will be used. *Second*, the computer program is not deliberative because it is an investigative tool that does not reveal the content of policy-oriented deliberations. The program *itself* does not constitute an exercise of policy-oriented judgment. Purely factual material can become deliberative if it is tied to, and would reveal, an agency's policy decision-making process. But EPA has taken the position that it did not use the OMEGA v.1.4.59 computer program in the development of *any* specific emissions standard.

At bottom, the deliberative-process privilege is "centrally concerned with protecting the process by which *policy* is formulated": "when material could not reasonably be said to reveal an agency's or official's mode of formulating or exercising policy-implicating judgment, the deliberative-process privilege is inapplicable." *PIC*, 976 F.2d at 1435. Because no one viewing the computer program can glean substantive information about EPA's policy-oriented decisionmaking, the program is not privileged.

A. EPA Failed to Establish that This Version of the OMEGA Computer Program is "Predecisional"

A communication is "predecisional" if the agency "pinpoint[s] the specific agency decision to which the document correlates" and verifies that it "precedes, in a temporal sequence, the 'decision' to which it relates." *Cuomo*, 166 F.3d at 482 (citation omitted). The district court did not identify any such specific agency decision. Indeed, the court acknowledged EPA's "admission" that OMEGA v.1.4.59 "was not used to develop the [Proposed Rule]," JA204—the *only* identifiable decision facing the agency.

The district court nonetheless found that OMEGA v.1.4.59 was predecisional because it was generally "intended to contribute to EPA

policy decisions regarding GHG emissions standards for new vehicles." JA204. But an agency cannot satisfy the predecisional prong simply by claiming that a record relates to the "routine and ongoing process" of agency activity. *Tigue*, 312 F.3d at 80 (citation omitted). Rather, the agency must be able "to demonstrate that, *ex ante*, the document for which executive privilege is claimed related to a specific decision facing the agency," even if the agency ultimately does not come to any final decision. *Id.*; *see also Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1094-95 (9th Cir. 1997) (*Maricopa*).

To be sure, EPA has a general and ongoing duty to regulate emissions that may reasonably be anticipated to endanger public health or welfare. 42 U.S.C. § 7521(a); 74 Fed. Reg. 66,496 (Dec. 15, 2009). And EPA originally developed OMEGA to calculate data relevant to that statutory duty. *See* JA73-74; JA130. But that general duty—precisely because it is continuous and ongoing—does not itself constitute a specific agency decision. Rather, EPA makes specific agency decisions when it sets emissions standards for motor vehicles for a given model year. And each time EPA has set standards for specific model years, EPA has used a different, up-to-date version of OMEGA to inform its

decision. See JA48-52; JA75, ¶14. A specific version of OMEGA could thus be predecisional to a decision to set emission standards for a particular model year, but not to EPA's general emissions-setting duty writ large.

B. EPA Failed to Establish That the OMEGA v.1.4.59 Computer Program Is "Deliberative"

A record is deliberative if it reveals "the formulation or exercise of policy-oriented judgment." *Cuomo*, 166 F.3d at 482 (citation omitted). For this reason, the privilege does not, as a general matter, cover "purely factual, investigative materials" like the OMEGA computer program. *See Mink*, 410 U.S. at 89.

The OMEGA computer program is simply a "specialized calculator." JA88. The program takes as its inputs publicly available factual data that could affect automakers' compliance costs, and calculates the most cost-efficient impact (from the automaker's perspective) of a given vehicle emissions standard. JA82-83, JA85. The computer program's user interface "is simple and relies on the fact that all of the information needed to run the model is contained in the input files." EPA, *OMEGA Core Model Version 1.4.56*, at 47; JA185, ¶8; JA189 In particular, if EPA wants to calculate costs for a hypothetical

emission standard, information about the possible standard is contained in one of the already disclosed input files, *not* in the computer program. JA75, JA85, JA88. The computer program itself consists only of a series of optimization algorithms. *See* JA131.

The OMEGA computer program is clearly a factual, investigative tool. Such materials are, by their nature, not deliberative. Court have found limited exceptions where (a) the factual material itself represents the product of an exercise of policy-oriented judgment, or (b) the factual material is "inextricably intertwined" with decisional content. *See Montrose Chem. Corp. of Cal. v. Train*, 491 F.2d 63, 68 (D.C. Cir. 1974) (*Montrose*); *Hopkins v. U.S. Dep't of Hous. & Urban Dev.*, 929 F.2d 81, 85 (2d Cir. 1991). Version 1.4.59 of the OMEGA computer program does not fall into either of these exceptions.

1. The OMEGA computer program is not the product of an exercise of agency policy-oriented judgment

The OMEGA computer program is not itself the product of agency policy-oriented judgment, such that probing it "would be the same as probing the decision-making process itself." *Montrose*, 491 F.2d at 68. Courts have recognized only two ways factual material can be the product of policy-oriented judgment: (1) if the facts reflect an officials'

exercise of a complex set of subjective judgments which would then be revealed if the facts were released; or (2) if the facts have been culled and selected from a larger mass of information which, if revealed, would "unveil the agency's reasoning by showing what it considered relevant (and irrelevant)." *PIC*, 976 F.2d at 1438; *see also Quarles*, 893 F.2d at 392-93. Neither circumstance applies here.

a. Programming OMEGA does not involve complex, subjective assessments

Factual material can be the product of policy-oriented judgment if the material reflects agency officials' exercise of a complex set of subjective assessments. That could be the case if, for example, officials derive a set of facts through a subjective process involving officials' use of significant discretion, preference selection, and assumptions about agency policy choices. But agency officials' bare manipulation of data is not deliberative.

