No. 19-547

In The Supreme Court of the United States

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Petitioners,

v.

SIERRA CLUB, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

SANJAY NARAYAN
Counsel of Record
ELENA SAXONHOUSE
MATTHEW MILLER
SIERRA CLUB ENVIRONMENTAL LAW PROGRAM
2101 Webster St., Ste. 1300
Oakland, CA 94612
(415) 977-5769
sanjay.narayan@sierraclub.org

SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th St., NW
Washington, DC 20009
(202) 588-1000

REED SUPER
SUPER LAW GROUP, LLC
180 Maiden Ln., Ste. 603
New York, NY 10038
(212) 242-2355

July 27, 2020

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

The Endangered Species Act prohibits any agency action that is likely to jeopardize the existence of threatened or endangered species or adversely affect their critical habitat, and requires agencies to seek the Fish and Wildlife Service's and National Marine Fisheries Service's opinion as to whether their actions violate that prohibition. 16 U.S.C. §1536(a)(2). If those Services conclude that the action would jeopardize protected species, they must, in cooperation with the action agency, develop reasonable alternatives to the agency's proposal. *Id.* §1536(b)(3)(A); 50 C.F.R. §402.14(g)(5).

The Environmental Protection Agency submitted a proposed regulation to the Services for that legally required review, and the Services concluded that the regulation violated the Endangered Species Act's jeopardy prohibition. Accordingly, the Services and the Agency developed a more stringent alternative, which the Services approved and the Agency adopted.

The court of appeals held that the Freedom of Information Act required the Services to disclose opinions supplying the basis for their jeopardy decision, concluding that the government had failed to demonstrate that the opinions were merely deliberative, advisory materials, entitled to that Act's exemption for "interagency or intra-agency memorandums that would not be available by law to a party other than the agency in litigation with the agency." 5 U.S.C. §552(b)(5).

The question presented is:

> Did the court of appeals correctly require disclosure of the Services' opinions supplying the

QUESTION PRESENTED—Continued

basis for their jeopardy decision, because of the operative effect of the decision and the record demonstrating that no further deliberation occurred over the jeopardy decision after preparation of the opinions, despite the government's nominal designation of its opinions as "drafts"?

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INTRODUCTION

The Freedom of Information Act ("FOIA"), 5 U.S.C. §552, makes all agency records available to the public, except certain specifically exempted material, so as to safeguard "citizens' right to be informed about 'what their government is up to.'" *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (citation omitted). In keeping with that emphasis on ensuring that agencies remain accountable when exercising their authority, FOIA mandates disclosure of "the reasons" that "supply the basis for an agency policy actually adopted." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152-53 (1975).

That principle resolves this case. The Fish and Wildlife Service and National Marine Fisheries Service (collectively, the "Services") made a decision: A regulation the Environmental Protection Agency ("EPA") submitted for their review under the Endangered Species Act ("ESA") violated the ESA's prohibition on actions likely to jeopardize protected species. 16 U.S.C. §1536(a)(2). That decision had concrete legal consequences: If an agency action threatens such jeopardy, the "agency must either terminate the action, implement [a Service-approved] alternative, or seek an exemption" from a Cabinet-level committee. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife ("NAHB")*, 551 U.S. 644, 652 (2007). The Services' jeopardy decision produced that prescribed effect: EPA added further protective measures, approved by the Services, to its regulation. 79 Fed. Reg. 48,300, 48,381 (Aug. 15, 2014).

The Services have refused to disclose the opinions supplying the basis for their jeopardy decision. But these are exactly the sorts of materials that FOIA makes public: documents explaining why agencies wield decisive statutory authority. The Services' contrary view—that the opinions are exempt under FOIA's fifth exemption, 5 U.S.C. §552(b)(5), as mere advisory deliberations—rests on three fundamental errors, each of which threatens to corrode the accountability FOIA was enacted to assure.

First, disregarding the power entrusted to them by the ESA, the Services dismiss their jeopardy conclusion as a mere recommendation that imposed no meaningful constraint on EPA. *E.g.*, Brief for Petitioners ("Brief") 33. This Court has repeatedly recognized, however, that the Services' decisions—while nominally consultative—carry "direct and appreciable legal consequences," given the ESA's strict prohibitions and the Services' statutory role and wildlife-related expertise. *Bennett v. Spear*, 520 U.S. 154, 178 (1997). The Services invoked the ESA's jeopardy bar—a severe restriction that overrides even other agencies' "primary missions," *TVA v. Hill*, 437 U.S. 153, 185 (1978) (citation omitted). Allowing the Services to make that decision and give it effect while shielding its basis from public scrutiny would contradict FOIA's core mandate: securing public access to the information necessary to hold agencies accountable to those they govern. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

Second, the Services blur two separate, consequential decisions required by the ESA: whether a

proposed agency action jeopardizes protected species, 16 U.S.C. §1536(a)(2); and, if it does, what alternatives are available to cure that violation, *id.* §1536(b)(3)(A). Because a jeopardy determination requires development of an alternative course of action, the Services portray that determination as an "interim" step and insist that its basis is therefore exempt from disclosure under FOIA. Brief 25. That portrayal allows the Services to hide their response to the threshold statutory question—whether a proposed action jeopardizes protected species—behind the legal consequences of an affirmative answer: changes to (or abandonment of) the proposed action. The Services' assertion that FOIA exempts intermediate decisions has no foothold in the statutory text. FOIA does not permit agencies to keep the reasons for consequential decisions secret merely because those decisions are followed by additional steps in a longer decision-making process. The Services' claim that they are entitled to withhold such materials runs counter to the statute's central command: that the public have access to information revealing where and by whom agency decisions are made, and why—that is, "what their government is up to." *Reporters Comm.*, 489 U.S. at 773 (citation omitted).

Third, the Services' view would elevate the formal label they affixed to the contested opinions—"draft"—over the substance of their actions, which reveal the decisive effect of the determinations explained by the opinions. Accepting that view would grant agencies discretion that Congress deliberatively withdrew: to "decid[e] what information to disclose" solely through

their own characterizations of their documents. *GTE Sylvania v. Consumers Union*, 445 U.S. 375, 384-85 (1980). The Services' label-focused approach would vitiate the record-specific judicial inquiry prescribed by FOIA, which requires "de novo" review with the burden "on the agency" to sustain its withholding. 5 U.S.C. §552(a)(4)(B). And it would foster the "secret (agency) law" that FOIA prohibits: rules and policies used by agencies to guide their actions yet kept hidden from public view. *Sears*, 421 U.S. at 153 (citation omitted).

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

1. The Freedom of Information Act

Congress enacted FOIA to "ensure an informed citizenry," *Robbins Tire*, 437 U.S. at 242, by illuminating the otherwise impenetrable activities of the "myriad of agencies" making up the contemporary government. S. Rep. No. 89-813, at 3 (1965). FOIA is designed to secure disclosure of the information necessary to enable thorough public "scrutiny" of agencies' "performance of [their] statutory duties," *Reporters Comm.*, 489 U.S. at 772-73 (citations omitted), and requires the government to bear the burden of justifying any withholding of agency records, 5 U.S.C. §552(a)(4)(B).

The statute's provisions begin by requiring agencies to affirmatively disclose, *inter alia*, "final opinions, including concurring and dissenting opinions, as well

as orders, made in the adjudication of cases"; "statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register"; and "administrative staff manuals and instructions to staff that affect a member of the public." 5 U.S.C. §§552(a)(2)(A)-(C). Those self-executing obligations are followed by an open-ended command to disclose all agency "records," upon suitable request. *Id.* §552(a)(3)(A); *see also id.* §552(a)(2)(D) (records made available to requesters must also be made public in specified circumstances).

The resulting mandate of "full agency disclosure," *Sears*, 421 U.S. at 136 (citation omitted), is limited only by nine "carefully structured" exemptions, enumerated at 5 U.S.C. §§552(b)(1)-(9). *Robbins Tire*, 437 U.S. at 220. These exemptions replaced earlier statutory language that allowed agencies to withhold records just by asserting that disclosure would not serve the "public interest" or would invade the agency's "internal management." S. Rep. No. 89-813, at 3-5. Those "undefined phrases placed broad discretion in the hands of agency officials in deciding what information to disclose, and that discretion was often abused," a problem "exacerbated" by the absence of searching judicial review. *GTE Sylvania*, 445 at 384-85; *see also Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011) ("vague phrases" allowed agencies to treat the law as more "'a withholding statute than a disclosure statute'") (citation omitted); H.R. Rep. No. 89-1497, at 2-3 (1966) (prior statute left "to each agency the decision on what information" to withhold).

Congress eliminated that discretion through specific, narrowly worded exemptions, "explicitly made exclusive." *Milner*, 562 U.S. at 565 (citation omitted). Because of that structure—the specificity with which the statute delineates the materials that an agency may withhold, set against the breadth of its disclosure mandate—this Court has "insisted that the exemptions be 'given a narrow compass,'" especially when faced with a construction that would "reauthorize the expansive withholding that Congress wanted to halt." *Id.* at 571-72 (citation omitted). The statute further limits agency discretion through robust and fact-specific judicial oversight: It requires "de novo" review of agencies' invocation of a statutory exemption, places the "burden . . . on the agency to sustain" any withholding, and permits *in camera* review. 5 U.S.C. §552(a)(4)(B). Agencies must, moreover, disclose "[a]ny reasonably segregable portion" of a document containing some exempt information. *Id.* §552(b).

