No. 19-547

IN THE

UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*,

Petitioners,

—v.—

SIERRA CLUB, INC.,

Respondent.

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

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AND CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan, non-profit organization with approximately two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Founded in 1920, the ACLU regularly appears before this Court, both as direct counsel and as amicus curiae. Documents obtained through Freedom of Information Act requests are often critical in shaping the ACLU's response on a range of important civil liberties issues.[1] The ACLU of Northern California is a state affiliate of the national ACLU.

Citizens for Responsibility and Ethics in Washington ("CREW") is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue Code. CREW seeks to promote accountability, transparency, and integrity in government. CREW is committed to protecting the right of citizens to be informed about the activities of government officials and empowering citizens to have an influential voice in government decisions through the dissemination of information, including information CREW obtains through the Freedom of Information Act. Toward that end, CREW uses a combination of research, litigation, and advocacy to advance its mission.

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[1] No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner has consented to the filing of this brief by letter on file with *amici*, and Respondent's letter consenting to the filing of amicus briefs is on file with the clerk.

SUMMARY OF ARGUMENT

In a large and complex network of government agencies, deliberation—within each agency, and among the many—is essential. Recognizing that reality, when the drafters of the Freedom of Information Act ("FOIA") created a default presumption that all government records are obtainable by the public, they also incorporated a narrow carve-out in Exemption 5—the deliberative process privilege—meant to foster frank and collaborative government decisionmaking. This case concerns a question that has largely escaped judicial attention: If a record that reflects the final determination of one agency is then considered by another agency in an inter-agency process, how does a court determine whether it is "predecisional" and "deliberative," and therefore protected under Exemption 5, or instead decisional and therefore disclosable?

The varying practices of government decision-making preclude a bright-line answer to this question. Decades of judicial application of FOIA to *intra*-agency deliberations, however, yield principles and factors that can usefully point the way. As this Court has already explained, the same considerations that help courts evaluate the application of the deliberative process privilege to *intra*-agency records likewise apply to *inter*-agency records. The critical questions are the function of the document itself and the context of the administrative process that generated it. To evaluate those questions, courts look to multiple factors. First, courts evaluate whether a document is meant to lay out options for an ultimate decisionmaker, or whether it effectively constrains another official's (or agency's) actions. Second, courts examine the authors and recipients of records and

their relative positions—a relationship that is indicative of the decisional quality of a document. Third, the contents of records themselves often indicate whether they are deliberative and predecisional. Finally, courts evaluate the impact a document has in an inter- or inter-agency process to see whether its operative effect suggests decision or deliberation. And each of these factors should be evaluated in light of the FOIA's presumption in favor of disclosure, as well as the important but limited purposes of Exemption 5.

In this case, these considerations point to the conclusion that the Services' 2013 biological jeopardy opinions are not deliberative documents, and thus their withholding is not justified under the statute. The court of appeals correctly determined that these opinions represented the considered determination of an independent agency on an issue entirely within its regulatory authority and scientific expertise—indeed, one that it, and it alone, is statutorily tasked with answering. The opinion reflects not its deliberations towards that answer, but its answer. It is a decisional document.

The fact that the Environmental Protection Agency ("EPA") then considered the Services' decision in its own deliberation does not transform the Services' record into a deliberative one. The EPA's own deliberations may be protected by Exemption 5, but not the conclusive determination of the Services on a matter within their authority and expertise. By focusing on the EPA's rulemakings, the government seeks to redefine the Services' 2013 opinions as merely another advisory input into the decision-making at a coordinate agency. But a careful examination of the opinions, their purpose, their contents, and their operative effect leads to the conclusion that they are not predecisional and

deliberative, but decisional expressions of the Services' final views. The fact that the EPA then considered these final views in *its own* deliberative processes does not transform the records from decisional to predecisional.

The government's logic turns the FOIA's presumption of access on its head: it dramatically expands a narrow, limited exception to the statute, and risks shielding countless government records from the public, contrary to Congress's intent. The Court should reject the government's bid to enlarge its withholding authority, and should affirm the appellate decision below.

ARGUMENT

I. The important but limited purpose of Exemption 5 is to shield from disclosure agency records reflecting deliberative "give and take," not to categorically exempt any record that somehow contributes to agency decisionmaking.

Passed in 1966 and strengthened several times since, the FOIA "is often explained as a means for citizens to know what their Government is up to." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004) (quotation marks omitted). As this Court has noted, the statute's "central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny." *DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 774 (1989). Indeed, public scrutiny of government decision-making that is many times removed from the voting booth—so that the people may "pierce the veil of administrative secrecy"—is the FOIA's central point. *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976)

(quotation marks omitted). This purpose serves "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The statute is a "structural necessity in a real democracy." *Favish*, 541 U.S. at 172.

