No. 19-547

IN THE
Supreme Court of the United States

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,
Petitioners,
v.

SIERRA CLUB, INC.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 28 MEDIA ORGANIZATIONS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici curiae are the Reporters Committee for Freedom of the Press, Atlantic Media, Inc., Cable News Network, Inc., The Center for Investigative Reporting (d/b/a Reveal), The Center for Public Integrity, Dow Jones & Company, Inc., First Amendment Coalition, First Look Media Works, Inc., Gannett Co., Inc., International Documentary Assn., Investigative Reporting Workshop at American University, Los Angeles Times Communications LLC, The Media Institute, MPA - The Association of Magazine Media, National Geographic Partners, National Press Club Journalism Institute, The National Press Club, National Press Photographers Association, National Public Radio, Inc., The New York Times Company, The News Leaders Association, News Media Alliance, POLITICO LLC, Quartz Media, Inc., Radio Television Digital News Association, Society of Environmental Journalists, Society of Professional Journalists, Tully Center for Free Speech, and The Washington Post (collectively, "amici").

Amici file this brief in support of Respondent Sierra Club, Inc. Amici are news organizations or

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici curiae state that no party's counsel authored this brief in whole or in part, no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the amici curiae, their members, or their counsel made monetary contributions intended to fund the preparation or submission of this brief. Petitioners have provided written consent to the filing of this amici brief. Respondent has provided blanket consent to the filing of all amici briefs in this case.

organizations that represent the interests of journalists and the press. Amici and the reporters and news outlets for which they advocate rely on the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA" or "the Act"), to obtain government records, which they use to inform the public about "[o]fficial information that sheds light on an agency's performance of its statutory duties." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 750 (1989). FOIA is a critical tool for amici and the press at large, whose role is to serve "as a powerful antidote to any abuses of power by government officials and as a constitutionally chosen means for keeping officials . . . responsible" and accountable. *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

Amici have a strong interest in ensuring that agencies invoking the deliberative process privilege to withhold records under FOIA Exemption 5, 5 U.S.C. § 552(b)(5), do so in a manner consistent with the plain text and purpose of the Act. The Court's interpretation of the deliberative process privilege in this case bears directly on amici's ability to gather records and disseminate information of public interest.

SUMMARY OF THE ARGUMENT

Respondent seeks certain records from Petitioners U.S. Fish & Wildlife Service and National Marine Fisheries Service (collectively, the "Services") pursuant to FOIA. The records at issue convey the Services' conclusion that particular action proposed by the Environmental Protection Agency ("EPA") would result in jeopardy to species protected by the

Endangered Species Act. The Services denied Respondent access to those records, contending they are subject to the deliberative process privilege and are exempt from disclosure under FOIA Exemption 5, 5 U.S.C. § 552(b)(5).

Amici agree with the Court of Appeals that the records at issue are not exempt from disclosure under Exemption 5 because they are neither predecisional nor deliberative.[2] *See, e.g.*, Br. for Resp. ("Resp.'s Br.") at 19–21; Pet. App. 18a–20a; 21a–27a; *see also Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (holding that records may be withheld under FOIA's deliberative process privilege only if *each* contested document is both "predecisional" and "deliberative"). Amici write to provide additional information and context about the federal government's use and abuse of the deliberative process privilege, which is routinely invoked to hide embarrassing and politically inconvenient information, even when the disclosure of such records is of fundamental importance to the public. Indeed, the abuse of the deliberative process privilege has become so pervasive that it is now frequently referred to as the "withhold it because you want to" exemption. *See, e.g.*, *Ctr. for Investigative Reporting v. Customs & Border Prot.*, 436 F. Supp. 3d 90, 105 (D.D.C. 2019) (citing to H.R. Rep. 114-391, a Congressional report expressing "concern regarding overuse" of the deliberative process privilege, noting it is referred to as the "withhold it because you want to" exemption); Nate Jones, *The Next FOIA Fight: The B(5) "Withhold*

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[2] Amici agree with Respondent's argument that the records at issue in this case are not deliberative. *See, e.g.*, Resp.'s Br. at 31–34.

