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 FOR *AMICI CURIAE* CENTER FOR BIOLOGICAL DIVERSITY AND DEFENDERS OF WILDLIFE IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

Amici are non-profit conservation organizations with longstanding interests in the effective implementation of both the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), and the Endangered Species Act, 16 U.S.C. §§ 1531-1544 ("ESA").

The Center for Biological Diversity ("Center") is a non-profit membership organization dedicated to the protection of native species and their habitats through the application of science, policy, and environmental law. The Center is incorporated in California and headquartered in Tucson, Arizona, with field offices throughout the United States and Mexico. The Center has more than 1.6 million members and on-line activists who have interests in conserving endangered and threatened species and effective implementation of the ESA.

Defenders of Wildlife ("Defenders") is a non-profit membership organization also dedicated to the protection of native animals and plants in their natural habitats, including our country's most imperiled wildlife and habitat. Defenders is headquartered in Washington, D.C. with regional offices throughout the country. Defenders has more than 1.8 million members and online activists across the country who have interests in

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[1] All parties have provided written consent to the filing of this brief. No counsel for any party in this case authored this brief in whole or in part and no person or entity other than *amici* has made a monetary contribution to the preparation or submission of this brief.

protecting endangered and threatened species and effective implementation of the ESA.

In advancing their organizational missions to avoid the extinction and further the recovery of imperiled species, the Center and Defenders rely heavily on the consultation process embodied in Section 7 of the ESA. In turn, the Center and Defenders depend on access to documents they can obtain under FOIA to monitor and inform their members about federal agencies' compliance with Section 7 and whether the consultation process is being implemented to perform its Congressionally-mandated function to avoid jeopardizing the continued existence of species and destroying their critical habitats. The position advocated by the government in this case—which would cloak much of the Section 7 consultation process in secrecy and deprive the public of vitally important factual and scientific information bearing on the effects of agency actions on endangered and threatened species—is highly detrimental to the Center's and Defenders' organizational missions to safeguard species including by informing the public about how the ESA is being carried out.

SUMMARY OF ARGUMENT

It is undisputed that to qualify for the deliberative process privilege, as incorporated into Exemption 5 of FOIA, agency records must be both "predecisional" and "deliberative." *See* Petitioner's Brief ("Pet. Br.") at 26. The government's argument that the documents at

issue are predecisional under the particular circumstances of this case should be rejected for the reasons set forth in the Sierra Club's brief. In addition, the Court of Appeals correctly held that the documents do not qualify as deliberative. Biological Opinions and other documents generated in the ESA Section 7 consultation process are, and by law are required to be, factually-focused documents that present scientific information on the current status of imperiled species and the ways in which agency actions will affect them. Under this Court's seminal ruling in *Envtl. Prot. Agency v. Mink*, this kind of material, which does not entail deliberation on any sensitive matters of policy, cannot be withheld under Exemption 5. 410 U.S. 73 (1973).

The government's position that drafts and other agency records that precede a final agency decision may be withheld in their entirety under the deliberative process privilege squarely conflicts with *Mink* and is also contrary to the plain terms and pro-disclosure purpose of FOIA. As applied to the Section 7 consultation process, this position, if adopted by the Court, would deprive the public of essential scientific information regarding the plight of federally protected species and whether federal agency actions are driving such species closer to extinction.

ARGUMENT

I. BIOLOGICAL OPINIONS AND OTHER MATERIALS GENERATED IN THE ESA CONSULTATION PROCESS ARE QUINTESSENTIALLY FACTUAL DOCUMENTS THAT DO NOT WARRANT BLANKET PROTECTION UNDER THE DELIBERATIVE PROCESS PRIVILEGE.

The deliberative process privilege, as incorporated by Exemption 5, has two requirements: agency records for which the privilege is claimed must be both "predecisional" and "deliberative." *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 462 (D.C. Cir. 2014); *see also* Pet. Br. 26 (citing cases). Respondent Sierra Club has convincingly explained why, under the particular circumstances of this case, the documents at issue do not qualify as "predecisional" for purposes of the application of the privilege. Rather than rehash those arguments, with which *amici* agree, this brief will focus on the alternate basis on which, after *in camera* review of the actual documents, the Ninth Circuit concluded that the information at issue does not warrant withholding from public scrutiny: the information is not "deliberative" material of the kind that warrants wholesale protection under Exemption 5. Rather, by statutory mandate, Biological Opinions are fundamentally factual in nature and hence do not involve or reflect the kinds of policy debates and advice and recommendations that the deliberative process privilege is designed to protect.

