

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES FISH AND WILDLIFE)
SERVICE, ET AL.,)
 Petitioners,)
 v.) No. 19-547
SIERRA CLUB, INC.,)
 Respondent.)
- - - - -

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Washington, D.C.

Monday, November 2, 2020

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

MATTHEW GUARNIERI, Assistant to the Solicitor General,
Department of Justice, Washington, D.C.;
on behalf of the Petitioners.
SANJAY NARAYAN, ESQUIRE, Oakland, California;
on behalf of the Respondent.

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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 19-547, United States Fish and Wildlife Service versus Sierra Club.

Mr. Guarnieri.

ORAL ARGUMENT OF MATTHEW GUARNIERI

ON BEHALF OF THE PETITIONERS

MR. GUARNIERI: Mr. Chief Justice, and may it please the Court:

The December 2013 draft biological opinions are privileged, predecisional, deliberative material. They were written by staff at the Services as a recommendation to agency decisionmakers about the position the Services should adopt in the ongoing consultation with the EPA.

When the relevant decisionmakers were presented with these drafts, they did not adopt them, they did not sign them, and they did not even transmit them in full to the EPA. Instead, they decided that more work needed to be done before making a final decision.

The Ninth Circuit committed two

1 principal errors in concluding, nonetheless,
2 that these drafts are outside the scope of the
3 deliberative process privilege.

4 First, the Ninth Circuit treated the
5 drafts as final, rather than predecisional,
6 because it viewed them as the Services' last
7 word on the version of the EPA rule under
8 consideration in December 2013.

9 But the EPA modified its approach, and
10 the Services never had any occasion to make a
11 final decision about the abandoned version of
12 the EPA rule. In the D.C. Circuit's memorable
13 words, the December 2013 draft opinion "died on
14 the vine" without ever blossoming into a final
15 decision.

16 Second, the Ninth Circuit viewed these
17 drafts as final documents because the drafts
18 largely don't contain red-lining, marginal
19 comments, or other obvious signs of still being
20 in flux.

21 That reasoning is unsound. No one
22 would confuse a law clerk's draft with a final
23 decision by a judge, even if the draft is
24 pristine. The key point is that the
25 decisionmakers at the Services had not yet made

1 up their mind. Their deliberations had not yet
2 come to an end. When the Services did make a
3 final decision in May 2014, they released an
4 85-page joint opinion explaining their reasoning
5 to the public.

6 Here, Respondent seeks to compel the
7 disclosure of earlier drafts which recommended
8 reasoning that the Services never adopted about
9 a version of the EPA rule that never saw the
10 light of day.

11 The Court should reject Respondent's
12 efforts to pry into those materials.

13 CHIEF JUSTICE ROBERTS: Mr. Guarnieri,
14 before you can decide whether something is
15 predecisional, you have to know what the
16 decision is. And why -- why isn't the decision
17 here EPA's final rule on the cooling water
18 intake structures, and the Services' opinion
19 simply is predecisional from the perspective of
20 that final rule?

21 MR. GUARNIERI: Mr. Chief Justice, we
22 think the final decision here is the Services'
23 decision in the ongoing consultation. So that
24 -- that is -- the final decision occurred in May
25 of 2014, when the Services exercised their

1 authority under the Endangered Species Act to
2 render a biological opinion with respect to
3 whether EPA's proposed action would cause
4 jeopardy to endangered species.

5 CHIEF JUSTICE ROBERTS: But that
6 doesn't do -- I mean, that -- that itself
7 doesn't rep -- represent any action by the
8 Service with respect to anything other than the
9 EPA decision. I mean, it is predecisional with
10 respect to that decision.

11 MR. GUARNIERI: That's right, Your
12 Honor, but -- but we think the deliberative
13 process that -- that should be the focus of the
14 Court's attention here is the deliberations that
15 were occurring within the Services about whether
16 or not the EPA's proposed action would cause
17 jeopardy, not --

18 CHIEF JUSTICE ROBERTS: No, I know
19 that's what you think. I'm trying to figure out
20 -- figure out why. I mean, you talk about,
21 within an agency, the different steps in the
22 process, and you say: Well, none of those steps
23 is actually, you know, final and decisional.

24 But, here, all of a sudden you get to
25 the end of the Services' role and it's final and

1 not predecisional, even though it's just part of
2 another ongoing process.

3 In other words, I'm not sure that your
4 position doesn't prove too much.

5 MR. GUARNIERI: Mr. Chief Justice, we
6 -- we think the statute itself makes clear that
7 there is a decisionmaking process that concludes
8 with the issuance of the final biological
9 opinion. That's in Section 7(b)(2) of -- of the
10 Endangered Species Act.

11 The implementing regulations also make
12 clear that, with respect to the interagency
13 consultation, it concludes with -- that -- that
14 process concludes with the issuance of a final
15 opinion.

16 Now, of course, if -- if the Court
17 were to view the -- the deliberate -- the
18 deliberations here more broadly as encompassing
19 also the EPA's rulemaking, then it's clear that
20 the EPA didn't make a final decision and didn't
21 issue a -- a final rule in that rulemaking until
22 May 2014. So the drafts that are at issue here
23 would also be predecisional with respect to the
24 EPA's final rule.

25 CHIEF JUSTICE ROBERTS: Thank you --

1 JUSTICE THOMAS: Counsel, the --

2 CHIEF JUSTICE ROBERTS: -- counsel.

3 Justice Thomas.

4 JUSTICE THOMAS: Thank you, Mr. Chief
5 Justice.

6 Counsel, the -- I'd like to follow up
7 with the Chief Justice's line. The -- what if
8 there were not a regulation that prohibited the
9 issuance of a final opinion before or while the
10 draft was under review by the requesting agency?

11 MR. GUARNIERI: Well, you know,
12 certainly, we think it's helpful here that the
13 -- the regulations clearly contemplate that
14 there would be a sharing of drafts in some
15 circumstances between the Services and the
16 action agency.

17 And, here, the Services didn't
18 actually even reach the point of sharing the
19 draft opinion in December 2013. The drafts were
20 never transmitted in full to the EPA at that
21 point.

22 But -- but, counterfactually, if there
23 were no regulation, then still at least on the
24 facts here, it's clear that the Services had
25 never made a final decision in the consultation

1 in December 2013.

2 The declarations that have been
3 submitted by agency officials make clear that
4 the relevant decisionmakers did not adopt these
5 drafts when the drafts were presented to them in
6 December 2013.

7 So we really think that's dispositive
8 here of the fact that the deliberations were
9 ongoing at that point in time.

10 JUSTICE THOMAS: So what if you were
11 right -- I'm trying to figure out, like, if
12 you're right up to the line that there is --
13 there is no more deliberation, that let's say
14 it's there -- it's a final, final draft and you
15 simply are call -- calling EPA to give a
16 heads-up that you're about to send it in -- in
17 five minutes.

18 Would you make the same argument?
19 Anything short of actually sending it, that's
20 what I'm getting at.

21 MR. GUARNIERI: Yes, Justice Thomas.
22 Now, of course, we're quite far from that point
23 in this particular case. But I -- I think, in
24 general, the principle that we are advocating
25 here is that until there is a -- until there is

1 actually a final decision, the agency
2 decisionmakers are free to change their mind in
3 a consultation.

4 And so that -- that is really the
5 critical distinction between sort of having a
6 mere final draft that is on the verge of being
7 transmitted and actually having a final agency
8 decision that represents the Services' final
9 opinion in -- in the consultation.

10 And until reaching that point, the
11 deliberations are -- are still ongoing, and --
12 and the Services -- the decisionmakers at the
13 Services could change their mind about any
14 aspect of the agency's analysis.

15 JUSTICE THOMAS: So anything short of
16 -- of just pressing the send button is -- is --
17 is non-final?

18 MR. GUARNIERI: Well, it's not -- to
19 -- to be clear, it's not the transmittal. It's
20 not hitting the send button to send it to the
21 EPA that we think is the critical distinction.
22 It's -- it's the point in time at which the
23 agency decisionmakers actually exercise their
24 authority to issue a biological opinion in the
25 consultation. And -- and they were far short of

1 that here in December of 2013.

