No. 19-547

In the Supreme Court of the United States

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

v.

SIERRA CLUB, INC.

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

REPLY BRIEF FOR THE PETITIONERS

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The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively, the Services) properly invoked the deliberative process privilege over the documents at issue here: draft biological opinions and drafts of associated documents, all of which were prepared by staff at the Services but never adopted by the relevant agency decisionmakers. Respondent fails to rebut the Services' showing that those documents—created in the course of an ongoing interagency consultation between the Services and the Environmental Protection Agency (EPA) under Section 7(a)(2) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1536(a)(2)—are pre-decisional drafts, not records of a decision the Services actually made. The draft documents are therefore exempt from compelled disclosure under Exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(5).

The panel majority reasoned that, even though the Services did not make their final decision in the interagency consultation until they issued their joint final biological opinion in May 2014, the deliberative process privilege nevertheless does not apply because the draft documents at issue purportedly represented the Services' "final view" about a *prior version* of EPA's draft rule, under consideration in December 2013. Pet. App. 18a. The majority's approach is deeply flawed. It would make the deliberative process privilege unavailable whenever a draft, pre-decisional document happens to be the last word within an agency about a matter that "die[s] on the vine," *National Sec. Archive* v. *CIA*, 752 F.3d 460, 463 (D.C. Cir. 2014) (Kavanaugh, J.), even when—as was the case here—the draft document was never adopted by the officials authorized to make decisions for the agency.

Respondent principally contends that the December 2013 draft biological opinions should be treated as final, rather than pre-decisional, because the drafts allegedly had the "operative effect" of causing EPA to revise its draft rule—a claim that neither the court of appeals nor the district court endorsed. Resp. Br. 19; see *id.* at 22-27. Respondent's alternative theory fares no better than the panel majority's rationale. Respondent's position is at odds with the record in this case and with the statutory and regulatory context of Section 7(a)(2) consultations, all of which make clear that the Services' decisionmakers never actually made a decision about whether the version of the EPA rule under consideration in December 2013 would have likely jeopardized ESA-listed species or adversely modified critical habitat. Respondent's effects-based approach also has no basis in this Court's precedent, and it would severely

undercut the clarity and certainty that are necessary for the deliberative process privilege to fulfill Congress's purpose of encouraging "frank discussion." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (citation omitted).

The documents that respondent seeks in this case are not final opinions explaining "the reasons for an agency decision already made," *Renegotiation Bd.* v. *Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975), but rather discussion drafts recommending a decision that the Services never made, for reasons they never adopted, addressing a version of the EPA rule that never issued. The deliberative process privilege exists to prevent such efforts to probe the pre-decisional mental processes within federal agencies. The Services should be "judged by what they decided, not for matters they considered before making up their minds." *National Security Archive*, 752 F.3d at 462 (citation omitted).

A. The Draft Documents Were Staff Recommendations To Agency Decisionmakers, Not Final Decisions

Respondent hangs its case on the contention that the Services "made a decision" in December 2013 finding that the version of the EPA draft final rule under consideration at that time would jeopardize ESA-listed species. Resp. Br. 1; see, *e.g.*, *id.* at 1-2, 13-14, 22, 25-27. That contention is unfounded. FWS and NMFS officials involved in the consultation process have stated in sworn declarations that the December 2013 draft opinions were not signed or adopted by the relevant agency decisionmakers, were not publicly issued, and were not treated as official commitments. Respondent's competing account of a "multi-step" process, *id.* at 38 (capitalization and emphasis omitted), in which the Services made a jeopardy decision in December 2013 and

then continued to deliberate only about other matters, is inconsistent with the regulatory scheme, established practice, and the record. And respondent cannot circumvent those shortcomings by relying instead on the purported "operative effect" of the draft documents on EPA. *Id.* at 19. Such an effects-based approach would undermine the clear distinction that this Court has drawn between pre-decisional recommendations and post-decisional memoranda.

1. The relevant decisionmakers did not sign or adopt the December 2013 draft biological opinions

The deliberative process privilege that Congress incorporated into FOIA Exemption 5 distinguishes between "predecisional memoranda prepared in order to assist an agency decision-maker in arriving at his decision, which are exempt from disclosure, and postdecisional memoranda setting forth the reasons for an agency decision already made, which are not." *Grumman Aircraft*, 421 U.S. at 184. The courts of appeals have generally implemented that distinction by requiring inter-agency or intra-agency documents to be both "predecisional" and "deliberative" in order to qualify for the privilege. Gov't Br. 26 (collecting cases); cf. Resp. Br. 7. The documents at issue here amply satisfy those requirements.

