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 Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The U.S. Fish and Wildlife Service and National Marine Fisheries Service conducted an assessment of a regulation proposed by the Environmental Protection Agency, in order to determine that regulation's effects on threatened and endangered species, and to decide whether the regulation was permissible under the Endangered Species Act, 16 U.S.C. § 1536(a)(2). The Services contend that certain documents setting forth conclusive determinations generated by that assessment are protected by the deliberative process privilege and therefore exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b)(5). To prevail in that claim, the Services must show that each document is "predecisional," and also that each document contains material that is "deliberative" in character.

The questions presented are:

1. Did the court of appeals err in finding, based on the record facts, that the contested documents contain the Services' conclusion that the Environmental Protection Agency was required to amend its regulation to avoid jeopardy to threatened and endangered species and were therefore not "predecisional"?

2. Did the court of appeals also err in finding, based on the record facts, that the documents contain no "deliberative" material, and for that independent reason are not protected by the deliberative process privilege?

RULE 29.6 STATEMENT

The respondent has no parent corporation, and no publicly held company has any ownership interest in the respondent.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTRODUCTION

The petition seeks review of the court of appeals' application of a properly stated rule of law—a rule grounded in this Court's jurisprudence and uniformly followed by the circuits. The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(5), allows an agency to withhold, *inter alia*, documents protected by the deliberative process privilege. That privilege protects material that is both "predecisional" and "deliberative." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 39 (D.C. Cir. 2002). This Court has squarely held that the first element of that two-part test—whether a document's contents are predecisional—embodies a functional, pragmatic standard, focused upon the "force and effect" of the document. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975). Contrary to the petition's assertion, Pet. 21-23, by longstanding judicial consensus that inquiry extends beyond whether the agency has "designated" its decision "as 'formal,' 'binding,' or 'final,'" *Elec. Frontier Found. v. U.S. Dep't of Justice*, 739 F.3d 1, 7 (D.C. Cir. 2014) (citation omitted). It looks instead to whether the "[d]ocuments reflect[ ] [the agency's] formal or informal policy on how it carries out its responsibilities." *Public Citizen v. OMB*, 598 F.3d 865, 875 (D.C. Cir. 2009).

The petition asks this Court to review the court of appeals' application of this hitherto uncontroversial and deeply fact-bound standard to a handful of documents generated by the U.S. Fish and Wildlife Service and National Marine Fisheries Service (collectively, the "Services"), in carrying out their obligations under

the Endangered Species Act ("ESA"), 16 U.S.C. § 1536. *See*, *e.g.*, Pet. 25 (court of appeals "dr[ew] the wrong conclusions" from facts in record). This case offers no reason to override the usual rule against certiorari in such cases. S. Ct. R. 10. The documents at issue conveyed the Services' conclusion that a particular action proposed by the Environmental Protection Agency ("EPA") would result in jeopardy to species protected by the ESA, and was therefore prohibited. 16 U.S.C. § 1536. Pet. App. 19a-20a. No decision from any court suggests that such documents—from Services possessing near-conclusive "decisional authority" to forbid otherwise permissible actions by the recipient agency—are categorically non-final and predecisional. *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 187-88 (1975). The petition's assertion that the Services merely sought "comment" from EPA about how to exercise their ESA duties, Pet. 29-30, is both legally and factually groundless and provides no reason for review by this Court.

EPA's decision to alter its regulation, after the Services deemed its initial proposed rule unlawful, does not make the Services' jeopardy determination predecisional, Pet. 26-27; on the contrary, it confirms that the Services' determination had the force and effect associated with a final action. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 652 (2007) (*"NAHB")* (when Services reach a jeopardy determination, the action-agency must abandon the action, modify it by adding further wildlife restrictions, or seek Cabinet-level exemption). Copious additional

material from the record further supports the court of appeals' holding that the documents were not predecisional. *See* below 28-34.

Even if the court of appeals erred in that holding, answering the question presented by petitioners would require this Court to address a second, equally fact-bound question: whether the documents contain "deliberative" material. Pet. App. 25a. That complicating, alternative basis for the court of appeals' decision makes this case a poor vehicle to address any claimed error in the court's application of the standard for determining whether records are predecisional. And the decision below presents no threat to agencies' decisionmaking. It merely makes available to the public documents that the Services generally include in the public record, C.A. S.E.R. 164-199, and illuminates "the reasons which . . . suppl[ied] the basis for an agency policy actually adopted"—here, an EPA rule containing endangered-species protections that the Agency had, prior to the Services' intervention, not intended to adopt. *Sears*, 421 U.S. at 152.

STATEMENT

A. Statutory and Regulatory Background

1. The Freedom of Information Act and Deliberative Process Privilege

FOIA "require[s] agencies to adhere to 'a general philosophy of full agency disclosure,'" so as "to open agency action to the light of public scrutiny." *U.S. Dep't*

of Justice v. Tax Analysts, 492 U.S. 136, 142 (1989) (citations omitted). When Congress enacted FOIA, its "attention . . . was primarily focused on the efforts of officials to prevent release of information in order to hide mistakes or irregularities committed by the agency." *GTE Sylvania v. Consumers Union*, 445 U.S. 375, 385 (1980) (citation omitted). FOIA was written, consequently, to "permit access" to information that agencies had "shielded unnecessarily from public view," and "to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1973).

To those ends, FOIA requires federal agencies affirmatively to "make available for public inspection" their "final opinions" and "statements of policy and interpretations which have been adopted by the agency." 5 U.S.C. § 552(a)(2). Upon suitable request, agencies must also "make . . . promptly available" all other records, subject to enumerated exemptions. 5 U.S.C. § 552(a)(3)(A). *See Sears*, 421 U.S. at 136 ("As [FOIA] is structured, virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the Act's nine exemptions."). Those exemptions include "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) ("Exemption 5"). FOIA thereby "exempt[s] those documents, and only those documents, normally privileged in the civil discovery context," *Sears*, 421 U.S. at 149, including those protected by the "deliberative process

privilege." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001).

To qualify for that privilege, a document must be, first, "predecisional"—that is, "produced in the process of formulating policy," rather than a "statement[ ] of an agency's legal position." *Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997).[1] Second, the document must be "deliberative"—one that "reflect[s] an agency's preliminary positions or ruminations," and that can "reasonably be said to reveal an agency's or official's mode of formulating or exercising policy-implicating judgment." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d at 39 (citation omitted, alteration in original).