The cardinal rule of the FOIA is its presumption in favor of the disclosure of government records. More than forty years ago, this Court explained that the FOIA's "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S. at 361. That framework has not changed in the interim, and following Congress's command, the Court continues to give the FOIA's exemptions "a narrow compass." *Milner v. Dep't of Navy*, 562 U.S. 562, 571 (2011) (quotation marks omitted). Moreover, the Court has explained in other contexts that exceptions to default rules do not apply automatically upon invocation, but rather must remain "[]tether[ed]" to "the justifications underlying the . . . exception." *Arizona v. Gant*, 556 U.S. 332, 343 (2009). The Court has refused to "unmoor . . . exception[s] from [their] justifications . . . and transform what was meant to be an exception into a tool with far broader application." *Collins v. Virginia*, 138 S. Ct. 1663, 1667 (2018).[2]

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[2] Congress has repeatedly recognized FOIA as central to democratic accountability. The original 1966 bill passed by an overwhelming margin in both chambers of Congress. 120 Cong. Rec. H1787–1803 (1974); 120 Cong. Rec. S9310–43 (1974). Congress strengthened FOIA in 1974, overriding a presidential veto to do so. 120 Cong. Rec. H10864–75 (1974); 120 Cong. Rec. S19806–23 (1974). FOIA has been amended repeatedly since then, most recently in 2016, in order to reinforce and further expand its reach. *See* FOIA Improvement Act of 2016, Pub. L. No. 114–185.

Like the other statutory exemptions under the FOIA, Exemption 5 is a limited exception to the statute's default rule of disclosure. Its text permits the withholding of "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The Court has described the exemption as encompassing records "made in the course of formulating agency decisions on legal and policy matters." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975). Congress adopted Exemption 5 with the "ultimate purpose" of "prevent[ing] injury to the quality of agency decisions," *Sears*, 421 U.S. at 151, and that purpose remains the touchstone for analysis. Exemption 5's incorporation of the "deliberative process privilege" protects records over which "confidentiality is necessary to ensure frank and open discussion and hence efficient governmental operations." *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 802 (1984). As the D.C. Circuit has explained, the privilege assures "subordinates within an agency" that they can "feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). It helps thwart the "premature disclosure of proposed policies," and prevents public "confusi[on]" resulting from a "misleading" account of "reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action." *Id.* Importantly, "[p]redecisional communications 'are not exempt merely because they are predecisional; they must also be a part of the agency give-and-take . . . by which the decision itself is made.'" *Senate of the Com.*

of P.R. v. DOJ, 823 F.2d 574, 585 (D.C. Cir. 1987) (alterations in original) (quoting *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975)).

As this Court long ago observed, "the line between pre-decisional documents and postdecisional documents may not always be a bright one." *Sears*, 421 U.S. at 152 n.19; *see Schlefer v. United States*, 702 F.2d 233, 237 (D.C. Cir. 1983) (Whether an agency record is deliberative or not, even "if readily described in abstraction, is often blurred in concrete cases."). The basic distinction is between "deliberative advice and recommendations," *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 186 (1975), and nonprivileged documents reflecting an agency's decision. The former class of records, which often express tentative opinions along the way toward reaching the agency's final determination, are "the ingredients of the decisionmaking process," and their compelled disclosure would risk inhibiting sound decisionmaking by revealing the thinking of government officials intended to frankly, and preliminarily, further the agency's creation of policy. *Sears*, 421 U.S. at 151. They are to be distinguished from unprivileged communications that either announce, or are "designed to explain" and justify, an agency decision. *Id.* at 152. Disclosure of decisional records promotes the "public interest in knowing the basis for agency policy already adopted." *Id.*; *see Schlefer*, 702 F.2d at 237 ("The disclosure of documents that authoritatively state an agency's position will neither inhibit the free exchange of views within the agency nor confuse the public, because the agency's own purpose in preparing such documents is to obviate the need for further intra-agency deliberation on the matters addressed.").

This Court has recognized that even the *same agency record* may serve predecisional and postdecisional (and thus privileged and unprivileged) functions. Context, not labels, must dictate whether such a document is subject to disclosure under the FOIA. In *Sears*, the Court considered the "prototype of the postdecisional document—the 'final opinion.'" 421 U.S. at 152 n.19.[3] The Court explained that although such a record would undoubtedly (and even intentionally) later "provid[e] guides for decisions of similar or analogous cases arising in the future," such a predecisional use of the document would not alter the "primarily postdecisional" nature of a record that "explain[s] a decision just made." *Id.* (cleaned up). The reason for such a document's disclosure has little to do with formalities such as headers, labels, or signatures—instead, it reflects a judgment that "disclosure [of such records] poses a negligible risk of denying to agency decisionmakers the uninhibited advice which is so important to agency decision." *Id.*

In short, Exemption 5 is not a blank check for government agencies to keep records secret by pointing to how they may be used to inform other decisions. Instead, it is a limited privilege, designed to protect only those documents that, when created, are truly predecisional and would reveal agency

[3] The government, focusing on the FOIA's affirmative disclosure provisions in 5 U.S.C. § 552(a)(2), suggests that the only kind of postdecisional (and non-deliberative) document subject to disclosure under the FOIA is a "final opinion." *See* Br. for Pet'rs 37. But while final opinions are one example of postdecisional documents, they are not the only kind of postdecisional (and non-deliberative) documents subject to disclosure under the FOIA. *See Grumman*, 421 U.S. at 184 n.21 (discussing *Sears*, 421 U.S. at 153–54).

deliberations entitled to protection to serve the statute's purposes.