In *Mink*, this Court held that, in invoking the deliberative process privilege to withhold documents sought under FOIA, it is insufficient for the government simply to assert that the records preceded an agency determination. Rather, the Court explained that the "privilege that has been held to attach to intragovernmental memoranda clearly has finite limits, even in civil litigation," and particularly that documents consisting of "factual material or purely factual material contained in deliberative memoranda and severable from its content would generally be available for discovery by private parties in litigation with the Government." 410 U.S. at 87-88 & n.14 (citing cases). In addition, "in applying the privilege, courts often were required to examine the disputed documents *in camera*, to determine which should be turned over or withheld." *Id*. at 88-89; *see also id.* at nn.15, 16 (collecting cases). The Court further explained that

> [w]e must assume, therefore, that Congress legislated against the backdrop of this case law, particularly since it expressly intended 'to delimit the exception [5] as narrowly as consistent with efficient Government operation.' Virtually all of the courts that have thus far applied Exemption 5 have recognized that it requires *different treatment for materials reflecting deliberative or policymaking*

> *processes on the one hand, and purely factual, investigative matters on the other.*

Id. at 89 & n.16 (quoting S. Rep. 813, 89th Cong., 1st Sess. 9 (1965)) (emphasis added).[2]

Documents generated in the course of ESA Section 7 consultation with regard to the impacts of agency actions on listed species and their habitats do not ordinarily involve "policy recommendations" of the kind that are the focus of Exemption 5's deliberative process privilege. *Mink*, 410 U.S. at 92. Rather, they are paradigmatic examples of the sorts of "factual, investigative" materials that are generally not covered by Exemption 5. *Id.* at 89.

For example, in initiating "formal consultation"—the process leading to issuance of Biological Opinions—the "action agency" must develop such basic factual material as a "description of the proposed action"; "any measures intended to avoid, minimize, or offset

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[2] In finding that "[n]othing in the legislative history of Exemption 5 is contrary to such a construction," the Court explained that, as originally introduced, FOIA contained an exemption that excluded " 'inter-agency memorandums or letters dealing solely with matters of law or policy' " and that this language was changed to its current form so that "confidential policy recommendations" would not have to be disclosed "simply because the document containing them also happened to contain factual data." *Mink*, 410 U.S. at 89-91. At the same time, the Court held that this "decision should not be taken, however, to embrace an equally wooden exemption permitting the withholding of factual material otherwise available on discovery merely because it was placed in a memorandum with matters of law, policy, or opinion." *Id*. at 91.

effects of the action"; the "duration and timing of the action"; the "location of the action"; the "specific components of the action and how they will be carried out"; "[m]aps, drawings, blueprints or similar schematics of the action"; "[a]ny other available information related to the nature and scope of the proposed action relevant to its effects on listed species or designated critical habitat"; a "map or description of all areas to be affected directly or indirectly by the Federal action"; "available information such as the presence, abundance, density or periodic occurrence of listed species and the condition and location of the species' habitat"; and "any other relevant information on the effects of the proposed action on listed species or designated critical habitat, including any relevant reports such as environmental impact statements and environmental assessments." 50 C.F.R. § 402.14(c)(1).

The U.S. Fish and Wildlife Service ("FWS") and/or National Marine Fisheries Service ("NMFS") (collectively "Service" or "Services") may then request "additional data" that would "provide a better information base from which to formulate a biological opinion." *Id*. § 402.14(f). Based on the "relevant information provided by the Federal agency or otherwise available," that may "include an on-site inspection of the action area," *id*. § 402.14(g)(1), the Services' Biological Opinions "shall include" a "summary of the information on which the opinion is based"; a "detailed discussion of the environmental baseline of the listed species and critical habitat"; a "detailed discussion of the effects of the action on listed species or critical habitat"; and the

Service's scientific finding as to whether the action is "[l]ikely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat." *Id*. § 402.14(h). A Biological Opinion that makes a finding of no jeopardy and no adverse destruction/modification of critical habitat must also be accompanied by a "statement concerning incidental take"—i.e., how many of the species may be killed, injured, or otherwise harmed as a result of the proposed action—that "[s]pecifies the impact, i.e., the amount or extent, of such incidental taking" as well as "reasonable and prudent measures" that are "necessary or appropriate to minimize such impact." *Id*. §§ 402.14(i)(1)(i)-(ii).