For instance, in *Quarles*, the D.C. Circuit held that the Navy's estimates of how much it would cost to berth battleships reflected policy-oriented judgment because the estimates "derive[d] from a complex set of judgments—projecting [the Navy's] needs, studying prior endeavors and assessing possible suppliers." 893 F.2d at 392-93. The

"surface precision" of the cost estimates concealed the significant amount of discretionary, policy-oriented judgment that went into compiling them. *Id.* at 392.

The D.C. Circuit revisited *Quarles* two years later, and clarified that the manipulation of data does not necessarily involve a complex set of subjective assessments. In *Petroleum Information Corp. v. U.S. Dep't of Interior*, the Court held that a Bureau of Land Management computer data file was not deliberative. 976 F.2d 1429, 1431 (D.C. Cir. 1992) (R.B. Ginsburg, J.) (*PIC*). To build the data file, agency officials reviewed a mass of publicly-available documents containing hand-drawn maps, chronological lists of land transactions, land use records, etc., and converted the information into a user-friendly digital format. *Id.* at 1431-32. The file displayed this information in the form of seventeen different "data elements," represented on the computer as "a matrix of letters and numbers." *Id.* Users could access the file to calculate information related to land use, survey lines, and property ownership. *Id.* at 1432. The Court acknowledged that, as in *Quarles*, the creation of the data bank involved some judgment on the part of Bureau personnel; but the process "d[id] not appear to involve the breadth of

discretion, and the wide range of considerations, the many forecasts and 'judgment calls' involved in making the cost projections at issue in *Quarles*." *Id.* at 1438.

The reasoning in *PIC* applies here. Agency staff who develop the OMEGA computer program algorithms are not tasked with weighing facts or engaging in broad, wide-ranging value judgments. Rather, their goal is to design a program that accurately and efficiently optimizes the pre-assembled input data. Their discretion, if any, is "circumscribed" by the nature of the program and its objective. *PIC*, 976 F.2d at 1438.

Any discretion of the *Quarles* kind exists in the overall OMEGA model—if at all—*before* the computer program, on the input side of the model—where EPA does not claim privilege. It is there that users select data about vehicle fleet composition, fuel costs, hypothetical emission standards, etc. But the computer program itself is not the product of broad discretion and judgment calls; it consists of a series of mathematical optimization algorithms. *Cf. NAACP v. Bureau of Census*, --- F. Supp. 3d ---, 2019 WL 3207623, at *6 (D. Md. July 16, 2019) (spreadsheets containing "complex calculations and numerical estimates" were not deliberative because they did not "contain any

proposed alternatives or any suggestions" or "'weigh the pros and cons' of adopting various estimates" (quoting *Quarles*, 893 F.2d at 392)).

Ironically, the district court concluded that the program was deliberative because EPA has made many prior versions of OMEGA public. JA208-10. Given that historical practice, the district court reasoned, release of OMEGA v.1.4.59 would allow the public to see how agency officials' approach to data manipulation has changed over time. As a threshold matter, EPA cannot make something deliberative that otherwise would not be simply by publicizing its surrounding information and then claiming that the requested record contains some privileged connective tissue. *Cf. PIC*, 976 F.2d at 1437 ("[T]he prior public availability of information surely does not strengthen an agency's claim to the *deliberative process privilege*.") (emphasis in original).

More importantly, EPA's approach to data manipulation in the OMEGA computer program is not a significant policy decision. *See id.* at 1437 ("The Bureau's mission in creating the [computer data bank], while challenging and important, is essentially technical and facilitative."). As EPA has explained elsewhere, a program like OMEGA "neither sets standards nor dictates where and how to set standards; it

simply informs as to the effects of setting different levels of standards." 83 Fed. Reg. 42,986, at 43,002; *accord id.* at 43,000. Because the data manipulation in OMEGA is focused exclusively on accurate calculation of cost-effective compliance paths, comparing different versions of OMEGA reveals only EPA officials' attempts to make the model more accurate—primarily by debugging the code and conforming it to new input data.