FOIA's "Exemption 5" allows agencies to withhold "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." *Id.* §552(b)(5). That exemption incorporates the "deliberative process privilege," protecting materials whose disclosure "would be 'injurious to the consultative functions of government'"; but it "delimit[s] the exception as narrowly as consistent with efficient Government operation." *EPA v. Mink*, 410 U.S. 73, 87 (1973) (citations omitted). Thus, agencies may avoid disclosing "advisory opinions, recommendations and

deliberations," but they may not withhold materials that "embody the agency's effective law and policy," or describe "the reasons" that "supply the basis for an agency policy actually adopted." *Sears*, 421 U.S. at 150-53 (citations omitted). FOIA requires such disclosure both because the text of its affirmative disclosure provisions, 5 U.S.C. §552(a)(2), reflects Congress's demand that materials that "explain agency action" or substantiate "an agency decision" be available to the public, and because disclosure of these explanations does not threaten "injury to the decisionmaking process." *Sears*, 421 U.S. at 152-54.

The courts of appeals utilize a two-part inquiry to identify records protected by the deliberative process privilege as incorporated by Exemption 5. To be exempt, a document must be "predecisional"—that is, "produced in the process of formulating policy," rather than a "statement[] of an agency's legal position." *Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997). Further, it must be "deliberative," containing material " 'reflect[ing] an agency's preliminary positions or ruminations' about a particular policy judgment," *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 39 (D.C. Cir. 2002) (citation omitted).

2. The Endangered Species Act

The ESA is "intended to protect and conserve endangered and threatened species and their habitats." *NAHB*, 551 U.S. at 651. It requires the government to identify and list species that are threatened or

endangered, 16 U.S.C. §1533, then provides a series of prohibitions and requirements intended to prevent those species' extinction and promote their recovery, *id.* §§1534-44. The Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") administer the statute, on behalf of the Secretaries of Interior and Commerce. *NAHB*, 551 U.S. at 651.

The ESA requires, *inter alia*, every federal agency to "insure" that its actions are "not likely to jeopardize the continued existence" of any listed species, or "result in the destruction or adverse modification" of their critical habitat. 16 U.S.C. §1536(a)(2); *see generally Hill*, 437 U.S. at 185. This jeopardy prohibition is implemented through a prescribed "consultation" with the Services when agency actions may affect listed species or their critical habitat. 16 U.S.C. §§1536(a)(2)-(3); 50 C.F.R. §402.14(a). Following the consultation, the Services "provide to the Federal agency" whose action is under review "a written statement" describing "how the agency action affects the species or its critical habitat." 16 U.S.C. §1536(b)(3)(A). If the Services conclude that the action will violate the jeopardy prohibition, the Services must "suggest those reasonable and prudent alternatives," if any, that might be available to the action agency. *Id.* If the Services do not reach a jeopardy conclusion, the need for such alternatives never arises. *Id.* The Services must also provide the action agency with a statement addressing any "incidental taking" of protected species. *Id.* §1536(b)(4). The Services call the document containing all these determinations a "biological opinion." *Bennett*, 520 U.S. at 158.

The Services' consultation "theoretically serves an 'advisory function.'" *Id.* at 169 (citation omitted). But "in reality it has a powerful coercive effect on the action agency." *Id.* An agency that wishes to disregard the Services' biological opinion must "articulate its reasons for disagreement," but those reasons will receive little or no deference because they require "species and habitat investigations that are not within the action agency's expertise." *Id.* Given the ESA's strict prohibitions, an agency that "proceed[s] with its proposed action" in defiance of the Services' opinion runs "a substantial risk if its (inexpert) reasons turn out to be wrong," *id.* at 169-70 (discussing Act's "take" prohibition)—*e.g.*, that its action will be held unlawful and set aside, *Hill*, 437 U.S. at 193-94 (applying jeopardy prohibition). Rather than serving as "a tentative recommendation," the Services' opinions thus have "direct and appreciable legal consequences." *Bennett*, 520 U.S. at 178 (citation omitted).

For that reason, a jeopardy determination from the Services effectively forecloses the action agency's ability to proceed with its proposed action. "[T]he agency must either terminate the action, implement [a Service-approved] alternative, or seek an exemption from the Cabinet-level Endangered Species Committee." *NAHB*, 551 U.S. at 652; *see* 16 U.S.C. §1536(e) (describing Committee). In the four decades since Congress created the Endangered Species Committee, a Committee exemption has only been sought six times, and granted twice. Cong. Res. Serv., *Endangered*

Species Act (ESA): The Exemption Process 1 (2017).[1] In almost every case, consequently, a jeopardy decision by the Services leaves the action agency with two viable choices: adopt a Service-approved alternative, or do not act at all.

The Services' regulations elaborate upon the statutory structure. For an action that the Services believe is "not likely to adversely affect listed species or critical habitat," the regulations contemplate an "informal consultation" that culminates without any biological opinion; the Services instead "suggest modifications" to the proposed action, and provide an eventual "written concurrence" that the action has no likely adverse effects. 50 C.F.R. §§402.13(b)-(c). If a Service (or action agency) concludes that the action is likely to adversely affect protected species, the regulations articulate a step-wise "formal" consultation. *Id.* §402.14. The action agency prepares a detailed "description of [its] proposed action, including any measures intended" to protect endangered and threatened species. *Id.* §402.14(c). The Services confirm that no "additional data" is required. *Id.* §402.14(f). They then review the agency's action, evaluate the effects of the action on the species, *id.* §§402.14(g)(1)-(3), and "formulate[] the Service's opinion as to whether the action is likely to jeopardize the continued existence of listed species," or adversely modify such species' critical habitat, *id.* §402.14(g)(4).

Once the Services have made those determinations, the regulations obligate the Services to "discuss"

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[1] Available at: https://fas.org/sgp/crs/misc/R40787.pdf.

their analysis and conclusions with the action agency. *Id.* §402.14(g)(5). If the action under review is issuance of a permit to a private party, the Services must also discuss their results with that "applicant." *Id.* "[I]f a jeopardy opinion is to be issued," the Services discuss with the action agency (and applicant) "reasonable and prudent alternatives." *Id*. The Services must "utilize the expertise of the Federal [*i.e.*, action] agency and any applicant in identifying these alternatives." *Id.* And, "if requested," the Services "shall make available" to the action agency (and any permit applicant) a draft jeopardy opinion "for the purpose of analyzing the reasonable and prudent alternatives" required by the Services' jeopardy determination. *Id.* Following such a request, the Services may "not issue" their final biological opinion until either "the Federal agency submits" its comments, or the statutory deadline arrives. *Id.* If the action agency persists with its proposed action, this final biological opinion must include both the Services' jeopardy determination and reasonable and prudent alternatives, as well as additional determinations that the ESA requires the Services to make during their consultation. *Id.* §§402.14(h)-(i); *see id.* §§402.14(g)(6)-(7) (describing other necessary determinations).

B. EPA's Intake-Structures Rule and the Services' Consultation

The Clean Water Act requires EPA to promulgate standards governing cooling-water intake structures—mechanisms by which large industrial facilities extract

water from nearby sources to cool their equipment. 33 U.S.C. §1326(b); *see generally Entergy Corp. v. Riverkeeper*, 556 U.S. 208, 212-13 (2009) (describing standards' history). EPA, States, and Tribes implement those standards on a plant-by-plant basis through the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") permitting program. 33 U.S.C. §1342; *see NAHB*, 551 U.S. at 650-51. In 2011, EPA proposed a regulation (the "Intake-Structures Rule"), eventually finalized in 2014, to require the "best technology available" for "minimizing adverse environmental impact" from intake structures. 79 Fed. Reg. at 48,302 (finalizing rule); 76 Fed. Reg. 22,174 (April 20, 2011) (proposing rule). The primary harm posed by intake structures is to aquatic wildlife: fish, turtles, and shellfish sucked into plants' cooling systems or squashed against intake-screens. J.A. 125-28; *Riverkeeper*, 556 U.S. at 213. Those harms affect a wide variety of freshwater and marine species protected by the ESA. J.A. 125-28. Before finalizing the regulation, EPA therefore initiated consultation with both Services pursuant to 16 U.S.C. §1536(a)(2). J.A. 116.[2]

EPA asserted, at the outset, that its Intake-Structures Rule had no adverse effects at all on any species, and therefore required only "informal" consultation under 50 C.F.R. §402.13. *Cooling Water Intake Structure Coal. v. EPA*, 905 F.3d 49, 62-63 (2d Cir. 2018). The

[2] These record facts emerged from documents disclosed by EPA and the Services in response to FOIA requests, the administrative record for EPA's Intake-Structures Rule, and the Services' declarations supporting their invocation of FOIA's exemptions.

Services disagreed. So EPA initiated formal consultation. *Id.* EPA prepared a biological evaluation, in which it described its proposed rule and assessed the rule's impacts. *Id.* EPA finalized and submitted that evaluation to the Services in June 2013, once again asserting that its proposed rule would "not cause adverse effects" to, and in fact would "benefit," threatened and endangered species. C.A. S.E.R. 55-56. Again the Services disagreed. C.A. S.E.R. 60-61. So EPA made its "final rule revisions" (including its "ESA edits"), ensured that "those edits [were] approved by [EPA's] administrators," and, in November 2013, provided that "final revised rule" to the Services with the understanding that this "final rule will serve as the basis" for the Services' jeopardy analysis. J.A. 88-89, 91-92.

The Services prepared draft biological opinions (the "Jeopardy Opinions") in which they "concluded that EPA's regulation in its then-current-form was likely to jeopardize listed species and adversely modify critical habitat," and that as written the Rule therefore violated the ESA. J.A. 58 (FWS decision-maker's litigation declaration); *see also* J.A. 37 (NMFS declaration stating that "NMFS preliminarily concluded" that Rule in its "then-current-form" would produce jeopardy). The relevant decision-makers within each Service reviewed the Jeopardy Opinions' contents. Pet. App. 19a; J.A. 95-100, 105. The Services conveyed the Opinions' conclusion—that EPA's intended Rule violated the ESA's jeopardy prohibition—to EPA in December 2013. *See* J.A. 102 (EPA emails acknowledging jeopardy determination). The Services were prepared

to send the Jeopardy Opinions to EPA. J.A. 95-97, 102-05. But after a phone call between the agencies' senior lawyers, the Services instead sent only a set of possible reasonable and prudent alternatives. J.A. 106-07. Having been apprised of the Services' jeopardy determination, EPA did not request the underlying Opinions, and the Services did not sign or transmit them. J.A. 37-38, 58-59.