In short, Section 7 consultations overall and Biological Opinions in particular do not generally establish policy or address novel legal issues but, rather, present a "plain account of factual information" that must be brought to bear in reaching a "Congressionally mandated scientific decision" concerning species and habitat impacts. *Nw. Envtl. Advocates v. Envtl. Prot. Agency*, No. 05-1876, 2009 U.S. Dist. LEXIS 10456, at *21 (D. Or. Feb. 11, 2009); *see also* FWS, NMFS, *Endangered Species Consultation Handbook* (March 1998), at 4-15–4-34, https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf ("Section 7 Handbook") (further describing the factual information ordinarily included in Biological Opinions, such as "[m]aps and other graphics" reflecting the "action area within the species' range"; "information on the species' life history, its habitat and distribution, and other data or factors

necessary to its survival"; the "size of a [species'] population and its variance over time"; and a description of the "factors affecting the environment of the species or critical habitat in the action area").

Indeed, the ESA mandates that Biological Opinions as well as other materials generated in the Section 7 consultation process be confined to an assessment of the "best scientific and commercial data available." 16 U.S.C. § 1536(a)(2). The federal government is therefore foreclosed from making decisions on these matters based on political or other non-scientific bases. *See Bennett v. Spear*, 520 U.S. 154, 176 (1997) (holding that the "obvious purpose of the requirement that each agency 'use the best scientific and commercial data available' [in the Section 7 process] is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise"); *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000) (explaining that the "best available data" standard in the ESA "'prohibits the [Service] from disregarding available scientific evidence that is in some way better than the evidence [it] relies on'") (citation omitted).

Consequently, by legislative mandate, Biological Opinions and other materials generated in the consultation process are "almost . . . exclusively factual document[s]" that "contain a significant amount of data, research, and statistical figures" regarding the status of imperiled species and the effects of agency actions on listed species and habitats. *Ctr. for Biological*

Diversity v. U.S. Marine Corps, No. 00-2387, 2005 U.S. Dist. LEXIS 50151, at *3 (D.D.C. Sept. 15, 2005); *see also* Section 7 Handbook at xi (to "assure the quality of the biological, ecological, and other information used in the implementation of the Act, it is the policy of the Services to . . . evaluate all scientific and other information used to ensure that it is reliable, credible, and represents the best scientific and commercial data available" and "document their evaluation of comprehensive, technical information regarding the status and habitat requirements for a species throughout its range").

With regard to the specific documents at issue in this case, both the district court and court of appeals conducted *in camera* reviews to assess the deliberative nature of the materials. *See* Petition Appendix ("Pet. App.") at 38a (District Court "Order Following In Camera Review"); *id*. at 25a (Court of Appeals description of *in camera* review). In *Mink*, this Court endorsed *in camera* inspection as a "necessary and appropriate" means by which a reviewing court may, in suitable circumstances, determine whether a document consists of genuinely deliberative material on the one hand or quintessentially factual material on the other. 410 U.S. at 93. FOIA also expressly authorizes district courts to conduct *in camera* reviews to "determine whether [agency] records or any part thereof shall be withheld under any of the exemptions" in the statute, including Exemption 5. 5 U.S.C. § 552(a)(4)(B).

Here, both the district court and court of appeals employed that process, reviewed the actual documents

at issue, and made *de novo* findings that, even aside from the documents' failure to qualify as genuinely predecisional in character, they do not contain the sorts of deliberative materials that Exemption 5 was intended to protect. Pet. App. 25a, 38a. This Court should not upset the considered judgment of the two lower courts that engaged in the very *in camera* review sanctioned in *Mink* and specifically authorized by Congress for distinguishing between exempt and non-exempt materials. In any event, the Court should take into account the fundamentally factual, technical, and scientific nature of documents generated in the Section 7 consultation process in determining how the deliberative process privilege—intended to protect the "frank discussion of legal or policy matters" and not "factual material," *Mink*, 410 U.S. at 87-88—applies in this case.

II. THE GOVERNMENT'S CONTENTION THAT THE PUBLIC HAS A RIGHT OF ACCESS TO ONLY FINAL DECISION DOCUMENTS CONFLICTS WITH *MINK* AS WELL AS THE PLAIN TERMS AND PURPOSE OF FOIA.