II. To ensure proper withholding under Exemption 5, courts should apply a functional test that accounts for the purpose of the exemption, the specific deliberative process at issue, the role particular agency records play in that process, and the contents of those records.

The government asks this Court to announce a "clear rule[]" regarding how the deliberative process privilege applies to agency memoranda. It argues that without one, the privilege cannot "succeed at promoting candor in individual agency employees." Br. for Pet'rs 18. But for roughly half a century, this Court and the lower courts have embraced the complexity of government decisional processes and have looked not to a bright line, but to a number of factors in making the necessarily case-by-case judgments as to whether a particular record is subject to Exemption 5—and it works. There is no basis to believe that this has chilled deliberation, and plenty of evidence to show that the prevailing approach is both necessary and administrable. Deliberative processes remain confidential, and the government offers no evidence that the extant approach has resulted either in the improper disclosure of deliberative material, or in the chilling of the deliberations themselves. The Court should reaffirm that Exemption 5 is not susceptible to a formalistic, bright-line rule, but requires a contextual consideration of several clearly defined and commonly applied factors, all going to the question whether a particular record was predecisional advice or reflects an agency's actual decision.

The diversity in government records and deliberative processes requires the judiciary to employ a purpose-driven and context-dependent approach when applying Exemption 5. The same is true with respect to the common-law privileges that underlie the exemption in ordinary discovery disputes. For example, claims of the attorney–client privilege are "assessed dynamically" rather than "demarcated by a bright line." *In re Cty. of Erie*, 473 F.3d 413, 420 (2d Cir. 2007); *accord, e.g.*, *Fort James Corp. v. Solo Cup Co.*, 412 F.3d 1340, 1349–50 (Fed. Cir. 2005). The same is true of the work product privilege. *See, e.g.*, *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (rejecting a categorical rule that would protect "all written materials obtained or prepared by an adversary's counsel with an eye toward litigation"). And courts have also long taken a flexible, fact-intensive, and purpose-driven approach to assessing the scope of the deliberative process privilege in other contexts, such as a claim of executive privilege or as part of a discovery dispute. *See, e.g.*, *Karnoski v. Trump*, 926 F.3d 1180, 1206 (9th Cir. 2019); *Redland Soccer Club, Inc. v. Dep't of Army*, 55 F.3d 827, 854–55 (3d Cir. 1995); *Texaco P.R., Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995); *see also* 12 Fed. Proc., L. Ed. § 33:303 (describing the "[f]actors to be balanced" in evaluating deliberative process claims in non-FOIA civil litigation). By its very nature, assessing whether a given document is predecisional and deliberative, or post-decisional and decisive, is necessarily a functional, rather than formal exercise. *See, e.g.*, *ACLU v. NSA*, 925 F.3d 576, 594 (2d Cir. 2019).

Overall, the "crucial" consideration in the FOIA context, as this Court explained long ago, is "an understanding of the function of the documents in

issue in the context of the administrative process which generated them." *Sears*, 421 U.S. at 138. This case-by-case functional inquiry takes into account various factors. *See, e.g.*, *Coastal States*, 617 F.2d at 867 (explaining that prior case law concerning the deliberative process privilege is of "limited help," because the privilege is "so dependent upon the individual document and the role it plays in the administrative process"). The same multi-pronged assessment is appropriate whether one considers an agency record in the context of an intra-, or inter-, agency process, *see Grumman*, 421 U.S. at 169—though the details of that process will inform the result as to a particular record.

First, courts assess the function the document played. Does it merely lay out available options for a coordinate decisionmaker, or does it constrain agency action by narrowing the range of permissible decisions? In conducting this analysis, courts eschew formalistic reliance on an agency's labels for a document, and instead look closely at the document's practical purpose and function. For example, in *Tax Analysts v. IRS* (*Tax Analysts I*), 117 F.3d 607, 616–18 (D.C. Cir. 1997), the D.C. Circuit held that certain Field Service Advice Memoranda ("FSAs")—documents issued by the Office of the Chief Counsel for the IRS, in response to requests for legal guidance from field revenue agents and attorneys—could not be withheld under the deliberative process privilege. One of the primary purposes of FSAs was to ensure that field personnel applied the law correctly and uniformly. *Id.* at 609. Even though these opinions were not "formally binding" on IRS field personnel, and even though they included "exploratory" analysis that considered the "strengths and weaknesses of a case," the D.C. Circuit concluded that the documents were

ultimately "statements of an agency's legal position" that guided agency action. *Id.* at 609, 617.