It Because You Want To" Exemption, Unredacted (Mar. 27, 2014), https://perma.cc/2QP7-RYCY; Ryley Graham, *What Is the 'Deliberative Process' Privilege? And Why Is It Used So Often to Deny FOIA Requests?*, Reporters Committee for Freedom of the Press (Apr. 30, 2020), https://perma.cc/H42C-777U.

In arguing that the records are exempt from disclosure, the Services urge this Court to apply a sweeping, practically limitless interpretation of what constitutes predecisional material. The Services argue that the records at issue are necessarily predecisional merely because they have labeled them as drafts. *See, e.g.*, Pets.' Br. at 5. This categorical approach is not only contrary to the Act, *see* Resp.'s Br. at 21–22, but will invite further overuse of the deliberative process privilege.

As Senator John Cornyn stated in connection with the Act's most recent amendments, FOIA's purpose is to "build on what our Founding Fathers recognized hundreds of years ago: that a truly democratic system depends on an informed citizenry to hold their leaders accountable." 114 Cong. Rec. S1496 (Mar. 15, 2016) (statement of Sen. Cornyn). Because FOIA's purpose to ensure an informed citizenry is, as Congress has recognized, already stymied by rampant overuse of the deliberative process privilege, the Services' arguments should be rejected. For the reasons set forth herein, amici urge the Court to affirm the Court of Appeals' judgment below.

ARGUMENT

I. Overuse and abuse of the deliberative process privilege is undermining the purpose of FOIA.

FOIA makes government records presumptively open to the public in order to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). As this Court has observed, FOIA reflects "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Dep't of Air Force v. Rose*, 425 U.S. 352, 360 (1976) (citing S. Rep. No. 813, at 3 (1965)). That framework serves the important function of ensuring the public knows "what the Government is up to[.]" *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989).

This Court has long recognized that, in furtherance of FOIA's structure and function, the statute's exemptions to disclosure are to be construed narrowly. *See, e.g.*, *Rose*, 425 U.S. at 361; *F.B.I. v. Abramson*, 456 U.S. 615, 630 (1982); *Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989); *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989); *Dep't of State v. Ray*, 502 U.S. 164, 180 (1991); *Dep't of Justice v. Landano*, 508 U.S. 165, 181 (1993); *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001); *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011). This principle of narrow construction is especially important in the context of the deliberative

process privilege because Congress has not defined it,[3] unlike other FOIA exemptions,[4] and because of its rampant use and abuse by executive branch agencies to withhold information from the public. Indeed, in recognition of the seriousness and breadth of the problem, Congress has amended the Act in recent years to curtail agencies' use of the deliberative process privilege.

When Congress enacted FOIA in 1966, it sought to achieve a "workable balance" between the public's right to be informed and the government's legitimate interests in keeping some information secret. *See generally Freedom of Information Act Source Book: Legislative Materials, Cases, Articles*, Subcomm. on Admin. Practice and Procedure of the Comm. on the Judiciary (1974), 26–27, https://perma.cc/TFV9-JYNC.

In the Act's early years, the balance between secrecy and openness tilted largely in favor of disclosure to the public; government agencies reported denying fewer than 1 percent of all FOIA requests in full or in part. *See Freedom of Information Act and Amendments of 1974 (P. L. 93–502) Source Book: Legislative History, Texts, and Other Documents*, Joint Comm. Report (1975), 104–5, http://perma.cc/HAM4-Y8A9 (reporting 2,195 full or

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[3] In the 2016 amendments to FOIA, Congress imposed a 25-year sunset on the privilege but did not otherwise define it. *See* FOIA Improvement Act of 2016, Pub. L. No. 114–185, 130 Stat. 538 (2016).

[4] Indeed, the Department of Justice itself describes Exemption 5's text as "opaque language." *Department of Justice Guide to the Freedom of Information Act, Exemption 5* at 1 (Aug. 6, 2019), https://perma.cc/7CJA-RMUC.

partial denials in response to 254,637 requests between July 1967 and July 1971).