As required "if the Services conclude that an agency action is likely to jeopardize listed species," the Services and EPA proceeded with the next step of the regulatory process: discussing and developing reasonable and prudent alternatives. J.A. 37-38, 58-59, 68-69, 102; 16 U.S.C. §1536(b)(3)(A); 50 C.F.R. §402.14(g)(5). The Services' and EPA's subsequent discussions addressed "options for a possible" alternative that would eliminate the harms to listed species that the Services' Jeopardy Opinions found impermissible. J.A. 40 (NMFS declaration, stating that because its analysis of EPA's proffered regulation "was that it was likely to jeopardize listed species" and harm critical habitat, agencies began "deliberations on [an] alternative"); J.A. 117 (final biological opinion, explaining that after the date of the Jeopardy Opinions' completion "the Services and EPA engaged in numerous exchanges about possible revisions to the processes embodied in EPA's draft final rule").

EPA chose, in its final Intake-Structures Rule, to include "process-based protections" that the Services had concluded would prevent the Rule from jeopardizing protected species. *Cooling Water*, 905 F.3d at 63; 79

Fed. Reg. at 48,381. The added provisions insert the Services into the NPDES permitting process for plants' intake structures. *See Cooling Water*, 905 F.3d at 72 ("[T]he Rule itself is properly interpreted to *require* the Services' participation" in the permit-approval process). "[A]ll permit applications for facilities subject to" EPA's Intake-Structures Rule must be transmitted to the Services for their review. 40 C.F.R. §§125.98(g)-(h). The Services then specify any additional permit requirements they deem necessary to protect endangered species. *Id.*; 79 Fed. Reg. at 48,381-82. EPA has further committed to "defer[]" to the Services' views regarding such species, and to override any State or Tribal permit that does not adopt sufficiently protective measures. J.A. 122, 132-33, 139-40 (noting interagency memoranda stipulating deference to Services and stating that EPA will "object[] to and federaliz[e]" State or Tribal permits if appropriate); *see* 33 U.S.C. §1342(d)(4) (describing EPA authority to override State-issued permits).

The Services issued a joint biological opinion in May 2014 (the "Final Biological Opinion"), finding that with those changes, the Rule cleared the ESA's jeopardy bar. J.A. 113. EPA issued its final Rule the same day. Pet. App. 6a. According to the Services' Final Biological Opinion, the Services' permit review will ensure that impacts from intake structures that might produce jeopardy or adversely affect critical habitat "will be addressed." J.A. 133. The Final Biological Opinion approves EPA's Rule on that basis, but does not reveal

the species, or impacts, that prompted the Services' initial jeopardy determination.

The Second Circuit upheld EPA's Intake-Structures Rule, and the Services' Final Biological Opinion, against challenges from groups representing the regulated industry and from conservation groups (including Sierra Club). *Cooling Water*, 905 F.3d at 58, 63 n.7. That court denied the conservation groups' motion to add the Jeopardy Opinions (and other materials) to the administrative record, reasoning that the movants had not overcome the "'presumption of regularity' afforded to the agencies' certified record." *Id.* at 65 n.9 (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971)).

C. Proceedings Below

Shortly after EPA finalized the Intake-Structures Rule (and before proceedings began in the Second Circuit), Sierra Club submitted FOIA requests seeking records from the Services' consultation leading to the Rule. J.A. 81. The Services disclosed over 3,700 documents (some in redacted form) but withheld almost 4,000 documents claimed to be exempt. J.A. 36, 61. Sierra Club filed suit and sought a summary judgment requiring disclosure of sixteen of the withheld documents, including the Jeopardy Opinions. Pet. App. 8a-9a. The Services claimed that Exemption 5 applied to these records because they are subject to the deliberative process privilege. Pet. App. 8a-9a. The district

court held that twelve of the contested documents fell outside Exemption 5. Pet. App. 9a-12a.

The court of appeals affirmed in part and reversed in part. The court found that the Services permissibly withheld several drafts of reasonable and prudent alternatives reflecting the Services' deliberations regarding possible changes to EPA's Rule following the Jeopardy Opinions. Pet. App. 8a, 27a-28a. It also upheld the Services' withholding of a separate draft biological opinion prepared by NMFS in 2014, which would have found that even with the protective measures ultimately incorporated in the final Rule, EPA's action still jeopardized listed species. The court found that NMFS had abandoned that view when it made its final determination, in the Final Biological Opinion, that those measures were sufficient to prevent the Rule from causing jeopardy. Pet. App. 8a, 28a.[3]

The court held, however, that the Jeopardy Opinions (and certain accompanying documents) were not privileged, and so should be made public. Pet. App. 18a-28a.[4] The court found that in light of the Services' ESA authority, the Jeopardy Opinions were consequential decisions in their own right; they could not be fairly withheld as materials that only "advise another decision-maker." Pet. App. 18a. And the Services' jeopardy

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[3] The Services later partially released these documents, acknowledging that they contained segregable non-privileged information. *See* D.C. Doc. No. 87; 5 U.S.C. §552(b).

[4] The accompanying documents describe effects of the rule EPA proposed to the Services, and possible mitigation measures. Pet. App. 20a-21a.

determination—though explained in Opinions denominated "draft"—had caused "changes to [EPA's] proposed regulation." Pet. App. 19a-20a. That the Services later issued their Final Biological Opinion, approving a regulation revised because of the Services' jeopardy determination, did not render the Jeopardy Opinions ineffectual "predecisional" drafts of that later no-jeopardy opinion. Pet. App. 19a-20a (Final Biological Opinion addressed "different version" of EPA's Rule). The court also found that the Services had not carried their burden of establishing that the Jeopardy Opinions described the Services' merely tentative or preliminary views. 5 U.S.C. §552(a)(4)(B). The FWS Assistant Director responsible for the consultation had "made final edits" to the FWS's opinion, and it awaited only his "autopen signature"; and NMFS was "preparing to release" its opinion "to the public." Pet. App. 19a; *see* J.A. 93-05. For all of those reasons, the court of appeals held that the Jeopardy Opinions were not "predecisional" materials protected by the deliberative process privilege.

The court further held, based on an *in camera* review, that the Jeopardy Opinions were not "deliberative." They revealed nothing of the agencies "internal deliberative process" that might discourage candid discussion or otherwise injure their consultative functions. Pet. App. 25a-26a. The Opinions contained no "line edits, marginal comments, or other written material" reflecting discussions amongst the Services' staff. Pet. App. 25a. They did not disclose the Services' or EPA's "internal deliberative process," individually or

by comparison with the Final Biological Opinion. Pet. App. 26a-27a. The only policy judgment revealed by the Jeopardy Opinions was one the Services had "already disclosed": that they prepared "final drafts of jeopardy opinions," which resulted in a "revised regulation." Pet. App. 26a.

SUMMARY OF ARGUMENT

The Services' Jeopardy Opinions explain a decision that had demonstrable legal consequences and operative effect: EPA and the Services treated as foreclosed the version of the Intake-Structures Rule that EPA provided for the Services' review; the agencies turned to reasonable and prudent alternatives; and EPA ultimately adopted a Services-approved alternative. The agencies deliberated over *how* to change EPA's Rule, following the Services' jeopardy determination. But they did not deliberate further over the distinct, antecedent, consequential question *whether* the ESA required changes to the Rule.

The decisive consequences of the Services' jeopardy determination cannot be disregarded solely because EPA was nominally free to defy it. This Court has recognized that the Services' statutory role and expertise lend their views determinative weight that alters the "legal regime" in which the action agency operates, even though those views may be couched as a recommendation. *Bennett*, 520 U.S. at 169-70. And the Services did not abandon their jeopardy decision

by later approving an amended Rule that allows the Services to address jeopardy on a permit-by-permit basis. The decision the Services had to make was whether the regulation EPA gave them violated the ESA's jeopardy prohibition. That their affirmative answer produced changes to that regulation—the effect prescribed by the ESA for a jeopardy determination—does not make it any less decisive, nor permit the Services to hide its basis.

The Services posit that the Jeopardy Opinions may nonetheless be withheld because, under their regulations, the official Final Biological Opinion is the "ultimate[]" resolution of the Services' consultation, while the Jeopardy Opinions explained just an "interim step." Brief 25. That argument is incorrect, for three related reasons. *First*, FOIA does not limit agencies' disclosure obligations to only the very last of a sequence of decisions; its text mandates disclosure of the reasoning for intermediate decisions that shape later outcomes, like the Jeopardy Opinions here. 5 U.S.C. §§552(a)-(b). The Services rely upon principles governing judicial review of final agency action, *e.g.*, Brief 28, but those principles reflect distinct statutory text, 5 U.S.C. §704, and embody concerns very different from those at issue here. That interlocutory decisions are unsuitable for judicial review does not mean that the public may be kept unaware of them without sacrificing agency accountability, or that their disclosure would injure agencies' deliberative capacity. *Second*, whether a document must be disclosed does not depend upon whether the agency designates it as its final,

official decision; it depends upon whether the record demonstrates that the document contains the basis of a policy the agencies "actually adopted," rather than conveying "advisory opinions, recommendations and deliberations." *Sears*, 421 U.S. at 150-52 (citation omitted). And *third*, the Services' regulations do not prevent the Services from explaining a jeopardy determination in a "draft" opinion. A draft opinion *may*, in other circumstances, describe a tentative jeopardy determination, subject to further intra- or interagency deliberation. Or, as here, it may set forth a conclusive jeopardy determination, leaving only reasonable and prudent alternatives for further discussion. 50 C.F.R. §§402.14(g)(4)-(5).