In fact, the only example of a *hypothetical* change in OMEGA v.1.4.59 that EPA could point to below was exactly such an attempt to improve the model's accuracy. EPA argued that release of OMEGA v1.4.59 would reveal whether EPA had included an "economic simulation or consumer choice" analytical tool in the model, which could signal a policy-oriented judgment by EPA about the "role of consumer choice in the regulatory development process." JA124. But the consumer choice tool—which in fact was included and released in the previous version of the OMEGA model—was an attempt by EPA officials to improve the model's accuracy at representing the "sales impacts of fuel economy changes together with price changes brought about by fuel economy standards." JA184. When EPA officials tested the consumer

choice tool in OMEGA, it "did not do well at projecting sales impacts." *Id.* EPA thus turned the tool "off" but nevertheless included the inoperative computer code in the previously, publicly released version of OMEGA. JA186. The only thing that possibly could be revealed by the release of the OMEGA v.1.4.59 computer program, then, is whether EPA managed to improve the accuracy of this tool. That is not a conclusion that would reveal any *policy* deliberations.

b. Programming OMEGA does not involve culling or selecting relevant facts

Nor does the OMEGA program involve any policy-oriented act of culling and selecting a small set of relevant facts from a much larger whole. *See, e.g.*, *Montrose*, 491 F.2d at 67-69; *see also PIC*, 976 F.2d at 1438. In the few cases in which courts have found an element of a computer model to be deliberative, those elements involved this unique function. *See, e.g.*, *Goodrich Corp. v. EPA*, 593 F. Supp. 2d 184, 187, 189 (D.D.C. 2009) (holding that the "evolving iterations" of a groundwater flow model's "inputs and calibrations" were deliberative because they revealed EPA's "selection and calibration of data" to determine whether an individual polluter caused the contamination of a specific site); *Cleary, Gottlieb, Steen & Hamilton v. Dep't of Health & Human Servs.*,

844 F. Supp. 770, 783 (D.D.C. 1993) (holding that a program built to investigate the relationship between a particular chemical compound and a disease was "deliberative" because it involved the "culling and selection of relevant facts" to identify a causal link). In both *Goodrich* and *Cleary*, the culling and selection of facts went straight to the purpose of the models: to uncover a particular causal link relevant to the agency's decisionmaking.

Unlike the models in *Goodrich* and *Cleary*, the purpose of OMEGA is not to uncover a causal link; thus the model does not discard those data runs or variables that are irrelevant and home in those facts that are statistically significant. Rather, OMEGA is an "accounting" program: it onboards a mass of publicly available data about the automotive sector, adds various emission control technologies to each car manufacturers' vehicle until the vehicle fleets achieve a user-selected vehicle emissions standard, and then calculates the total costs incurred. *See* JA87-88.

OMEGA is much more akin to the model in *Reilly v. EPA*, 429 F. Supp. 2d 335 (D. Mass. 2006). *Reilly* held that the outputs from EPA's "Integrated Planning Model," or IPM, were not deliberative. *Id.*

at 352-53. The IPM is a computer program that calculates the most cost-effective way for the power sector to comply with a variety of environmental regulations. *Id.* at 338-40. The Court noted that "the internal workings of IPM are not in any way deliberative." *Id.* at 353. The Court also concluded that the outputs of that model were not deliberative because the model was "essentially an investigative technique utilized to generate raw data." *Id.* at 352-53. "It is those facts which then serve as the grist for the agency's decisionmaking, that data which is debated and discussed in formulating the rule." *Id.* at 353. But nothing about the release of the outputs themselves would "expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency." *Id.* (citation omitted). *See also, e.g.*, *Lahr v. NTSB*, 2006 WL 2854314, at *1, *23-*24 (C.D. Cal. Oct. 4, 2006) (computer program was not deliberative because it "was merely a tool used in connection with other data to derive a result based upon that data"); *Carter v. Dep't of Commerce*, 186 F. Supp. 2d 1147, 1155–56 (D. Or. 2001), *aff'd*, 307 F.3d 1084 (9th Cir. 2002) (release of census data derived from one possible calculation would not reveal agency's deliberative process over whether to use that data).

The same is true here. Probing the OMEGA v.1.4.59 computer program is simply not equivalent to "probing [EPA's] decision-making process itself." *Montrose*, 491 F.2d at 68. The program does not contain a complex set of subjective, policy-oriented assessments by EPA officials. Nor does it cull or select facts such that its release would reveal which facts EPA considered important in its decisionmaking.

2. The OMEGA v.1.4.59 computer program is not "inextricably intertwined" with policy decisionmaking

Purely factual material that is not on its own deliberative can become deliberative if it is so "inextricably intertwined" with decisional content "that disclosure would 'compromise the confidentiality of deliberative information that is entitled to protection under Exemption 5.'" *Hopkins*, 929 F.2d at 85 (quoting *Mink*, 410 U.S. at 92). The district court held that OMEGA v.1.4.59 is deliberative because its release could reveal EPA's "policy choices." JA204-05. Specifically, the district court relied on former EPA official Wehrum's statement that "the policy choices made throughout the regulatory development process are inextricably tied to analytical choices internal to the OMEGA model itself." JA205.

As a threshold matter, former-OTAQ Director Oge made numerous specific points addressing OMEGA's traditional relationship to agency decision making that Wehrum did not rebut. Wehrum's more general statements are off-point and, regardless, contradicted by Director Oge, who stated that "neither I nor the Assistant Administrator ever worked with technical staff to make 'substantive analytical changes' to the core model. There were no 'analytical choices internal to the OMEGA model itself made by . . . policymakers,' as Wehrum contends . . . . The construction and modification of the core model was a task delegated entirely to OTAQ technical experts." JA135-36; *see also* JA137.