While acknowledging that this Court's precedents require documents subject to the deliberative process privilege to be both "predecisional" and "deliberative," Pet. Br. 26, the government asks the Court to endorse a broad-brush approach under which the requirement that information be deliberative in nature is rendered meaningless. Hence, in addition to arguing that the documents at issue constitute "predecisional" drafts,

the government contends that "*[a]ll of the provisional drafts in this case were deliberative* because they were 'intended to facilitate or assist development of the [Services'] final position on' the EPA's rule." *Id.* at 43 (emphasis added; citation omitted). In the government's view, therefore, merely by virtue of the documents being (according to the government) "predecisional," they are also, *ipso facto*, "deliberative" in nature *in toto*; *see also id*. at 25 (arguing that the "only remaining question in this case" is "whether the Services' draft documents were just that—drafts").

Under this extraordinarily sweeping approach to Exemption 5, every document a federal agency characterizes as a "draft," along with virtually every other scrap of paper any federal agency generates—besides a document reflecting or incorporating a "final position" of the agency—may be withheld in its entirety. *Id*. at 19-20 (arguing that every agency record at issue that does not embody a final decision and therefore "carry the force of law" falls within the deliberative process privilege). The government seeks to justify this functional conflation of the two distinct requirements for invocation of the deliberative process privilege on the grounds that there is a "need for clear and workable rules," *id.* at 25, and that anything short of wholesale withholding of any purported draft or other document that is a precursor to an ultimate decision will not afford the "clarity that is necessary for the privilege to be effective." *Id.* at 21.

While the approach advocated by the government is certainly "clear," it is also irreconcilable with the

Court's holding and reasoning in *Mink*, the plain terms of FOIA, and the overarching design of the statute. In *Mink*, the Court expressly rejected the sort of "wooden" approach advocated by the government—*i.e.*, one that would "permit[] the withholding of factual material otherwise available on discovery merely because it was placed in a memorandum" that preceded the adoption of a final agency decision. *Mink*, 410 U.S. at 91. The Court instead embraced a "flexible, commonsense approach that has long governed private parties' discovery of such documents in litigation with Government agencies," under which all "severable" factual material must be disclosed even if contained in *otherwise* "deliberative memoranda." *Id*. at 88-91.

In conflict with this holding, under the government's proposed approach, even such quintessentially factual information as a "statistical chart showing estimated aggregated effects of cooling water intake structures on protected species," Pet. Br. 14, and any "additional data" that were generated to "help[] ensure the technical accuracy of the opinion," *id*. at 31, may be withheld from public scrutiny so long as they were predecisional to a "final biological opinion" publicly issued by a Service and reviewable under the Administrative Procedure Act ("APA"). *Id*. at 43. But that is precisely the "wooden" approach to the deliberative process privilege that this Court rejected in *Mink*.

Indeed, if the government's test for withholding had been applied in *Mink*, that case would have been resolved entirely differently than it was. The documents withheld on Exemption 5 grounds in *Mink*

involved indisputably *predecisional* memoranda, prepared for the President's consideration, in which various agency officials were tasked with both "review[ing] the annual underground nuclear test program" and "encompass[ing] within this review requests for authorization [by the President] of specific scheduled tests." *Mink*, 410 U.S. at 76. Accordingly, if the government's "clear" test had been applied to those disputed documents, they undoubtedly could have been withheld in their entirety because they were designed to "facilitate or assist development of the [President's] final position" on the nuclear testing issue. Pet. Br. 43. That, however, is not how the Court resolved the case. Instead, applying a more "flexible, commonsense approach" to Exemption 5, the Court remanded for a determination of whether "separable, factual" information was contained within the predecisional documents, including through use of the very kind of "*in camera* inspection" conducted by the district court and court of appeals here. *Mink*, 410 U.S. at 91-93. Consequently, to adopt the government's proposed approach the Court would have to overrule *Mink* although the government has not proffered (and cannot proffer) any legitimate justification for doing so.