Indeed, respondent does not dispute the key facts demonstrating that the December 2013 draft biological opinions are pre-decisional staff recommendations: the drafts were never signed by the relevant agency decisionmakers; those decisionmakers did not adopt the drafts when presented with them, but instead concluded that "more work needed to be done," J.A. 37; and the drafts were never circulated in full to EPA. Gov't Br. 28-29. Respondent itself identifies the documents as

"*draft* biological opinions." Resp. Br. 13 (emphasis added). More accurately, the documents were drafts of drafts; the Services did not even reach the point of transmitting a complete draft biological opinion to EPA in December 2013 before EPA decided to change course and revise the draft final rule that was the subject of the Section 7(a)(2) consultation. Gov't Br. 30.[1]

Respondent is thus wrong to equate (*e.g.*, Br. 21) the recommendations by the Services' personnel in the draft biological opinions with "a conclusive jeopardy determination" by the Services themselves. The agency staff who prepared those documents lacked the authority to make final decisions for the agencies. Under the ESA, the biological opinion that concludes formal interagency consultation under Section 7 is issued by "the Secretary," 16 U.S.C. 1536(b)(3)(A), a term the ESA defines to mean either "the Secretary of the Interior or the Secretary of Commerce," 16 U.S.C. 1532(15), depending on the species involved. The Secretaries have delegated their authority to conduct consultations and to issue biological opinions to, respectively, the Director of FWS and the Assistant Administrator for Fisheries at NMFS. 51 Fed. Reg. 19,926, 19,926 (June 3, 1986); 50 C.F.R. 402.14(h)(1)(iv). Those officials, in turn, may authorize subordinates to act on their behalf. 51 Fed. Reg. at 19,935.

In this case, the authority to act for the agencies rested with specified subordinate officials in FWS and

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[1] The other documents at issue are drafts that were prepared to accompany the never-consummated circulation of the December 2013 draft biological opinions, and a March 2014 draft of reasonable and prudent alternatives. Those documents are privileged for the same reasons that the December 2013 draft biological opinions are privileged. See Gov't Br. 13-14, 28.

NMFS—specifically, the Director of the NMFS Office of Protected Resources and the Assistant Director for Ecological Services at FWS. See J.A. 33, 56-57. Those designated agency decisionmakers adopted and signed (or caused to be signed) the final biological opinion issued in May 2014, J.A. 112, but they never similarly finalized the December 2013 draft biological opinions. Assistant Director Frazer, the decisionmaker at FWS, submitted a declaration under oath in this case stating unequivocally that he did not sign the draft biological opinions presented to him in December 2013 and did not transmit them in full to EPA because "FWS concluded that additional consultation was needed to better understand * * * key elements of EPA's rule." J.A. 58. The Court thus has before it direct evidence from the official at FWS best positioned to know whether the agency made a decision in December 2013, and he says that it did not. The record also contains a declaration to similar effect from a senior NMFS official who participated in the consultation. See J.A. 30, 33, 37. Accordingly, the Services did not "concededly * * * provide EPA with their decision" in December 2013. Resp. Br. 26 (emphasis omitted). The agency decisionmakers did not make a decision at that time, let alone transmit it to EPA.

Respondent contends (Br. 48-51) that the government's approach would give undue weight to whether the relevant agency decisionmaker adopted or signed a document. But those are hardly empty formalities; they are the very things that convert a draft into a decision with legal consequences. The adoption of a recommendation as an official agency decision marks the end of the deliberative process "by which governmental decisions and policies are formulated," *Sears*, 421 U.S. at 150 (citation omitted), *i.e.*, the point when the relevant

agency decisionmaker renders a "final disposition[]" of the matter under consideration, *Grumman Aircraft*, 421 U.S. at 187. The text of FOIA's affirmative disclosure obligations reflects the same focus, requiring agencies to disclose "*final* opinions" and "statements of policy and interpretations which have been *adopted*" by the agency. 5 U.S.C. 552(a)(2)(A) and (B) (emphases added); see Gov't Br. 37. Here, the relevant agency decisionmakers never signed the December 2013 draft biological opinions because they never adopted them as agency decisions or policies, however polished the drafts may have been. See J.A. 39 (December 2013 drafts "reflect[ed] a preliminary analysis," which "was not adopted"); J.A. 58-59, 67 (similar).