Summary judgment is inappropriate in FOIA cases where the Government's affidavit is "called into question by contradictory evidence in the record." *Cuomo*, 166 F.3d at 478 (citation omitted). Director Oge's affidavit directly and specifically controverted EPA's generalized evidence about the relationship between the development of OMEGA and EPA's decisionmaking process in setting vehicle emissions standards. The district court nonetheless concluded that Wehrum's affidavit was sufficient to sustain summary judgment "because *it is*

possible that EPA policy regarding the development of OMEGA has changed since Oge left the EPA or that Oge was not personally involved in making substantive changes to OMEGA, while others [sic] EPA employees were." JA205 & n.2 (emphasis added). But a mere possibility, absent specific facts, is not sufficient to carry EPA's burden to show that records may be withheld. In any event, the district court's suppositions are contradicted by the full release of OMEGA in 2016, and smaller releases even in 2017. *See* JA49; JA138, ¶12.

First, Oge's statements cannot be reconciled by the supposition that EPA's approach to OMEGA has changed, because both Wehrum's and Oge's affidavits describe EPA's *past* approach to OMEGA. *Compare, e.g.* JA123, ¶15 ("The regulatory development process and the process of making upgrades to the OMEGA model *have traditionally proceeded* in parallel . . . .") (emphasis added), *with* JA136, ¶4 ("During my tenure as director of OTAQ, adjustments to the various components of OMEGA, including the core executable model, were not reviewed or approved by me or upper-level management at EPA."); JA137, ¶8.

S*econd*, Oge's declaration specifically stated that other EPA officials did not direct substantive changes to the OMEGA computer

program. JA135, ¶3 ("[N]either I nor the Assistant Administrator ever worked with technical staff to make 'substantive analytical changes' to the core model."); *see also, e.g.* JA136-37, ¶¶7-8). EPA nowhere specifically rebutted this point.[6] The district court's conjecture to the contrary was thus entirely unfounded. Because Wehrum's affidavit is controverted by contradictory evidence in the record, the Government was not entitled to summary judgment.

Instead, Plaintiffs are entitled to summary judgment because Wehrum's affidavit is insufficient to carry EPA's burden. Release of OMEGA v.1.4.59 cannot reveal EPA's policy choices because, as discussed, EPA has not specified any agency rulemaking for which it has used OMEGA v.1.4.59. EPA's explanation for OMEGA v.1.4.59's deliberative nature thus makes no sense. Release of the program cannot reveal the "policy choices made throughout the regulatory development

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[6] Wehrum's original affidavit says "upper-level decisionmakers *may work* with technical staff" to make substantive changes. JA122, ¶11. He conspicuously does not say that he—or anyone else—*ever did so*. Like much of his affidavit, this is precisely the sort of vague statement that is insufficient to support withholding. *See Quinon v. F.B.I.*, 86 F.3d 1222, 1229 (D.C. Cir. 1996).

process" if EPA did not use the program in that regulatory development process.

Indeed, EPA's failure to connect OMEGA v.1.4.59 with any specific vehicle emissions standard renders EPA's "deliberative" argument specious. Non-deliberative factual material can become deliberative only if it is so "intertwined" with deliberative content that its disclosure would reveal those deliberations. *See, e.g.*, *Local 3, Intern. Broth. of Elec. Workers, AFL-CIO v. N.L.R.B.*, 845 F.2d 1177, 1180 (2d Cir. 1988) (facts were exempted because they were so intertwined within legal memoranda that release would reveal officials' analyses and recommended dispositions). But here, because EPA avers that it has not used OMEGA v.1.4.59 in the formulation of any vehicle emission standard, EPA can point to no deliberative content—*e.g.*, internal discussions regarding a specific standard—that could possibly be revealed if OMEGA v.1.4.59 were released. The program thus cannot be withheld as deliberative.

3. The OMEGA v.1.4.59 computer program is not a "draft" that is inherently "deliberative"

Finally, EPA argued below that the computer program is inherently deliberative simply because it is purportedly an incomplete

"draft." This argument, which the district court declined to address, also lacks merit.

First, labeling something a draft is not enough to render it "deliberative." *Arthur Andersen & Co. v. I.R.S.*, 679 F.2d 254, 257-58 (D.C. Cir. 1982); *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't Agency*, 811 F. Supp. 2d 713, 741 (S.D.N.Y.), *amended on reconsideration* (Aug. 8, 2011). *Second*, EPA's basis for classifying OMEGA v.1.4.59 as a "draft" was the bare and tautological contention that the program has not been "finalized." *See, e.g.*, JA124 ("Before it is released publicly alongside a regulatory action, the OMEGA model is in draft form."). But that argument must fail: the agency cannot claim that a record is a draft, and therefore deliberative, on the basis that EPA has not publicly released the record. That reasoning would render FOIA effectively inert. *Third*, EPA's assertion that OMEGA v.1.4.59 is an incomplete draft contradicts its own response to Plaintiffs' FOIA request. *See* JA57 (EPA's FOIA Determination) ("EPA is withholding the latest *full* version of the OMEGA model itself (version 1.4.59)." (emphasis added)).