The government's proposed test for invocation of the deliberative process privilege is also impossible to harmonize with the plain terms of FOIA itself, which make clear that the public's right of access cannot be confined solely to final decision documents. To begin with, the government's approach disregards FOIA's express requirement that "[a]ny reasonably segregable

portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). As *Mink* holds, that requirement applies fully to materials prepared for consideration by an ultimate decisionmaker. *See Mink*, 410 U.S. at 92-93.[3]

Further, as the government itself points out, in addition to the public's right to *request* agency records—the statutory provision at issue here—FOIA contains "affirmative disclosure" provisions providing that even without a request, agencies must proactively publicize particular kinds of agency materials. Pet. Br. 37. These provisions encompass materials that must be published in the Federal Register, such as "substantive rules of general applicability" and "statements of general policy or interpretations of general applicability," 5 U.S.C. § 552(a)(1)(D), and other materials that must be made affirmatively "available for public inspection," including "*final opinions*," and "statements of policy and interpretations *which have been adopted by the agency* and are not published in the Federal Register." *Id*. §§ 552(a)(2)(A), (B) (emphasis added).

According to the government, this "statutory text" somehow "shows that Congress separated protected documents from unprotected ones based on whether they established a final opinion, policy, or

[3] Even the dissenting judge below would have "instruct[ed] [the district court] to perform a segregability analysis on remand," Pet. App. 37a, which the government ignores while asking for a ruling that all of the documents in their entirety be deemed "protected against compelled disclosure." Pet. Br. 48.

interpretation, not whether the document addressed an earlier version of an agency proposal." Pet. Br. 37. That might be a valid argument if FOIA contained *only* the affirmative disclosure obligations. But the argument makes no sense in view of the fact that FOIA *also* authorizes the public to request other agency records that are not covered by the affirmative disclosure requirements. *See* 5 U.S.C. § 552(a)(3)(A) ("each agency, upon request for any record which [] reasonably describes such records . . . shall make the records promptly available to any person"); *see also U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 754-55 (1989) (explaining that the ability to *request* information that is not affirmatively required to be disclosed is an "addition[al]" right under FOIA). The only reasonable interpretation of that additional public disclosure right—and the only one consistent with basic principles of statutory construction—is that Congress did not, as the government maintains, intend to restrict public access only to "a *final* opinion, policy, or interpretation" of an agency. Pet. Br. 37 (emphasis added); *see also Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 13 (2015) (explaining that rendering statutory provisions "mere surplusage" is a "result we try to avoid" in statutory construction).

Indeed, the government's effort to restrict public scrutiny only to what the government itself acknowledges as final decision documents would nullify the overarching pro-disclosure mandate of FOIA. As this Court has stressed, Congress's determination to authorize members of the public to request access to

specific agency records—in addition to the final decision documents that must be affirmatively disclosed under other provisions—embodies the "'basic policy that disclosure, not secrecy, is the dominant objective of the Act.'" *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (quoting *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976)).

The Court explained in *Mink* that FOIA was a "revision of § 3, the public disclosure section" of the APA, which was "generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute." 410 U.S. at 79. The requirements of FOIA were therefore intended to "stand in sharp relief against those of § 3" by "permit[ting] access to official information long shielded unnecessarily from public view" and "creat[ing] a judicially enforceable public right to secure such information from possibly unwilling official hands." *Id*. at 79, 80.

However, the government's proposed approach to Exemption 5 would, in practical effect, render FOIA functionally indistinguishable from its discarded predecessor. Virtually every agency-generated document is part and parcel of an agency decision making process of some kind. Consequently, if, as the government maintains, virtually everything other than an agency record that reflects a final agency decision may be withheld as "deliberative" as well as "predecisional," then the overwhelming majority of agency records can be withheld in their entirety, FOIA will be rendered "more [of] a withholding statute than a disclosure

statute," *Mink*, 410 U.S. at 79, and secrecy rather than disclosure will be the order of the day in contravention of Congress's design.[4]

III. THE GOVERNMENT'S APPROACH TO EXEMPTION 5 WOULD DEPRIVE THE PUBLIC OF CRUCIAL INFORMATION REGARDING IMPERILED SPECIES THAT IS GENERATED IN THE SECTION 7 CONSULTATION PROCESS.