Similarly, in *Coastal States*, 617 F.2d at 858, 867–69, the D.C. Circuit held that legal opinions from the Department of Energy's ("DOE") regional counsel interpreting regulations for agency auditors were not subject to the deliberative process privilege because they had "operative effect"—*i.e.*, they narrowed the range of legitimate agency action. In arguing that the opinions were privileged, DOE had emphasized that regional counsel lacked "final decisionmaking authority," and that the opinions were not "formal" or "binding" interpretations of the regulations. *Id.* at 859–60 & nn.7–8, 866–67. Yet the court looked instead to the function and effect of the documents, concluding that the opinions were not "informal suggestions" that "could be freely disregarded," *id.* at 860, 869, but were "akin to a 'resource' opinion about the applicability of existing policy to a certain state of facts," *id.* at 868. They therefore fell outside the scope of the deliberative process privilege. *Id.*[4]

Second, courts routinely assess the identities and positions of both the authors and recipients of a record, again to help guide its assessment of whether the records are "predecisional" or "decisional." Is the document meant to assist a supervisor who has decisionmaking authority, or is it written by the decisionmaker him or herself to announce a decision? *See, e.g.*, *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 258 (D.C. Cir. 1982) (explaining that both "the nature

[4] While *Tax Analysts I* and *Coastal States* discuss agency "working law"—that is, an agency's effective law or policy—a document need not qualify as working law to fall outside the scope of the deliberative process privilege. *See supra* note 3 & *infra* note 5.

of the decisionmaking authority vested in the office or person issuing the disputed documents" and "the positions in the chain of command of the parties to the documents" are important considerations (cleaned up)). "A document from a subordinate to a superior official is more likely to be predecisional, while a document moving in the opposite direction is more likely to contain instructions to staff explaining the reasons for a decision already made." *Coastal States*, 617 F.2d at 868.

In making this assessment, courts take a functional rather than formalist approach. The D.C. Circuit's decision in *Schlefer*, 702 F.2d at 237–38, is illustrative. There, the court held that certain legal opinions from the Office of the Chief Counsel of the Maritime Administration to Maritime Administration officials who requested them were not subject to the deliberative process privilege, due in part to the identities and ranks of the author and recipients. *Id.* at 238–39. As a formal matter, the officials requesting legal advice from the Chief Counsel had decisionmaking responsibility for the ultimate agency action. *Id.* at 238. However, as a practical matter, the Chief Counsel occupied a "superior" position with respect to the legal advice at issue. *Id.* That's because, in practice, "[a]gency action that depends on statutory interpretation d[id] not occur without Chief Counsel approval." *Id.* While the Chief Counsel's decisions could be overruled by the head of the agency, *id.* at 238 n.11, what mattered to the court was the Chief Counsel's authority vis-à-vis the officials requesting legal guidance.

Third, courts consider whether the content of the document itself sheds light on its status under Exemption 5. Does a record purport to announce or carry out a decision, or is it exploratory, tentative, or

inconclusive? Indeed, the very text can provide important clues as to the document's function. Terms such as "[w]e believe" or "[w]e suggest" indicate non-finality, while phrases such as "[w]e conclude" or announcing "the position of the [agency]" indicate that the agency has reached a final decision. *Tax Analysts v. IRS* (*Tax Analysts II*), 294 F.3d 71, 81 (D.C. Cir. 2002). Other kinds of evidence, including agency declarations or depositions in connection with FOIA litigation, may also be relevant to this inquiry, but a document's textual clues, rather than officials' post-hoc justifications, are more reliable indicators. *Id.* at 81 (rejecting government's post-hoc "characterize[ation]" of the documents at issue for the purposes of the Exemption 5 inquiry).[5]

Finally, courts evaluate a document's impact, to see whether its operative effect suggests decision or deliberation. The government maintains that this factor centers on whether a record has a "binding effect" or a "binding legal force." Br. for Pet'rs 20, 30,

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[5] Though it is not at issue in this case, another factor often relevant to the Exemption 5 inquiry is whether a particular document has *become* a reflection of an agency's effective legal or policy position, either through informal agency practice or self-conscious agency adoption—even if it were once predecisional and deliberative. *See, e.g.*, *ACLU v. NSA*, 925 F.3d at 598. The logic behind that rule, encompassed by the so-called "working law" and "adoption" inquiries, is based on this Court's decision in *Sears*, which observed that the FOIA was in no small part intended to "prevent the creation of secret law." 421 U.S. at 138 (quotation marks omitted); *see* 5 U.S.C. § 552(a)(2) (requiring affirmative disclosure of various types of agency records, including "final opinions" and "statements of policy and interpretations which have been adopted by the agency"); *see also, e.g.*, *Coastal States*, 617 F.2d at 869 (explaining that the FOIA does not allow agencies to "promulgate[] a body of secret law" that is "actually appl[ied]" as "precedent" but is "protect[ed] behind a label" such as "[t]entative").

31, 34–35. It is true that an agency record with "binding" effect presents an unusually simple case for disclosure under Exemption 5. That is because withholding such records would serve no purpose under the FOIA, as such a document does not contain "the ideas and theories which go into the making of the law" but "the law itself, and as such, should be made available to the public" lest an agency develop "secret law." *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 708 (D.C. Cir. 1971). But the converse is not true: the fact that a document is not formally binding does not mean that it is automatically deliberative for purposes of Exemption 5. *See Tax Analysts II*, 294 F.3d at 81; *see also Coastal States*, 617 F.2d at 859–60. Instead, the relevant inquiry is whether the document has an "operative effect." *Grumman*, 421 U.S. at 186–87 & n.24.