III. RELEASE OF THE OMEGA COMPUTER PROGRAM WILL NOT PLAUSIBLY HARM INTERESTS PROTECTED BY THE DELIBERATIVE-PROCESS PRIVILEGE

Irrespective of whether the OMEGA computer program falls within Exemption 5, EPA must release the program because its disclosure will not harm agency deliberations. Largely in response to agency misuse of Exemption 5, Congress added a "foreseeable harm" requirement to FOIA in 2016. As amended, even if a record is otherwise exempt, an agency may withhold it "only if . . . the agency reasonably foresees that disclosure would harm an interest protected by an exemption." 5 U.S.C. § 552(a)(8)(A)(i). And EPA has the burden to point to specific record evidence that its withholding meets the standard. *ACLU*, 925 F.3d at 585 n.7, 600. EPA did not show that it is reasonable to foresee that disclosure of anonymous technical updates to OMEGA program code in 2017 or 2018 will cause agency staff to be less candid in future policy discussions. EPA's conclusory claims of harm are legally insufficient to justify withholding.

A. EPA Has a Substantive Burden to Establish Harm

Congress enacted the "foreseeable harm" requirement in the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538,

codified in relevant part at 5 U.S.C. § 552(a)(8). The bipartisan Act addressed "a growing and troubling trend" of agencies invoking exemptions, particularly Exemption 5, to withhold records "even though no harm would result from disclosure." *See* S. Rep. 114-4, at 4; *see also* H. Rep. 114-391, at 10 ("Exemption five has been singled out as a particularly problematic exemption. . . . The deliberative process privilege has become the legal vehicle by which agencies continue to withhold information about government operations.").

Congress borrowed the new requirement from a policy referred to as the "presumption of openness." *See* S. Rep. 114-4, at 4; *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 2019 WL 4644029, at *3 (D.D.C. Sept. 24, 2019). Under that policy, disclosure is not harmful "merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears." S. Rep. 114-4, at 4 (quoting 74 Fed. Reg. 4,683).[7] To

[7] *See also*, Rep. Meadows (R-N.C.), "FOIA Improvement Act of 2016," Cong. Rec. at H3713 ("Under the presumption of openness, agencies may no longer withhold information that is embarrassing or could possibly paint the agency in a negative light simply because an exemption may technically apply. This will go a long way toward getting rid of the withhold-it-because-you-want-to exemption.").

implement that policy, FOIA now provides that an agency "shall withhold information . . . only if . . . the agency reasonably foresees that disclosure would harm an interest protected by an exemption." 5 U.S.C. § 552(a)(8)(A).

This language imposes "a meaningful and heightened standard that the agency must satisfy." *Judicial Watch*, 2019 WL 4644029, at *3-*4 (collecting cases); *see also NRDC v. EPA*, 2019 WL 3338266, at *1 (S.D.N.Y. July 25, 2019) (rejecting EPA's argument that the provision does not provide a heightened standard). EPA must establish, at a minimum, that disclosure will foreseeably harm a "protected" interest—here, the deliberative process. Further, the statute requires that EPA's prediction of harm be "reasonable." *Accord, e.g.*, *Judicial Watch*, 2019 WL 4644029, at *3 ("[A]n agency must release a record—even if it falls within a FOIA exemption—if releasing the record would not *reasonably* harm *an exemption-protected interest*." (quoting *Rosenberg v. Dep't of Def.*, 342 F. Supp. 3d 62, 73 (D.D.C. 2018) (emphasis added))). EPA failed to demonstrate a reasonable prospect that release of the OMEGA v.1.4.59 computer program will meaningfully inhibit candid discussion of policy within EPA.

B. EPA's Generalized Prediction of Harm is Insufficient

EPA bears the burden to justify any FOIA withholding. *See ACLU*, 925 F.3d at 585 n.7. In an attempt to meet the heightened foreseeable harm standard, EPA proffered a declaration from then-Assistant Administrator Wehrum. JA120. Wehrum's statements—though "fitted to FOIA doctrine in a lawyerly manner," *PIC*, 976 F.2d at 1436—fail to provide a "reasonably detailed explanation" for why release of the OMEGA computer program would plausibly harm EPA's ability to deliberate. *Halpern*, 181 F.3d at 295. Further, given the nature of this type of computer program, and the voluminous OMEGA information EPA has previously released, no plausible reason exists that EPA's deliberative interests would be harmed by its release.

1. EPA failed to show plausible harm

There is a presumption that agency statements in a supporting declaration are made in good faith. *Halpern*, 181 F.3d at 295. But there is no presumption that those statements are *sufficient*. *Id*. Nor must Plaintiffs prove bad faith to undermine those statements—agency statements can be controverted by evidence in the record. *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 73 (2d Cir. 2009).

The protectable interest at issue is EPA's ability to have "open and frank discussion among [decisionmakers]." *Klamath*, 532 U.S. at 9. The district court erred in concluding that EPA's declarations were sufficient to show harm to this interest. The court relied solely on statements from the Wehrum declaration to find that disclosure would "chill free and open discussion" and "cause public confusion." JA210-11.

