No. 19-547

In the Supreme Court of the United States

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL., PETITIONERS

v.

SIERRA CLUB, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondent offers no sound basis for denying review of the Ninth Circuit's novel holding that a federal agency's *draft* decision documents can be subjected to compelled disclosure, even though those documents were never signed by a decisionmaker or given legal effect, and were instead superseded. Congress incorporated the deliberative process privilege into Exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(5) (2012), because the privilege is critical to agencies' ability to improve the quality of their decisions by having open and frank discussions before a final decision is made. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). For Exemption 5 to achieve Congress's purpose, it should be straightforward to determine whether any given document is protected by the deliberative process privilege. And in contrast to the Ninth Circuit in this case, other courts of appeals

have upheld assertions of the privilege for draft agency documents that were not approved by a decisionmaker and did not commit the agency to a position. See, *e.g.*, *Town of Norfolk* v. *United States Army Corps of Eng'rs*, 968 F.2d 1438, 1458 (1st Cir. 1992) (document was privileged because it "reflects a preliminary position by the [agency] that was subsequently rejected"); *American Fed'n of Gov't Emps.* v. *U.S. Dep't of Commerce*, 907 F.2d 203, 208 (D.C. Cir. 1990) (documents were privileged because they were "not approved by the ultimate decisionmaker" and reflected "actions to which the [agency] was not yet committed").

The Ninth Circuit's decision below replaced that simple inquiry with an amorphous rule that an agency can sometimes be forced to disclose draft decision documents prepared in an interagency consultation process if a court has the sense that the agency's decision was *close enough* to being finalized. See Pet. App. 18a-19a, 25a. If the Ninth Circuit's misinterpretation of Exemption 5 is left standing, it will threaten to chill the candid exchange between agencies that Congress specifically envisioned for the Section 7 consultation process under the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1536.

A. The Decision Below Is Deeply Flawed

Respondent fails to rebut the showing in the petition for a writ of certiorari that the Ninth Circuit has imposed a substantially watered-down and legally unsupported standard for the deliberative process privilege. Respondent concedes that the draft biological opinions prepared in December 2013 by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively, the Services) were only in "draft" form, Br. in Opp. 8 (quoting Pet. App. 5a), and

were created amid an ongoing consultation process with the U.S. Environmental Protection Agency (EPA), before the Services issued a final decision concerning the likely impact on listed species and critical habitat of the final version of EPA's rule for cooling water intake structures. The Services' December 2013 draft opinions were not signed by decisionmakers, were not publicly issued, and were not treated as official commitments. In fact, the Services never even circulated complete drafts to EPA. See Br. in Opp. 9 (conceding that the December 2013 draft opinions were only "partially transmitted").

If the Ninth Circuit had applied the deliberative-process-privilege standard used by the other courts of appeals, see pp. 1-2, *supra*, the record here would show conclusively that the Services' December 2013 draft biological opinions were both pre-decisional and deliberative. The documents were pre-decisional because they were created as part of the Services' decisionmaking process, "before any final agency decision" concerning EPA's proposed rule. *National Sec. Archive* v. *CIA*, 752 F.3d 460, 463 (D.C. Cir. 2014) (Kavanaugh, J.). And the documents were "deliberative" because they were "intended to facilitate or assist development of the agenc[ies'] final position on the relevant issue." *Ibid.*

Respondent attempts to fit the decision below into the straightforward standard applied by *National Security Archive* and many other cases by simply repeating the Ninth Circuit's statement that the December 2013 draft opinions contained the Services' "final conclusions by the final decision-makers." Br. in Opp. 11 (quoting Pet. App. 18a). But the Ninth Circuit's conception of finality is very different from that of the D.C. Circuit: The Ninth Circuit held that it was enough to overcome

the deliberative process privilege that, in the court's view, the Services' December 2013 draft opinions were *nearly* final—relying on the fact that "*preparations* were being made" to sign and release those documents (if decisionmakers gave their final approval)—and that those drafts were the Services' last word on EPA's *then-current* version of its proposed rule. Pet. App. 25a (emphasis added); see *id.* at 18a-20a.