2 JUSTICE THOMAS: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Breyer.

5 JUSTICE BREYER: Well, I'm not -- one,
6 I'd like any comment you have about the test. I
7 mean, the object is will this document, in fact,
8 diminish agency decisionmaking quality by -- by
9 discouraging the staff and others from debating
10 if it's going to become public?

11 And you might have a better choice or
12 not, I'm curious, about the -- the words that
13 have been used are predecisional and
14 deliberative. Hmm, maybe. Okay. So that's one
15 in the back of my mind. Anything you want to
16 say?

17 And the other thing, at least in some
18 of these documents, and we'll have to look
19 through the record, it -- it seems to have
20 reached a final stage. I mean, people say, when
21 you make these final changes, which they made to
22 the draft, I can e-mail the Assistant Director,
23 and we have an autopen with his signature we can
24 use to send it out, and they'll send it to the
25 EPA. And, in fact, that's what they normally

1 do.

2 I mean, normally what they do is they
3 send these things over before they're absolutely
4 final. The EPA makes changes. And then it
5 never appears. And that happened apparently
6 thousands of times, and only twice did they
7 actually publish it.

8 So -- so those -- those -- those are
9 -- do you get what I'm driving at? And, if so,
10 I'd appreciate your -- your thoughts.

11 MR. GUARNIERI: Sure. Well, with
12 respect to your second set of questions, Justice
13 Breyer, the e-mails that you're referring to are
14 e-mails about finalizing the draft for
15 transmittal to the EPA.

16 And so it's abundantly clear in those
17 e-mails, even in the e-mail suggesting that the
18 transmittal letter could be signed by autopen,
19 it's very clear that the Services understood
20 themselves to still be working on draft
21 biological opinions, and they had committed
22 previously to sharing a draft with the EPA.

23 So even if they had transmitted that
24 draft or transmitted those documents, they --
25 they understood themselves to be transmitting a

1 draft that did not yet represent a final
2 decision.

3 With respect to Your Honor's first
4 question, the lower courts have understood this
5 Court's precedent on the deliberative process
6 privilege to require that a document be both
7 predecisional and deliberative in order to
8 qualify for the privileges.

9 We're not taking issue with that. We
10 think, if the Court were to apply that framework
11 here, these documents would certainly satisfy
12 it.

13 JUSTICE BREYER: Okay. Thank you.

14 MR. GUARNIERI: Justice Breyer, if I
15 may also, your question alluded to the fact that
16 there are relatively few jeopardy opinions.
17 That -- that's certainly true. There are some
18 -- there's an empirical study cited in the
19 amicus briefs suggesting that jeopardy opinions
20 are relatively rare.

21 But we don't really see any particular
22 problem with that. And I think that could be
23 simply a sign that the consultation process
24 required by the Endangered Species Act is
25 working as intended. Federal agencies are

1 incorporating these standards into proposed
2 agency actions and are --

3 CHIEF JUSTICE ROBERTS: Justice Alito.

4 MR. GUARNIERI: -- applying law and
5 avoiding actions that would cause jeopardy.

6 CHIEF JUSTICE ROBERTS: Justice Alito.

7 JUSTICE ALITO: Are there examples of
8 sit -- situations in which a jeopardy biological
9 opinion has been issued, but the action agency
10 has then gone ahead with the action in the face
11 of that?

12 MR. GUARNIERI: Justice Alito, I'm --
13 I'm not aware of such a -- such a -- such an
14 example. There -- there are a handful of
15 examples -- so, to -- to step back for a second,
16 the Endangered Species Act -- as -- as the Court
17 discussed in Bennett against Spear, the
18 Endangered Species Act at least theoretically
19 permits an action agency to decide that,
20 notwithstanding the biological opinion, the
21 action agency has decided that its agency's
22 action would not cause jeopardy.

23 I -- I don't know that that's ever
24 occurred. There are a handful of examples. The
25 -- the statute also permits an action agency to

1 obtain an exemption from a -- a -- a -- a
2 cabinet-level committee, and that has occurred
3 on -- on a handful of occasions.

4 JUSTICE ALITO: Well, if it -- if it
5 almost never occurs, then something that is
6 labeled a draft biological opinion may really be
7 tantamount to the Services' final word on the
8 subject, unless it can be persuaded by the
9 action agency to change its opinion or the
10 action agency makes an adjustment in what it was
11 previously proposing to do.

12 Isn't that the case?

13 MR. GUARNIERI: Well, I -- I think the
14 -- the draft aspect of the opinion -- I mean,
15 from our perspective, the key point here is that
16 the agency decisionmakers at the Services had
17 not yet actually made up their mind about
18 whether the version of the rule that was under
19 consideration in December of 2013 would cause
20 jeopardy.

21 JUSTICE ALITO: Okay. Well, maybe
22 that's -- maybe that's true, but I'm interested
23 in where your argument goes, where we should
24 draw the line.

25 Do you want us to draw a line between

1 those draft biological opinions that do not
2 reflect -- that reflect all of the deliberation
3 that the Service intends to conduct internally,
4 but -- and those that do not reflect all of the
5 deliberation that the Service wants to conduct
6 internally, or does your argument logically lead
7 to the conclusion that no draft biological
8 opinion can ever be final?

9 MR. GUARNIERI: Well, I -- I think
10 it's the latter, Justice Alito. No draft
11 biological opinion -- by -- by definition, if it
12 is a draft opinion, then it is predecisional and
13 deliberative because the agency has not yet made
14 up its mind. The Services have not yet made up
15 their mind in the ongoing consultation.

16 And -- and there are good reasons for
17 that, and one of them is that, you know, as the
18 regulations contemplate, the Services will often
19 share these draft opinions with the action
20 agency, and that process sort of -- the give and
21 take between the Services and the -- the agency
22 that is consulting the Services can be helpful
23 to refine the -- the draft opinion and to -- for
24 the Services to better understand the proposed
25 agency --

1 JUSTICE ALITO: Thank --

2 MR. GUARNIERI: -- action.

3 JUSTICE ALITO: -- thank you, counsel.

4 My time has expired.

5 CHIEF JUSTICE ROBERTS: Justice

6 Sotomayor.

7 JUSTICE SOTOMAYOR: I am following up
8 a little bit on Justice Alito's questioning. In
9 Bennett, we held that biological opinions, while
10 technically advisory, have "a powerful coercive
11 effect" on the action of the agency.

12 Why is it that a draft jeopardy
13 opinion doesn't have the same coercive effect?
14 As I think the Ninth Circuit pointed out, what
15 was at issue was the November rule that the EPA
16 was proposing, and the draft that was sent to
17 the EPA made them change their mind. They did
18 something completely different. With respect to
19 the decision relating to that November action,
20 the draft opinion did exactly what a final
21 opinion is intended to do.

22 So I -- I understand your basic
23 argument that it wasn't clear the agency's final
24 decisionmaker had accepted that that was the
25 jeopardy opinion they were going to get, but I

1 go back to Justice Thomas's question.

2 If that agency head was about to sign
3 it and said, ah, I'll -- I'm just going to send
4 it to them and tell them I'll sign it on -- on
5 Monday, I don't want to go into the office on
6 Sunday, it would be your argument that that
7 wouldn't be a final opinion worthy of
8 disclosure?

9 MR. GUARNIERI: Well, Justice
10 Sotomayor, to -- to -- to sort of take those
11 questions in -- in sequence, I think it's
12 abundantly clear that in Bennett against Spear,
13 the Court was discussing final biological
14 opinions, as evidenced by the Court's focus on
15 the legal force and effect of the incidental
16 take statement that is issued when the agency --
17 when the Services render a jeopardy -- excuse
18 me, a no jeopardy opinion.

19 So the -- the -- the Court's focus
20 there was on the fact that the final biological
21 opinion does have real force and effect. It has
22 legal consequences. None of those consequences
23 attach to a draft biological opinion. The
24 statute and the regulation attach no legal
25 consequences whatsoever to a draft biological

1 opinion of the kind that are at issue here.

2 JUSTICE SOTOMAYOR: Counsel, I have
3 one question I want to get to. In the Ninth
4 Circuit, you agreed that a remand would be
5 appropriate to determine whether the documents
6 contain segregable factual information.