This dispute therefore does not involve any "secret agency law." *Sears*, 421 U.S. at 153 (brackets and citation omitted). There was only non-final, preliminary analysis in draft form, not a decision that had any binding effect, even internally. The cases invoked by respondent (Br. 49) are not to the contrary; those cases addressed documents memorializing the so-called working law of the agency—legal positions that had been "adopted, formally or informally, as the agency position." *Coastal States Gas Corp.* v. *Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); see *id.* at 868-869 (requiring disclosure of final opinions explaining the application of "agency regulations in specific factual situations"); *Tax Analysts* v. *IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997) (requiring disclosure of final memoranda expressing "considered statements of the agency's legal position"). No such adoption occurred here in December 2013. And when the Services did make a final decision in May 2014, they released their biological opinion to the public.

Finally, the government's position here would not, as respondent asserts, transform the deliberative process privilege into "an all-purpose back-up provision to withhold sensitive records that do not fall within any of FOIA's more targeted exemptions." Resp. Br. 44 (quoting *Milner* v. *Department of the Navy*, 562 U.S. 562, 579 (2011)). In *Milner*, this Court rejected an interpretation of FOIA Exemption 2, 5 U.S.C. 552(b)(2), that would have allowed agencies to withhold records concerning an agency's rules and practices for its personnel to follow (as opposed to records of personnel practices), in part out of concern that a broader interpretation of Exemption 2 would "tend to engulf" other FOIA exemptions. 562 U.S. at 578; see *id.* at 577-579. The government's position does not create any similar concern. Contrary to respondent's suggestion (Br. 44), FOIA does not require an agency to disclose *draft* "policies relating to sentencing," *draft* "enforcement * * * guidelines," or other draft documents that might, if finalized, constitute the working law of the agency.

2. The ESA and its implementing regulations confirm that the draft biological opinions are pre-decisional

Section 7(a)(2) and its implementing regulations confirm that the December 2013 draft biological opinions were merely that—drafts. Gov't Br. 30-35. Respondent depicts (Br. 20) the consultation process as a stepwise "sequence of decisions" in which the Services first reached a final decision on jeopardy and then proceeded to deliberate further only about reasonable and prudent alternatives (RPAs). See Resp. Br. 38-42. That view cannot be reconciled with the statutory and regulatory scheme or with established practice, and it does not accurately describe the deliberations that occurred here.

a. Section 7(a)(2) provides that each federal agency "shall, in consultation with and with the assistance of the Secretary, insure" that its actions are not likely to jeopardize listed species or adversely modify designated critical habitat. 16 U.S.C. 1536(a)(2). The statutory text does not suggest a staggered series of decisions, as respondent envisions, but rather a single "consultation," *ibid.*, culminating in "a written statement setting forth the Secretary's opinion," 16 U.S.C. 1536(b)(3)(A). The implementing regulations bear out that understanding. Under the regulations, a formal consultation concludes with the Service's issuance of a "biological opinion," stating its "opinion on whether the action" is likely to cause jeopardy. 50 C.F.R. 402.14(h)(1)(iv). If the Service issues a jeopardy opinion, the "opinion shall include reasonable and prudent alternatives, if any," that the Service believes would avoid jeopardy. 50 C.F.R. 402.14(h)(2); cf. 16 U.S.C. 1536(b)(3)(A). Identifying RPAs is therefore part of issuing a jeopardy opinion.

Respondent is wrong to liken (Br. 40-41) a jeopardy determination to "[t]hreshold agency decisions" that trigger "additional decisional steps"—such as a decision by EPA to designate a category of sources of hazardous air pollutants, see *Michigan* v. *EPA*, 576 U.S. 743, 747-749 (2015). Unlike the sequential processes required by statute in other contexts, the ESA and its implementing regulations do not contemplate a final decision on jeopardy, followed by a separate final decision on RPAs, but rather a single "written statement" setting forth the Service's entire opinion. 16 U.S.C. 1536(b)(3)(A).

The Services reached such a final decision only in May 2014, when they signed and issued the joint final

biological opinion. Prior to that time, agency decisionmakers were free to "change their minds," *Grumman Aircraft*, 421 U.S. at 189-190 n.26, about any aspect of the agency's analysis. This case therefore does not present any question about whether "consequential intermediate decisions within multi-step regulatory processes" are exempt from disclosure. Resp. Br. 38 (capitalization and emphasis omitted). The December 2013 draft biological opinions were not agency decisions at all, "intermediate" or otherwise.