The government incorrectly asserts that in *Grumman*, this Court "specifically contrasted legally binding documents with a draft or 'recommendation.'" Br. for Pet'rs 33 (quoting *Grumman*, 421 U.S. at 186–87). The *Grumman* Court analyzed whether Exemption 5 protected reports drafted by "Regional Boards" that could "investigate and recommend" whether a government contractor had received excessive profits but could not decide that question, an authority reserved for another agency, the "Renegotiation Board," 421 U.S. at 185. The Court concluded that Regional Board reports were deliberative and predecisional. *Id.* at 186. But in explaining why, the *Grumman* Court never used the word "binding." And the word it did employ—"operative"—has a significantly different meaning. *Compare* "Binding," *Black's Law Dictionary* (11th ed. 2019) ("having legal force to impose an obligation," "requiring obedience"), *and* "Binding," *Cambridge*

Dictionary, https://perma.cc/RH6C-589B ("that cannot be legally avoided or stopped"), *with* "Operative," *Black's Law Dictionary* (11th ed. 2019) ("[b]eing in or having force or effect"), *and* "Operative," *Cambridge Dictionary*, https://perma.cc/XR78-48PJ ("working or being used"). The Court asked whether an agency record had "operative effect," *i.e.*, whether it had a substantive effect on another agency or a person, or whether it was merely the "recommendation of any agency staff member whose judgment has earned the respect of a decisionmaker." *Grumman*, 421 U.S. at 186–87 & n.24.

Courts must pay special attention to the "operative effect" of an advising agency's record when assessing documents in an inter-agency process. In determining whether an advising agency's opinion effectively constrains or meaningfully dictates a course of action for the receiving agency, courts should ask, among other things, whether the record speaks on a matter within the authoring agency's independent regulatory authority and expertise, or on a matter outside those realms. This follows from the relevance, in the *intra*-agency context, of "the nature of the decisionmaking authority vested in the office or person issuing the disputed document(s)." *Arthur Andersen*, 679 F.2d at 258; *cf. Schlefer*, 702 F.2d at 238 (although the Chief Counsel of the Maritime Administration lacked formal decisionmaking power, "[i]n the end, the Chief Counsel decides questions of statutory interpretation"); *Coastal States*, 617 F.2d at 859–60, 867 (holding that regional counsel's legal opinions were not deliberative; as experts in the law, their advice had "operative effect" and was typically followed by "non-legal staff").

Such multi-factor tests may not offer a "bright line," but they are often necessary, and courts have shown that they are fully competent to apply them.

Like the Fourth Amendment concepts of "reasonableness" and "reasonable suspicion," both of which call for the ultimate multi-factor test—"the totality of the circumstances," *see Kansas v. Glover*, 140 S. Ct. 1183, 1191 (2020); *Illinois v. Wardlow*, 528 U.S. 119 (2000)—the "deliberative process privilege" is not susceptible to a bright-line rule. But that hardly means it is unmanageable. Just as police have been able to work with the concept of reasonableness and reasonable suspicion in effecting seizures, so government officials are able, with reasonable reliability, to anticipate whether the documents they prepare are deliberative or decisional. As with reasonable suspicion, so with deliberative process, many instances will clearly fall on one or the other side of the line.[6] There will be close cases, but that is inescapable, and the multi-factor test here focuses on the key issue: Is the document predecisional, or does it announce a decision?

Moreover, a functional test serves an important FOIA interest by preventing the manipulation of labels, the provision of self-serving descriptions, or the withholding of formalities in order to game the statute and avoid disclosure. For decades, the lower courts have agreed that "simply designating a document as a 'draft' does not automatically make it privileged under the deliberative process privilege."

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[6] This Court has often endorsed multifactor tests. *See, e.g.*, *Dietz v. Bouldin*, 136 S. Ct. 1885, 1894 (2016) (discussing multi-factor test for determining whether prejudice should prevent a district court from recalling a discharged jury); *Cty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020) (discussing multi-factor test for determining when a permit is required under the Clean Water Act, and explaining that sometimes "there are too many potentially relevant factors applicable to factually different cases for this Court now to use more specific language").

Brennan Ctr. for Justice at N.Y.U. Sch. of Law v. DHS, 331 F. Supp. 3d 74, 96 (S.D.N.Y. 2018) (quotation marks omitted); *accord Arthur Andersen*, 679 F.2d at 257 (an agency's "designation of . . . documents . . . as 'drafts' does not end the inquiry" under Exemption 5, because "document[s] identified as a 'draft' [are not] per se exempt"). The real question is whether such a document is actually "deliberative in nature." *Arthur Andersen*, 679 F.2d at 258 (quotation marks omitted). And to answer it, courts look to the details of the "individual document and the role it plays in the administrative process." *Animal Legal Def. Fund, Inc. v. Dep't of Air Force*, 44 F. Supp. 2d 295, 299 (D.D.C. 1999) (citing *Coastal States*, 617 F.2d at 867)). If a document "does not reveal an agency's mode of formulating or revealing policy-implicating judgment, Exemption 5 does not protect it from disclosure." *Larson v. DOS*, 2005 WL 3276303, at *24 (D.D.C. Aug. 10, 2005), *aff'd*, 565 F.3d 857 (D.C. Cir. 2009). The government asks for clarity—but if that clarity comes in the form of a rule that says anything labeled "draft," or that lacks a signature, is protected, it will undermine the FOIA's overriding purpose. *See, e.g.*, 112 Cong. Rec. 13,031 (1966) (statement of Rep. Rumsfeld), *reprinted in* Subcomm. On Admin. Prac. and Proc. of the Comm. on the Judiciary, 93rd Cong., *Freedom of Information Act Source Book*, at 70 (1974) ("[This] bill will make it considerably more difficult for secrecy-minded bureaucrats to decide arbitrarily that the people should be denied access to information on the conduct of Government. . . .").[7]