In the decades that followed, however, agencies steadily began withholding substantially more information. In fiscal year 2008, agencies asserted a FOIA exemption to deny, in full or in part, approximately 22 percent of all FOIA requests. *See* Department of Justice, *Data*, www.foia.gov/data.html (reporting 124,828 full or partial denials in fiscal year 2008, 21.59 percent of the 578,172 requests processed that year). By 2019, that percentage had doubled; agencies asserted an exemption to withhold information in response to almost *44 percent* of all requests. *See id*. (reporting 385,347 full or partial denials in fiscal year 2019, 43.8 percent of the 877,966 requests processed that year).

Agencies withhold massive swaths of records each year pursuant to Exemption 5.[5] In 2018, for example, agencies invoked Exemption 5 a total of 61,135 times to withhold government records requested under the Act. *See id.* In 2019, that rose to 74,050 invocations. *Id*. In other words, of the full or partial denials of records across the federal government in 2019, Exemption 5 was cited approximately 19 percent of the time. The growth in the use of that exemption by some agencies is particularly worrisome: in the mere seven years that the Consumer Financial Protection Bureau has been in existence, for example, its use of Exemption 5 has

[5] The federal government does not delineate between privileges in reporting data under Exemption 5, but the deliberative process privilege is the most commonly invoked. *Department of Justice Guide to the Freedom of Information Act, Exemption 5*, *supra* note 4, at 14.

almost tripled. *See id.* (reporting 99 uses in FY2019 over 435 requests processed, versus 35 uses in FY2013 over 209 requests). During the same time period, Exemption 5's use at the Federal Bureau of Investigation rose more than five-fold. *See id.* (608 uses in FY2019 versus 117 uses in FY2013).

The tremendous increase in agency reliance on FOIA's exemptions to withhold records, and on Exemption 5 in particular, has generated "widespread concern among journalists, academics, lawyers, and the general public that FOIA's 'workable balance' has tilted so far in favor of government secrecy that . . . the [A]ct is failing to serve its core purpose." Katie Townsend & Adam A. Marshall, *Striking the Right Balance: Weighing the Public Interest in Access to Agency Records under the Freedom of Information Act*, in Troubling Transparency 227 (David E. Pozen & Michael Schudson, eds., 2018).

A. Agencies' overuse of the deliberative process privilege has harmed the public's right to know.

Excessive invocation of the deliberative process privilege by agencies obstructs the ability of journalists and the public to gather important information about the conduct of government. Consider, for example, the Department of Energy's $535 million loan to Solyndra, a solar-panel manufacturer, under the green-infrastructure provisions of President Obama's major stimulus bill in 2009. In 2011, Solyndra defaulted on the loan, unable to pay it back to the government—and, ultimately, U.S. taxpayers. Chris Good, *The Solyndra Scandal: What It Is and Why It Matters*, The Atlantic (Sept. 15, 2011), https://perma.cc/3YY3-8U3F.

Emails later obtained by reporters showed that "OMB officials privately said they felt pressured to approve the loan prematurely." *Id*. According to news reports, "The Obama White House tried to rush federal reviewers for a decision on a nearly half-billion-dollar loan" to Solyndra "so Vice President Biden could announce the approval at a September 2009 groundbreaking for the company's factory." Joe Stephens and Carol Leonnig, *White House Pushed $500 Million Dollar Loan to Solar Company Now Under Investigation*, Wash. Post (Sept. 13, 2011), https://perma.cc/MH3J-U9RR; *see also* Matthew Mosk, et al., *Emails: Obama White House Monitored Huge Loan to 'Connected' Firm*, ABC News (Sept. 13, 2011), https://perma.cc/5FSL-8Q9R.

News outlet ProPublica reported on multiple "red flags" concerning Solyndra and OMB officials' concern that "they were being rushed" to approve the loan "without adequate time to assess the risk to taxpayers." Marian Wang, *What's Happening with That Solar Company Scandal? Here's Our Guide on Solyndra.*, ProPublica (Sept. 15, 2011), https://perma.cc/ZG8M-U5C3. But when ProPublica submitted a FOIA request to the Department of Energy to learn more about whether and to what extent the Obama Administration backed green-energy companies like Solyndra without conducting the requisite due diligence, it received records riddled with redactions pursuant to Exemption 5. *See Solyndra-FOIA-Final-Responsive-Documents*, DocumentCloud (last accessed May 29, 2020), https://bit.ly/2OEendf (displaying a heavily redacted production of records, contributed by Michael Grabell of ProPublica). These redactions obscured entire

emails and portions of emails throughout a 706-page production, keeping large swaths of agency communications about Solyndra hidden from view.