7 Do you think that if we were to rule
8 in your favor, we would still have to remand for
9 that to happen?

10 MR. GUARNIERI: Yes, Your Honor. That
11 -- that would be appropriate. Under -- under
12 Section 552(b), if a document qualifies for one
13 of the exemptions set forth in subsection (b),
14 then and only then would an agency determine
15 whether, notwithstanding the fact that the
16 document qualifies for an exception, there are
17 portions of it that could be segregated and
18 released.

19 So that -- that did occur after the
20 Ninth Circuit decision. That did occur with
21 respect to three documents that the court of
22 appeals found to qualify for Exemption 5.

23 If this Court were to sustain our
24 assertion of Exemption 5 here, then the same
25 kind of analysis would follow on remand.

1 JUSTICE SOTOMAYOR: Thank you,
2 counsel.

3 CHIEF JUSTICE ROBERTS: Justice Kagan.

4 JUSTICE KAGAN: Mr. Guarnieri, could I
5 focus on the part of your argument which is that
6 the relevant decisionmakers were still working
7 on the draft and give you a hypothetical, which
8 is that there was -- the draft came to the
9 relevant decisionmaker, and he looked at it and
10 he realized that it was going to cause a big
11 problem for the EPA, and so he said: You know,
12 I'm not going to send this over. I'm going to
13 give the EPA head a call and just tell him
14 everything in it, and that will ensure that
15 there's nothing FOIA-able that -- in this
16 document.

17 What -- what would your answer to that
18 be? You know, he has the document, he's not
19 working on it, but -- but he doesn't want to
20 make it FOIA-able. And can he end-run this in
21 that way?

22 MR. GUARNIERI: Justice Kagan, there
23 is a body of existing law in the lower courts
24 addressing circumstances in which an agency has
25 implicitly made a final decision. Some of those

1 principles might -- might be brought to bear on
2 the hypothetical that Your Honor's posing.

3 But -- but, here, there's really
4 nothing in the record to suggest that the
5 agencies had implicitly made a final decision,
6 even if they had not memorialized that by, for
7 example, signing and publicly issuing a
8 biological opinion.

9 And -- and, in fact, here, the
10 evidence is really all to the contrary. There
11 are declarations from agency officials.
12 Including for the Fish and Wildlife Service,
13 there's a declaration from Assistant Director
14 Frazer, who was himself the agency decisionmaker
15 for Fish and Wildlife, and he says that he was
16 presented with these draft declarations and he
17 determined not to make a decision at that time
18 because he felt that more work was needed in the
19 consultation.

20 JUSTICE KAGAN: Yeah, it -- it -- it
21 -- it's a very general statement. Do you have
22 any sense of what more work needed to be done?
23 Because one way to understand what happened here
24 is that everybody really responded and acted as
25 if there were a completed draft opinion. You

1 know, there was sending the reasonable
2 alternatives over. The AP -- the EPA starts
3 talking to the Service about how to change its
4 rule. The EPA does change its rule.

5 It was as if -- you know, everything
6 that happened was as if there had been a final
7 draft opinion that was sent to the EPA.

8 MR. GUARNIERI: Well, Justice Kagan,
9 among other things, Assistant Director Frazer
10 said that -- and this is at page 58 of the Joint
11 Appendix -- that elements -- key elements of the
12 EPA's rule were still being deliberated within
13 the EPA.

14 So I think the declaration reflects
15 that there was a -- a -- a significant degree of
16 fluidity here both as to the -- the -- what the
17 Services planned to say in the consultation and
18 -- and also what the EPA's final rule would look
19 like.

20 Now it's difficult to describe exactly
21 the conversations that occurred from December
22 onwards without reviewing the substance of the
23 agency's privileged discussions, but the
24 declaration, I do think, makes clear that, you
25 know, there -- there were a number of moving

1 parts here. It wasn't simply EPA revising its
2 rule in response to the draft biological
3 opinion.

4 JUSTICE KAGAN: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Gorsuch.

7 JUSTICE GORSUCH: Good morning,
8 counsel.

9 Let's say EPA had decided at the end
10 of it to just withdraw its rule and -- and give
11 up, at least for the time being, maybe come back
12 to it in five or 10 years. Would that be a
13 final decision? And, if so, would that have
14 made the last draft that the Service gave to EPA
15 discoverable or not in your view?

16 MR. GUARNIERI: Justice Gorsuch, as I
17 was trying to articulate earlier, we think the
18 -- the key question here is whether the Services
19 had made a final decision.

20 And so, if the Services rendered a
21 final biological opinion finding jeopardy in the
22 consultation and that caused the EPA not to
23 proceed with its proposed action, then,
24 certainly, there the Services' final opinion
25 would itself not be privileged and -- and --

1 and, actually, as a matter of agency practice --

2 JUSTICE GORSUCH: All right. I -- I

3 --

4 MR. GUARNIERI: -- serve --

5 JUSTICE GORSUCH: -- I got that,
6 counsel. I guess what I'm ask -- so would the
7 EPA decision itself not to proceed, it died on
8 the vine, but would that be nonetheless final
9 and itself discoverable?

10 MR. GUARNIERI: Would -- would the
11 EPA's decision be final and discoverable?

12 JUSTICE GORSUCH: That's the question
13 now.

14 MR. GUARNIERI: I -- I suppose it
15 would depend. I mean, if the EPA memorializes
16 its decision not to proceed in the rulemaking in
17 some sort of agency document, then its
18 explanation of -- of why it had chosen not to
19 proceed would not -- hypothetically would not be
20 predecisional or deliberative and, therefore,
21 would be FOIA-able.

22 JUSTICE GORSUCH: But, if they just
23 decide in its last draft, you know, we're not --
24 we just -- it's too hard, we can't do it, we
25 give up, internally, but it doesn't -- it

1 doesn't publish anything, would that be final?

2 MR. GUARNIERI: No, I -- I don't think
3 that would be final. And, in fact, that would
4 be reminiscent of the situation that this Court
5 contemplated in Footnote 18 of its decision in
6 Sears, which is that, you know, you're -- you're
7 going to have privileged internal deliberations
8 that do not result in any final decision
9 because, you know, you could have a degree of
10 kind of agency brainstorming that doesn't
11 ultimately lead to any final agency action.

12 And -- and, in that circumstance, the
13 agency's deliberations are privileged, even
14 though they do not culminate in any specific
15 final decision.

16 JUSTICE GORSUCH: And what if -- what
17 if -- what if, alternatively, the leadership of
18 the Service had, you know, signed that last
19 draft and sent it over to EPA? EPA didn't --
20 what -- whoever -- whatever happened at EPA
21 happened, but the -- the Services signed
22 something. EPA, though, you know, ultimately
23 maybe decided not to do anything.

24 Would the Service document be
25 discoverable?

1 MR. GUARNIERI: If -- if the Services'
2 document remained in draft form and had never
3 actually been issued as a final biological --

4 JUSTICE GORSUCH: No, I'm supposing
5 now it was signed by the leadership of the
6 Service and sent over to EPA.

7 MR. GUARNIERI: Yeah, in -- in that
8 circumstance --

9 JUSTICE GORSUCH: But EPA decided to
10 do nothing. Its -- its regulation died on the
11 vine.

12 MR. GUARNIERI: I -- I see. I see.
13 Yes. That -- that would be the -- when the
14 agencies reach a final decision in a
15 consultation, they release their opinion, their
16 biological opinion to the public, and --

17 JUSTICE GORSUCH: Oh, no, they didn't.
18 They sent it over to EPA because EPA's was still
19 in draft form, but the Service decided they'd
20 come to a final view on the draft of EPA and
21 they signed it. Then what?

22 MR. GUARNIERI: Then -- then that --
23 that would be a decision that would -- we could
24 not withhold under the deliberative process
25 privilege because the Services had -- have

1 reached a final decision. They have exercised
2 their authority under the Endangered Species
3 Act. And there was a --

4 JUSTICE GORSUCH: Counsel, thank you.
5 My -- my -- my time is over. Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Kavanaugh.

8 JUSTICE KAVANAUGH: Thank you, Chief
9 Justice.

10 And good morning, Mr. Guarnieri.

11 Just to follow up on the Chief's
12 questions and Justice Gorsuch's questions, it's
13 possible, I think, in your view, that even a
14 final agency or -- opinion or memo could still
15 be predecisional as part of a broader
16 deliberative process, and a draft opinion, which
17 we have in this case, in your view, is even more
18 obviously predecisional. Is that correct in
19 terms of a general statement?