The dire implications of the government's position are illustrated vividly by the shroud of secrecy the government asks the Court to drape over the ESA Section 7 consultation process. According to the government, the "deliberative process privilege stops at *final* agency documents [] and a Service's decision in an ESA Section 7 consultation is not final until it issues a final biological opinion." Pet. Br. 47. Under this view, every piece of technical information exchanged between a

[4] The government cites the Court's recent ruling in *Food Mktg. Inst. v. Argus Leader Media* for the proposition that FOIA's "exemptions serve 'important interests' and they are 'as much a part of FOIA's purposes and policies as the statute's disclosure requirement.' " Pet. Br. 22 (quoting 139 S. Ct. 2356, 2366 (2019)). But under the government's approach, Exemption 5 would completely overwhelm the statute's disclosure requirement. In that regard, it is also worth noting that *Food Marketing* significantly expanded the scope of Exemption 4 as it applies to *non*-agency generated records, *i.e.*, those submitted to the government by private entities. If the government's approach to Exemption 5 were also to be adopted as to agency-generated documents, then very little of substance would be left of the public's right to request access to records covered by FOIA.

Service and an action agency that does not, for whatever reason, make it into a "final biological opinion" reviewable under the APA is covered by the "deliberative process privilege" and should be shielded from public scrutiny. *Id*.

For example, a FWS expert biologist's factual description of a depleted species' population numbers or the current threats to its continued existence before additional effects of the agency action are factored in—what is known as the "baseline" condition of the species and its critical habitat, 50 C.F.R. § 402.14(h)(ii)—may be withheld from public review so long as such data are, for whatever reason, not included in a *final* Biological Opinion. Likewise, a geographic map of the "area[] to be affected directly or indirectly by the Federal action," *id*. § 402.14(c)(1)(ii), may never see the light of day if it is not included in a final opinion. Allowing such core factual material to be withheld from the public merely because it is contained in an ostensibly "draft" document—or is otherwise deemed predecisional to a Service's ultimate Biological Opinion—would foreclose meaningful public understanding of how agencies are fulfilling their vital responsibilities to "insure" that their actions are not "jeopardiz[ing] the continued existence of any endangered species or threatened species" and, in particular, whether they are relying on the "best scientific and commercial data available" in the consultation process, as required by the ESA. 16 U.S.C. § 1536(a)(2). Indeed, allowing the government to shield this entire Congressionally-mandated extinction-avoidance process from public review, but for the

Services' ultimate Biological Opinions, would fundamentally abridge the "citizens' right to be informed about 'what their government is up to'"—which is FOIA's prime concern. *Reporters Comm.*, 489 U.S. at 772-73.[5]

This deprivation of public access is especially destructive to government transparency and public oversight in view of the fact that, as explained further below, very few of the thousands of ESA consultations that are conducted each year even result in *final* Biological Opinions, and even fewer in so-called "jeopardy" Biological Opinions. Consequently, under the government's proposed approach, the public could be deprived of a vast amount of important factual information bearing on agencies' performance of their obligations under Section 7 to avoid contributing to the loss of species.

The ESA implementing regulations distinguish between "formal" and "informal" Section 7 consultations, with only the former resulting in final Biological

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[5] The public's acute interest in learning about whether federal agencies, including the Services, are in fact relying on the best available science is reinforced by high-profile instances in which political appointees have directed FWS biologists to disregard the technical data they have compiled and instead make ESA decisions based on non-scientific considerations in contravention of the law. *See*, *e.g.*, Holly Doremus, *Scientific and Political Integrity in Environmental Policy*, 86 Tex. L. Rev. 1601, 1603-09, 1640-43 (2008) (describing instances in which interference by a political appointee in the Interior Department prevented FWS scientists from issuing Biological Opinions and other ESA decisions based on the best available scientific data, resulting in decisions subsequently being withdrawn or invalidated).

Opinions. *See* 50 C.F.R. §§ 402.13, 14. Informal consultation is an "optional process that includes all discussions, correspondence, etc. between the Service and the Federal agency . . . designed to assist the Federal agency in determining whether formal consultation" is required. *Id*. § 402.13(a). If, during informal consultation, the Service provides "written concurrence" that the agency's action "is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary"—i.e., no formal consultation is conducted and no final Biological Opinion is ever produced. *Id*. § 402.13(c).

According to several studies, the overwhelming majority of consultations conducted over the years have been informal, with no resulting Biological Opinion.[6] The most recent such study found that, of 88,290 ESA consultations conducted between 2008 and 2015, 81,461 of them were informal, so that only about 8% of all consultations resulted in formal consultation, the process by which final Biological Opinions are produced. *See* Jacob W. Malcom & Ya-Wei Li, *Data Contradict Common Perceptions About a Controversial Provision of the U.S. Endangered Species Act*, 112

[6] *See* H.R. Rep. 97-567, Part 1, Committee on Merchant Marine and Fisheries, Endangered Species Amendments (1982) ("1982 House Report"); Donald Barry, et al., *For Conserving Listed Species, Talk is Cheaper Than We Think* (World Wildlife Fund) (1992), http://www.nativefishlab.net/library/textpdf/15635.pdf ("Barry Study").