Agencies have used the deliberative process privilege to hide embarrassing and politically inconvenient records. For example, reporting from *The New York Times* that former Secretary of State Hillary Clinton exclusively used a private email server for her government work, *see* Michael S. Schmidt, *Hillary Clinton Used Personal Email Account at State Dept., Possibly Breaking Rules*, N.Y. Times (Mar. 2, 2015), https://perma.cc/5N8Y-UL2U, spawned multiple FOIA lawsuits in which the privilege has been used to successfully shield records. The Department of Justice successfully invoked the privilege to withhold "talking points prepared for Attorney General Lynch pertaining to her decision . . . to accept the recommendation of the Federal Bureau of Investigation (FBI) that its investigation of Secretary Clinton's use of a personal email system during her time as Secretary of State be closed." *Am. Ctr. for Law & Justice v. Dep't of Justice*, 392 F. Supp. 3d 100, 105 (D.D.C. 2019) (cleaned up); *see also Judicial Watch, Inc. v. Dep't of State*, 285 F. Supp. 3d 249, 251 (D.D.C. 2018) (holding deliberative process privilege may shield records pertaining to, *inter alia*, requests from Secretary Clinton or her staff for approval to use an iPad or iPhone for official government business).

Use of the deliberative process privilege to withhold embarrassing material ranges from the farcical to the deadly serious. On one end, it has been cited by the FCC to withhold drafts of the script for a skit presented at the Federal Communications Bar

Association annual dinner. Dell Cameron, *FCC Says Releasing 'Jokes' It Wrote About Ajit Pai Colluding with Verizon Would 'Harm'* Agency, Gizmodo (Feb. 6, 2018), https://bit.ly/2WwizA8. The agency claimed that release of drafts of the skit would "harm the [FCC's] deliberative process[.]" *Id.* (follow link to response letter).

In another particularly piffling example, the State Department used the deliberative process privilege to redact an employee's unprofessional comment made on a House Resolution. In 2000, the House of Representatives introduced a resolution "[e]xpressing the sense . . . that Pakistan should be designated as a state sponsor of terrorism." H. Res. 406, 106th Cong. (2000). The resolution was motivated, in part, by what the House perceived as the "Pakistani Government's demonstrated reluctance to halt the use of its soil for terrorist organizations[,]" including that it "provided refuge and assistance to Osama Bin Laden[.]" *Id*. When the National Security Archive obtained a copy of the resolution from the Department of State through FOIA, it bore a redaction pursuant to the deliberative process privilege; after successfully administratively appealing, the unredacted document revealed that State had concealed a handwritten annotation to the House Resolution that stated simply, "What a bunch of crap!!" Nate Jones, *Document Friday: Someone from the Department of State thought that punishing Pakistan for "providing refuge and assistance" to Osama bin Laden was "a bunch of crap!!"*, Unredacted (May 13, 2011), https://perma.cc/W6T8-SRNK.

On the other end of the spectrum, embarrassing records withheld under the deliberative

process privilege can have serious consequences for public health. In 2014, the Department of Veterans Affairs ("VA") "withheld the names of hospitals where 19 veterans died because of delays in medical screenings," claiming the information was "preliminary." CJ Cairamella, *VA Hides Names of Hospitals Where Vets Died from Delays*, The Wash. Free Beacon (Mar. 28, 2014), https://perma.cc/Q8H4-33WR. The denial, made in response to a FOIA request from the *Tampa Tribune*, sparked outrage and prompted Senator Bill Nelson to demand answers from the VA: "Veterans across this country have a right to know about their local VA facility's record of care . . . They cannot be adequately served if they do not fully understand their benefits and in some cases, are not fully informed about the care they need." *Id.*