The Ninth Circuit could not have concluded that the December 2013 draft biological opinions were genuinely final in light of the record and the ESA Section 7 consultation regulations. A NMFS official stated in a signed declaration that NMFS's December 2013 draft "reflect[ed] a preliminary analysis," C.A. E.R. 45, that "was never made final" because both Services and EPA "agreed that more work needed to be done," *id.* at 43. And a FWS official similarly stated that the decisionmaker who reviewed FWS's December 2013 draft "concluded that additional consultation was needed to better understand and consider the operation of key elements of EPA's rule." *Id.* at 59.

The Services were thus preparing in December 2013 merely "to share a draft" of their opinions "with EPA" for review and comment. C.A. E.R. 43. Respondent contends (Br. in Opp. 31-32) that EPA would have been limited to reviewing any reasonable and prudent alternatives proposed by the Services, not the Services' preliminary analysis of the EPA's proposed rule's likely impact on listed species and critical habitat. But the Services have rejected that reading of their regulations, stating instead that more comprehensive review by action agencies of draft biological opinions supports the Services' ability to produce "more thorough" and "technical[ly] accura[te]" final biological opinions. 51 Fed.

Reg. 19,926, 19,952 (June 3, 1986). The regulations therefore provide that, "while the draft [biological opinion] is under review" by the action agency, a Service "will not issue" a final biological opinion. 50 C.F.R. 402.14(g)(5).

Respondent does not point to any decision of any other court of appeals concluding that an agency's draft decision documents were unprotected by FOIA Exemption 5 even though those documents were never signed or finalized or treated as binding by the agency. Respondent instead relies heavily (Br. in Opp. 16-18) on cases requiring disclosure of agencies' "'working law'"—documents that "have 'the force and effect of law'" even if they operate only within an agency and so are not usually public. *Sears*, 421 U.S. at 153 (citations omitted). But respondent's invocation of that rationale for disclosure only reinforces that the Ninth Circuit's decision is a radical departure from the precedents of this Court and other courts of appeals. In the cases cited by respondent, courts found that the agencies had finalized the documents at issue, or that those documents had some binding effect. See *ACLU* v. *NSA*, 925 F.3d 576, 598 (2d Cir. 2019) (documents that "operate[ ] as functionally *binding* authority"); *Electronic Frontier Found.* v. *United States Dep't of Justice*, 739 F.3d 1, 7 (D.C. Cir.) (documents "actually applied" by the agency), cert. denied, 574 U.S. 933 (2014); *Public Citizen, Inc.* v. *Office of Mgmt. & Budget*, 598 F.3d 865, 874 (D.C. Cir. 2010) (documents "reflecting * * * how [the agency] carries out its responsibilities"); *Tax Analysts* v. *IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997) (documents were "considered statements of the agency's legal position" that were "'routinely used' and relied upon")

(citation omitted); *Coastal States Gas Corp.* v. *Department of Energy*, 644 F.2d 969, 978 (3d Cir. 1981) (document "that was in fact agency policy").

This case is just the opposite. The Services' December 2013 draft opinions did not have the force and effect of law; those drafts were "never issued" because agency decisionmakers decided that more work was needed, and the drafts were directed to a version of the EPA's proposed rule that was later superseded. C.A. E.R. 43; see *id.* at 45, 59-60. Respondent gains nothing by invoking (Br. in Opp. 20-21) the "direct and appreciable legal consequences" that flow from a final biological opinion, *Bennett* v. *Spear*, 520 U.S. 154, 178 (1997), because only *final* biological opinions carry those consequences, see *id.* at 177-178. And a final biological opinion is issued only "[o]nce the consultation process contemplated by [the ESA] has been completed," which is *after* the Services have shared a draft biological opinion with the action agency (if requested) for review and comment. *National Ass'n of Homebuilders* v. *Defenders of Wildlife*, 551 U.S. 644, 652 (2007); see 50 C.F.R. 402.14(g)(5). If respondent or any other party had attempted to bring suit based on something in the Services' December 2013 draft biological opinions, that claim would have been swiftly dismissed for lack of final agency action.