That a document contains some privileged material does not allow an agency to withhold the document in its entirety; the agency "has the burden of demonstrating that no reasonably segregable," non-exempt "information exists within the documents withheld." *Army Times Publ'g Co. v. Dep't of Air Force*, 998 F.2d 1067, 1068 (D.C. Cir. 1993). If a document contains such segregable, non-privileged material, FOIA requires that the agency disclose it (generally in the form of a redacted copy). 5 U.S.C. § 552(b); *Stolt-Nielsen Transp. Grp. Ltd. v. United States*, 534 F.3d 728, 733-34 (D.C. Cir. 2008).

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[1] "Because there are a number of federal government agencies located in Washington . . . the majority of the caselaw interpreting FOIA has been decided by the D.C. Circuit." *Miccosukee Tribe v. United States*, 516 F.3d 1235, 1257 n.23 (11th Cir. 2008).

2. The Endangered Species Act and the Jeopardy Prohibition

The ESA, 16 U.S.C. §§ 1531-44, "is intended to protect and conserve endangered and threatened species and their habitats." *NAHB*, 551 U.S. at 651. The Services administer the ESA on behalf of the Secretaries of Interior and Commerce. *Id.* The two Services identify and list "species of animals that are 'threatened' or 'endangered'" and "designate their 'critical habitat.'" *Bennett v. Spear*, 520 U.S. 154, 158 (1997) (citation omitted).[2] The ESA requires, *inter alia*, "[e]ach federal agency . . . [to] insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of such species' critical habitat. 16 U.S.C. § 1536(a)(2).

That prohibition is carried out through "consultation" between the Services and other agencies. *Id.* An agency first determines whether its action may affect a listed species, 16 U.S.C. § 1536(c); 50 C.F.R. § 402.14(a). If so, the agency is required to consult with the Service responsible for the listed species, "after which the Service must provide the agency with a written statement (the Biological Opinion) explaining how the proposed action will affect the species or its

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[2] The National Marine Fisheries Service is responsible for marine and anadromous species. The Fish and Wildlife Service is responsible for land and freshwater species. *See Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1105 n.2 (10th Cir. 2010).

habitat." *Bennett*, 520 U.S. at 158; 16 U.S.C. § 1536(b)(3)(A). A Biological Opinion must, in particular, convey the Service's determination of "whether the action is . . . [l]ikely to jeopardize the continued existence of a listed species," or harm its critical habitat. 50 C.F.R. § 402.14(h)(1)(iv).

If the Services conclude that the agency's proposed action is likely to result in such jeopardy, the Services then suggest "reasonable and prudent alternatives," if any, that would avoid that violation. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(2). The Services' regulations encourage the Services to work with action-agencies "to utilize their expertise in developing [such] alternatives." 48 Fed. Reg. 29,990, 29,995 (June 29, 1983). To facilitate that work the regulations contain provisions by which, following a jeopardy determination, the Services may convey a "draft biological opinion" to an action-agency "for the purpose of analyzing the reasonable and prudent alternatives" that might be available. 50 C.F.R. § 402.14(g)(5) (reasonable and prudent alternatives arise only "if a jeopardy opinion is to be issued").

A jeopardy determination by the Services effectively forecloses an agency's authority to proceed. "[T]he agency must either terminate the action, implement the [Service's] proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee." *NAHB*, 551 U.S. at 652; 16 U.S.C. §§ 1536(a)(2), (e); *see also TVA v. Hill*, 437 U.S. 153, 185 (1978) (explaining the "conscious decision by Congress to give endangered species priority over the 'primary

missions' of federal agencies" and the consequently inflexible prohibition on agency actions that jeopardize endangered species). Accordingly, the determinations made by the Services' biological opinions are final agency actions in their own right, rather than "purely advisory" suggestions supplementing other agencies' decisionmaking. *Bennett*, 520 U.S. at 178.

3. The Clean Water Act and EPA's Intake-Structures Rule

The Clean Water Act instructs EPA to promulgate standards reflecting the "best technology available" to minimize the adverse environmental impacts from cooling water intake structures (the mechanisms used by power plants to extract large volumes of water from rivers, lakes, or the ocean). 33 U.S.C. § 1326(b); *see Entergy Corp. v. Riverkeeper*, 556 U.S. 208, 212-13 (2009). EPA has been developing those standards for decades. *Id.* at 213-14.

Following the remand of its most recent effort, EPA proposed a new rule in 2011 (the "Intake-Structures Rule"). *Cooling Water Intake Structure Coalition v. EPA*, 905 F.3d 49, 62-63 (2d Cir. 2018). EPA initiated formal consultation with both Services under the ESA in June 2013. *Id.* at 62. In October 2013, EPA provided the Services with what it intended to be the "final" revisions to its regulation, "approved by [EPA's] administrators." C.A. S.E.R. 72-73. After reviewing that regulation, in December 2013 the Services each completed "draft jeopardy opinions" (the "2013 Jeopardy

Opinions"). Pet. App. 5a. The 2013 Jeopardy Opinions describe EPA's proposed Intake-Structures Rule, the "location of affected structures," and "evaluate[ ] the direct and indirect effects that the EPA's proposed action would have on ESA-listed species and their habitats." Pet. App. 46a-47a. In both Opinions, the Services concluded that "the rule in its then-current form was likely to cause jeopardy" to species protected by the ESA, and "negatively impact their designated critical habitat." Pet. App. 5a. The Services partially transmitted those documents to EPA, informing EPA that they had reached a jeopardy determination. Pet. App. 5a-6a; C.A. S.E.R. 76-77.

Because the Services had reached a jeopardy determination, they prepared documents describing "reasonable and prudent alternatives," by which EPA could avoid violating the ESA. C.A. E.R. 44; Pet. App. 10a (describing three documents containing alternatives, hereinafter the "Reasonable and Prudent Alternatives"). EPA then "issued a new version" of the Intake-Structures Rule, including additional restrictions on impacts to protected species, "which it sent to the Services" in March 2014. Pet. App. 6a; *Cooling Water*, 905 F.3d at 63 (noting added "process-based protections" for wildlife). The National Marine Fisheries Service prepared a draft biological opinion for that newly revised Rule, concluding that it too was likely to result in jeopardy to listed species (the "2014 Draft Jeopardy Opinion"). Pet. App. 6a. After further discussions with EPA, the National Marine Fisheries Service revised that conclusion, and in May 2014 the

Services issued a joint opinion concluding that EPA's new Intake-Structures Rule would not result in jeopardy, and so required no further changes (the "2014 Final No-Jeopardy Opinion"). *Id.* EPA issued its regulation "the same day." *Id.*

B. Proceedings Below

Sierra Club submitted FOIA requests, pursuant to 5 U.S.C. § 552(a)(3), to both Services for records prepared during their ESA consultations regarding EPA's Intake-Structures Rule. C.A. E.R. 94-96, 105-107. The Services released over 3,700 documents, in full or redacted form, and withheld almost 4,000 documents as exempt from FOIA's disclosure requirements. C.A. E.R. 43, 61.