The deliberative process privilege has been wielded to withhold final agency decisions affecting billions of dollars in commerce. In 2008, the FCC cited the privilege to withhold a document setting forth rules for an upcoming spectrum auction that the Commission adopted in a 4-1 vote. *See* John Dunbar, Associated Press, *Voted Items at FCC Are Secret, Agency Says*, Fox News (Jun. 18, 2008), https://perma.cc/SX6F-BARU. That auction would later raise nearly $20 billion. *Id.* Although the FCC rules were approved in a public vote, the agency claimed that they were "predecisional" and refused to release them, arguing there were subsequent "editorial changes" that allowed them to keep the voted-on document secret. *Id.*

In another concerning incident, the Department of Justice used the deliberative process privilege to withhold a report about the United States

government's Nazi-hunting operations, as well as its role in creating a "safe haven" for Nazis and their collaborators after World War II. The press and the public were eager to review the report to understand the actions taken by U.S. officials in the aftermath of the terror of Nazi Germany. *See* Eric Lichtblau, *Nazis Were Given 'Safe Haven' in U.S., Report Says*, N.Y. Times (Nov. 13, 2010), https://perma.cc/8U4V-U5DK. Despite the fact the DOJ finalized the report in 2006, it refused to release it until 2010, after it was sued by the National Security Archive for unlawfully denying a FOIA request for it. *Id.* The Justice Department claimed that the report "was never formally completed and did not represent [the agency's] official findings," *id*., citing "numerous factual errors and omissions," but declining to explain what they were. *Id*.

Even after the Justice Department was forced to process the report for release under FOIA, it redacted large portions of it, claiming they were protected by the deliberative process privilege. *See Justice Department Censors Nazi-Hunting History*, The National Security Archive (Nov. 13, 2010), https://perma.cc/KH2S-NW6Q. But when The New York Times obtained an unredacted copy of the report, it became clear that the DOJ's redactions were being employed to withhold embarrassing—and, in some cases, shameful—matters that were nonetheless of fundamental historical importance, such as:

- References to what American officials knew about the atrocities committed by Otto von Bolschwing, a Nazi associate of Adolph Eichmann, who had become a CIA asset;

- Information about Arthur Rudolph, a German Scientist who ran a slave labor camp and went on to become a NASA scientist, including allegations that he forced "slave laborers to watch hangings[;]"

- References to the Department of Justice's belief that there was "definitive proof" that the Swiss had accepted Nazi gold and that the Truman Administration had underestimated the size of the gold purchases; and

- Passages regarding misconduct allegations an appellate judge raised against prosecutors in 1994 in the case against Ohio autoworker John Demjanjuk, who was alleged to be responsible for war crimes and crimes against humanity in Nazi extermination camps.

In Hunt for Nazis, an Incomplete History, N.Y. Times, https://perma.cc/T3T9-23CF (comparing redacted and unredacted portions of report). If not for the *Times'* reporting, this information may have been hidden forever by the deliberative process privilege.

B. Congress has recognized and sought to curb agencies' abuse of the deliberative process privilege.

In recent years, Congress has held hearings to understand and address agencies' increasing use of FOIA's exemptions to justify government secrecy. In doing so, Congressional leaders have paid special attention to agencies' abuse of Exemption 5 and the deliberative process privilege. For example, in 2004, the minority staff of the House Committee on Government Reform, Special Investigations Division,

issued a report that explored the "consistent pattern" of FOIA being "undermined" given "repeated . . . expan[sion]" of exemptions to withhold information. U.S. House of Rep., Comm. On Gov't Reform—Minority Staff, *Secrecy in the Bush Administration* at iii (Sept. 14, 2004), https://perma.cc/N6F5-5FU7. In one cited example, the report explains that when The Wilderness Society sued the Department of the Interior (DOI) under FOIA for records about the inventory of federal lands eligible for protection as wilderness areas, the DOI attempted to withhold records under the deliberative process privilege that were neither predecisional nor deliberative. *Id*. at 23.