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[7] In the Exemption 5 analysis, an agency cannot protect non-deliberative material through self-conscious application of "label[s]." *Coastal States*, 617 F.2d at 869. Yet agencies throughout the government have misused the deliberative

III. Because the Services' 2013 biological opinions announced the agencies' considered judgment regarding a concrete question firmly within their regulatory and scientific purview, the opinions are not deliberative and cannot be withheld under Exemption 5.

A. The court of appeals properly applied the relevant factors to the biological opinions.

The court of appeals properly applied the above factors to the records at issue here, and determined that because they represented the final decision of the

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process privilege to avoid the requirements of FOIA, including by making documents appear more informal or less "final" than the decisions they reflect. In 2014, the Second Circuit criticized the Department of Justice for failing to identify and disclose a sixteen-page DOJ white paper that the agency had labeled a "draft," even though the document represented DOJ's operative legal analysis of the government's "targeted killing" program. *See N.Y. Times Co. v. DOJ*, 756 F.3d 100, 110 & n.9 (2d Cir. 2014). Similarly, officials at the State Department reportedly developed strategies for "prospectively shield[ing] documents from disclosure, such as by marking them as involving the 'deliberative process.'" *See* Laura Meckler, *Hillary Clinton's State Dep't Staff Kept Tight Rein on Records*, Wall St. J., May 19, 2015, https://perma.cc/C263-6D6X. More broadly, a congressional investigation found that the Department of Homeland Security had used Exemption 5 "inappropriately and excessively to avoid releasing embarrassing material," even though the information was neither deliberative nor predecisional. *See* Staff of H. Comm. on Oversight and Gov't Reform, 112th Cong., *A New Era of Openness? How and Why Political Staff at DHS Interfered with the FOIA Process*, at 81–86 (2011), https://perma.cc/3Q3D-VQXZ; *see also* Staff of H. Comm. on Oversight and Gov't Reform, 114th Cong., *FOIA Is Broken*, at 10–14 (2016), https://perma.cc/DBY7-T3U9 (describing repeated misuse of the deliberative process privilege by the Federal Communications Commission).

Services on an issue squarely within the Services' authority to decide, they were not exempt from disclosure under the FOIA. The court carefully assessed the opinions' function in the context of the administrative process through which they were generated, giving proper weight to the independent authority of the Services with respect to the determinations made in the documents at issue. *See* 16 U.S.C. § 1536 (describing the Services' role in the consultation process under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531–1544); 50 C.F.R. § 402.14 (describing the Services' biological assessments); *see also* Br. for Resp't 7–11 (describing the statutory and regulatory scheme in greater detail). In making that assessment, the court examined the factual record, and took account of how the records under consideration were created. Because the records reflected the Services' decision on the EPA's proposed rule, and did not reveal the deliberative processes either of the Services or the EPA, the court properly concluded that the records were not privileged. They were "created by a final decision-maker" and "represent[ed] the final view of an entire agency as to a matter which, once concluded, is a final agency action independent of another agency's use of that document." Pet. App. 19a. The EPA's subsequent consideration of the opinions did not transform the Services' decisional documents into "pre-decisional" documents. *Id.*

First, the court properly recognized that the Services' opinions did not simply lay out options for the EPA, but had operative effect, constraining the EPA's actions thereafter and causing it to adopt a new course. *See* Br. for Resp't 22–27. In so doing—and regardless of whether the Ninth Circuit was correct to call the drafting of those opinions "final agency actions" for the purposes of administrative

law, *see* Pet. App. 19a—the court properly recognized that the Services are capable of issuing decisional records in their own right. *See* 5 U.S.C. § 551(1) (defining "agency" as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency"). Here, in drafting the opinions, the Services were performing their statutorily mandated function to determine whether the first version of the EPA's water-cooling-intake rule was "likely to jeopardize the continued existence," or "result in the destruction or adverse modification of habitat," of any endangered or threatened species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a); *see* Pet. App. 3a–4a. As the court concluded, "these opinions, created pursuant to an ESA Section 7 formal consultation, contain the *final conclusions by the final decision-makers*—the consulting Services—regarding whether a proposed regulation will harm protected species and habitat." Pet. App. 18a (emphasis added).