20 MR. GUARNIERI: I -- I -- I do think
21 that's correct. And -- and that's why, in our
22 briefing, we -- we refer to these in places as
23 drafts of drafts, because, here, the EPA -- the
24 December 2013 draft biological opinion had not
25 even reached the point of being transmitted as

1 drafts to the EPA.

2 JUSTICE KAVANAUGH: To follow up on
3 something that Justice Kagan asked, does the
4 motive of the agency official with respect to
5 FOIA play a role in determining how a court
6 should assess whether it's obtainable under
7 FOIA?

8 MR. GUARNIERI: It -- it has not
9 traditionally been a part of the analysis that
10 this Court has engaged in for the deliberative
11 process privilege.

12 As I -- as I said to Justice Kagan, I
13 think there are existing doctrines that can
14 address any concerns along those lines,
15 including doctrines under which an agency may be
16 determined to have implicitly reached a final
17 decision, even though a document might be
18 notionally labeled a recommendation or a draft.

19 But -- but those are simply
20 inapplicable here. There's really no basis to
21 infer that the Services -- that the
22 decisionmakers at the Services had made a final
23 decision in December of 2013.

24 JUSTICE KAVANAUGH: I think there's a
25 concern lurking in this case that executive

1 branch officials might just stamp drafts on
2 everything and, therefore, evade FOIA.

3 Can you respond to that concern?

4 MR. GUARNIERI: Sure. You know, I --
5 I -- I take the point, Justice Kavanaugh, but
6 we're just very, very far from that here.

7 Here, we are in the molten core of the
8 deliberative process privilege, where it's --
9 it's clear from the record that the agency --
10 the decisionmakers at the Services did not adopt
11 the draft opinions when they were first entered.

12 JUSTICE KAVANAUGH: Well, if I could
13 interrupt, I -- I understand that point as to
14 this case, but how we frame the rule or the
15 principle will matter.

16 And how exactly would you have us
17 frame the principle of law that governs here?

18 MR. GUARNIERI: Well, we -- we accept
19 that the -- the lower court's formulation that a
20 document must be both predecisional and
21 deliberative is -- is a sort of -- accurately
22 captures the substance of this Court's case law.

23 With respect specifically to whether
24 or not a document is labeled "draft," we do
25 think that is important. I mean, it has a

1 significant meaning within the executive branch
2 when a document is labeled "draft." It's a
3 signal to other parties that the document has
4 not yet been finalized.

5 But, you know, of course, to address
6 the concern that -- that Your Honor has
7 mentioned, the labeling of a document as "draft"
8 wouldn't necessarily be dispositive. It would
9 be an important factor. But a court could also
10 look to other factors to ascertain whether a
11 document was still, in fact, in draft format.

12 JUSTICE KAVANAUGH: Okay. Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett.

15 JUSTICE BARRETT: I want to pick up on
16 the thread that Justice Kavanaugh was just
17 exploring with you.

18 You said that if a government official
19 simply stamps "draft" on it and sent it over
20 and, as Justice Kavanaugh is positing, did so in
21 order to avoid FOIA disclosure requirements, you
22 said that a court might look at other factors to
23 determine whether it's still final.

24 What other factors would a court
25 consider?

1 MR. GUARNIERI: I -- I think a court
2 might look to the -- the -- the treatment of the
3 document within the agency's process. And there
4 are circumstances in which the lower courts have
5 found that the labeling of a document as "draft"
6 might be considered pretextual, if you will, in
7 light of other evidence about the processes that
8 generated the document or the consequences that
9 were attached to the document within the
10 agency's administrative process.

11 But, you know, here, those factors tip
12 decisively in our favor. We have the
13 declarations making clear that the agency
14 decisionmakers didn't reach a final decision.
15 We know that they didn't publicly issue the
16 December 2013 draft, even though a final
17 biological opinion was publicly issued. And we
18 know that they had committed in advance to share
19 a draft with the EPA and they didn't even reach
20 that point because they determined that more
21 work needed to be done with the -- with the
22 draft opinions that were presented to them in
23 December 2013. So those are --

24 JUSTICE BARRETT: I mean, that's --

25 MR. GUARNIERI: -- all kinds of

1 peripheral considerations that a court might
2 take into account in determining that the label
3 of a document as "draft" is -- is, in fact,
4 accurate.

5 JUSTICE BARRETT: That's a pretty
6 fact-intensive determination then. So it's not
7 your position that we should adopt some sort of
8 bright line saying, listen, it's not over until
9 it's over, it's not until it's actually issued
10 in the sense of being final, maybe even in the
11 Bennett versus Spear sense of the word? You're
12 not asking for a rule that's that bright?

13 MR. GUARNIERI: Well, we -- we think
14 that those considerations for this particular
15 scheme, the line is very easy to draw because
16 it's so clear that the Endangered Species Act
17 and its implementing regulations set up a
18 process in which the deliberations conclude with
19 the issuance of a final biological opinion. And
20 I think the Court could dispose of this case on
21 that ground alone.

22 But, if there are concerns that, you
23 know, disposing of the case on those grounds
24 might lead to evasions or pretextual -- the --
25 the pretextual use of the label "draft" in the

1 future, then I -- I was just trying to give the
2 Court some comfort that there are other
3 considerations that could also be brought to
4 bear to -- to make sure that that isn't
5 occurring.

6 JUSTICE BARRETT: So your first order
7 of preference would be the kind of formalistic
8 line that I was just describing, and then your
9 backup argument would be, if the Court was
10 uncomfortable about the possibility of avoiding
11 FOIA obligations by, say, the stamping "draft"
12 on the top, that we go with the more kind of
13 multi-factor fact-specific test, you know, maybe
14 to see was the agency holding this out as a
15 final opinion?

16 MR. GUARNIERI: Yes, Your Honor. Yes.
17 I -- I think that that captures the -- the --
18 the way that we think the case ought to be
19 resolved. The -- the deliberative process
20 privilege here ought to extend to all of the
21 deliberations that precede the issuance of the
22 actual final biological opinion.

23 JUSTICE BARRETT: Thank you.

24 CHIEF JUSTICE ROBERTS: Mr. Guarnieri,
25 do you want to take a minute to wrap up?

1 MR. GUARNIERI: Thank you, Mr. Chief
2 Justice.

3 I -- I would just emphasize again, as
4 I've tried to several times this morning, that
5 -- that there can be no real dispute on the
6 facts of this case, that the decisionmakers at
7 the Services did not make a final decision in
8 December 2013.

9 The -- the record is clear that they
10 did not make a final decision in the ongoing
11 consultation until May of 2014. And when they
12 made that final decision, they -- they released
13 an 85-page joint opinion with -- with several
14 hundred pages of appendices explaining to the
15 public the reasoning that led them to issue a no
16 jeopardy opinion in this particular
17 consultation.

18 Until that point in time, the agency
19 decisionmakers were free to change their mind.
20 And the deliberative process within the agency
21 had not yet come to an end.

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. Narayan.

1 ORAL ARGUMENT OF SANJAY NARAYAN
2 ON BEHALF OF THE RESPONDENT

3 MR. NARAYAN: Thank you, Mr. Chief
4 Justice, and may it please the Court:

5 I'd like to begin with the standard
6 that follows from Sears and which should resolve
7 this case. If a document explains the decision
8 made by the agency with appreciable legal
9 consequences, Exemption 5 does not apply.

10 The opinions here explain a decision
11 made by the Services, that EPA's proposed
12 regulation jeopardized protected species. And
13 Bennett holds that jeopardy decision has legal
14 consequence.

15 Because the Services' conclusions
16 invariably get deference, the Services' jeopardy
17 determination made it very likely that EPA's
18 regulation would be overturned unless EPA
19 adopted additional protections.

20 None of that turns on whether the
21 Services label their opinions "draft" or
22 "final." Indeed, as the amicus briefs explain,
23 the Services almost never exercise their
24 jeopardy authority through a final jeopardy
25 opinion.

1 The jeopardy decision reached earlier
2 in the process achieved the same legal
3 consequence. It forecloses the agency's
4 proposed action and requires adoption of a more
5 protective alternative.