In 2011, a report by staff for Darrell Issa, then-Chairman of the United States House of Representatives Committee on Oversight and Government Reform, compared redacted emails, obtained through FOIA by the Associated Press from the Department of Homeland Security, with unredacted versions the Committee requested. *See* U.S. House of Rep., Comm. on Oversight and Gov't Reform, *A New Era of Openness? How and Why Political Staff at DHS Interfered with the FOIA Process* 81–87 (Mar. 2011), https://perma.cc/UVS3-8HFN. The report found that emails had been withheld from the AP under Exemption 5 not because they were predecisional and deliberative, but simply because they were "embarrassing to the Department's political appointees." *Id.* at 84

In 2015, the House Committee on Oversight and Government Reform held a two-day hearing on problems with the FOIA process, including the overuse of exemptions. *See Ensuring Transparency Through the Freedom of Information Act (FOIA):*

Hearing Before the Committee on Oversight and Government Reform, House of Representatives, 114th Cong. 114-80 (2015), https://perma.cc/S8RW-GCE5. Thereafter, then-Chairman Jason Chaffetz released a report titled, simply, "FOIA Is Broken." U.S. House of Rep., Comm. On Oversight and Gov't Reform, *FOIA Is Broken: A Report* (Jan. 2016), https://perma.cc/5AMZ-Y9CA.

Chairman Chaffetz's report found that agencies "overuse and misapply exemptions, withholding information and records rightfully owed to FOIA requesters." *Id*. at iii. It specifically emphasized Exemption 5, noting it is "frequently misapplied." *Id.* at 10. In one example highlighted in the report, the FCC withheld a clearly "post-decisional communication" under the deliberative process privilege—a statement reflecting the agency's official position on a policy matter, the language of which had already been "approved" for a speech. *Id*. at 10. The report further explained that some "[m]embers of the media" had completely abandoned the FOIA process as a newsgathering tool "because delays and redactions made the request process wholly useless for reporting to the public." *Id*. at ii. According to the report, one freelance journalist who contacted the Committee stated: "I often describe the handling of my FOIA request as the single most disillusioning experience of my life." *Id*.

Congress took action to correct some of the most egregious overuses of exemptions by passing S.337, the FOIA Improvement Act of 2016. *See* Pub. L. No. 114–185, 130 Stat. 538 (2016). As Senator Charles Grassley stated in support of the bill, S.337 was intended to address a "culture of government secrecy"

that "has served to undermine FOIA's fundamental promise." 114 Cong. Rec. S1494 (Mar. 15, 2016), https://perma.cc/KQW7-655R (statement of Sen. Grassley).

The legislative history of S.337 makes clear that Congress was concerned, in particular, with agency overuse of the deliberative process privilege. As the Senate Report states:

> There is a growing and troubling trend towards relying on these discretionary exemptions to withhold large swaths of Government information, even though no harm would result from disclosure. For example, according to the *OpenTheGovernment.org 2013 Secrecy Report*, Federal agencies used Exemption 5, which permits nondisclosure of information covered by litigation privileges such as the attorney-client privilege, the attorney work product doctrine, and the deliberative process privilege, more than 79,000 times in 2012—a 41% increase from the previous year.

2016 U.S.C.C.A.N. 321, 323. The House Report for H.R. 653, a parallel bill in the House of Representatives, likewise explained:

> Federal agencies most commonly invoke [Exemption 5] to withhold records protected by attorney client privilege, attorney work product privilege, and the deliberative process privilege. The

> deliberative process privilege is the most used privilege and the source of the most concern regarding overuse . . . . The deliberative process privilege has become the legal vehicle by which agencies continue to withhold information about government operations.

FOIA Oversight and Implementation Act of 2015, H.R. Rep. No. 114–391 at 10, https://perma.cc/A5UQ-CLJF.[6]

The 2016 amendments to FOIA impose new, additional requirements that must be met before records may be withheld under one of FOIA's discretionary exemptions, including Exemption 5. Specifically, the amendments impose a "foreseeable harm" requirement, prohibiting a government agency from withholding information that falls within the scope of an exemption unless it "reasonably foresees that disclosure would harm an interest protected by" that exemption, or disclosure is otherwise prohibited. 5 U.S.C. § 552(a)(8). Congress also imposed a 25-year limitation on the deliberative process privilege. *Id.* § 552(b)(5).