Sierra Club filed suit, and sought a summary judgment requiring the release of sixteen of the withheld documents, including the 2013 Jeopardy Opinions, the Reasonable and Prudent Alternatives, and the 2014 Draft Jeopardy Opinion. Pet. App. 8a-12a. The Services asserted that all of the documents were protected by the deliberative process privilege, and therefore properly withheld under Exemption 5. Pet. App. 8a-9a. Following *in camera* review, the district court found four documents to be protected by the deliberative process privilege and exempt from disclosure; one to be only partially exempt; and eleven documents to be non-exempt—including the 2013 Jeopardy Opinions, the Reasonable and Prudent Alternatives, and the 2014

Draft Jeopardy Opinion. Pet. App. 9a-12a. The Services appealed.

The court of appeals affirmed in part, and reversed in part. Because Exemption 5 does not encompass all documents "transmitted between agencies," but rather only those "inter-agency . . . memorandums or letters" that "fall within the ambit of a privilege against discovery," Pet. App. 13a-14a (quoting *Klamath Water Users*, 532 U.S. at 8) the court of appeals undertook a granular assessment of whether each contested document was both "predecisional" and "deliberative," so as to qualify for the deliberative process privilege.

After conducting its own *in camera* review, the court of appeals held, first, that the 2013 Jeopardy Opinions, and certain accompanying documents,[3] were not predecisional. Pet. App. 18a-20a. Noting that under this Court's precedent, "the issuance of a biological opinion is a final agency action" in its own right, the court of appeals assessed "whether each document at issue is pre-decisional as to" the Service's own "biological opinion"—not "whether it is pre-decisional as to the EPA's rulemaking." Pet. App. 18a. On the record before it, the court of appeals found that the 2013 Jeopardy Opinions, though labeled drafts, "contain the final conclusions by the final decision-makers—the

[3] These documents are a statistical table showing "estimated aggregate effects" of EPA's then-proposed Rule on listed species, and several documents "explain[ing] best practices for mitigating the projected, harmful effects" of that Rule. Pet. App. 20a-21a. For simplicity's sake, subsequent references to the "2013 Jeopardy Opinions" include those additional documents.

Services—regarding whether" EPA's proposed Intake-Structures Rule, in its then-current form, would jeopardize threatened and endangered species. Pet. App. 18a. The court based that conclusion on, *inter alia*, the facts that: "[t]he documents had been approved by final decision-makers at each agency"; the Assistant Director at the Fish and Wildlife Service who was the responsible decision-maker had "made final edits" to the Fish and Wildlife Service's Jeopardy Opinion; that opinion awaited only "his autopen signature"; and the National Marine Fisheries Service was prepared "to release [its Jeopardy Opinion] to the public," and had prepared "talking points for its legislative affairs staff." Pet. App. 19a.

The court of appeals found, further, that "EPA made changes" to its Intake-Structures Rule "after both Services' jeopardy opinions were completed and partially transmitted to the EPA," Pet. App. 19a-20a. Because the Services' 2014 Final No-Jeopardy Opinion addressed a "different proposed rule"—that is, the Rule that EPA devised after the 2013 Jeopardy Opinions prohibited its prior proposal—the court of appeals rejected the Services' characterization of the 2013 Jeopardy Opinions as earlier, predecisional versions of the Services' 2014 Final No-Jeopardy Opinion. Pet. 20a.

The court of appeals held that the 2013 Jeopardy Opinions were not entitled to the deliberative process privilege for a second, independent reason: they did not contain "deliberative" discussions. *See* Pet. App. 21a ("To shield documents from disclosure . . . the Services must not only show that they are pre-decisional, but

also that they are deliberative."). It noted, based on its *in camera* review, "that the documents do not contain line edits, marginal comments, or other written material that expose any internal agency discussion about the jeopardy finding." Pet. App. 25a. The 2013 Jeopardy Opinions did not "[c]ontain any insertions or writings reflecting input from lower level" agency staff. *Id.* Nothing in the documents would "allow a reader to reconstruct the 'mental processes' that [led] to the production of the" Services' joint 2014 Final No-Jeopardy Opinion. Pet. App. 27a. It found that the 2013 Jeopardy Opinions revealed nothing regarding the Services' internal deliberations beyond "what the Services themselves have already disclosed during this litigation: that the initial proposed regulations resulted in final drafts of jeopardy opinions . . . that the EPA received portions of those opinions and proposed a revised regulation . . . and that the Services ultimately issued a no jeopardy opinion for" EPA's revised Intake-Structures Rule. Pet. App. 26a.

By contrast, the court of appeals held that a number of the Services' other documents leading up to the 2014 Final No-Jeopardy Opinion were privileged. Pet. App. 29a. The court of appeals found that two of the three documents describing the Services' Reasonable and Prudent Alternatives did "not reflect the [Services'] final position regarding the kinds of changes . . . needed in order to comply with the ESA." Pet. App. 17a. They were, rather, "earlier drafts" of the third and final document, which contained the Services' conclusive determination of the options available to EPA. For that

reason, the court of appeals found the two earlier Reasonable and Prudent Alternatives to be predecisional. *Id.* And because "comparing these [earlier] drafts would shed light on [the Services'] internal vetting process," it found them to be deliberative. Pet. App. 27a-28a. The court of appeals therefore held that all but the last of the Services' Reasonable and Prudent Alternatives (prepared just before EPA revised its Intake-Structures Rule, Pet. App. 8a, 10a) were exempt under the deliberative process privilege.

Likewise, the court of appeals held that the 2014 Draft Jeopardy Opinion was exempt from disclosure. Pet. App. 29a. Unlike the 2013 Jeopardy Opinions, it did "not appear to represent the [Services'] conclusion" as to the "likely impact" of EPA's revised, 2014 Intake-Structures Rule. Pet. App. 17a. It was, rather, "an interim step," expressing "the agency's staff's initial opinion as to the Rule," which was never "adopted . . . as the agency's" decision—the Services had instead jointly issued the 2014 Final No-Jeopardy Opinion. *Id.* The court consequently found the 2014 Draft Jeopardy Opinion to be predecisional. *Id.* And because its contents might allow a reader to "reconstruct some of the deliberations" that preceded the National Marine Fisheries Service's later no-jeopardy conclusion, the court of appeals found that the 2014 Draft Jeopardy Opinion was deliberative. Pet. App. 28a.

Judge Wallace partially dissented. "[E]ven if [the 2013 Jeopardy Opinions] represented the view of the 'entire' Services," as to the lawfulness of EPA's initial Intake-Structures Rule, he would have held that

Exemption 5 allowed the Services to withhold them. Pet. App. 33a.