6 Petitioners have expressed concern as
7 to the workability of the standard insofar as it
8 allows courts to look past labels like "draft"
9 or "non-binding." But the lower courts have
10 been doing just that for 40 years with no
11 unusual difficulty. Those cases, like this one,
12 follow the standard FOIA practice. They're
13 resolved on summary judgment based on the
14 governing statutes and regulations, together
15 with the agency's record and declarations, and,
16 if necessary, examination of the documents
17 themselves.

18 The Endangered Species Act may call
19 the Services' review a consultation, but, in
20 reality, the statute gives the Services decisive
21 gatekeeping authority over other agencies'
22 actions. At stake here is whether the public
23 has access to the reasons underlying the
24 Services' exercise of that statutory authority.

25 CHIEF JUSTICE ROBERTS: Counsel,

1 government decisionmaking often involves several
2 different layers, you know, the issues addressed
3 by the section and then it turns over to the
4 bureau, then it goes to the division, and,
5 eventually, say, to the final decisionmaker.

6 What -- what if that decisionmaker,
7 looking at all this, says, you know, I think --
8 I think the bureau got it right; I don't think
9 the division did much at all; I like what they
10 did? Does that mean -- in other words: And
11 that's why I'm making the decision I am, because
12 I think the bureau analysis was right.

13 Does that mean that the bureau
14 analysis is disclosable because it is the one
15 that had operative effect?

16 MR. NARAYAN: If a decisionmaker on
17 behalf of the agency adopts that bureau's view
18 as a basis of the agency's decision, then, yes,
19 I think that is the basis of a decision that is
20 actually adopted.

21 CHIEF JUSTICE ROBERTS: Well, but that
22 -- that's certainly predecisional. I mean, it
23 goes up to the division and then only then to
24 the -- the agency director. I mean, the -- the
25 agency did not adopt the final recommendation

1 from the division but, rather, something that
2 certainly was predecisional.

3 MR. NARAYAN: I'm sorry. We're
4 talking about the decision that the director
5 chooses as the basis of the agency's decision?

6 CHIEF JUSTICE ROBERTS: Yeah. In its
7 -- in this chain of -- of responsibility that
8 leads up to him, he picks one in the middle. He
9 says, that's what is going to affect -- that --
10 that's what I'm going with.

11 Is that -- even though it's
12 predecisional in the sense that there were
13 several other layers before it got to him.

14 MR. NARAYAN: I think it is under
15 Sears because Sears says that if an agency
16 chooses to adopt a document that was
17 predecisional, but it makes it the basis of its
18 actual decision, then, you know, that doesn't
19 raise concern for two reasons.

20 One is that that's the decision of the
21 agency. Any criticism is going to go to the
22 agency, its decision.

23 And the second is that, in general --
24 again, this is -- this is Sears, not me -- but,
25 when that happens, the lower decisionmaker's not

1 embarrassed. They -- they generally tend to
2 like the fact the agency has taken their
3 decision and the decisionmaker has chosen it as
4 his or her own decision.

5 CHIEF JUSTICE ROBERTS: Well, counsel,
6 your -- the operative effects test seems sort of
7 tailor-made for the facts here, but it doesn't
8 seem to be very helpful in most cases. In most
9 cases, you can't pick a particular item in the
10 decisional process and say this is the one that
11 drove the decision.

12 So how would your effect -- your test
13 work in the typical case?

14 MR. NARAYAN: If -- if there is no
15 statement of basis there at all -- you know,
16 FOIA doesn't require an agency to write one up,
17 so, you know, one feature here is that the
18 regulations do require the Services to have a
19 statement of basis that is their opinion, their
20 jeopardy opinion, available if the action agency
21 asks for it. Therefore --

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Justice Thomas.

25 JUSTICE THOMAS: Yes, I'd like to pick

1 up a bit on what the Chief -- on the Chief's
2 line of questioning. How far back would you go
3 in the process? We asked the government how
4 close to the line of actually sending the
5 proposal out or the rule out would he -- would
6 he -- can he come to before it ceases being a
7 draft.

8 I'd like to ask you, how far back in
9 the process can we go before it is not
10 discoverable and it's a part of the deliberative
11 process, as opposed to something that is subject
12 to FOIA?

13 MR. NARAYAN: Well, I mean, in this
14 case, I think the important thing is that by all
15 indications of the record, this analysis that
16 it's a jeopardy opinion was complete and reached
17 a conclusion.

18 I don't think it goes much further
19 past that. That is, if the analysis is not
20 complete and they haven't -- and they're still
21 working on it, then that is legitimately
22 deliberative and predecisional and is not
23 disclosed.

24 JUSTICE THOMAS: So how do you
25 determine that? The -- the government says as

1 long as they still -- they have not said it's
2 final, it's still a part of the deliberative
3 process.

4 Why don't we take them at their word?

5 MR. NARAYAN: Well, I mean, I think
6 the reason not to take them at their word is
7 that that then hands control of disclosure to
8 the government based on how they choose to
9 characterize documents.

10 In this case, I really do think it is
11 the record as a whole, and there are four
12 elements in particular that I think deserve
13 attention, keeping in mind that the burden is on
14 the Services here.

15 I mean, the first is that we know the
16 Services had a decision to make. EPA gave them
17 their regulation so they could decide: Does it
18 pass muster under the Endangered Species Act?

19 And the second is that when the time
20 came to make that decision, under the schedule
21 that the agencies agreed to at Joint Appendix
22 91, the Services conveyed the conclusion that
23 the regulation caused jeopardy and that the next
24 steps were reasonable and prudent alternatives.

25 And we know that there were no further

1 deliberations, either contemplated or that
2 occurred, as to the viability of the proposed
3 regulation. And in EPA's final rule, it said
4 these changes were the result of the Services'
5 consultation in order to avoid jeopardy.

6 I mean, all of that lends no support
7 to the Services' claim that their analysis was
8 somehow not yet done or incomplete or -- or
9 inconclusive.

10 JUSTICE THOMAS: So what's at stake
11 here? EPA's first rule, it doesn't -- it's gone
12 now. They've got a different rule. So what's
13 at stake? Why do you need -- what information
14 are you trying to get about a rule that's no
15 longer in place?

16 MR. NARAYAN: Well, in this rule, what
17 they've said is that they are going to make
18 permit-by-permit determinations as to what is
19 required to avoid jeopardy and protect the
20 species.

21 And what the Sierra Club's interested
22 is -- in is knowing that those future decisions
23 are consistent with the basis by which they have
24 made these changes so that if, for example, it's
25 turtles at a certain kind of plant, that future

1 permits protect turtle -- turtles at -- at those
2 plants. And industry has a different set of
3 concerns, which is simply knowing that when the
4 agencies exercise this authority, they're doing
5 it on sound grounds.

6 JUSTICE THOMAS: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Breyer.

9 JUSTICE BREYER: Well, this is
10 complicated because I think there are several
11 documents here. So I'm going to ask you just to
12 check me. And don't say I'm right if I'm not
13 right, okay?

14 MR. NARAYAN: Okay.

15 JUSTICE BREYER: Okay. First, we are
16 talking about the -- the animals, the Fish and
17 Wildlife Department and the Marine Fisheries,
18 okay? What they're supposed to do is they write
19 a document called a biological opinion, is that
20 right?

21 MR. NARAYAN: Yes.

22 JUSTICE BREYER: Okay. In the history
23 of this Act, that document, once they publish
24 it, will force EPA to change, basically, and
25 that document has been actually issued never. I

1 mean, let me not exaggerate. In 7,000 cases in
2 seven years, they issued one exactly twice.

3 Now the reason is there is a different
4 document called a draft biological opinion, and
5 what happens when they write that draft is they
6 send it to EPA and they negotiate, and EPA
7 eventually ends up probably doing what they
8 finally agree to do.

9 So we're talking about that draft
10 biological opinion, and it has two things about
11 it: One, we're going to negotiate this with
12 EPA; and, two, private people, who are nothing
13 to do with the EPA, can get a hold under FOIA of
14 that document. Is that right?

15 MR. NARAYAN: Yes, except I think that
16 what is being negotiated is not the jeopardy
17 conclusion but what happens next; that is --

18 JUSTICE BREYER: Yeah. All right.
19 What happens next, but there is a document
20 called draft biological thing, and things happen
21 as a result of that, and it's pretty clear that
22 private people can get ahold of it. Indeed,
23 there's a reg to that effect. Is that right?