Nor is respondent correct (Br. in Opp. 30-31) that EPA modified its proposed rule because the Services' December 2013 draft biological opinions obligated it to do so. The Services lacked the ability to impose obligations through non-final drafts that they shared only partially. To the extent that EPA made changes in response to the Services' *preliminary* analysis, that is just how interagency consultation is supposed to work. Furthermore, the record shows that in December 2013, EPA

was itself still "deliberat[ing]" internally over "key elements" of its proposed rule. C.A. E.R. 59; see *id.* at 43.

In short, there was no "secret [agency] law" here, *Sears*, 421 U.S. at 153 (brackets in original; citation omitted); there was only non-final, preliminary analysis in draft form that never became law at all. The Services' December 2013 draft biological opinions reflected the agencies' "thinking in the process of working out" their decision. *Ibid.* Thus, FOIA "Exemption 5, properly construed, calls for * * * withholding" those documents, *ibid.*, and the Ninth Circuit plainly erred by holding otherwise.

B. The Question Presented Is Important And Warrants Review

1. The Ninth Circuit's flawed holding forcing agencies to reveal their draft decision documents from an interagency consultation process strikes at the core reason why Congress incorporated the deliberative process privilege into FOIA Exemption 5: "to prevent injury to the quality of agency decisions." *Sears*, 421 U.S. at 151.

One important feature of a healthy deliberative process is the ability of an ultimate decisionmaker to review a draft document, even a draft that may seem nearly complete, and decide to hold off on a final decision so as to allow further consideration. When decisionmakers reviewed the preliminary analysis in the Services' December 2013 draft biological opinions, they decided that more work was needed. C.A. E.R. 43, 59-60. The Ninth Circuit's decision risks undermining the authority of agency decisionmakers to pause a decisionmaking process shortly before its anticipated completion in order to improve the agency's final decision.

The decision below also risks discouraging the candid exchange of views within and among agencies that

Congress wanted to protect through Exemption 5, and that Congress desired in particular for the ESA Section 7 consultation process. "'[T]here are enough incentives as it is for playing it safe and listing with the wind,' and * * * 'human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the *detriment of the decisionmaking process*.'" *Sears*, 421 U.S. at 150-151 (brackets and citation omitted). The Ninth Circuit's nebulous new standard for finality under the deliberative process privilege creates uncertainty in a situation where a document's writer "needs to know at the time of writing that the privilege will apply and that the draft will remain confidential, in order for the writer to feel free to provide candid analysis." *National Security Archive*, 752 F.3d at 463; see *Upjohn Co.* v. *United States*, 449 U.S. 383, 393 (1981). If the decision below stands, the harm to future interagency consultations will come when thoughts and suggestions are not written down or circulated for discussion, lest a draft document be ordered disclosed under the Ninth Circuit's unpredictable approach. See *National Security Archive*, 752 F.3d at 462 ("If agencies were 'to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer.'") (citation omitted).

Respondent's contention that the deliberative process privilege is not important because the Services sometimes choose to release draft biological opinions, Br. in Opp. 37, is unavailing. Respondent admits that the Services have not waived the privilege. *Id.* at 37 n.8. And this case presents one circumstance this Court has recognized where the deliberative process privilege particularly matters: where revealing the Services'

draft documents would tend to shift public focus away from their final decision to "reasons supporting a policy which [the] agenc[ies] ha[ve] rejected." *Sears*, 421 U.S. at 152. Crediting respondent's argument could discourage agencies "from making any disclosures other than those explicitly required by law." *Mobil Oil Corp.* v. *United States Envtl. Prot. Agency*, 879 F.2d 698, 701 (9th Cir. 1989) (O'Scannlain, J.).

2. Respondent fails to rebut the petition's showing that the Ninth Circuit's decision creates serious tension with decisions of other courts of appeals and this Court. Most acutely, the Second Circuit found on judicial review of EPA's final rule and the Services' final no-jeopardy biological opinion that the very same documents had properly been excluded from the administrative record because they were protected by the deliberative process privilege. See *Cooling Water Intake Structure Coal.* v. *United States Envtl. Prot. Agency*, 905 F.3d 49, 65 n.9 (2018). Respondent attempts to explain away that disparate result (Br. in Opp. 24-26) by pointing to a difference in the "burden[] of proof." But both courts answered the same ultimate *legal* question about the scope of the privilege.