Case-specific inquiry into the operative effect of nominally "draft" documents deprives the Services only of the power to control "what information to disclose." *GTE Sylvania*, 445 U.S. at 384-85. Courts have looked past agencies' formal designations for decades, without causing any uncertainty disruptive to agencies' decision-making. This fact-specific approach is required by the statutory text, which strictly cabins agencies' discretion to determine which records are confidential and prescribes rigorous judicial review of the facts underlying agencies' refusal to make their records public. 5 U.S.C. §§552(a)(4)(B), (b)(5). The Services' contrary interpretation would allow the Services to conceal the reasons for exercises of ESA authority that are expected to, and do in fact, decisively alter agency action. And it would permit the Services to

conduct their case-by-case review of future intake-structures' permits without anyone knowing what impacts, to which species, the Services considered likely to involve jeopardy. Those results would be deeply antithetical to the accountability FOIA was enacted to provide.

ARGUMENT

I. The Services Failed to Carry Their Burden of Demonstrating Their Entitlement to Withhold the Jeopardy Opinions Under Exemption 5.

A. The Record Establishes That the Services' Jeopardy Determination Caused EPA to Amend Its Rule.

EPA prepared what it intended to be its "final rule," containing its final "revisions," and presented it to the Services for a statutorily required decision: whether the regulation would violate the ESA's jeopardy prohibition. J.A. 88-90; 16 U.S.C. §1536(a)(2). The Services concluded that EPA's rule would jeopardize threatened and endangered species and adversely affect such species' critical habitat, and they conveyed their answer to EPA. J.A. 37-38, 58-59, 102. That decision had the watershed effects the ESA prescribes when the Services conclude that an agency's proposed action jeopardizes protected species: EPA did not finalize the regulation it had prepared; the Services and EPA turned to "reasonable and prudent alternatives"; and EPA ultimately adopted a Services-approved

alternative. 16 U.S.C. §§1536(a)(2), (b)(4)(A). The Services' jeopardy determination was therefore a "legal [and] policy decision," which the agencies gave distinct "force and effect." *Sears*, 421 U.S. at 153, 155 (citation omitted). Because the Jeopardy Opinions provide the "basis" for their decision, Exemption 5 does not permit the Services to keep them from the public. *Id.* at 152.

FOIA places the burden on the Services to sustain their contrary claim of privilege. 5 U.S.C. §552(a)(4)(B). To carry that burden, the Services point to deliberations over "changes to EPA's Regulation" subsequent to the jeopardy determination and assert that they establish that the Services' jeopardy determination lacked decisional effect. Brief 11 (citation omitted). But that argument conflates two separate, consequential decisions required by the ESA: (1) whether a proposed action is "likely to jeopardize" protected species, or adversely modify their critical habitat, 16 U.S.C. §1536(a)(2); and, (2) if the answer is "yes," what reasonable alternatives might avoid such jeopardy or adverse modification, *id.* §1536(b)(4)(A). The Services and EPA deliberated over the latter—*what* changes were required to EPA's action. *See* Pet. App. 27a-28a (holding these deliberations privileged). But that does not demonstrate deliberation over the former—*whether* changes were required—any more than asking "how high?" demonstrates deliberation over a decision to jump.

The record contains no evidence that, following the Jeopardy Opinions, any of the agencies in fact devoted any further attention to the primary statutory

question: whether the regulation EPA submitted to the Services jeopardized protected species. The Services' litigation declarations, from "the Services' officials who supervised the consultation process," Brief 28-30, do not dispute that the Jeopardy Opinions resolved whether EPA could proceed with that version of its regulation. Indeed, they acknowledge that the Opinions "concluded" that the Rule, as then written, would result in jeopardy. J.A. 37, 58. The Services' declarations state that "more work needed to be done," J.A. 37, 58-59, and characterize their jeopardy conclusions as "preliminar[y]" to that work, J.A. 37, or preceding "additional consultation." J.A. 58. The subsequent "work," however, involved changes to "provisions in the [Intake-Structures] Regulation" and "key elements of EPA's rule"; the declarations describe no additional work contemplated or undertaken regarding the scientific or legal basis of the Jeopardy Opinions. J.A. 37, 58-59.

The Services' Final Biological Opinion likewise states that the Services' and EPA's "exchanges" subsequent to the completion of the Jeopardy Opinions addressed only "possible *revisions* to the processes embodied in EPA's draft final Rule." J.A. 117-18 (emphasis added). The Services' declarations make clear, furthermore, that their Final Biological Opinion reached a different conclusion from the Jeopardy Opinions not because the Services reconsidered the Jeopardy Opinions, but because EPA made responsive "changes to the Regulation." J.A. 37, 59; Brief 11. None of this demonstrates that the Jeopardy Opinions'

conclusion—that the regulation EPA submitted to the Services violated the ESA's jeopardy prohibition—was an inconclusive "recommendation[]." Brief 19.

The agencies' actions unequivocally and forcefully demonstrate the operative effect of the Services' jeopardy conclusion on EPA's decision-making. All agree: the Services and EPA proceeded to develop reasonable and prudent alternatives. J.A. 37, 40, 59, 106, 117. Under the ESA, as the Services acknowledge, the need to consider such alternatives arises *only* "if jeopardy or adverse modification is found." 16 U.S.C. §1536(b)(3)(A); *accord* 50 C.F.R. §§402.14(g)(5), (h)(2); J.A. 31, 59; Brief 6 ("If a Service concludes that jeopardy . . . will likely result from the agency's action—that is, if it issues what is known as a 'jeopardy opinion'—then it must suggest any 'reasonable and prudent alternatives.'"). The agencies' development of such alternatives cannot be reconciled with the Services' claim that no meaningful jeopardy determination ever occurred. The jeopardy decision's eventual result confirms its decisive effect: instead of adopting the rule EPA deemed "final" before the Jeopardy Opinions, J.A. 88-89, EPA finalized a Service-approved alternative. J.A. 118; *see* 79 Fed. Reg. at 48,381 (added provisions emerged from Services' consultation as necessary "to insure that [the] rule is not likely to jeopardize listed species").

The substance of the changes made to the Intake-Structures Rule demonstrates the exercise of the Services' ESA authority. The final Rule adds the Services to the Clean Water Act permitting process for plants'

intake structures. 79 Fed. Reg. at 48,381; 40 C.F.R. §125.98(h). And EPA has separately agreed to defer to the Services' views regarding the sufficiency of the provisions within plants' NPDES permits, insofar as "federally-listed fish and wildlife" are concerned. J.A. 121-23 (Final Biological Opinion attaching correspondence from EPA acceding to Services' request for deference). Those provisions—enabling the Services to prevent jeopardy on a permit-by-permit basis—are incomprehensible if the Services never really concluded there was any jeopardy to prevent. EPA's final Intake-Structures Rule did not just "differ[] from" its proposed regulation. Brief 11 (citation omitted). The amended Rule embodies the Services' determination that, absent their intervention, EPA's regulation would likely jeopardize protected species or harm their critical habitat.

The Services emphasize that they never shared the Jeopardy Opinions with EPA. Brief 10-11; J.A. 38, 59. But they concededly did provide EPA with their *decision*—that EPA's Rule, in its then-current form, was prohibited by the ESA. J.A. 102-04, 106-08. That the Services declined to share the Opinions explaining that determination does not mean that the Services' decision was inconclusive. If anything, it demonstrates the opposite: that the substance of the Jeopardy Opinions was not subject to further inter-agency deliberation. Had EPA and the Services wished to discuss the "technical" details or "biological reasons" that "mandat[ed] a change" to EPA's proposed action, Brief 31 (citation omitted), the first step would have been sharing the Opinions containing those details and reasons—

which the government insists never happened. Brief 10-11.

Agencies do not receive the benefit of the doubt under FOIA. The statute demands *de novo* review and places the burden on the agency to sustain its claim of privilege. 5 U.S.C. §552(a)(4)(B); *cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2422-23 (2019) (noting that statutes requiring *de novo* review preclude deference). Under that exacting standard, the Services' statement that "more work needed to be done," J.A. 37, 58-59, set against a record showing that the only work that *was* done was to abandon EPA's proposed action in favor of a more protective alternative, does not suffice to establish that the Services' Jeopardy Opinions contain purely predecisional, deliberative material.

B. Because the Jeopardy Opinions Describe the Basis for the Services' Determination, FOIA Requires Their Disclosure.

The Services made a decision: that the regulation EPA provided for their review violated the ESA's jeopardy prohibition. The agencies acted on that decision by amending the regulation. The decision's basis—its underlying factual and legal reasoning—is supplied in the Jeopardy Opinions. Such materials are exactly what FOIA requires an agency to make public: "the reasons which did supply the basis for an agency policy actually adopted." *Sears*, 421 U.S. at 152-53. Because "the public is vitally concerned with [those] reasons,"

they are, "if expressed within the agency . . . outside the protection of Exemption 5." *Id.*

FOIA's text, as this Court has held, "powerfully support[s]" that rule. *Id.* at 153. The "affirmative portion of the Act"—which requires agencies to make public all "statements of policy and interpretations which have been adopted by the agency," 5 U.S.C. §§552(a)(2)(A)-(B)—"represents a strong congressional aversion to 'secret (agency) law,'" and requires "disclosure of documents which have 'the force and effect of law.'" *Sears*, 421 U.S. at 153 (citations omitted). Those provisions implement FOIA's central concern: enabling the public to know "'what their government is up to,'" by compelling disclosure of any "[o]fficial information that sheds light on an agency's performance of its statutory duties." *Reporters Comm.*, 489 U.S. at 772-73 (citation omitted). Confirming that core aim, the statutory text states Congress's understanding that "disclosure of the information is in the public interest" whenever it "is likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. §552(a)(4)(A)(iii) (waiving processing and reproduction fees for requests serving that interest).