The court of appeals later issued an amended opinion, and an order denying the Services' petition for panel rehearing, as well as its petition for rehearing en banc (as to which no judge requested a vote). Pet. App. 2a. The Services then reviewed the 2014 Draft Jeopardy Opinion and the two Reasonable and Prudent Alternatives that the court of appeals found to be within the ambit of the deliberative process privilege, to assess whether those documents contained reasonably segregable, non-exempt information. *See* Pet. App. 29a. The Services determined that the three documents' contents were not privileged in their entirety and released redacted copies of each. *See* Order on Stipulation, D.C. Doc. No. 87.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals' Decision Creates No Tension with Decisions of This Court or Any Circuit Court.

The petitioners do not contend that there is a conflict among the circuits, or that the court of appeals' decision conflicts with any decision of this Court. They rest solely upon a claim of "serious tension" with "decisions of this Court and other courts of appeals." Pet. 13. But even that claim is unsupported. Rather, the court of appeals' decision applies settled principles to an idiosyncratic set of facts, and is entirely consistent with

this Court's decisions and those of every other court of appeals.

A. The Court of Appeals' Application of *Sears*'s Pragmatic "Working-Law" Standard to the Particular Facts in This Record Does Not Warrant Certiorari.

In conducting a fact-specific inquiry into the contents and context of the contested documents, rather than giving "dispositive" weight to whether the Services formally "signed" and "issued" the 2013 Jeopardy Opinions, Pet. 21, the court of appeals followed the rule established by *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 151-52. *Sears* holds that FOIA's textual "aversion to 'secret (agency) law'" requires disclosure of all "documents which have 'the force and effect of law.'" *Id.* at 153 (citations omitted). Consequently, an agency may not invoke Exemption 5 and the deliberative process privilege to conceal "'opinions and interpretations' which embody the agency's effective law and policy." *Id.* at 152 (deliberative process privilege encompasses only "papers which reflect the agency's group thinking in the process of working out what its policy and determining what its law shall be" (citation omitted)). The emphasis on function rather than form—on "*effective* law and policy"—mandates disclosure of any "reasons . . . expressed within the agency" that "constitute the '*working law*' of the agency." *Id.* at 152-53 (emphasis added, citations omitted).

Sears's "working law" standard, *id.*, requires courts—as the court of appeals did here—to look past an agency's decision whether to publicly issue a document as well as its official designation of the document as "draft" or "final," Pet. 21-23. Any other rule would permit agencies to maintain the "secret (agency) law" that *Sears* prohibits. 421 U.S. at 152 (citation omitted). For that reason, *Sears*—like the court of appeals here—declined to extend the privilege to internal memoranda that had the effect of altering an agency's decisions, even though the agency had characterized those memoranda as "advisory only and not binding." *Id.* at 157.

The circuits have, consequently, uniformly understood *Sears* to prescribe a fact-intensive standard, emphasizing practicalities rather than formalities, to determine whether an agency document qualifies as predecisional. "[A]n agency is not permitted to develop 'a body of secret law,' used by it in the discharge of its regulatory duties . . . but hidden behind a veil of privilege because it is not designated as 'formal,' 'binding,' or 'final.'" *Elec. Frontier Found.*, 739 F.3d at 7 (quoting *Schlefer v. United States*, 702 F.2d 233, 244 (D.C. Cir. 1983)). Documents that are "not issued in final form, signed off on . . . or otherwise adopted as official policy" may still describe "the 'final views'" of an agency, Pet. 14, and consequently fall outside the deliberative process privilege. *ACLU v. NSA*, 925 F.3d 576, 594 (2d Cir. 2019) (adopting "functional test to determine whether a document constitutes 'working law,'" based on "operative effect" rather than "nominal[]" designations).

Accord Coastal States Gas Corp. v. Dep't of Energy, 644 F.3d 969, 978 (3d Cir. 1981) (deliberative process privilege does not cover "internal advice that was in fact agency policy"); *King v. IRS*, 684 F.2d 517, 520-21 (7th Cir. 1982) (adoption of a position, either "formally or informally," places document outside privilege).

"Documents reflecting [an agency's] formal *or informal* policy as to how it carries out its responsibilities fit comfortably within the 'working law' framework" by which *Sears* identifies conclusive, rather than predecisional, material. *Public Citizen*, 598 F.3d at 875 (D.C. Cir. 2010) (emphasis added). Under that framework, an agency's designation of documents as drafts does not necessarily render them predecisional; "the agency must present to the court the 'function and significance of the document(s) in the agency's decisionmaking process,' 'the nature 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." *Arthur Anderson & Co. v. IRS*, 679 F.2d 254, 258 (D.C. Cir. 1982) (citations omitted).

Sears and its progeny establish that, contrary to the petition's insistence, the court of appeals made no "legal" error in looking beyond the formalities of signature and public issuance. Pet. 21, 24. It correctly examined the entirety of the facts surrounding the contested documents—such as whether they had been "approved by final-decisionmakers at each agency," and whether the documents had the effect of forcing EPA to "ma[ke] changes to its proposed regulations"—to determine

whether the documents contained "the Services' final views," Pet. App. 18a-19a. *See Schlefer*, 702 F.3d at 238 (Under *Sears*, a court's "consideration looks beneath formal lines of authority to the reality of the decision-making process in question."). The petition cites no federal appellate authority—in fact, no judicial authority at all—that supports its view that labels are determinative under FOIA.

Indeed, *Sears* forbids the approach urged by the petitioners: giving "dispositive" weight to a subset of purely formal "facts"—here, signature and public adoption, Pet. 21-22—regardless of whether the documents describe the Services' "effective law and policy." 421 U.S. at 153. The "force and effect," *id.*, of the Services' jeopardy determination does not depend upon the formalities emphasized by the petition. The "effective law and policy" standard established by *Sears* is necessarily broader and more fact-intensive, requiring detailed scrutiny of the information within the contested documents and the particulars of the decisionmaking process within which those documents were generated. For the reasons set forth in Part II, below, the court of appeals correctly concluded that the 2013 Jeopardy Opinions were not predecisional under that standard. But regardless, any mistake in the court's conclusion would be one of fact rather than law—whether this particular record demonstrates that the 2013 Jeopardy Opinions contained the Services' final conclusions, or merely their preliminary suppositions. Even if the court of appeals had erred by characterizing as "final" material that was instead

"nearly final," Pet. 23, that close factual call would not warrant certiorari.