Second, the court considered the Services' relationship to the EPA in the context of the inter-agency process. Between 2011 (when the EPA issued its proposed rule in the Federal Register, *see* Nat'l Pollutant Discharge Elimination System, 76 Fed. Reg. 22,174 (Apr. 20, 2011)) and 2014 (when the EPA issued a final rule in the same publication, *see* Nat'l Pollutant Discharge Elimination System, 79 Fed. Reg. 48,300 (Aug. 15, 2014)), the Services were not simply contributing tentative or preliminary advice or recommendations to the EPA. When the Services produced the 2013 opinions, the question before them was not whether some ever-evolving EPA rule would put endangered species in biological jeopardy—it was whether the version of the rule that the EPA had prepared and submitted for the Services' review

would do so. *That* was the question placed before them by the statute. And *that* was the question the Services answered, conclusively, with its opinions. They were not advising EPA on what *its* answer ought to be; they were providing *the* answer that the Services—and no one else—are statutorily authorized to provide. Moreover, the answer the Services gave was not merely loose "advice" or an abstract "recommendation" by a coordinate agency or official, but an application of the agency's statutorily recognized scientific judgment, based in fact, research, and experience, to a concrete EPA proposal. On that question, the Services' answer is determinative, and the EPA has no authority to revise the Services' assessment.

Third, the court correctly relied on the contents of the opinions in justifying its conclusion as to their non-deliberative character. As the court explained, the opinions "do not contain line edits, marginal comments, or other written material that expose any internal agency discussion about the jeopardy finding." Pet. App. 25a. They were not "prepared by low-level officials," *id.*, nor do they "contain any insertions or writings reflecting input from lower level employees," *id.*. Indeed, the opinions explicitly "state [that] they were prepared on behalf of the entire agency and represent that agency's opinion." *id.*; *see also* Pet. App. 19a (explaining that the December 9, 2013 biological opinion incorporated "final edits" from, and was ready to be signed by, the high level Services official "who was responsible for overseeing and administering ESA consultations"). The opinions' contents refute the notion that they "contain merely tentative findings." Pet. App. 25a. And the surrounding context of how the agencies were treating these opinions confirms all of this: the

Services were preparing to "roll out" the opinions and publish them in the administrative record, *id.* (cleaned up), and one opinion had already "received final edits from a senior official and was just awaiting his autopen signature," *id.*[8]

The Ninth Circuit also looked to the text of the documents to determine that they would not reveal the Services' (much less the EPA's) internal deliberations. As it concluded:

> [The records] do not reveal more about the internal deliberative process that the Services went through before issuing their joint May 2014 no jeopardy opinion than what the Services themselves have already disclosed during this litigation: that the initial proposed regulation resulted in final drafts of jeopardy opinions in December 2013, that the EPA received portions of those opinions and proposed a revised regulation at some point after that, and that the Services ultimately issued a no jeopardy opinion for that revised, proposed regulation.

Id. at 26a. And the court further concluded that the opinions do not "reveal either the Services' internal deliberative processes that led to reaching those opinions or the EPA's internal deliberative process that resulted in revising the draft regulation." *Id.*

Finally, the court properly assessed the opinions' operative effect. As it explained, "the Services' own

[8] The government emphasizes that agency declarations prepared in this litigation demonstrate the deliberative status of the opinions. *See, e.g.*, Br. for Pet'rs 8. But the court was correct to place heavier weight on its evaluation of the opinions themselves and the context of their creation than on self-serving post-hoc declarations.

account indicates that the EPA made changes to its proposed regulations after December 2013—that is, after both Services' jeopardy opinions were completed and partially transmitted to the EPA." Pet. App. 19a–20a. Under the relevant statute, "if the Services conclude that an agency action is likely to jeopardize listed species," the Services and EPA must proceed to the next step of the regulatory process: discussing and developing "reasonable and prudent alternative[s]." 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(5). And that is exactly what they did. JA 37–38, 68, 102.

B. The government's counterarguments are unpersuasive.

The government's arguments that the court of appeals erred in evaluating the biological opinions are wrong.

First, the government insists that rather than evaluate the opinions' deliberative character with reference to the *Services*, this Court should do so with reference to the *EPA* because the EPA later considered the Services' 2013 biological jeopardy opinions in deciding what rule to implement. *See* Br. for Pet'rs 36–38. The government attempts to reframe the 2013 opinions as subordinate pieces in a long-running and iterative rulemaking. But the fact that there was one final EPA rule does not mean that everything that preceded it, within and outside the EPA, reflected the EPA's deliberative process. *See, e.g.*, *Vaughn*, 523 F.2d at 1145 (rejecting government's argument that an "entire process of management appraisal, evaluation, and recommendations for improvement is a seamless whole, that it is in its entirety a deliberative process, and that it is this process which the Government seeks to protect as an ongoing continuous affair" because to accept it "would be interpreting Exemption 5

to protect too much"). Documents that reveal the *EPA's* deliberation would be protected by Exemption 5. But a document created by the *Services*, and reflecting its considered judgment, reflects nothing about the *EPA*'s deliberation. And because the opinions reflect the Services' final assessment of the biological jeopardy consequences of the EPA's proposed rule, they also do not reveal anything about the Services' own deliberative process.

It is true that the EPA changed *its* rule before issuing its final version as a matter of administrative law. But that did not affect the decisional character of the Services' independent assessment of the EPA's proposed rule. The EPA had no authority to alter or revise the Services' jeopardy assessment. And when the EPA issued its second (and later final) rule, it triggered a distinct statutory consultation process with the Services—and the Services subsequently issued another definitive biological opinion, this time on the EPA's new proposal. Pet App. 39a–41a; *see* 50 C.F.R. §402.14(m)(2) (discussing termination of an individual ESA "consultation"). Both of the Services' opinions were decisional as to the Services. The 2013 biological opinions are the Services' ultimate and operative views on the particular question presented to them at the time. The mere fact that the EPA then considered that conclusion as part of its own deliberation does not make the Services' considered judgment deliberative, just as an agency's consideration of an existing agency rule in developing policy would not make the rule itself "deliberative."