These statutory terms illustrate FOIA's basic point: to ensure that the public knows not just *what* the government does, but *who* does it, and *why. See id.* §552(a)(1)(B) (requiring disclosure of "methods by which [agencies'] functions are channeled and determined," including "formal and informal procedures"). FOIA's disclosure requirements are meant to allow

"the public [to] determin[e] where and by whom decisions are made." S. Rep. No. 89-813, at 6. Yet those are the materials the Services claim to be exempt: the Jeopardy Opinions revealing where and by whom the decision to change EPA's Intake-Structures Rule was made, and that decision's basis. Taken at face value, the Services' insistence that draft jeopardy opinions are privileged would permit them to conceal not only the basis for a jeopardy decision, but that they ever *made* a jeopardy decision—even where that decision forces other agencies to change their actions. *See* Brief 29-30. But even the Services appear unwilling to go that far. *See* Pet. App. 26a (Services disclosed that they made jeopardy determination during litigation). And if a jeopardy decision is non-exempt, the Services suggest no grounds to keep the reasons for that decision secret.

The interests served by disclosure of this information are neither trivial nor parochial. By revealing the reasons for agencies' regulatory behavior—the ways in which the "hundreds of departments, branches, and agencies which are not directly responsible to the people" actually exercise their authority, S. Rep. No. 89-813, at 3—FOIA ensures "an informed citizenry," capable of "hold[ing] the governors accountable to the governed." *Robbins Tire & Rubber*, 437 U.S. at 242. That accountability requires knowledge of the Services' and EPA's respective roles in producing the Intake-Structure Rule (or any other agency action subject to the Services' review). Without such knowledge, "citizens cannot readily identify the source of . . .

regulation that affects their lives," allowing "Government officials [to] wield power without owning up to the consequences." *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 57 (2015) (Alito, J., concurring). And the bedrock principle of reasoned agency decisionmaking depends upon the public knowing the reasons agencies make decisions. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

Knowing when and why the Services wield their ESA authority is important not only to members of the public interested in protecting wildlife, but also (indeed, especially) to those who must comply with the regulatory demands resulting from the Services' decisions. Withholding the Services' reasons for demanding more stringent wildlife protections harms all sides affected by those protections, as exemplified here in two key ways. First, the factual and legal rationale for the Services' decision—the reasons the Services concluded that the regulation EPA gave them would violate the ESA, and needed to be made more protective—has never been subject to public scrutiny.[5] Second, the Services will henceforth employ their case-by-case review of facilities' NPDES permits to prevent impacts to protected species that led to the Jeopardy Opinions. 79 Fed. Reg. at 48,381. Without the Jeopardy Opinions, the public cannot know whether the conditions imposed by the Services align with the impacts that

[5] The Final Biological Opinion finds the final Rule's provisions sufficient under the ESA but does not explain why the Services deemed them necessary or why EPA's proposed Rule could not be finalized. J.A. 144.

provided the *raison d'etre* for the Services' role in the permitting process. The Services could allow impacts to species that they previously concluded would produce jeopardy, or prohibit activities they concluded would not produce jeopardy. Such "'unexplained inconsistency' in agency policy is 'a reason for holding [an action] to be . . . arbitrary and capricious,'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (citation omitted). But here the public and regulated industry have no means of identifying any inconsistencies, much less holding the Services accountable for them.

C. The Services' Account of the Record Mistakes the Nature of Their ESA Authority.

The Services' account of the above-described record as one of ruminative give-and-take, rather than decisive cause-and-effect, hinges upon two errors. First, the Services incorrectly characterize their jeopardy decision as an indeterminate suggestion, akin to a recommendation by lower-level agency staff with a "total lack of decisional authority," *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 187-88 (1975). Brief 8-9. Second, the Services describe their Jeopardy Opinions as only relevant to "a policy which an agency has rejected," because EPA altered its Intake-Structures Rule, Brief 24-25, 37—even though this alteration was caused by the jeopardy determination whose basis the Opinions supply.

1. According to the Services, their refusal to approve the version of the Intake-Structures Rule EPA provided them as its "final" regulation, J.A. 88-89, may have "motivated" EPA to revise the Rule, but EPA made those changes entirely "voluntarily." Brief 33. That narration elides the "virtually determinative" authority inherent in the Services' "legal regime"-changing, though nominally consultative, role. *Bennett*, 520 U.S. at 170; *see NAHB*, 551 U.S. at 652. That authority, repeatedly recognized by this Court, contradicts the Services' assertion that their jeopardy conclusion was merely advisory and may be disregarded as having no "operative effect" on EPA's decisions. Brief 33 (citation omitted).

The Services' answer is to confine the "appreciable legal consequences" of their decisions to the imposition of formally "*binding* legal obligations"; according to the Services, this occurs only when the Services designate "a *final* biological opinion." Brief 32-33 (citation omitted). But that misunderstands both biological opinions and the reasons this Court held, in *Bennett*, that the Services' opinions are legally consequential. Even a *final* biological opinion does not *formally* require the action agency to comply: "The action agency is technically free to disregard the Biological Opinion and proceed with its proposed action." *Bennett*, 520 U.S. at 170.[6] *Bennett* rejects the proposition that this technical

[6] A final biological opinion likewise does not prevent the Services from changing their minds, subject to the constraints of reasoned decision-making. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005).

possibility deprives the Services' conclusions of legal impact and meaningful effect. Given the ESA's unyielding prohibitions and the Services' wildlife-related expertise, the Services' conclusions have practical and legal consequences such that action agencies cannot "in reality" defy them. *Id.* at 169-70. The Services' narrow focus on formal "legal obligations," Brief 33—whether EPA was, in abstract theory, "free to disregard" the Services' views—bypasses the consequences that are the crux of *Bennett*'s holding. 520 U.S. at 170. Embracing that focus would render even a final biological opinion advisory—an argument *Bennett* repudiates, *id.* at 169-70, and which the Services do not explicitly advance.

The consequences of the Services' decisions do not arise from their ability to formally compel other agencies by signing and issuing a "final" biological opinion. They arise, rather, from the Services' arrival at a determination and the resulting predicament faced by an "inexpert" action agency confronting Services whose views will, in almost any disagreement involving endangered species or their habitat, prevail. *Id.* The Services' wildlife-related expertise and their role in administering the Act, together with the Act's strict prohibitions and the Services' mandatory consultative role, lend their nominal "recommendations" a "powerful coercive effect on the action agency." *Id.* at 169 (citation omitted). The record here exemplifies that dynamic. At each turn—informal consultation, biological evaluation, and jeopardy—EPA asserted that it had satisfied the ESA, the Services disagreed, and EPA

yielded. *See supra*, at 12-15. *Bennett* does not permit the Services to dismiss the Jeopardy Opinions as "frank discussions," or hortatory "comments and suggestions," simply because the Services did not designate them "final." Brief 33-34 (citation omitted). The Services' authority does not rest on such formalities, but on a jeopardy finding's functional effect on the action agency's decision-making "in reality." *Bennett*, 520 U.S. at 169.

The Services' jeopardy determination here was distinctly consequential. When the Services refused to approve EPA's proffered Intake-Structures Rule, that decision had marked legal and practical effects: EPA could not finalize its Rule without "a substantial risk" that it would be deemed unlawful. *Id.* at 169-70; *Hill*, 437 U.S. at 185. Rather than contesting the Services' expert determination, EPA acceded and changed its action—as agencies virtually always do. *Bennett*, 520 U.S. at 169 ("[A]ction agencies very rarely choose to engage in conduct that [a] Service has concluded is likely to jeopardize . . . species.") (citation omitted). That is a "real operative effect," *Sears*, 421 U.S. at 160, and requires the Jeopardy Opinions' disclosure, Exemption 5 notwithstanding, as the explanation for "a legal or policy decision" adopted by the agencies, *id.* at 152-53, 155.

2. The Services' argument that the Jeopardy Opinions died on the vine because they addressed the regulation EPA submitted to the Services, rather than EPA's final Intake-Structures Rule, is equally untenable. Under the ESA, the "determinative effect" of the

Services' jeopardy determination, *Bennett*, 520 U.S. at 170, was to cause a change to EPA's proposed action. *NAHB*, 551 U.S. at 652. That EPA changed its proffered regulation in response to the Services' jeopardy determination does not, therefore, establish that the Services "abandoned" their Jeopardy Opinions. Brief 36. It indicates the opposite: that the decision substantiated by those Opinions had the force and effect accorded a jeopardy determination under the ESA. 16 U.S.C. §1536(a)(2).

The Services contend that whenever an action agency abandons or modifies its action following the Services' jeopardy determination, the opinion explaining that determination is just a deliberative rumination that has "died on the vine." Brief 39 (quoting *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 462-63 (D.C. Cir. 2014)). That contention makes prohibitory authority disappear, simply because it is prohibitory. When EPA refuses to approve a permit submitted to it, that refusal does not die on the vine if the applicant abandons or amends its proposed activities. Such changes by the applicant are the result of EPA's exercise of its statutory authority. Likewise, a jeopardy determination does not die on the vine when the action agency "terminate[s]" its action or "implement[s] [an] alternative." *NAHB*, 551 U.S. at 652. Such changes by the action agency are the result of the Services' exercise of their ESA authority. To allow that result to justify invocation of Exemption 5 would hide the Services' decisions precisely when they have determinative "force and effect." *Sears*, 421 U.S. at 153 (citation omitted).

