

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.)
- - - - -

Pages: 1 through 70
Place: Washington, D.C.
Date: November 2, 2020

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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 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