PNAS 15844-15849 (Dec. 29, 2015) ("Malcom & Li Study").[7]

Consequently, if, as the government maintains, the "deliberative process privilege stops at *final* agency documents [] and a Service's decision in an ESA Section 7 consultation is not final until it issues a final biological opinion," Pet. Br. 47, the public may be denied even the most basic information generated during Section 7 consultation—the central legal tool crafted by Congress to stem the tide of extinctions, *see TVA v. Hill*, 437 U.S. 153, 179 (1978)—more than 92% of the time. *See also W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011) (describing the Section 7 process as the "[h]eart of the ESA"). That is hardly consistent with the "broader objective of transparent and open government." *Nat'l Sec. Archive*, 752 F.3d at 464.

Even in the relatively rare circumstances in which formal consultation is pursued, the Services' issuance of final Biological Opinions finding that particular agency actions will jeopardize the continued existence of species is scarcer still. While that has always been the case, *see* 1982 House Report at 13 (finding that 1.8% of the formal consultations studied resulted in jeopardy opinions), in more recent years, jeopardy opinions have become virtually non-existent. Between 2008 and 2015, out of 6,829 formal consultations, FWS

[7] Available at https://www.pnas.org/content/112/52/15844.

issued a jeopardy opinion only *twice*, for a rate of just 0.03%. *See* Malcom & Li Study, 112 PNAS at 15848.[8]

While there are a number of reasons for the increasing paucity of jeopardy findings, including pressure applied by agency higher-ups to Service biologists to avoid them, *see supra* at n.6, one of the principal explanations is that such opinions are "negotiated away" during the consultation process—as apparently occurred in this case. In other words, "federal agencies are now more inclined to continue negotiating the scope of their proposed projects in response to FWS issuing a draft biological opinion with a jeopardy or destruction/adverse modification conclusion." Malcom & Li Study, 112 PNAS at 15847.

According to the government, such outcomes signify that the "ESA consultation process [has] worked as Congress intended for the benefit of protected species." Pet. Br. 34; *id*. at 8 (asserting that the agencies "worked collaboratively to achieve a regulatory solution that would benefit ESA-listed species"). But, as in this case, in the absence of any public scrutiny of the process by which a jeopardy determination on a certain action has been altered to a no jeopardy conclusion on a modified action, it is impossible for the public to know

[8] This decline in the number of jeopardy opinions is particularly striking since it occurred during a time frame in which the number of species listed as endangered or threatened *increased* by 318 species. *See* FWS, U.S. Federal Endangered and Threatened Species by Calendar Year, at https://ecos.fws.gov/ecp0/reports/species-listings-count-by-year-report.

whether such a dramatic shift in conclusions—which may spell the difference between survival or extinction for a species already on the brink of oblivion—is in fact supported by the "best available scientific data" as required by the statute. This is exactly the kind of "[o]fficial information that sheds lights on an agency's performance of its statutory duties [that] falls squarely within [FOIA's] statutory purpose." *Reporters' Comm.*, 489 U.S. at 773.

To be sure, as the government acknowledges, the Services have frequently released to the public the kinds of documents at issue here, thereby recognizing the vital interest that conservation—as well as industry—advocates have in understanding how the Section 7 process is being carried out in practice. *See* Pet. Br. 47. Yet the government contends that the "fact that the Services have weighed the benefits and drawbacks of disclosure differently in other proceedings does nothing to undermine the Services' official judgments here." *Id*. That is tantamount to a concession that releasing draft Biological Opinions and other documents that provide the public with insight into the consultation process cannot be inherently harmful to any agency deliberations. More important, the government's argument betrays a fundamental misunderstanding of why FOIA was enacted: "to create a judicially enforceable public right to secure such information from possibly unwilling official hands" rather than to allow government officials to pick and choose when they will deign to allow public access to agency records of paramount

public import and when they will not. *Mink*, 410 U.S. at 80.

CONCLUSION

For the foregoing reasons, the Court should affirm the holding of the court of appeals.

Respectfully submitted,

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