24 MR. NARAYAN: That's right if there's
25 an applicant involved in the process.

1 JUSTICE BREYER: An applicant can get
2 ahold of it. So I thought that that was, once
3 you write that draft biological opinion, you've
4 got something that's final enough that somebody
5 can get it under FOIA.

6 Now the question here is: Well, what
7 about the draft leading up to that draft? And
8 that's what we're trying to get or not get. Is
9 that right?

10 MR. NARAYAN: No, Your Honor. I think
11 our position is that this document is that
12 draft. I mean, EPA didn't ask for it.

13 JUSTICE BREYER: Yeah, yeah, yeah,
14 yeah, but it doesn't say it. And so the
15 government says: Well, this is just a draft of
16 the draft, or maybe the government means, no,
17 you can't get ahold of the draft, in which case
18 you can never get ahold of anything because they
19 never use anything beyond the draft. Is that
20 right?

21 MR. NARAYAN: That's how I understand
22 the government's position. But, to be clear,
23 you know, all they said is that EPA didn't ask
24 for it, so it was never formally transmitted.

25 JUSTICE BREYER: All right.

1 MR. NARAYAN: They did send over a
2 portion, and this does appear to be the
3 statement of basis for the jeopardy conclusion,
4 as we --

5 JUSTICE BREYER: So your view is I
6 looked through the nine -- or the -- the
7 documents that are supposed to be turned over or
8 not, I read this record, and I ask myself: Is
9 this, in effect, the draft biological opinion,
10 or is this a document that is part of the debate
11 within the agency that will lead up to the draft
12 biological opinion that will serve as a basis
13 for the discussion with EPA? Have I got that
14 right?

15 MR. NARAYAN: Yes, along with the rest
16 of the record, right.

17 JUSTICE BREYER: Okay. Okay. Now I
18 know what to do. That's extremely helpful.
19 Thank you.

20 CHIEF JUSTICE ROBERTS: Justice Alito.

21 JUSTICE ALITO: Well, I really don't
22 know what to do. We face a conundrum. One
23 possibility is for us to say that, if it's a
24 draft, it's -- it's privileged.

25 The other is to try to draw a

1 distinction between different kinds of drafts.
2 So let me ask you this: Suppose that the
3 Services went through a three-step process in
4 issuing a biological opinion, and the draft
5 produced at Step 1 turns out to be what the
6 Service will ultimately issue 90 percent of the
7 time. What emerges from Step 2 is what it will
8 issue 97 percent of the time. And what emerges
9 from Step 3 is the final product.

10 Now at what point do you think a
11 document would become non-privileged?

12 MR. NARAYAN: So I think the answer is
13 going to depend on the particular process --
14 decisionmaking process that actually occurs
15 because, you know, there aren't -- they've given
16 themselves a lot of flexibility.

17 So, in a case like this one, where
18 there was no further deliberation that seemed to
19 have been contemplated or that occurred, then,
20 you know, it is the -- the 90 percent draft
21 because, you know, the 10 percent simply doesn't
22 seem to be at issue in this case. EPA chose not
23 to interrogate their -- their determination
24 here, as agencies normally do.

25 JUSTICE ALITO: Well, you know, with

1 respect, counsel, I don't know how satisfactory
2 that answer is because, if a Service is
3 determined not to have this released under FOIA,
4 all they need to do at every step is simply to
5 say: This is what we think up to this point,
6 but, of course, this isn't our final word, we're
7 open to hearing other information about this so
8 that it's made explicitly non-final, subject to
9 further internal deliberations, until it's
10 finally issued.

11 MR. NARAYAN: Well, no, I mean, the
12 fact that they could change their mind in their
13 own discretion is clearly not enough. I mean,
14 Sears said that at Footnote 25. Grumman does
15 not stand for that proposition.

16 So, if -- if all they say is, well, in
17 our discretion, we have some room to move, I
18 mean, that's even true about final biological
19 opinions. I think, you know, what I'm saying is
20 that if you have a situation in which, you know,
21 they have a -- a process set up where they say,
22 well, we're giving you a draft and we want your
23 opinion and we intend to respond to it, you
24 know, if a real deliberative process is set up
25 within the rulemaking, then that's a different

1 kind of draft.

2 JUSTICE ALITO: Well, so help me.
3 Could you just say as succinctly and precisely
4 as possible what you think the test is we should
5 apply in distinguishing among opinions that are
6 labeled drafts?

7 MR. NARAYAN: If the draft opinion
8 reflects a decision made by the agency with
9 appreciable legal consequences, then it needs to
10 be released.

11 JUSTICE ALITO: Well, I mean, if it
12 was -- if Step 1 was followed 50 percent of the
13 time, that would have appreciable legal
14 consequences, wouldn't it?

15 MR. NARAYAN: I -- I think it would.
16 I just want to be clear that, you know,
17 50 percent -- I mean, if it is a -- a
18 discretionary reconsideration process and, you
19 know, the Services have all the power to control
20 what happens in that other 50 percent, then,
21 yes, that's --

22 JUSTICE ALITO: All right. Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor.

25 JUSTICE SOTOMAYOR: Counsel, I'm -- I

1 guess I'm getting bogged down in the details,
2 but I do want to a little bit.

3 In this case, what is clear is that
4 all we know is that portions of the draft
5 jeopardy opinion went to the EPA. And I know
6 that -- or at least my law clerk has looked
7 through the record and not been able to find an
8 answer as to what portions. But how can we say
9 that there was a final draft jeopardy opinion
10 that was signed off if the EPA never saw it?

11 And if they never saw it and were
12 working in a collaborative process thereafter to
13 change their rule, how could -- how can it help
14 you to look at that draft when the EPA, in
15 following whatever it's doing now, was never
16 informed by the draft?

17 MR. NARAYAN: So, in answer to, I
18 think, the first part of your question, if you
19 look at 402.14(g)(5), what it says is that when
20 the Services reach this stage of the process,
21 when they make a jeopardy conclusion as to the
22 regulation they have been given, they need to
23 have essentially a statement of basis available
24 to the action agency if the action agency wants
25 to submit comments.

1 And, you know, here, EPA, again, chose
2 not to submit comments. It didn't want to
3 interrogate the Services' opinion apparently.

4 But, you know, that is still a
5 statement of basis that provided -- that
6 explains the Services' decision. And, you know,
7 that EPA didn't ask for the thing to be formally
8 transmitted, I think, doesn't really affect that
9 -- that document's purpose or the operative
10 effect of the decision itself.

11 As to why we want to see it even if
12 EPA hasn't, the problem is that these jeopardy
13 decisions don't just affect the action agency.
14 You know, ultimately, they affect the public and
15 regulated communities -- the regulated community
16 and everybody else.

17 So, for our purposes, you know, that
18 -- the Services going down the line as they
19 exercise their supervisory -- supervisory
20 authority behave in a way that is consistent
21 with the conclusions they reached here remains
22 important.

23 JUSTICE SOTOMAYOR: All right. Could
24 you articulate for me your rule again? We know
25 there has to be some collaborative process.

1 There has to be some collaborative process
2 within the Services and one -- and then with the
3 EPA.

4 At what point is that draft biological
5 opinion -- articulate the rule that you want us
6 to write -- final in your judgment or subject to
7 disclosure?

8 MR. NARAYAN: I mean, when the draft
9 opinion provides the basis for a decision made
10 by the Services, that is, the agency as a whole,
11 that has appreciable legal consequences, then
12 that opinion needs to be disclosed.

13 JUSTICE SOTOMAYOR: Thank you,
14 counsel.

15 CHIEF JUSTICE ROBERTS: Justice Kagan.

16 JUSTICE KAGAN: Mr. Narayan, assume I
17 agree with you for the moment that what we might
18 call a final draft opinion is FOIA-able, you
19 know, the one that triggers the back and forth
20 between the Service and the agency, but the
21 government here says: Well, this was not such a
22 final draft opinion. It -- you know, it
23 characterizes it as a draft of a draft. And
24 they point to the various decisionmakers'
25 declarations.