The Services can, of course, "abandon[] or modif[y]" a jeopardy opinion and its conclusion. Brief 36. But the hallmark of such abandonment would be EPA's *adoption* of the "draft final Rule" EPA proffered for the Services' review. J.A. 117; *see* Pet. App. 16a-17a, 28a (permitting NMFS to withhold a later draft jeopardy opinion that was replaced by an opinion concluding that the same action would *not* cause jeopardy). It is also theoretically possible that an action agency might alter its action for reasons unrelated to the Services' jeopardy decision. For example, EPA might have decided that the Clean Water Act required it to rewrite the regulation it gave the Services. Under those circumstances, the Services' opinion could be said to genuinely "die[] on the vine," like a speech never given. *Nat'l Sec. Archive*, 752 F.3d at 463. But the record indicates that EPA's changes here were the product of the Services' jeopardy decision, not independent of it. Before the Services' decision, EPA had made its "final" revisions to the Rule (including its "ESA edits"). J.A. 88-89; *see also* C.A. S.E.R. 55-56 (EPA's evaluation concluded that its intended regulation would "benefit" rather than adversely affect protected species). EPA acknowledged that the wildlife protections added after the Jeopardy Opinions were the result of the Services' "consultation," intended "to insure that [the Rule] is not likely to jeopardize listed species or result in the destruction or adverse modification of designated critical habitat." 79 Fed. Reg. at 48,381.

II. The Services May Not Withhold the Jeopardy Opinions Merely Because They Preceded the Final Biological Opinions.

The Services argue that even if the Jeopardy Opinions supply the basis for a decision that resulted in changes to EPA's Intake-Structures Rule, those effects are insufficient to require the Jeopardy Opinions' disclosure because any decision prior to the Final Biological Opinion was necessarily "preliminary" and, in their view, shielded from public view by Exemption 5. Brief 33-34. The Services contend that they "made their decision in the consultation process" as a whole "only when they signed and issued their *Final* Biological Opinion in May 2014." Brief 18, 28. According to the Services, whether their earlier jeopardy determination foreclosed the regulation EPA submitted to the Services therefore does not matter. To reach that result, the Services: (A) interpret Exemption 5 as separating "interim" actions that may be withheld from "'final' 'dispositions'" that must be disclosed, Brief 25, 28-31, 33 (citation omitted); (B) suggest that Exemption 5 depends upon whether agencies "sign[]" or otherwise "adopt[]" a document as their official decision, Brief 18, 28; and (C) claim that their regulations only permit the Services to decide whether a proposed action violates the ESA's jeopardy prohibition in a final biological opinion addressing the action an agency ultimately adopts, Brief 31. Each assertion is incorrect.

A. FOIA Does Not Permit Withholding of Consequential Intermediate Decisions Within Multi-Step Regulatory Processes.

1. FOIA's Disclosure Provisions Preclude Interpreting Exemption 5 to Encompass Consequential Interim Decisions.

Exemption 5, like any other statutory text, must be read in context. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). The first problem that principle creates for the Services' interpretation of Exemption 5 as placing "interim" decisions beyond the public's reach lies in FOIA's affirmative requirements, 5 U.S.C. §552(a)(2). Those requirements define the starting point of the disclosure obligations forming FOIA's central operational mandate. *Id.* §552(a)(3). The affirmative requirements illustrate the scope of that mandate, describing the types of records whose disclosure, in Congress's judgment, serves to assure accountability in government decision-making. As *Sears* recognizes, Exemption 5 may not be interpreted to implicitly deem disclosure of such materials injurious to agency functions, or to eliminate agencies' obligation to make them public. 421 U.S. at 159-60.

The affirmative disclosure provisions demonstrate a central statutory concern with agencies' interim actions, irreconcilable with the Services' claim that FOIA requires disclosure of only their final dispositions. Of the subsections describing the materials agencies must disclose, only §552(a)(2)(A) is limited to "final" documents. 5 U.S.C. §552(a)(2)(A) (listing "orders" and "final opinions"); *id.* §551(6) (defining orders as the

whole or a part of a "final disposition"). The ensuing subsections describe archetypical interim steps in agency decision-making. Subsection 552(a)(2)(B) demands disclosure of "statements of policy and interpretations which have been adopted by the agency." *Id.* §552(a)(2)(B). That language encompasses *any* policy "actually" adopted by an agency, whether or not it is followed by additional actions in a longer decision-making process. *Sears*, 421 U.S. at 152-53, 160.

The same sentence of §552(a)(2)(B) requires disclosure of agency "interpretations" that are not "published in the Federal Register." 5 U.S.C. §552(a)(2)(B). Interpretations, even where published, "advise the public" of a decision that will shape an agency's later actions. *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96-97 (2015) (citation omitted) (discussing "interpretative rules," 5 U.S.C. §553(b)(A)). Nevertheless, FOIA makes all interpretations—not just interpretative rules—public. Subsection 552(a)(2)(C), similarly, lists "administrative staff manuals" and all "instructions to staff that affect a member of the public," 5 U.S.C. §552(a)(2)(C)—materials that shape agencies' final dispositions of the matters under their jurisdiction. *See Taxation with Representation Fund v. IRS*, 646 F.2d 666, 682 (D.C. Cir. 1981) (requiring disclosure of documents that "serve[] as an interpretive guide and research tool for agency personnel," because they are used to resolve individual matters).

Exemption 5 protects a truly advisory draft of a manual or interpretation—that is, one the agency has not adopted. But the Services interpret Exemption 5 to

shield a determination that decisively shaped the agencies' later proceedings, simply because it preceded additional steps required to complete the Services' ESA consultation. That view of Exemption 5 suggests that materials FOIA explicitly makes public—interpretations, staff instructions, and policies with operative effect on later agency decisions—should, contrary to the statute, largely be secret. And it conflicts with the congressional judgment inherent in FOIA's affirmative disclosure requirements: that internal agency documents used to guide agencies' future actions should be made public. *See Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979) (requiring disclosure of "instructions" to "subordinate official[s]" that guide future decisions). Accordingly, "an agency's application of a policy to guide further decision-making does not render the policy itself predecisional." *Public Citizen v. OMB*, 598 F.3d 865, 875 (D.C. Cir. 2010).

As an exception to the full-disclosure mandate forming FOIA's "general statement of policy," Exemption 5 should be read "narrowly in order to preserve the primary operation of the [statutory] provision." *Knight v. CIR*, 552 U.S. 181, 190-91 (2008) (citation omitted). The Services instead demand an "expansive reading of a somewhat ambiguous exception" that threatens to "eviscerate [the] legislative judgment" contained within FOIA's operative provisions. *Id.* (citation omitted). Neither the statutory text nor the logic of agency decision-making support that result. Threshold agency decisions—like those here, triggering additional decisional steps—are commonplace. *See*, *e.g.*, *Thryv, Inc. v.*

Click-to-Call Techs., 140 S. Ct. 1367, 1375 (2020) (describing threshold determination triggering inter partes patent review); *Michigan*, 135 S. Ct. at 2705 (construing threshold finding triggering regulation of toxic emissions). Indeed, there is almost always "more work" to be done in administrative procedures. Brief 10 (citation omitted). That cannot, by itself, exempt otherwise decisive materials from FOIA's disclosure requirements. *See*, *e.g.*, *Tax Analysts*, 117 F.3d at 617 (IRS documents advising field offices are not predecisional, even though they "may precede the field office's decision in a particular taxpayer's case," because "they do not precede the decision regarding the agency's legal position").

The Services nevertheless claim that *Sears* stands for the proposition that "interim step[s]" are categorically privileged. Brief 25. *Sears*, according to the Services, held that "a memorandum directing the filing of a complaint *was* privileged, because that document 'd[id] not finally dispose' of an NLRB proceeding, and instead preceded the Board's decision that would ultimately resolve the case." *Id.* (alteration in original, citation omitted). But the language the Services cite does not, as they claim, "describe[] the deliberative process privilege." *Id.* The privilege *Sears* applied to that memorandum was the attorney work-product privilege:

> Although . . . it does not effect a 'final disposition,' the memorandum does explain a decision already reached by the General Counsel which has real operative effect—it permits

> litigation before the Board; and *we have indicated a reluctance to construe Exemption 5 to protect such documents*. We do so in this case *only* because the decisionmaker—the General Counsel—must become a litigating party to the case . . . [so that] *[t]he attorney's work-product policies . . . come into play*.

421 U.S. at 160 (emphases added). *Sears* holds that Exemption 5, insofar as the *deliberative process privilege* is concerned, depends on whether a document explains a decision that an agency reached and gave operative effect, *id.* at 152-53—even if the document "does not effect a 'final disposition,'" *id.* at 160. Those straightforward terms place the Jeopardy Opinions outside Exemption 5's scope.

2. The Services' Interpretation of Exemption 5 Contradicts the Narrow Structure of FOIA's Exemptions.

The second contextual problem with the Services' interpretation of Exemption 5 as permitting withholding of "interim step[s]" toward an agency's "ultimate[]" resolution of its proceedings, Brief 25, arises from FOIA's adjacent exemptions. Each of those exemptions includes criteria sharply limiting agencies' discretion: *e.g.*, materials "related solely to the internal personnel rules and practices of an agency," 5 U.S.C. §552(b)(2); records "specifically exempted from disclosure" by a statute, if it "leave[s] no discretion" or provides "particular criteria" governing disclosure, *id.* §552(b)(3); and "records or information compiled for

law enforcement purposes," but only if certain conditions are met, *id.* §552(b)(7). As this Court has recognized, this structure requires that each exemption be given a "narrow compass," to avoid judicially "reauthoriz[ing] the expansive withholding" that the statutory terms are meant to "halt." *Milner*, 562 U.S. at 571-72 (citation omitted); *see also FBI v. Abramson*, 456 U.S. 615, 630 (1982) ("FOIA exemptions are to be narrowly construed").