Many of Wehrum's statements are subjective beliefs and naked conclusions: "I believe the release of the OMEGA model would be harmful to the agency"; "I believe the release of the OMEGA model would cause public confusion"; "it would chill free and open discussions of EPA staff regarding their opinions on the appropriate analytical tools to be included in the model." JA125. Such cursory and conclusory statements receive no deference and should be disregarded. *See Bloomberg*, 601 F.3d at 147; *Quinon*, 86 F.3d at 1229.

The remaining statements are no less conclusory. Wehrum states that a "chilling effect" from disclosure "would impact EPA's decisionmaking processes and ability to have internal discussions." JA125, ¶21. This, again, is a conclusion—not an explanation—and

merely articulates the purpose of the deliberative-process privilege. The record is also to the contrary. *E.g.*, JA139, ¶¶14-15, JA78, ¶26.

Stripped of extraneous filler, all that is left is Wehrum's statement that, if staff knew their "interim updates or initial attempts" might become public, "they would be less likely to test or experiment" with others. JA125, ¶21. It is telling that EPA's other affiant—a 27-year career staff member—makes no similar averment. JA127-34. Regardless, entirely missing from Wehrum's affidavit is any explanation for *why* agency staff would be any less candid when proposing possible future updates to the computer program. The absence of any explanation (*e.g.*, "they would be less likely to propose updates because . . . ."), much less a "reasonably detailed" one, *Halpern*, 181 F.3d at 295, is fatal. Nor is it permissible for a court to supply its own explanation or fill in the blanks, because "[t]he government bears the burden . . . and all doubts . . . must be resolved in favor of disclosure." *Florez v. CIA*, 829 F.3d 178, 182 (2d Cir. 2016).

Wehrum also states that release "would cause public confusion." JA125, ¶22. This conclusion likewise lacks a supporting explanation. Wehrum, in so many words, declares (a) that the computer program is

in draft form and (b) that EPA did not rely on it to develop its SAFE Vehicles rule. *See id*. But the declaration nowhere explains *why* either of those statements, even if true,[8] mean disclosure would cause public confusion. As the D.C. Circuit has explained, there is no reason why concerns of this kind "could not be allayed by conspicuously warning . . . that the [computer] file is as yet unofficial and . . . disclaim[ing] responsibility for any errors." *PIC*, 976 F.2d at 1437. Indeed, EPA has done exactly that: repeatedly telling the public that it did not rely on OMEGA to develop the Proposed Rule. *E.g.*, JA60; 83 Fed. Reg. at 43,000.

At bottom, Wehrum's statements simply recapitulate EPA's claim that the computer program is deliberative. But the "foreseeable harm" requirement *presupposes* that the disputed record is deliberative. It thus cannot be enough for an agency to declare that because a record is deliberative, release will make staff less likely to deliberate candidly. Accepting such tautological justifications would sap the requirement of

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[8] As explained, *supra* Section II.B.3, EPA's contention that OMEGA v.1.4.59 is an incomplete draft is both inconsistent with its prior representations to Plaintiffs and the district court, and contradicted by the record.

all meaning—a result at odds with both the statutory text and with Congress' goal of restricting agency use of Exemption 5 in particular.

2. Disclosure will not cause reasonably foreseeable harm

The judicial record provides ample evidence that release of this version of the OMEGA computer program could not reasonably be expected to harm EPA's deliberative process. Put another way, the record contradicts even EPA's conclusory assertions of harm.

The concern with releasing deliberative communications is that it might publicize a subordinate's candid—possibly unpopular—opinions, which were intended to provide an agency decisionmaker with full information to inform pending policy choices. *See Klamath*, 532 U.S. at 8-9. Publication of those unvarnished remarks could lead to public scorn, in turn possibly causing the subordinate to temper his opinions in the future—subsequently denying the agency decisionmaker a full range of views to inform her future policy decisions. *See id*. The goal is that policy makers have access to all relevant advice, not just uncontroversial advice.

Release of computer program code will not plausibly threaten the free flow of relevant advice on policy issues. The computer-coded

algorithms that comprise the program are not remarks or opinions, candid or otherwise. *See, e.g.*, *PIC,* 976 F.2d at 1438-39 ("We do not see in the data elements, codes, and format choices [of the computer file], . . . the 'candid or personal' decisions that, if revealed prematurely, would be likely to 'stifle honest and frank communication.'" (citation omitted)). Further, updates to the code algorithms are technical in nature. These may be "complex" calculations, but one does not speak of a "candid" equation or a "frank" algorithm. As another court recently observed:

> Spreadsheets do not contain any information that is 'candid or personal.' They do not contain any proposed alternatives or any suggestions about which choice among alternatives should be adopted. The Spreadsheets do not 'weigh the pros and cons' of adopting various estimates. *See Quarles*, 893 F.2d at 392. Instead, they contain complex calculations and numerical estimates. No authors are identified within the Spreadsheets. The Court cannot fathom how disclosure of the Spreadsheets might ever embarrass someone, cause someone in the future to be less than candid in their professional cost estimations, or result in an Executive Branch official purposefully calling only for 'fuzzy' estimates expressed in wide ranges. *See Quarles*, 893 F.2d at 393."