1 So what evidence do you have that the
2 government is wrong to say that?

3 MR. NARAYAN: Well, I think the
4 measure of those sorts of simply conclusory
5 statements, right, like this was deliberative,
6 is the fact that the government has offered to
7 support their conclusion.

8 JUSTICE KAGAN: Well, it's not just
9 conclusory statements. I mean, you have the
10 Service head saying, I -- I -- I -- I thought
11 that more work needed to be done on it, I was
12 not ready to sign off on this.

13 MR. NARAYAN: That's correct. But the
14 only work that they've described is coming up
15 with an alternative that they would approve,
16 right? So, yes, more work needs to be done.
17 But then, in this particular process, there
18 appears to have been no work either contemplated
19 or that occurred as to the permissibility of the
20 proposed regulation.

21 And the only reason they give for
22 changing their jeopardy conclusion is that EPA
23 agreed to add these additional measures, which,
24 again, EPA itself ascribed to the Services'
25 jeopardy determination through the consultation.

1 So, you know, again, I think it's fair
2 to say that more work needs to be done, but, if
3 the only work that needs to be done is to
4 essentially follow through on the consequences
5 of the jeopardy determination, then I think
6 that's not enough.

7 JUSTICE KAGAN: Well, suppose that --
8 suppose that the -- the -- the -- the Service
9 head got a memo from a staffer saying this is --
10 this is a bad idea, there's going to be all
11 kinds of jeopardy, and the Service head really
12 had not -- did -- did not look at it very
13 closely, you know, hadn't decided whether he was
14 ready to sign off on it, but he did realize that
15 there were some issues here, and he calls up the
16 EPA and he says: Look, I -- I haven't gotten
17 all the way through this, I haven't made a final
18 decision yet, but I -- I -- I think that there
19 might be a problem here, and I want to get you
20 to talk to my guys and to try to work this out
21 informally.

22 Would -- would you say that there's a
23 FOIA-able document there?

24 MR. NARAYAN: No, I wouldn't. I mean,
25 our point here is that the Services haven't made

1 that showing in this record.

2 And the other point is that they are
3 required to have a statement of basis available
4 under 402.14(g)(5) when they reach this stage,
5 that is, when they make a jeopardy conclusion.
6 So --

7 JUSTICE KAGAN: Well, I guess why
8 isn't my hypothetical essentially this case? If
9 we -- if we treat declarations as -- as serious
10 and as worthy of, you know, being -- you know,
11 we should respect them unless we see something
12 to the contrary, that basically the head of the
13 Service looked at this and said: I don't know
14 if I'm ready to sign off on this. I think maybe
15 more work would need to be done to put this in
16 final form. I think that there's probably a --
17 a -- an issue here. I want to get everybody to
18 start talking about it.

19 MR. NARAYAN: Well, I think the -- the
20 reason the lower court didn't reach that factual
21 conclusion is that by all indications, this
22 document was ready to go to EPA if EPA asked for
23 it. All that happened is that EPA didn't ask
24 for it.

25 JUSTICE KAGAN: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Gorsuch.

3 JUSTICE GORSUCH: Good morning,
4 counsel.

5 I -- I think we all understand the
6 problem of -- of the government effectively
7 stamping everything "draft" and -- and -- and
8 the concerns that attach to that. But I just
9 wanted to explore the concerns on the other side
10 of the coin too, and that is, you know, without
11 adequate room to kind of back down privately,
12 the government sometimes winds up making worse
13 decisions rather than better ones.

14 And, here, it does seem like that
15 because of the back and forth privately, thanks
16 to the Services' intervention, EPA came up with
17 a -- a rule that might be better from your
18 perspective.

19 To what -- what -- how do we balance
20 that concern and allow agencies sufficient room
21 to maneuver privately to avoid having, you know,
22 to embarrass themselves later and allow them to
23 save face to get to better policy results?

24 MR. NARAYAN: You know, if an agency
25 puts those facts into the record, then I think,

1 fair enough, but the key point is that if the
2 agency is going to back down, it has to back
3 down from its decision, right? It can't make
4 the decision and then say, well, we're not --

5 JUSTICE GORSUCH: I guess I'm asking
6 you to abstract up a level with me, counsel, and
7 say: You know, I think you'd agree here that
8 EPA got to a better result thanks to the
9 Services' informal interventions, right?

10 MR. NARAYAN: Yes, we'd agree.

11 JUSTICE GORSUCH: Okay. And -- and --
12 and so there's got to be some room for that kind
13 of private negotiation, don't you think?

14 MR. NARAYAN: Yes. To be clear, we're
15 not complaining about the Services' making EPA
16 make its regulation more protective. And an
17 important fact here is that the Services really
18 do have the authority.

19 JUSTICE GORSUCH: Well, I guess I'm
20 more -- I'm asking don't -- do you -- are you at
21 all concerned that a more invasive rule might
22 deter this kind of productive back-and-forth
23 discussion? And how do we -- how do we balance
24 that concern?

25 MR. NARAYAN: No, Your Honor. I mean,

1 we're not concerned, I think, for a couple
2 reasons. One is that the biological opinion
3 really is a mostly science -- scientific studies
4 and facts, you know, so it's not the sort of
5 thing that lends itself to the sorts of
6 embarrassment. Those things are normally
7 subject to peer review, right?

8 So -- and then, you know, in this sort
9 of back and forth, I mean, what's important is
10 that you have a position -- you have one party
11 who has authority, effective authority, and one
12 who's acting like a subordinate, and that's the
13 action agency.

14 And in that circumstance, I think, you
15 know, yes, there is some balancing, but it is
16 really important to know why the Services are
17 saying what they're saying, at least when they
18 effectively foreclose a -- a proposed
19 regulation, that from EPA's purposes, that they
20 had said: We've -- we've reached the end of the
21 line for the Endangered Species Act for us.

22 JUSTICE GORSUCH: Thank you, counsel.

23 MR. NARAYAN: All we need to know from
24 you is, you know, are we good?

25 CHIEF JUSTICE ROBERTS: Justice

1 Kavanaugh.

2 JUSTICE KAVANAUGH: Thank you
3 Mr. Chief Justice.

4 And good morning, Mr. Narayan.

5 I wanted to pick up first on Justice
6 Thomas and Breyer and Alito and -- and others
7 have talked about. What is the agency decision?
8 I would -- I would have thought that the way to
9 do this is to start by figuring out what is the
10 decision, capital D decision, and then
11 everything that led up to that decision is -- is
12 predecisional.

13 And that would be a pretty simple
14 formula. And, obviously, there would be case --
15 questions in some cases about what the decision
16 is. Here, theoretically, you could argue EPA's
17 decision, but the government acknowledges that
18 the Services' opinions are the decision.

19 What's wrong with that framework?

20 MR. NARAYAN: I don't think anything
21 is wrong with it so long as we recognize that
22 when EPA gives a proposed regulation to the
23 Services and asks does it pass muster under the
24 Endangered Species Act, that is a capital D
25 decision.

1 JUSTICE KAVANAUGH: And the second
2 question I wanted to ask is the need for clear
3 rules in the FOIA context. So the -- the need
4 for that, I think, is multi-pronged.

5 First, the agency officials who are
6 engaged in deliberations need to be able to
7 speak with candor, as Justice Gorsuch was just
8 saying.

9 Second, FOIA officers, who are rampant
10 throughout the executive branch, spend an
11 enormous amount of time and resources on FOIA,
12 could use clarity.

13 And then district court judges in the
14 District of Columbia and elsewhere, if you talk
15 to, would lament the lack of clarity and clear
16 rules in -- in FOIA cases.

17 So that raises the concern that the
18 effects-based test or looking at the effects of
19 the memo could become so fact-intensive and
20 could really blur the longstanding predecisional
21 principle of the deliberative process privilege
22 because lots of drafts have -- have real effects
23 within the executive branch.

24 Can you respond to all that?

25 MR. NARAYAN: Yes. I mean, so I'll

1 start with the agencies because it -- I think it
2 is important here that the Services had
3 themselves developed workable standards via the
4 memos we cited at page 55 of our draft by which
5 they do distinguish between drafts that have
6 decisional weight and those drafts that really
7 are deliberative.

8 So there's no suggestion or at least
9 there's no evidence that there's any lack of
10 clarity that has -- is -- is impeding their
11 activities in this context.