Second, the government's argument that "an agency's draft document can[not] lose its privilege when the proposed agency action under consideration is abandoned or modified," Br. for Pet'rs 36, is beside the point. The Ninth Circuit did not conclude, and

Respondents do not argue, that the Services' 2013 opinions suddenly "lost" their deliberative character and "became" final when the EPA changed its rule. The opinions were not deliberative in the first place, when they were conveyed to the EPA, because they contained the Services' ultimate analysis of the EPA's first proposed rule. *See* Pet. App. 26a (explaining that the opinions "are not 'earlier draft' versions of the no jeopardy opinion from May 2014" because "that later opinion addressed a new and different proposed rule").

Third, the government's warnings that affirming the court of appeals would chill agency decision-making make little sense. The government argues that "[i]f agency employees believed that their drafts and recommendations could cease to be privileged simply because a new 'version' of the proposal under review might be developed, then some employees might stop providing their best advice, and agency deliberations 'would be the poorer as a result.'" Br. for Pet'rs 38 (quoting *Sears*, 421 U.S. at 150). But the officials who generated the 2013 biological opinions were not engaged in the provision of tentative advice that could be taken or rejected; they were preparing a document that they understood would reflect the Services' final assessment of the particular impact of an EPA proposed rule that itself was public. *See* Pet. App. 26a. Because the opinions reflect the Services' final assessment, they do not reflect its deliberative process. And because the EPA had nothing to do with creating the opinions, their release certainly does not in any way reveal the *EPA*'s deliberations.

Fourth, the government notes the opinions are marked "draft," and argues that a "discussion draft does not become final unless and until an official with authority makes a decision to adopt the draft." Br. for Pet'rs 40 (emphasis removed). As discussed above,

the "draft" label is not determinative, and is easily manipulable. Moreover, the question is not whether the 2013 biological drafts were final *records*—it is whether their contents were *predecisional and deliberative* and therefore deserving of protection under Exemption 5. There is a critical difference between a final *decision* and a final *record*—a difference the government's reliance on the "draft" label seeks to obscure. For example, even if a record is not dressed up on agency letterhead or signed with an autopen, if its contents reflect an agency's final decision, it is not entitled to protection—because it is only the *deliberations* that Exemption 5 is meant to protect. The government seeks to raise the bar for disclosure under the FOIA by expanding Exemption 5 to include everything but "final" opinions or memoranda. But this Court rejected that notion in *Sears*, and reiterated that rejection in *Grumman*. *See* 421 U.S. at 184 n.21 (discussing *Sears*, 421 U.S. at 153–54). The relevant question is: What legitimately deliberative characteristics of the opinions would withholding justifiably protect?

Applying the Exemption 5 privilege to the Services' 2013 opinions would not serve any statutory purpose. We already know the opinions reached a conclusion—that the 2011 EPA rule would cause biological jeopardy—that is well within the Services' expertise, as Congress recognized in the ESA. We know that portions of the Services' 2013 biological jeopardy opinions were transmitted to the EPA, *see* Pet. App. 26a–27a, and that these portions affected the EPA, leading it to issue a revised rule, *see* 79 Fed. Reg. at 48,381. And not only do we know that the Services did not find the same problem with the EPA's revised rule, but we know why. *See id.* (attaching Services' 2014 no jeopardy biological opinion to the Federal

Register). A Services official in 2013 working on the biological jeopardy opinions would not have been chilled by the knowledge that the opinion would become public.

If all it takes to render an agency record deliberative is to identify a decision, either within or outside the agency, that involved consideration of the record at issue, Exemption 5 will swallow the rule of presumptive disclosure. In that scenario, even a final and formal memorandum from the Secretary of State about the human rights situation in a foreign country might be withheld as deliberative simply because the Department of Defense subsequently relied on it to make a decision about troop movements abroad, or the Treasury Department used it to inform an economic sanctions decision. Yet the Secretary of State's memo would not reveal *anything* about the deliberations of either the Defense Department or the Treasury Department—and therefore, while the latter two agencies' deliberations might be protected, the State Department memo itself would not be. Similarly, if the government were correct, a definitive report from the Department of Transportation about the future of the nation's highways might be withheld simply because the Department of Agriculture subsequently used it in evaluating the movement of commodities. And it would even be open to the government to argue that, because the President oversees the entire executive branch, any agency record, however authoritative and decisional from the agency's perspective, is merely tentative and deliberative *with respect to him*, and therefore falls within Exemption 5's ambit.

These examples reveal the fallacy of the government's principal argument. It contends that because the EPA itself reviewed the Services'

opinions in arriving at its final rule, the opinions are deliberative. But the Services' opinions reveal *nothing* about the EPA's own deliberations. And because they reflect the Services' final assessment of the proposed rule, they also reveal nothing about the Services' deliberative process. The court of appeals correctly ordered their disclosure.

CONCLUSION

The court of appeals' judgment should be affirmed.

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