That interpretive principle reflects the broader canon that "statutory words are often known by the company they keep," *Lagos v. United States*, 138 S. Ct. 1684, 1688-89 (2018). Exemption 5 sits on a list of tightly circumscribed exemptions and should be read accordingly, especially given the absence of any basis for the Services' expansive interpretation in Exemption 5's text. "[I]nter-agency or intra-agency memorandums or letters" are rarely, if ever, the last step in agencies' decision-making; internal memoranda and letters are the documents by which agencies lay the groundwork for later decisions. 5 U.S.C. §552(b)(5); *cf. id.* §§551(4)-(13) (defining terms signifying agencies' formal dispositions). Reading Exemption 5 to encompass every "inter-agency [and] intra-agency memorandum[] or letter[]" that relates to agency decision-making, but falls short of a formal, final disposition, would give little meaning to the remainder of its text (requiring that such memoranda "not be available by law . . . in litigation"). *Id.* §552(b)(5). Further, such a reading would ignore this Court's recognition that Exemption 5 is delimited "as narrowly as consistent with

efficient Government operation." *Mink*, 410 U.S. at 87 (citation omitted).

The Services' interpretation of Exemption 5 suffers from the same flaw that led this Court in *Milner* to reject a similarly capacious and atextual interpretation of FOIA's second exemption: it threatens to "render[] ineffective the limitations" reflected in FOIA's other exceptions, 562 U.S. at 578, by handing the government an axe where the statutory text provides only scalpels. Under the Services' view, an agency could bypass the restrictions within 5 U.S.C. §552(b)(7) by invoking Exemption 5 for many law-enforcement records preceding the agency's ultimate resolution of an enforcement proceeding (such as policies relating to sentencing recommendations). *But see Milner*, 562 U.S. at 579-80 (rejecting similarly broad interpretation); *Jordan v. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (enforcement and sentencing guidelines "express the settled and established policy of the U.S. Attorney's office," that "govern" the office's work, and so must be disclosed). Records describing internal "practices of an agency" that guide decision-making could be withheld, even if they did not concern "personnel," 5 U.S.C. §552(a)(2). *But see Milner*, 562 U.S. at 578 (refusing to allow withholding of "all [of an agency's] internal rules and practices"). As in *Milner*, the Services' interpretation of Exemption 5 would create "an all-purpose back-up provision to withhold sensitive records that do not fall within any of FOIA's more targeted exemptions," disserving "the text, context, [and] purpose of FOIA." *Id.* at 579-80. The statute does not

support that expansion of Congress's intricately structured exemption regime.

3. The Services' Interpretation Ignores Both FOIA's Core Function and the Deliberative Process Privilege's Purpose.

The narrow compass of FOIA's exemptions, like the broad scope of its disclosure requirements, highlights the statute's core function: disclosure of all "[o]fficial information that sheds light on an agency's performance of its statutory duties." *Reporters Comm.*, 489 U.S. at 772-73. The Services' effort to superimpose the rules of finality governing judicial review onto Exemption 5, *e.g.*, Brief 28, ignores that distinct statutory purpose. FOIA's point is to allow "citizens to know 'what their Government is up to,'" a phrase that this Court has refused to "dismiss[] as a convenient formalism," *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171-72 (2004) (citation omitted), and one that Congress has embedded in FOIA's text, 5 U.S.C. §552(a)(4)(A)(iii) (specifying "public interest" in "public understanding of the operations or activities of the government"). Judicial review of agency action involves wholly different concerns. *See*, *e.g.*, *Thryv*, 140 S. Ct. at 1374 (analyzing judicial review of multi-step decision-making). There is no textual or practical reason to import those concerns into FOIA's disclosure obligations. An interlocutory decision may be poorly suited to immediate judicial review, *Bennett*, 520 U.S. at 177-78, but it remains critical to public

understanding of where, by whom, and why government decisions are made. A document that explains the basis for an agency's exercise of its statutory responsibilities—and especially one that leads to adoption of a novel rule that would not otherwise exist—squarely serves FOIA's informative function. Read as a whole, FOIA does not permit the Services to withhold that document. *Sears*, 421 U.S. at 152-53.

Moreover, the Services' emphasis on whether the Jeopardy Opinions provided the basis for an interlocutory rather than final decision ignores the gravamen of the deliberative process privilege: whether disclosure is demonstrably "injurious to the consultative functions of government." *Mink*, 410 U.S. at 87 (citation omitted) (describing privilege's "finite limits"). That an agency decision is part of a longer decision-making process does not justify calling it "predecisional." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) ("Characterizing these documents as 'predecisional' simply because they play into an ongoing audit process would be a serious warping of the meaning of the word."). But even if the "predecisional" label could apply, the existence of further regulatory steps following a consequential decision does not show that the document explaining that decision is "deliberative"—that it contains "advisory opinions, recommendations [or] deliberations," whose disclosure would harm the agency's functions. *Sears*, 421 U.S. at 150 (citation omitted). Extending the deliberative process privilege to the basis of every decision shaping "development of the agency's final position," Brief 26

(citation omitted), would detach the privilege from its central purpose: not to "protect Government secrecy pure and simple," but to "enhance 'the quality of agency decisions.'" *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 9 (2001) (citation omitted).

The Jeopardy Opinions reveal something we already know: that the Services decided that the regulation EPA submitted for their review violated the ESA's jeopardy prohibition. Pet. App. 26a. And they reveal something FOIA was meant to disclose: the reasons and analysis explaining that decision. *Sears*, 421 U.S. at 151-52. Making those reasons public would only subject the Services to additional scrutiny of their decision to demand additional wildlife protections, and of their implementation of those protections. *See* Brief 45 (disclosure might enable "public advocacy" and challenges to "federal agency actions"). That is not an injury justifying invocation of the deliberative process privilege. The privilege protects agency staff's ability to engage in "honest and frank communication." *Coastal States*, 617 F.2d at 866. It does not insulate agencies as a whole from criticism when they actually exercise their authority. "It is the decision-making process that requires shielding from public scrutiny, not the decision itself once it has been acted on." *Doe 2 v. Shanahan*, 917 F.3d 694, 705 (D.C. Cir. 2019) (quoting 3 Weinstein's Federal Evidence §509.23 (2019)). FOIA was enacted to enable critical scrutiny of agency decision-making. *GTE Sylvani*a, 445 U.S. at 385 (FOIA is "primarily focused on the efforts of officials to prevent

release of information in order to hide mistakes or irregularities committed by the agency").

B. Exemption 5 Does Not Turn on Signature or Official Issuance.

The Services also argue that the Jeopardy Opinions are privileged because the Services never "signed and issued" them, or otherwise "signified" the Opinions' "official adoption." Brief 18, 28. That emphasis on formal adoption over operative effects has no basis in FOIA's text or this Court's jurisprudence, which rejects interpretations of FOIA that rest on "wooden" formalities. *Mink*, 410 U.S. at 91. The statute's disclosure obligations are not limited to those materials an agency claims as its official statements. *See* 5 U.S.C. §§552(a)(2)(B)-(C), (a)(3). Congress understood how to limit disclosure to decisions formally "adopted as authorized by law," *id.* §552(a)(1)(D); a similar restriction should not, via Exemption 5, be inserted into FOIA's general disclosure requirements, *id.* §§552(a)(2)-(3). *See Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 777 (2018) ("[W]hen Congress includes particular language in one section of a statute but omits it in another[,] . . . this Court presumes that Congress intended a difference in meaning.") (alterations in original; citation omitted).

FOIA's text compels disclosure of agencies' "secret (agency) law"—decisions that are not formally issued or officially acknowledged but have operative "force and effect" upon agencies' regulatory activities. *Sears*,

421 U.S. at 153 (citations omitted). Because the Jeopardy Opinions provide the basis for a decision by the Services that caused EPA to alter its Intake-Structures rule, FOIA "prevent[s] the agency from keeping [them] secret," *id.* at 156, by labeling them "draft" or refusing to sign them. Such labels merely divide decisions an agency wishes to keep secret from those it chooses to acknowledge. For that reason, the courts of appeals have uniformly refused to allow agencies to keep decisions "used . . . in the discharge of [their] regulatory duties . . . hidden behind a veil of privilege because [they are] not designated as 'formal,' binding,' or 'final.'" *Coastal States*, 617 F.2d at 867. "[T]hat [documents] are nominally non-binding is no reason for treating them as something other than considered statements of the agency's legal position." *Tax Analysts*, 117 F.3d at 617; *accord Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 357 n.5 (2d Cir. 2005) (Exemption 5 does not mean that material is public only where agency "uses specific, explicit language of adoption or incorporation").

The Services rely on *Grumman* as establishing that because an unsigned decision leaves the agency "free to 'change [its] mind,'" it may be withheld as non-"binding" and therefore advisory. Brief 19-20 (citing 421 U.S. at 189-90). Even under the more rigorous finality standard governing judicial review, 5 U.S.C. §704, this Court has never followed that formalistic approach. *E.g.*, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1814-15 (2016) ("'pragmatic' approach" governs finality, so that decision notifying

others that proceeding with an action places them at "risk of significant" penalties is final despite agency's ability to change course) (citation omitted); *Bennett*, 520 U.S. at 178. *Grumman* does not suggest that, under FOIA's less demanding disclosure standards, an agency's nominal ability to change its mind allows it to withhold an otherwise determinative decision. *Grumman* addressed reports that had "no operative effect" and carried "no legal weight whatever." 421 U.S. at 187. The agency "never adopted" the reasoning of the reports and was free to ignore their conclusions. *Id.* at 189.