12 As to the district courts, you know,
13 the district courts have not -- I mean, yes,
14 they are perhaps fact-intensive judgments but
15 really no more so than those required under
16 other elements of the APA. And it is always
17 possible for an agency to submit declarations
18 that don't speak to the standards and then say:
19 Well, these standards are unworkable.

20 For an agency to put in facts like,
21 you know, in fact, there are elements of the
22 biological analysis that we -- with which we did
23 not agree or -- you know, all of those things
24 are -- are in their possession. And the reason
25 FOIA places the burden on the agency is because

1 they're the only ones that have it, right?

2 So, again, in general, these cases
3 have been resolved in really typical FOIA
4 fashion. I mean, you look at the regulations
5 and the statute, you look at their declarations
6 in the record, and if all of that isn't clear,
7 then there's the option of in camera review.

8 JUSTICE KAVANAUGH: Okay. Thank you.
9 That's helpful.

10 CHIEF JUSTICE ROBERTS: Justice
11 Barrett.

12 JUSTICE BARRETT: Counsel, I have a
13 question following up on Justice Breyer when he
14 gave you the hierarchy of documents that might
15 be at stake here. I want to be sure that I
16 understand the consequences that flow from each.

17 So, you know, in your conversation
18 with Justice Breyer, you identified the
19 biological opinion, which is almost never
20 issued; the draft biological opinion, which is
21 available by regulation; and then the draft of a
22 draft, which the government says this was.

23 Is it true that the draft biological
24 opinion, that second one in the hierarchy, is
25 always FOIA-able and that there's no controversy

1 about that?

2 MR. NARAYAN: Oh, no, no, there --
3 there is controversy about that.

4 JUSTICE BARRETT: Okay.

5 MR. NARAYAN: I mean, it is -- it is
6 available if there's an applicant involved
7 because, in that case, it's -- it's not a purely
8 interagency document, and so, under Klamath,
9 those are -- are produced.

10 JUSTICE BARRETT: Okay.

11 MR. NARAYAN: I mean, one of the
12 controversies here is if -- is that kind of
13 draft document available or not?

14 JUSTICE BARRETT: Okay. Thank you. I
15 wanted to clarify that.

16 My next question has to do with the --
17 what you characterized as the legal effect of
18 this document. Why was it a legal effect as
19 opposed to simply a practical effect when having
20 this document caused the EPA to abandon the 2013
21 regulation and then move on to the 2014
22 regulation?

23 MR. NARAYAN: Well, I think Bennett
24 really suggests three reasons why, under the
25 Endangered Species Act, there are legal

1 consequences and not just practical influence.

2 I mean, the first is that there's a
3 statutory prohibition in Section 7, right, no
4 actions are allowed that create jeopardy.

5 The second is that the -- the -- the
6 Services have a mandatory statutory role in
7 enforcing that prohibition. So it's not a
8 matter of -- of just asking for advice from
9 somebody. They have to be involved.

10 JUSTICE BARRETT: But I'm sorry,
11 counsel, let me just interrupt for one second.

12 I think that's true if you have a
13 final biological opinion. But, in this case,
14 would you say that if EPA simply got -- I'm
15 sorry -- if EPA simply got wind of what the
16 Services were thinking and said: Oh, well, it
17 doesn't look like this is going to be on a -- a
18 good track for us with respect to jeopardy, and
19 so abandoned it, that seems to be a practical
20 consequence, and that might be the same kind of
21 consequence that flows from a draft opinion, as
22 opposed to a biological opinion, which does have
23 force in the scheme.

24 MR. NARAYAN: No, I -- I agree with
25 you that in that scenario, it -- it would be

1 privileged. I think the point here is that the
2 Services reached a conclusion, conveyed the
3 conclusion to EPA, and EPA responded exactly as
4 the Services expect them to respond.

5 When they say jeopardy, EPA then moves
6 to change its regulation.

7 JUSTICE BARRETT: But how can a draft
8 opinion give rise to that legal consequence?

9 MR. NARAYAN: Well, what Bennett says
10 is that what's important is that when the
11 Services reach a conclusion, the action agency
12 knows that that conclusion is based on an
13 administrative record that is going to get
14 deference.

15 So -- so, as long as EPA knows the
16 Services have reached this conclusion, none of
17 what Bennett describes really depends upon
18 whether the -- the analysis in the record is --
19 is currently labeled "draft" or "final."

20 What they need to know is the analysis
21 is there and they really are going to have no
22 chance of contesting it in court.

23 JUSTICE BARRETT: Thank you, counsel.

24 CHIEF JUSTICE ROBERTS: A minute to
25 wrap up, counsel.

1 MR. NARAYAN: The problem with the
2 Services' standard is that it boils down to it's
3 privileged if we say it's privileged. And the
4 upshot here would be to deprive the public of
5 access to the reasons underlying the Services'
6 jeopardy decision, which, again, virtually never
7 appear in final opinions.

8 Those decisions are enormously
9 consequential not just to the action agency or
10 to the Sierra Club but to the regulated parties
11 who ultimately have to comply with the measures
12 the Services demand.

13 The importance of looking to those
14 legal consequences, rather than just labels, is
15 that it tracks FOIA's core concern, making sure
16 the public knows how agencies are actually using
17 the authority Congress gave them.

18 Thank you very much.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Mr. Guarnieri, three minutes for
22 rebuttal.

23 REBUTTAL ARGUMENT OF MATTHEW GUARNIERI
24 ON BEHALF OF THE PETITIONERS

25 MR. GUARNIERI: Thank you, Mr. Chief

1 Justice.

2 In our view, the general rule here
3 should be a clear bright-line test that, until a
4 biological opinion is signed and formally
5 issued, there is no final decision in an
6 interagency consultation.

7 The deliberative process privilege
8 really requires that degree of certainty. Any
9 exception should -- should be rare.

10 In -- in -- in that respect, it's
11 really no different -- the biological opinion
12 here is really no different than a judge's or a
13 court's opinion, which is not actually final
14 until it's adopted by the judge and -- and
15 issued as an official opinion.

16 Now, turning to Respondent's
17 alternative, first, Respondent really this
18 morning has made no effort to defend the actual
19 reasoning of the court of appeals.

20 Respondent does not defend the kind of
21 last version rationale that the court of appeals
22 employed to conclude that the December 2013
23 draft biological opinions were -- were not
24 predecisional and deliberative.

25 Respondent's alternative instead is

1 this appreciable legal consequences test, which
2 I don't think works for a number of reasons.

3 First of all, as -- as -- as Justice
4 Barrett's questioning illustrated, there --
5 there is no appreciable legal consequence to a
6 draft biological opinion. Legal consequences
7 attach only to the final biological opinion.

8 Second, as Justice Kagan's
9 hypothetical illustrated, the appreciable legal
10 consequences test that Respondent has proposed
11 here really proves too much because the same --
12 the same consequences that Respondent is relying
13 on here could have flowed from, for example, an
14 informal recommendation made by a subordinate
15 staff member at one of the Services.

16 You know, we use -- we use this
17 example in our reply brief that, if a junior
18 staffer at one of the Services had sent an
19 e-mail to the EPA at the very outset of the
20 consultation saying: Well, in my view, my
21 supervisors might make a jeopardy determination
22 here unless you change the following things
23 about your proposed rule, no one would confuse
24 that with a final decision.

25 Respondent's -- Respondent's only real

1 answer to those problems is to insist that in
2 this particular consultation, the Services, in
3 fact, made a decision in December 2013.

4 And that contention is just at odds
5 with the record of the proceedings here. It's
6 clear that the agency decisionmakers at the
7 Service never adopted the December 2013 draft as
8 an official agency position. They never signed
9 them. They never publicly issued those
10 documents. And they never even transmitted them
11 in full to the EPA.

12 What Respondent is seeking to obtain
13 here is not an explanation of the decision the
14 agencies actually made. As Respondent
15 confirmed, Respondent would write these drafts
16 in order to impeach the decision that the
17 agencies made in future challenges to the
18 application of the EPA's rule to particular
19 permits.

20 So Respondent is seeking to mount a
21 sort of collateral attack against the agency's
22 decision, not to understand the basis for that
23 decision. The Court should reject that effort.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 11:10 a.m., the case
3 was submitted.)

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