B. The Court of Appeals' Recognition of the Services' Decisional Authority Creates No Tension with *Grumman Aircraft.*

Contrary to the petition's assertion, the court of appeals' opinion is also entirely consistent with *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168. *Grumman* holds, as the petitioners acknowledge, that the deliberative process privilege encompasses "recommendations and advice" given to "an agency possessing decisional authority," by "a separate agency *not possessing such decisional authority*." *Id.* at 187-88 (emphasis added). *Accord* Pet. 29. Because the documents at issue in *Grumman* originated in an agency lacking such authority, and thus were "functionally indistinguishable from the recommendation of any agency staff member whose judgment has earned the respect of [the agency's] decisionmaker," this Court found them to be predecisional. *Grumman*, 421 U.S. at 187.

The Services' role under the ESA is very different. The ESA grants the Services' independent decisional authority—authority that is, in the case of a jeopardy finding, well-nigh conclusive. Such a determination definitively delimits an agency's discretion to undertake its proposed action, regardless of the statutes providing the agency's "primary missions." *TVA*, 437 U.S. at 185. The agency must either terminate the action

entirely; add those restrictions that the Services approve as reasonable and prudent alternatives; or seek an exemption from a Cabinet-level Endangered Species Committee.[4] *NAHB*, 551 U.S. at 652 (citation omitted). The Services' decision "has direct and appreciable legal consequences" that dramatically "alter the legal regime to which the action agency is subject." *Bennett*, 520 U.S. at 178 (concluding that the Services' role is not akin to providing "tentative recommendations," but rather to issuing "binding determination[s]"). *See also id.* at 169 (despite nominally "advisory function," Services' consultation "in reality . . . has a powerful coercive effect on the action agency").

Where an agency's role is not to advise, but to decide, *Grumman* does not suggest that its interagency communications are categorically predecisional. *Grumman* extends the deliberative process privilege only to documents that have "no operative effect" on the receiving agency, due to the sending agency's "total lack of decisional authority." 421 U.S. at 190-91. *Compare id.* at 184 (finding that "the evidence utterly fails to support the conclusion that the reasoning in the reports [was] adopted by the Board") *with* Pet. App. 19a-20a (noting that after 2013 Jeopardy Opinions, "EPA made changes to its proposed regulations"). The court of appeals correctly recognized that, under *Grumman*, it was required to ask "whether each document at issue

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[4] Exemptions have been sought only six times, and granted twice. Cong. Res. Serv., *Endangered Species Act (ESA): The Exemption Process* 1 (2017), available at https://fas.org/sgp/crs/misc/R40787.pdf.

is pre-decisional as to a biological opinion," rather than deeming them "pre-decisional as to EPA's rule-making." Pet. App. 18a (citations omitted).

The court of appeals did not, moreover, ignore *Grumman*'s holding that "Exemption 5 does not distinguish between inter-agency and intra-agency memoranda." 421 U.S. at 188. The court's opinion recognizes that inter-agency communications and intra-agency communications are subject to the same standards: if predecisional and deliberative, they are privileged. Pet. App. 13a-14a (citations omitted). When confronted with facts demonstrating that the Services' inter-agency communications met that standard, the court found them exempt from disclosure. Pet. App. 17a, 27a-28a (finding that two drafts of Reasonable and Prudent Alternatives sent by Services to EPA did not "reflect the final position" of the Services and were deliberative). Faced with different facts—indicating that the 2013 Jeopardy Opinions described the Services' "final conclusions," Pet. App. 18a, and revealed nothing "about the internal deliberative process," Pet. App. 26a—the court reached a different conclusion.

Those factual distinctions do not reflect any differential treatment of "*inter*-agency and *intra*-agency memoranda." Pet. 28 (citation omitted). The court of appeals did not, as the petition supposes, mandate disclosure of any documents sent to EPA by the Services to seek "advice from the EPA about the [Services'] decision," Pet. 29 (quoting dissenting opinion, Pet. App. 34a); it found, as a factual matter, that the documents in question were not intended to seek advice, but to

convey the Services' final conclusions. Pet. App. 18a-19a. That finding produces no tension with *Grumman*. *See Schlefer*, 702 F.2d at 243 (documents that do "not invite a response" and "contain no hint that they are anything but final," are not predecisional).

Finally, the court of appeals generated no friction with *Grumman* when it distinguished the 2014 Draft Jeopardy Opinion from the 2013 Jeopardy Opinions. Pet. 28-29. In keeping with the uniform holdings of the circuits, the court of appeals examined "the identity and position of the author and any recipients of the document" as a "relevant factor" in assessing whether the documents contained the Services' final conclusions. *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1249 (4th Cir. 1991) (citing *Access Reports v. U.S. Dep't of Justice*, 926 F.2d 1192, 1195 (D.C. Cir. 1991)). In the case of the 2014 Draft Jeopardy Opinion—which was "only circulated between groups of [National Marine Fisheries Service] employees"—that factor (among others) supported the court of appeals' conclusion that the document was part of the agency's "'back-and-forth' debate," and predecisional. Pet. App. 16a-17a, 17a n.9 (also noting that document "expressed the agency staff's initial opinion"). In the case of the 2013 Jeopardy Opinions—which were "approved by final decisionmakers," and partially conveyed to EPA as expressions of the Services' jeopardy conclusion—the court of appeals weighed that factor (among others) in favor of finding those documents not predecisional. Pet. App. 19a. This distinction is confirmed by the fact that the 2013 Jeopardy Opinions prompted revision of EPA's

Intake-Structures Rule, while after the 2014 Draft Jeopardy Opinion the Services ultimately reached a different final conclusion without requiring any further changes to EPA's Rule. Pet. App. 8a. The court of appeals' consideration of those facts is wholly in keeping with—indeed, implements—*Grumman*'s basic concern with the document's relationship to "decisional authority." 421 U.S. at 186. *See id.* at 184 (to be predecisional, document must "be prepared in order to assist an agency decisionmaker in arriving at his decision").

C. The Court of Appeals' Decision Creates No Tension with the Decisions of Any Other Circuit.

There is no "serious tension" between the court of appeals' decision and the Second Circuit's decision upholding EPA's final Intake-Structures Rule and the Services' 2014 Final No-Jeopardy Opinion. Pet. 27. Before the Second Circuit, the agencies excluded the 2013 Jeopardy Opinions from the administrative record, citing the deliberative process privilege. *Cooling Water*, 905 F.3d at 65 n.9. The Second Circuit saw "nothing in the privilege log that would disturb the 'presumption of regularity' afforded to the agencies' certified record," under *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), and therefore denied a motion to compel amendment of that record. 905 F.3d at 65 n.9. As the court of appeals below explained, the Second Circuit's ruling on the adequacy of the privilege log—in a footnote, with no analysis of either the requirements of

the deliberative process privilege or the facts surrounding the documents—does not "suggest[] a different result" from the one reached by the court below on the FOIA issue presented by this case. Pet. App. 14a-15a n.8. The court of appeals here assessed the Services' privilege invocation under FOIA, in which Congress specified that "the burden is on the agency" to sustain any exemption from disclosure. 5 U.S.C. § 552(a)(4)(B); *Senate of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 584-85 (D.C. Cir. 1987). The Second Circuit applied a "presumption of regularity," demanding instead "a strong showing of bad faith or improper behavior," from the parties seeking to add the 2013 Jeopardy Opinions to the administrative record. *Citizens to Preserve Overton Park*, 401 U.S. at 420. *See Cooling Water*, 905 F.3d at 65 n.9 (citing *Overton Park* as providing applicable standard).