That is hardly the case here. The Services' views as to jeopardy were not just "recommendations"; they had "virtually determinative effect." *Bennett*, 520 U.S. at 169-70 (citation omitted). *Grumman* does not suggest that the reports it deemed privileged would remain so if the sending agency functioned as decision-maker but chose to label its opinions "draft." *See Schlefer v. United States*, 702 F.2d 233, 237-41 (D.C. Cir. 1983) (refusing to extend privilege to opinions that are not binding "as a formal matter," where "in practice" recipients "always follow the advice given," and defiance "would be indulging in a futile gesture"). *Grumman*'s fulcrum is that *nothing* the sending agency conveyed meaningfully constrained the recipient. 421 U.S. at 184-85. Here, the most that could be said is that the Services (as a decision-maker always might) could have withdrawn their objection—but didn't. That is not enough to permit withholding. *Sears*, 421 U.S. at 158 n.25 (*Grumman* does not allow

withholding just because "the decision reached . . . may be overturned").

The Services' effort to yoke the deliberative process privilege to agencies' formal designations—"draft," "unofficial," or "confidential in the public interest"—threatens to reinstate agency discretion that FOIA was enacted to eliminate: to "decid[e] what information to disclose," and what to keep secret. *GTE Sylvania*, 445 U.S. at 384-85. Where, as here, the record indicates that an agency gave a document decisive effect, Exemption 5 should not permit the agency to withhold it by leaving it unsigned, marking it "draft," or refusing to officially issue it. *Coastal States*, 617 F.2d at 867. Agencies have given some "draft" manuals controlling weight for decades. *See*, *e.g.*, *Sierra Club v. EPA*, 499 F.3d 653, 654 (7th Cir. 2007) (discussing EPA's use of 1990 draft New Source Review manual). Allowing such designations to require exemption would give agencies unilateral authority to extend Exemption 5 to "any memoranda, even those that contain final opinions and statements of policy, whenever the agency concluded that disclosure would not promote the 'efficiency' of its operations or otherwise would not be in the 'public interest' "—a result FOIA does not allow. *Merrill*, 443 U.S. at 354.

C. The Services' Regulations Do Not Prevent the Services from Addressing Jeopardy in a Draft Opinion.

The Services claim, finally, that their regulations allow them to decide whether a proposed action jeopardizes protected species only through one document: a "signed and issued" "*Final* Biological Opinion." Brief 18. For that reason, according to the Services, the Jeopardy Opinions must be deemed advisory under FOIA. Brief 29. But the regulations do not prevent the Services from reaching a jeopardy determination whose basis is explained in an opinion marked "draft," nor deprive such a decision of its "virtually determinative" operative effect, *Bennett*, 520 U.S. at 170. The regulations instruct the Services to make their jeopardy decision, 50 C.F.R. §402.14(g)(4), then "discuss" that finding with the action agency (and any private applicant), *id.* §402.14(g)(5). They do not require the Services to reconsider their jeopardy determination once they have discussed it—much less give the action agencies any power to over-ride the Services' conclusion. By contrast, the materials that *Grumman* held privileged were reports whose findings, reasoning, and conclusions the recipient agency had plenary authority to reject or amend. 421 U.S. at 186-87. The Services' consultation regulations require only that the Services inform the action agency of their jeopardy decision and discuss its basis; they give the action agency no similar countervailing authority that might render the Services' jeopardy conclusion advisory in every instance. 50 C.F.R. §402.14(g)(5).

The regulations instruct the Services to consider the action agency's views on just one distinct topic: "if a jeopardy opinion is to be issued," the Services must "utilize the expertise of the [action agency] and any applicant in identifying" reasonable and prudent alternatives. *Id.* If the action agency "request[s]" a copy of the draft biological opinion, the Services must provide one. But the draft is shared "for the purpose of analyzing the reasonable and prudent alternatives," not those alternatives' logical and legal antecedent: the Services' jeopardy conclusion. *Id.* And even as to available alternatives, the regulations do not require the Services to adopt or even respond to the action agency's suggestions. The Services must only provide the action agency an opportunity to submit comments before issuing a "final" opinion specifying their reasonable and prudent alternatives. *Id.*

In sum, the regulations instruct the Services to seek the action agency's views on the decision that *follows* from a jeopardy determination: reasonable and prudent alternatives. That might make deliberations over *alternatives* predecisional; but it does not make the Services' *jeopardy* finding any less decisive (after all, it is the jeopardy finding that requires development of alternatives). Here, the three agencies devoted no attention to the "technical accuracy" and "biological reasons" (Brief 31 (citation omitted)) supporting the Services' jeopardy determination once EPA was informed of it. *See supra*, at 22-27. They turned instead to the next regulatory step: changing EPA's Rule. Brief 31. As EPA did not request the Jeopardy Opinions, the

regulations' commenting procedures did not come into play. That decision-making sequence—a draft explaining the jeopardy decision preventing EPA from finalizing the regulation it submitted to the Services, followed by deliberations over a more protective alternative—is entirely consistent with the Services' regulations.

Moreover, the regulations do not categorically define draft jeopardy opinions as confidential documents, prepared solely for internal agency discussion and deliberation. Draft jeopardy opinions are shared not just between agencies, but also with any private "applicant" (as they must be, given the impact on applicants' eventual regulatory obligations). 50 C.F.R. §402.14(g)(5). Those draft jeopardy opinions are meant for outside parties, and therefore public. *Klamath*, 532 U.S. at 10-12 (requiring disclosure of communications with interested nongovernmental parties). These Jeopardy Opinions were prepared according to the same regulatory criteria, to serve the same regulatory function. The Services thus seek a categorical rule that interagency draft jeopardy opinions must be secret, based upon regulations also designed to produce draft jeopardy opinions provided to nongovernmental actors that will necessarily be public. There is no support for that rule—one by which draft jeopardy opinions affecting a single permit are revealed while these Jeopardy Opinions, affecting over a thousand permits, are secret. The Services' internal policies have long acknowledged that "draft" documents can provide "significant input into the decision-making process," or "resolv[e]"

factual, scientific, and legal issues, and that such drafts belong in the public record. Memorandum from Lois Schiffer to Assistant Administrators 10 (Dec. 21, 2012);[7] *see* Memorandum from David Bernhardt to Assistant Secretaries 10 (June 27, 2006).[8] Consistent with that guidance, the Services' personnel anticipated that the Jeopardy Opinions would be public, J.A. 95-96, 103, and have regularly made such opinions public in the past. C.A. S.E.R. 164-199.

The regulations, consequently, do not conclusively establish that every draft biological opinion is one whose disclosure would be injurious to the agency's deliberative capacity. Some drafts may contain only tentative views. A few may be contested by the action agency and altered or abandoned as a result. But others—like the Jeopardy Opinions—substantiate the Services' conclusion that a proposed action is likely to jeopardize protected species, and lead to the development of reasonable and prudent alternatives. 50 C.F.R. §402.14(g)(5). As with any other document, if the record demonstrates that an opinion supplies the basis for a decision with those operative effects, FOIA requires its disclosure. 5 U.S.C. §552(a)(4)(B).

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[7] Available at: https://www.gc.noaa.gov/documents/2012/AR_Guidelines_122112-Final.pdf.

[8] Available at: https://www.fws.gov/policy/e1282fw5.pdf.

III. FOIA's Text and Function Require a Fact-Specific Approach to Exemption 5.

The Services invoke a need for "clarity." Brief 21. Yet the rule at issue here—that the deliberative process privilege depends on what agencies do, not just what they say—has been applied for forty years without any evident diminution in agencies' ability to fulfill their responsibilities. *See*, *e.g.*, *Coastal States*, 617 F.2d at 854; *Schlefer*, 702 F.2d 233 (addressing nominally non-binding documents adopted as policy); *Elec. Frontier Found. v. Dep't of Justice*, 739 F.3d 1, 8 (D.C. Cir. 2014) (addressing genuinely advisory materials). This "functional approach" to Exemption 5 does not place "candid recommendations" at risk. Brief 44 (citation omitted). Where the Services in fact abandon their opinion, without barring an agency's proposed action, the opinion need not be disclosed. *See* Pet. App. 17a n.9 (permitting withholding under those facts). Where agency staff recommend policy positions that the agency does not adopt, their advice need not be disclosed. *See* Pet. App. 27a-28a (permitting withholding under those facts). Examining agencies' actual decision-making only prevents agencies from withholding materials explaining decisions that meaningfully shape their (or others') regulatory actions—that is, those with a "real operative effect." *Sears*, 421 U.S. at 160.

These standards may not furnish a bright categorical line for every case. But that is the consequence of Congress's decision to model Exemption 5 on litigation privileges. 5 U.S.C. §552(b)(5). That chosen model by its nature entails fact-specific rather than categorical

judgments. *See In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (deliberative-process privilege is applied, in litigation, "flexibly on a case-by-case, ad hoc basis"). The resulting case-by-case inquiry may deprive agencies of "confidence," Brief 44, that they can conceal a document by designating it "draft" or refusing to sign and formally issue it—but they are not entitled to exert such control. Fact-specific inquiry is essential to the meaningful judicial review of agencies' privilege claims demanded by FOIA's text—including its review provisions, 5 U.S.C. §552(a)(4)(B), and its narrowly limited exemptions, *id.* §§552(b)(1)-(9). Such searching inquiry is required to maintain the proper balance of Exemption 5's allowance for limited agency confidentiality against FOIA's primary aim: ensuring the public insight necessary to hold agencies accountable for the exercise of their regulatory authorities.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted,

SANJAY NARAYAN
Counsel of Record
ELENA SAXONHOUSE
MATTHEW MILLER
SIERRA CLUB ENVIRONMENTAL LAW PROGRAM
2101 Webster St., Ste. 1300
Oakland, CA 94612
(415) 977-5769
sanjay.narayan@sierraclub.org

SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th St., NW
Washington, DC 20009
(202) 588-1000

REED SUPER
SUPER LAW GROUP, LLC
180 Maiden Ln., Ste. 603
New York, NY 10038
(212) 242-2355

July 27, 2020