NAACP, --- F. Supp. 3d ---, 2019 WL 3207623 at *6 (D. Md. July 16, 2019).

Release of the OMEGA v.1.4.59 computer program will, at most, allow a computer expert to determine if an embedded algorithm was updated or added since the release of version 1.4.56. But the public will not know *who* coded that update. Nor will the public know *why*. Any discussion that led to the update, or any subsequent opinions on its utility, will remain inscrutable. There is no plausible reason that release of an unattributed, technical update to program code would cause the anonymous programmer to be less than forthright in advising on the possible range of algorithms in the future. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 869 (D.C. Cir. 1980) ("The documents do not contain subjective, personal thoughts on a subject, so public knowledge of the documents will not subject the writer either to ridicule or criticism.").

The best evidence that release here would be innocuous is the fact that EPA has repeatedly released the computer program in the past. *E.g.* JA48-52. And not just in so-called "final" form. The nascent version 1.0 was developed in an open and collaborative process, and the agency actively sought developmental feedback from stakeholders outside the agency. JA74, ¶9. EPA also released explicitly non-final

versions to invite public feedback in connection with *proposed* rules and *draft* technical reports. JA137-38, ¶¶10-12. Further, not only did EPA release the program itself, the agency also released all the files and data necessary for the public to fully utilize it, JA48-52; copious documentation explaining in detail not just the program's functionality, but also its rationale, *id.* (with links to download documentation, *e.g.*, *OMEGA Model Documentation 1.0*, Doc. No. EPA-420-B-09-035 (Oct. 2009)); and even details of the agency's own modeling with OMEGA, *e.g.* JA49 (with links to download inputs and outputs used in various proposed and draft analyses). With each release, EPA also informed the public that future updates "would" be released, and "encouraged" the public to stay up-to-date. *E.g.* EPA, *OMEGA Core Model Version 1.4.56*, at 3, Doc. EPA-420-B-16-064 (July 2016).[9]

Notwithstanding all this, EPA suggests in this litigation that these releases were exceptional, and that the agency zealously guarded

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[9] Further contradicting EPA's claims, the released documentation for the CAFE model that EPA avers it is currently using is conspicuously labeled "DRAFT." *See* NHTSA, *Draft CAFE Model Documentation* (July 2018), available at https://www.nhtsa.gov/corporate-average-fuel-economy/compliance-and-effects-modeling-system.

information in between. *See* JA123, ¶13. But the record evidence is all to the contrary. EPA affirmatively released OMEGA when the public was most likely to be interested, such as in connection with rulemakings. JA138, ¶11; JA48-52. But EPA staff were empowered to share information about the model with stakeholders at all other times. JA138, ¶11. And the record contains evidence that EPA staff in fact shared detailed information, both about the current model, as well as ongoing efforts to improve it. *E.g.* JA140, ¶¶16-17; JA142-62; JA164-82. In contrast, there is no record evidence that EPA *ever* refused stakeholder access until Plaintiffs' March 2018 letter to Wehrum went unanswered. JA18, ¶44; JA33, ¶44. As former OTAQ Director Oge—who oversaw the original development of OMEGA and publication of four different "core" model versions—explains: "Disclosure of the model and associated files *improved* EPA's decision making while I was at EPA through peer review and extensive feedback from stakeholders." JA78, ¶26. EPA has provided no evidence that disclosure now would have any different effect.

EPA's own litigation hypothetical undermines any claim of harm. EPA declares it has previously given "policy" consideration to adding an

"economic simulation or consumer choice sub-model as an analytical tool to the OMEGA model." JA124, ¶18. EPA here contends that it needs to shield from disclosure "the mere fact of whether or not" it considered another such tool. *Id.* ¶19. But EPA's actions with respect to the actual consumer choice sub-model flatly contradict its claimed concern: EPA actually informed the public in advance that it was considering the "sub-model," JA184, ¶6; had an initial version of it peer-reviewed, after which EPA published the reviewers' comments and EPA's responses, JA184; *see also* EPA, Science Inventory, *Peer Review for the Consumer Vehicle Choice Model*, https://cfpub.epa.gov/si/si_public_record_report.cfm?Lab=OTAQ&direntryid=240153; undertook and then published a validation study that recommended against using the tool, JA184, ¶5; and released the program code to the public, JA184, ¶6. In other words, EPA let the public know "whether or not" it considered adding a tool, details of that consideration, and why it decided not to employ the tool. EPA demonstrated no concern that airing model considerations would harm its policy-making abilities.

Further, whether to add a "sub-model" or "tool" to an accounting program is not a meaningful *policy* choice. *See PIC*, 976 F.2d at 1437. EPA itself recently cautioned the public not to "conflate the analytical tool used to inform the decisionmaking with the action of making the decision," 83 Fed. Reg. at 43,002. The "tool" is factual and investigative, and release would not harm policy deliberations. *See Mink*, 410 U.S. at 89.