In light of the inverted burdens of proof properly applied by the two decisions, there is no basis for reading the decisions to reflect disagreement on any legal issue—and, especially, no indication that the Second Circuit adopted petitioners' view that the Services' failure to formally designate the 2013 Jeopardy Opinions 'final' should be given "dispositive" weight. Pet. 21. Reading *Cooling Water* to take that view is especially unwarranted given that the Second Circuit, in two more recent decisions that directly involve FOIA, has expressly rejected that formalistic approach, emphasizing, like the court of appeals below (and *Sears*), that the "operative effect" of the documents in question is decisive. *ACLU*, 925 F.3d at 594-95; *N.Y. Times Co. v.*

U.S. Dep't of Justice, 939 F.3d 479, 491 (2d Cir. 2019). A document is not predecisional, according to the Second Circuit, merely because it is "nominally non-binding" or "nominally advisory"; rather, its finality is evidenced by, *inter alia*, "whether agency officials feel free to disregard the document's instructions," and "whether an agency superior distributes the document to subordinates (rather than vice versa)." *ACLU*, 925 F.3d at 594. *Accord* Pet. App. 18a-19a. There is no reason to believe that the Second Circuit would reach a different conclusion if asked to apply that pragmatic standard to the record in this case; even where a "document purports to offer recommendations or advice," that Circuit does not consider it predecisional if the facts suggest that the agency "nonetheless regard[s] it in practice as embodying the agency's 'working law' on an issue." *N.Y. Times*, 939 F.3d at 490.

The decision below is also entirely consistent with the D.C. Circuit's decision in *National Security Archive v. CIA*, 752 F.3d 460 (D.C. Cir. 2014). *National Security Archive* found, first, that the draft agency history at issue preceded "any final agency decision on the relevant matter." *Id.* at 463. Having established the document's predecisional nature, then-Judge Kavanaugh wrote that it was "still pre-decisional," even though the agency had never completed a "final CIA history." *Id.* ("[D]raft regulation[s] that the [agency] never issues" are "no less drafts than the drafts that actually evolve into final . . . actions."). That holding—that a predecisional document *remains* predecisional, even if the agency fails to complete the action to which it

pertains—only applies where a court determines that the document is, in the first place, predecisional.

The court of appeals here reached the opposite conclusion: that the 2013 Jeopardy Opinions were *never* predecisional, but rather contained the "final conclusions" of the "final decision-makers" at the Services, Pet. App. 18a—that is, "the final view of an entire agency as to a matter which, once concluded, is final agency action," Pet. App. 19a. Nothing in the court of appeals' decision suggests that "abandonment . . . elevate[s] a draft document into a final decision," Pet. 26. The court of appeals did not conclude that the 2013 Jeopardy Opinions were predecisional drafts that became final when the Services "abandoned" them; nor did it indicate that any such "abandonment" followed EPA's decision to reduce its Rule's impact on endangered species. Pet. 26-27. It found the 2013 Jeopardy Opinions were final decisions, "approved by final decision-makers at each agency." Pet. App. 19a; and that those decisions provoked "changes" to EPA's preferred course of action, Pet. App. 19a-20a.

National Security Archive does not hold that such a document—a conclusive agency decision, with "a powerful coercive effect on the action agency," *Bennett*, 520 U.S. at 169—becomes predecisional when the action agency complies with it by abandoning the proposal that the document deems unlawful. To suggest otherwise, petitioners insist that the Services' jeopardy determination and the EPA's Intake-Structures Rule are a "single decisionmaking process," in which *EPA's* modification of its Rule necessitates the conclusion

that the *Services* modified or abandoned their jeopardy decisions. Pet. 26-27. But, as explained above, the ESA gives the Services independent and consequential decisionmaking authority, distinct from EPA's authority to promulgate the Intake-Structures Rule. Pet. App. 18a (citing *Bennett*, 520 U.S. at 178). *See Public Citizen*, 598 F.3d at 875 ("[A]n agency's application of a policy to guide further decision-making does not render the policy itself predecisional," if the policy represents a "decision regarding the agency's legal position"). That "EPA modified" its 2013 Intake-Structures Rule by adding wildlife protections consequently does not mean that "the Services abandoned" their 2013 Jeopardy Opinions. Pet. 26. It suggests the opposite: EPA's modifications are precisely the effect that would follow from a final jeopardy determination by the Services. *NAHB*, 551 U.S. at 652 (citation omitted).

II. The Court of Appeals' Decision Correctly Concluded, Based on the Facts in the Record, that the 2013 Jeopardy Opinions Were Not Predecisional.

In applying legal standards on which this Court and the lower courts broadly agree to the facts of this case, the court of appeals reached the correct conclusion: the government did not demonstrate that the contents of the 2013 Jeopardy Opinions (or the final version of the Reasonable and Prudent Alternatives) were predecisional. Pet. App. 17a-20a.

The court of appeals did not err in determining that the "record reflects the finality of the conclusions" in the 2013 Jeopardy Opinions, Pet. App. 19a, notwithstanding the Services' failure to formally designate the Opinions 'final' through signature, official transmission,[5] or inclusion of "final[ ]" in their titles. Pet. 21. As noted above, *Sears*'s prohibition on "secret law" prevents a court from treating an agency's "designat[ion] as 'formal,' 'binding,' or 'final' " as dispositive. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867-68 (D.C. Cir. 1980). Such formalities merely separate the decisions the agency wishes to make public from those it wishes to keep secret. The question is whether the documents describe "orders and interpretations which [an agency] actually applies." *Id.*; *see Sears*, 421 U.S. at 160 (suggesting need to look to "real operative effect" to determine whether deliberative process privilege applies).