Respondent also fails to offer any plausible basis for reconciling the Ninth Circuit's decision with then-Judge Kavanaugh's opinion for the D.C. Circuit in *National Security Archive*. The Ninth Circuit acknowledged that the Services did not later issue the December 2013 drafts as final biological opinions in light of EPA's subsequent changes to its proposed rule, but the court held that it was enough to overcome the privilege that those documents were, in its view, the Services' last word on the EPA's "then-proposed regulation." Pet. App. 26a; see *id.* at 20a. Yet the D.C. Circuit in *National Security*

Archive squarely held that a draft agency document that "died on the vine * * * is still a draft and thus still pre-decisional and deliberative." 752 F.3d at 463. Respondent's only suggestion to distinguish that holding (Br. in Opp. 27-28) is to repeat the erroneous contention that the Services' December 2013 drafts "were *never* predecisional" because they were final and legally binding. See pp. 2-7, *supra*.

For similar reasons, respondent fails to rehabilitate the Ninth Circuit's decision under this Court's precedents governing the deliberative process privilege. At least two clear principles from this Court are relevant here: First, careful attention to "the function of the documents in issue in the context of the administrative process which generated them" is "[c]rucial" to applying the privilege correctly. *Sears*, 421 U.S. at 138. Second, deliberative drafts circulated between agencies are just as privileged as intra-agency drafts. *Renegotiation Bd.* v. *Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 188 (1975). The Ninth Circuit gave short shrift to key features of the ESA Section 7 administrative context, see pp. 4-6, *supra*, and incorrectly treated as a point in favor of disclosure the fact that the Services' December 2013 draft biological opinions were being prepared for circulation to EPA as opposed to stating the views of "lower level employees," Pet. App. 25a-26a. Once again respondent's only answer (Br. in Opp. 18-19, 22-23) is to erroneously claim legally binding status for the December 2013 draft opinions.

3. Respondent identifies nothing that would make this case an unsuitable vehicle to review the Ninth Circuit's interpretation of the deliberative process privilege.

That the Ninth Circuit found that the Services' December 2013 draft biological opinions were neither

pre-decisional *nor* "deliberative," Br. in Opp. 34-36, is no reason to deny review. The petition plainly challenges both conclusions. *E.g.*, Pet. 18-20. The Ninth Circuit treated those concepts as "overlap[ping]," Pet. App. 15a, and mostly repeated the same errors for both. Here too the court altered the applicable legal standard by looking past the function of the December 2013 draft opinions in the administrative process—"to facilitate or assist development of the [Services'] final position," *National Security Archive*, 752 F.3d at 463—and giving weight instead to irrelevant facts, such as that the drafts did not contain "line edits" or "marginal comments" and that preparations were being made for release *if* the drafts had been approved. Pet. App. 25a. Respondent does not identify any other court of appeals that has suggested that polished documents cannot be deliberative drafts, or that discussion drafts can cease to be deliberative before a decisionmaker gives final sign-off.

Finally, respondent is wrong to contend (Br. in Opp. 38) that this Court should not review the Ninth Circuit's interpretation of the deliberative process privilege in light of the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538. That FOIA amendment codified an existing standard of the Department of Justice for withholding agency information, see S. Rep. No. 4, 114th Cong., 1st Sess. 7-8 (2015), and it does not even apply to judicial resolution of this case, Pet. App. 12a n.7. This case, moreover, concerns the substantive scope of the privilege itself. Regardless, the Services have shown how they "reasonably foresee[ ] that disclosure" of draft documents that were pulled back for more work and later abandoned "would harm" one of the core "interest[s] protected by" FOIA Exemption 5, 5 U.S.C. 552(a)(8)(A): "[A]gency officials 'should be judged by

what they decided, not for matters they considered before making up their minds.'" *National Security Archive*, 752 F.3d at 462 (citation omitted).

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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JANUARY 2020