Finally, by the repeated invocation of possible new "analytical tools," *e.g.* JA124, ¶16, EPA implies an almost infinite malleability to the OMEGA computer program. But the technical nature of the program in fact "circumscribes" EPA's discretion in updating it. *See PIC*, 976 F.2d at 1438. The overall OMEGA model "relies heavily on its inputs," and its modeling flexibility is primarily achieved through the user's modification of input data—all of which EPA has already released. JA85-88, ¶¶13, 15, 22; EPA, *OMEGA Core Model Version 1.4.56*, at 7. The computer program itself is just a calculational element in the overall model, and one further constrained by its particular objective: mathematical optimization. JA87-88, ¶¶20, 22. The computer program's technical objective constrains the possible scope of any

updates. Further, the record indicates that the form and structure of the current inputs are materially the same as the last program release, additionally constraining the scope of any change to the program that processes them. JA185-86.

In light of the agency's history of openness regarding both OMEGA and possible updates, EPA's claim of harm rings hollow. EPA says only that version 1.4.59 "has been updated by staff in various ways" since version 1.4.56. JA132, ¶16. Even assuming this refers to the model's "core" computer program, and not simply the model's inputs, there is no record evidence that the thousandths-place change in version numbers represents anything other than program debugging or ministerial updates to conform the program to the most recent input data. If the program is materially unchanged, it cannot be harmful to the deliberative process to release. EPA has a minimum burden to aver, not necessarily *which* significant change has been made, but at least *that* a significant change has been made to the computer program. Otherwise, FOIA's foreseeable-harm requirement would be rendered a dead letter because an agency *always* can say that disclosure of a record would reveal whether or not changes have been made since the last

release. *Cf. PIC*, 976 F.2d 1436 n.8 ("Even the most mundane material could be said to reflect the exercise of agency discretion in some sense, for example, by indicating the typeface an official favors. To be protected under Exemption 5, the kind and scope of discretion involved must be of such significance that disclosure genuinely could be thought likely to diminish the candor of agency deliberations in the future.").

Despite the express invitation to buttress its claim, (*see* ECF 50, Plaintiffs' Op. Br. at 21), EPA did not declare that the agency has actually made *any* material change to the program beyond ministerial updates, or indeed provided even any other hypothetical additions that could have been made. There is no reasonable prospect that disclosure will harm EPA's ability to deliberate.

IV. THE EXECUTABLE PORTION OF THE OMEGA COMPUTER PROGRAM IS "REASONABLY SEGREGABLE" AND MUST BE DISLCOSED

Even if some of the computer program is exempt from disclosure, EPA must still release "[a]ny reasonably segregable portion" that is not. 5 U.S.C. § 552(b). As explained below, the "executable" portion of the program is easily segregable and must be released. Human programmers construct algorithms in C# code. This C# "source" code

must then be converted into "machine" code—a process called "compiling"—before a computer can execute the program. JA184, ¶7. This executable machine code is unintelligible to humans—even programmers—and quintessentially not a deliberative interagency communication that could be harmful to disclose. *See id.*

EPA says it is possible to reverse engineer, or "decompile," the executable code into C# source code. JA191. But EPA admits that any reverse-engineered code is only "*functionally* identical" to the original source code, JA192 (emphasis added), *not* the same code. In other words, disclosing the executable machine code would reveal, at most, whether the withheld version of the OMEGA program is *functionally* the same as the last public version. The bare fact of a functional change is not "inextricably intertwined" with any "privileged opinions [or] recommendations such that disclosure would compromise the confidentiality of deliberative information that is entitled to protection." *See Hopkins*, 929 F.2d at 85 (citation omitted). Nor has EPA established that there *is* any significant change in function from the last public version. EPA has failed to show that the executable code is both exempt and would reasonably lead to foreseeable harm to a protected interest if

released. The executable portion of the OMEGA computer program is thus "reasonably segregable," 5 U.S.C. § 552(b), and at least that portion must be disclosed.

* * * * *

EPA's proposal to roll back existing emission standards would undo one of the most important actions our government has ever taken to stave off catastrophic climate change. The public has a right to all the facts and investigative tools in EPA's possession that relate to that change, even if the agency has ignored them. FOIA exists for this precise purpose: "to promote honest and open government and to assure the existence of an informed citizenry." *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 355 (2d Cir. 2005). But a citizenry informed too late may not be able to meaningfully hold its government to account, which is why delay in FOIA cases is tantamount to denial. Plaintiffs respectfully urge the Court to act expeditiously on this appeal.

CONCLUSION

The Court should reverse the district court's judgment and direct it to order EPA to expeditiously release the full OMEGA v.1.4.59 computer program.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that:

This brief complies with Local Rule 32.1(a)(4)(A)'s type-volume limitation because it contains 13,992 words (as determined by the Microsoft Word word-processing system used to prepare the brief), excluding the parts of the brief exempted by Rule 32(f).

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/s/ Peter Huffman
Peter Huffman

CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2019, I caused the foregoing to be filed electronically with the Clerk of Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system. Participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Peter Huffman
Peter Huffman