

Petition Urges SCOTUS to Address Whether Agencies May Unilaterally Exclude “Deliberative” Documents from Administrative Record on Judicial Review

News

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On September 13, a Jenner & Block team filed a petition for certiorari in the United States Supreme Court on behalf of the Blue Mountains Biodiversity Project asking the Court to hear whether the Administrative Procedure Act (APA) permits an agency to categorically and unilaterally exclude from the administrative record materials that the agency deems deliberative.

The petition is part of Blue Mountains’ ongoing litigation against the U.S. Forest Service’s approval of a logging project in an Oregon National Forest. Co-counsel includes the Jenner & Block Supreme Court and Appellate Clinic at the University of Chicago Law School, Tom Buchele of Earthrise Law Center at Lewis & Clark Law School and Jesse Buss and Bridgett Chevallier of the Willamette Law Group. This is Blue Mountains’ and Earthrise’s first petition ever filed at the Court.

The petition seeks review of a question that has divided lower courts: whether the APA—which requires an agency to turn over the “whole record” to a reviewing court—permits an agency to categorically and unilaterally exclude from the administrative record materials that the agency deems deliberative. Over dissent, the Ninth Circuit concluded that the answer was yes. The petition argues, however, that the growing consensus among lower courts is that the APA means what it says: agencies “shall” produce the “whole record.” To withhold documents that are part of the full record based on an assertion of privilege, the petition argues, the agency must produce a privilege log that opposing parties and courts can examine. Otherwise, neither a court nor litigants could verify whether those omitted documents were relevant, let alone whether they supported the agency’s action.

“A rule that allows agencies to unilaterally excise documents from the record because they are deliberative creates a one-way ratchet that undermines effective judicial review,” the petition says.

The team included Partners Matthew Hellman and Michael Brody, Associate Andy Osborne, Law Clerk Donovan Hicks, and Senior Paralegal Cheryl Olson. The team was also aided by former Summer Associates Ashlee Fox, Krister Rasmussen, and Kevin Zhang.

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