Questions exist about whether the government can, in fact, demonstrate harm from the release of records that only fall within the scope of the deliberative process privilege. Regarding the

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[6] H.R. 653, the "FOIA Oversight and Implementation Act of 2016," was a similar effort by the House of Representatives to reform FOIA that passed that chamber but was eventually overtaken by S.337. *See* H.R. 653, 114th Cong. (2016), https://perma.cc/2EEG-NKJZ.

privilege, critics have noted that there is a serious "lack of empirical evidence to support its value in administrative governance." Shilpa Narayan, *Proper Assertion of the Deliberative Process Privilege: The Agency Head Requirement*, 77 Fordham L. Rev. 1183, 1192 (2008). One author has written that when executive branch officials leave office,

> they immediately sell to the highest bidder, for personal profit, their self-serving account of what went on in the behind-the-scenes deliberations in which they may have played some part. [. . .]
>
> Thus, it is common knowledge that everyone who really matters will, at the earliest possible moment, publish his account of the deliberations in which he was involved. It is equally well-known that those officials are, even as they engage in those deliberations, generating contemporaneous records, for use in connection with that publication.

Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 Ind. L.J. 845, 888 (1990). However, "[n]o one, least of all those who have not yet left office, criticizes the practice in terms of the oft-recited deliberative rationale." *Id.*

The FOIA request at issue in this case is not governed by the 2016 amendments because it was submitted before their effective date. *See* Pub. L. No. 114–185, 130 Stat. 544–45 (2016). Nevertheless, the plain text of the Act, as recently amended, makes

clear Congress's intent to curb agencies' abuse of the deliberative process privilege.

II. The Services' interpretation of what constitutes "predecisional" material would enable further abuse of the deliberative process privilege.

In this case, Respondent seeks jeopardy opinions written by the Services in 2013 which convey a conclusion that particular action proposed by the EPA would result in jeopardy to species protected by the Endangered Species Act, and was therefore prohibited. Pet. App. 19a–20a. The Services insist that because the jeopardy opinions at issue were "not adopted or finalized" or "circulate[d] . . . in full to EPA," Pets.' Br. at 21, those opinions are, by default, predecisional for the purposes of the deliberative process privilege and may be withheld, *id*. at 20–21. That reading is a grave distortion of both the purpose and intended application of FOIA.

Amici agree with Respondent that FOIA requires that courts not look solely to the label agencies attach to documents, but rather to their function and substance when determining whether records are predecisional. *See* Resp.'s Br. at 21–22; 49–51. Agencies do not have license to simply declare a record "nonfinal" in order to withhold it under the deliberative process privilege. FOIA requires that courts conduct a functional, pragmatic inquiry, that looks to the "force and effect" of the record instead of its label. *See, e.g.*, *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975).

The Services' proffered interpretation of "predecisional," if accepted, also risks agencies' development of "a body of secret law which it is actually applying in its dealings with the public but which it is attempting to protect behind a label." *Coastal States*, 617 F.2d at 869. This, too, is contrary to FOIA's purpose to foster an informed public "vital to the functioning of a democratic society." *NLRB*, 437 U.S. at 242; *see also* Resp.'s Br. at 28, 48–49.

The Services' jeopardy opinions at issue here have the force and effect associated with a final agency action. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 652 (2007) (explaining that when Fish & Wildlife Service and the National Marine Fisheries Service reach a jeopardy determination, the action-agency must abandon the proposed action, modify it by adding further wildlife protections, or seek a Cabinet-level exemption to move forward on its proposed course). The Services had concluded that the EPA's proposed rule "in its then-current form was likely to cause jeopardy" to endangered or threatened species and "negatively impact their designated critical habitat." Pet. App. 5a. The records therefore "contain the final conclusions by the final decision-makers—the Services"—regarding whether the EPA's proposed Intake-Structures Rule, in its then-current form, would jeopardize threatened and endangered species. Pet. App. 18a; Resp.'s Br. at 13, 24. They are, accordingly, not predecisional and are required to be released under FOIA.

CONCLUSION

For the foregoing reasons, amici curiae respectfully urge the Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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