The court of appeals was therefore correct to weigh both the formalities cited by petitioners and other "informal" indicia of the policy by which the Services "carr[y] out their responsibilities." *Public Citizen*, 598 F.3d at 875. And it was correct to find that the balance indicated that "[a]lthough the December 2013 biological opinions in this case were not *publicly* issued, they nonetheless represent the Services' final views and recommendations regarding the EPA's then-proposed

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[5] The Services did convey to EPA portions of their 2013 Jeopardy Opinions—including the Services' conclusion that EPA's initial Rule would result in jeopardy and was therefore prohibited. Pet. App. 40a; C.A. S.E.R. 76-77.

regulation." Pet. App. 18a. The Fish and Wildlife Service's responsible decisionmaker had made his "final edits," and the Opinion was ready for his "autopen signature." Pet. App. 19a; C.A. S.E.R. 79; *see Access Reports*, 926 F.2d at 1195 (Information "moving from senior to junior is far more likely to manifest decisionmaking authority and to be the denouement of the decisionmaking rather than part of its give-and-take."). The National Marine Fisheries Service had prepared a "roll-out plan" and "talking points," C.A. S.E.R. 11-12—activities that an agency does not undertake for mere "preliminary positions or ruminations," *Petroleum Info. Corp. v. Dep't of Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992) (Ginsburg, J.).

The Services indicated to EPA that they had reached "draft Jeopardy opinions," C.A. S.E.R. 76, and sent EPA Reasonable and Prudent Alternatives, C.A. S.E.R. 81—a step which, according to the Services, occurs *after* "the Services conclude that [the] agency action is likely to jeopardize listed species." C.A. E.R. 44. The Services completed the 2013 Jeopardy Opinions expecting that EPA would place them on its public docket. C.A. S.E.R. 11. And, perhaps most crucially, the 2013 Jeopardy Opinions had the "force and effect," *Sears*, 421 U.S. at 152, of a final jeopardy finding: EPA did not finalize its Rule, but instead complied with the Services' decision by adopting wildlife restrictions designed to reduce the Rule's impact on protected species. Pet. App. 19a-20a. *See NAHB*, 551 U.S. at 652.

That the Services "retain[ed] authority to revise" their jeopardy determination does not make the 2013

Jeopardy Opinions predecisional. Pet. 18. As this Court has noted, such authority is "a common characteristic of agency action," and "does not make an otherwise definitive decision nonfinal," *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1814 (2016) (citations omitted).[6] The record does not suggest that the Services did, in fact, alter their jeopardy decision; rather, they allowed EPA to finalize its Rule only after EPA adopted an alternative that addressed impacts to protected species. Pet. App. 19a-20a; *Cooling Water*, 905 F.3d at 63. The petitioners' insistence that the Services' jeopardy determination "carries no legal consequences" until it is formally stamped 'final,' Pet. 23, defies the pragmatism that has long governed this Court's approach to agency decisionmaking. *See Hawkes*, 136 S. Ct. at 1814; *Mink*, 410 U.S. at 91 (Exemption 5 demands "flexible, common-sense approach"). The statement "stop or I'll shoot" carries consequences, even before the speaker pulls the trigger.

Second, the ESA's implementing regulations do not render the 2013 Jeopardy Opinions predecisional. Pet. 24. The dissenting opinion cites 50 C.F.R. § 402.14(g)(5) as providing EPA "time to comment" on a draft biological opinion transmitted to the agency under that regulatory sub-section, and therefore supporting the conclusion that all information contained in such a draft must be predecisional. Pet. App. 30a. But

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[6] A document need not embody a final agency action reviewable under the Administrative Procedure Act, 5 U.S.C. § 706, to be subject to disclosure under FOIA. *See Sears*, 421 U.S. at 154-55 (Exemption 5 "can never apply" to final agency opinions).

the Services' regulations do not state that a jeopardy determination, conveyed to an action-agency pursuant to 50 C.F.R. § 402.14(g)(5), is preliminary and subject to comment by the action-agency. On the contrary, that sub-section states that when the Services "make available to the Federal agency [their] draft biological opinion," they do so "for the purpose of analyzing . . . *reasonable and prudent alternatives*," 50 C.F.R. § 402.14(g)(5) (emphasis added)—not the *jeopardy* determination that requires the adoption of such alternatives. The regulation provides for further deliberation regarding reasonable and prudent alternatives (deliberations that the court of appeals found to be privileged, until they reached their conclusion, Pet. App. 17a, 27a). It does not thereby render *all* of the Services' conclusions predecisional—especially the jeopardy determination that necessitates discussion of more protective alternatives. C.A. E.R. 44 ("[I]f the Services conclude that an agency action is likely to jeopardize listed species . . . the Services must provide" reasonable and prudent alternatives). *Cf. Public Citizen*, 598 F.3d at 875 (A document that makes a recommendation is "hardly contagious, spreading [its] predecisional and deliberative nature to all other documents in [its] vicinity," and an agency's general "advisory role" does not render all its documents predecisional.).

Third, the record fully supports the court of appeals' determination that the 2013 Jeopardy Opinions were not merely preliminary versions of the Services' 2014 Final No-Jeopardy Opinion. Pet. App. 19a-20a.

The 2014 Final No-Jeopardy Opinion addressed a distinct regulation—one that included endangered-species protections absent from the Intake-Structures Rule addressed by the 2013 Jeopardy Opinions. *Id.* That "EPA modified" its Intake-Structures Rule following receipt of the Services' jeopardy determination, Pet. 26, supports rather than negates the finality of the 2013 Jeopardy Opinions. As noted above, a final jeopardy determination compels exactly such modifications. To ignore the "changes" that "arise" from the Services' decision, *id.*, would be to ignore the "force and effect" of that decision—something the court of appeals could not do. *Sears*, 421 U.S. at 153.

The record flatly contradicts any suggestion that EPA "modified" the Intake-Structures Rule for reasons independent of the 2013 Jeopardy Opinions, inducing the Services to "abandon[]" their jeopardy determinations. Pet. 26-27. Prior to completion of the 2013 Jeopardy Opinions, EPA confirmed, at the Services' insistence, that EPA had provided its "final rule revisions," which had been "approved by [EPA's] administrators." C.A. S.E.R. 72. The Services informed EPA that they viewed EPA's then-current regulatory text as the "final rule," which would "serve as the basis" for the Services' biological opinion. *Id.* Those facts, found in the contemporaneous agency record, amply support the conclusion that EPA's adoption of endangered-species protections was a product of the Services' jeopardy determination—not an independent, unrelated EPA decision that caused the Services to discard that determination. And the agencies followed the 2013

Jeopardy Opinions with Reasonable and Prudent Alternatives, C.A. S.E.R. 81—the very existence of which *required* the Services to have reached a jeopardy conclusion. 16 U.S.C. § 1536(b)(3)(A); C.A. E.R. 44. Had the Services abandoned the 2013 Jeopardy Opinions, neither those Alternatives nor the wildlife-related restrictions that distinguished EPA's final Intake-Structures Rule from its 2013 proposed regulation would have been necessary. *See also* Pet. App. 6a (when Services issued their final 2014 "no-jeopardy" conclusion, EPA issued Rule "the same day").

III. Review Would Require Resolution of a Second, Equally Fact-Bound Question: Whether the 2013 Jeopardy Opinions Were "Deliberative."

Even if this Court were to accept petitioners' claim that the court of appeals erred by concluding that the documents in question contain "'final' agency decisions," Pet. 27, that would only satisfy one of the two prerequisites of the deliberative process privilege—that the documents be "predecisional." To grant petitioners relief, this Court would have to answer a second, equally fact-bound question: whether the 2013 Jeopardy Opinions were also "deliberative." *Public Citizen*, 598 F.3d at 367 ("'[I]t is not enough that a communication precede the adoption of an agency policy.' To qualify under Exemption 5, a document must also 'be a direct part of the deliberative process in that it makes recommendations or expresses opinions. . . .'"

(citation omitted))[7]; *see Mink*, 410 U.S. at 88 (privilege only applies where "production of the contested document would be 'injurious to the consultative functions of government.'" (citation omitted)); *Carter v. U.S. Dep't of Commerce*, 307 F.3d 1084, 1090 (9th Cir. 2002) (to determine if material is deliberative, court examines "the effect of the materials' release" (citation omitted)).

"Material is deliberative if it 'reflects the give-and-take of the consultative process,'" a standard that "focuse[s] upon whether disclosure of the requested material would tend to 'discourage candid discussion within an agency.'" *Petrochemical Info. Corp.*, 976 F.2d at 1434 (citations omitted). Based on its *in camera* review of the contested documents, the court of appeals concluded that the 2013 Jeopardy Opinions did not meet that standard. Pet. App. 26a-27a. It found that the Opinions "do not contain line edits, marginal comments, or any other written material that expose any internal agency discussion about the jeopardy finding." Pet. App. 25a. They do not include "any insertions or writings reflecting input from lower level employees."

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[7] *Accord Town of Norfolk v. U.S. Army Corps of Eng'rs*, 968 F.2d 1438, 1458 (1st Cir. 1992); *Grand Central Partnership v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999); *Abdelfattah v. U.S. Dep't of Homeland Sec.*, 488 F.3d 178, 184 (3d Cir. 2007); *Ethyl Corp.*, 25 F.3d at 1247; *Skelton v. U.S. Postal Serv.*, 678 F.2d 35, 36 (5th Cir. 1982); *Norwood v. FAA*, 993 F.2d 570, 576-77 (6th Cir. 1993); *Enviro Tech Int'l v. EPA*, 371 F.3d 370, 374 (7th Cir. 2004); *Missouri Coal. for the Env't Found. v. U.S. Army Corps of Eng'rs*, 542 F.3d 1204, 1211 (8th Cir. 2008); *Casad v. U.S. Dep't of Health & Human Serv.*, 301 F.3d 1247, 1252 (10th Cir. 2002); *Broward Bulldog, Inc. v. U.S. Dep't of Justice*, 939 F.3d 1164, 1194-95 (11th Cir. 2019).

Id. Their contents "do not reveal more about the internal deliberative process . . . than what the Services have already disclosed during [the] litigation: that the initial proposed regulation resulted in final drafts of jeopardy opinions in December 2013," and do not "reveal either the Services' internal deliberations that [led] to reaching those opinions or the EPA's internal deliberative process that resulted in revising the draft regulations." Pet. App. 26a.

Review of the court of appeals' not-deliberative holding would entail only reassessment of the above-described "evidence and . . . specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Yet this Court cannot answer the question petitioners present—whether the 2013 Jeopardy Opinions are exempt from disclosure under the deliberative process privilege, Pet. (I)—without undertaking that additional fact-specific inquiry. Predecisional material is not privileged, if it does not " 'reflect[ ] an agency's preliminary positions or ruminations' about a particular policy judgment." *NAHB v. Norton*, 309 F.3d at 39 (citation omitted). Addressing only whether the records are predecisional, without considering whether they are also deliberative, could provide no basis for altering the judgment below, rendering the Court's determination merely advisory. Accordingly, even if the petition's claims of error as to the records' predecisional status might otherwise merit this Court's review, the need to address this fact-bound issue to resolve the question presented would make the case a poor candidate for review.

IV. This Case Implicates No Interests Warranting Review.

The court of appeals' decision does not create any "risk of confusing and misleading the public," Pet. 33. The ESA gives the Services decisive authority, firmly circumscribing action-agencies' discretion. Allowing the Services to draw a veil of privilege over the exercise of that authority, merely by declining to formalize "signature" and "public issuance" of an otherwise conclusive opinion, Pet. 32, would run directly contrary to FOIA's fundamental purpose of ensuring that the public is aware of the reasons actually supplying "the basis for an agency policy," *Sears*, 421 U.S. at 152. *See Elec. Frontier Found.*, 739 F.3d at 7.

Neither does the opinion threaten to "chill the deliberative process" by upsetting any agency expectation that these particular biological opinions, or all opinions marked "draft," will be secret. Pet. 32-33. The record demonstrates that no such agency expectation exists. The Services believed that the 2013 Jeopardy Opinions would be made public when they completed them. C.A. S.E.R. 11-12 (noting understanding that EPA would place Opinions in record). Similar documents are, as a matter of general practice, routinely included in the public record, C.A. S.E.R. 164-199 (providing examples).[8] Far from "creat[ing] uncertainty," Pet. 32,

[8] The Services' practice of making "draft" biological opinions public may not constitute waiver. Pet. 32 n.4. But it strongly undercuts petitioners' suggestion that the "possibility" of draft opinions' disclosure will drastically alter the Services' decision-making. Pet. 32-33.

the court's decision merely confirmed the agencies' existing expectations.

Finally, the court of appeals applied a statutory provision that Congress has amended since the requests at issue. To assert a FOIA exemption as to records requested subsequent to the amendment, agencies must additionally show that "disclosure would harm an interest protected by [the] exemption," or that "disclosure is prohibited by law." 5 U.S.C. § 552(a)(8)(A)(i). *See* Pet. App. 12a n.7. Were a member of the public to request the 2013 Jeopardy Opinions today, that "heightened standard" would apply to any effort by the Services to withhold them. *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 375 F. Supp. 3d 93, 100 (D.D.C. 2019) (holding that the government must articulate a link between specific, reasonably foreseeable harm and specific material withheld). A decision from this Court would thus address the court of appeals' application of a superseded legal standard, further diminishing any grounds for certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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