If the Services had (contrary to fact) made a final decision in the consultation in December 2013, they would have been obligated to provide an opinion to EPA promptly. See 16 U.S.C. 1536(b)(3)(A) (requiring the Secretary to provide an opinion "[p]romptly after conclusion of consultation"). In fact, the consultation continued for an additional five months. And respondent does not identify any authority for its suggestion (Br. 14) that the Services could have transmitted a final jeopardy opinion to EPA in December 2013 by telephone. The statute requires a "written statement" of the final opinion. 16 U.S.C. 1536(b)(3)(A).

b. The applicable regulations also underscore the pre-decisional character of the documents that respondent seeks. Under the regulations, if the Services prepare a jeopardy opinion, the Services must "make available * * * the *draft* biological opinion" to the action agency upon request, and the Services may not issue a final opinion "while the *draft* is under review by the [action] agency." 50 C.F.R. 402.14(g)(5) (emphases added). The regulations thus anticipate the sharing of draft opinions before they are finalized. In this consultation, the Services committed to sharing a draft biological opinion with EPA, but the agencies did not even reach

that step in December 2013, after which EPA changed course and revised its contemplated rule. Gov't Br. 9, 31. Accordingly, the December 2013 draft biological opinions were drafts of drafts—never-finalized staff recommendations to agency decisionmakers about the position the Services should adopt in the draft biological opinion that the Services had promised to transmit to EPA before making a final decision in the consultation. See p. 5, *supra*.

Respondent argues (Br. 52-53) that the regulation cited above requires the Services to consider an action agency's views only on RPAs, not on jeopardy. Respondent is correct that Section 402.14(g)(5) states that the Services must make a draft jeopardy opinion available to the relevant agency "for the purpose of analyzing" RPAs. 50 C.F.R. 402.14(g)(5). But as Judge Wallace explained in his partial dissent, the regulations as a whole "make clear that the purpose of agency review is to allow the Services to consider changes to the draft opinion based on the agency's comments," Pet. App. 30a—not merely to solicit input on RPAs. For example, the Services must "[d]iscuss" their "review and evaluation" with the action agency, including "the basis for any finding in the biological opinion." 50 C.F.R. 402.14(g)(5); see 51 Fed. Reg. at 19,952 (explaining that sharing draft biological opinions encourages the "exchange of information" and "the preparation of more thorough biological opinions").

Formal consultation is thus a "cooperative process," in which the Services "[a]ctively seek the views of the action agency." FWS & NMFS, *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section*

7 of the Endangered Species Act 1-2 (Mar. 1998) (*Consultation Handbook*). That approach has obvious practical benefits. If a Service reaches a tentative conclusion in a draft biological opinion that is based on a misunderstanding, the action agency can identify and correct the problem. See 51 Fed. Reg. at 19,952 (stating that sharing a draft biological opinion with the action agency "helps ensure the technical accuracy of the opinion, and may save time and resources by resolving these issues early"). Likewise, in many cases the Services can bring to bear their expertise in protecting listed species to help the action agency modify its proposed action in ways that would avoid the need to make a jeopardy finding. See *Consultation Handbook* 1-14 ("Providing action agencies * * * an opportunity to discuss a developing biological opinion * * * may result in productive discussions that may reduce or eliminate adverse effects."). A regulatory scheme that required the action agency to be locked into its initially proposed action, or required the Services to reach a final decision on jeopardy without the benefit of the action agency's feedback, would ill serve all parties.

This case illustrates the back-and-forth dynamic of many Section 7(a)(2) consultations, particularly for complex rulemakings that are nationwide in scope. Personnel from the Services and EPA engaged in almost two years of consultation, involving thousands of emails and numerous in-person meetings and conference calls, to discuss multiple versions of EPA's draft final rule and the Services' biological opinion. Gov't Br. 8; see J.A. 32, 58. Like the many other discussion drafts generated during that process, the December 2013 draft biological opinions expressed "preliminary" views, J.A. 39, and did not mark the end of deliberations.

c. Respondent's remaining arguments about the regulatory context are without merit.

Respondent observes (Br. 54) that no regulation "define[s] draft jeopardy opinions as confidential documents." But an agency need not adopt a regulation deeming its internal, pre-decisional drafts confidential in order to assert the deliberative process privilege. Respondent also observes (*ibid.*) that the implementing regulations require the Services to share draft biological opinions with private parties in some circumstances. When a Section 7(a)(2) consultation concerns the action agency's decision whether to issue a permit or license, the applicant for the permit or license "may request a copy of the draft [biological] opinion from the Federal agency." 50 C.F.R. 402.14(g)(5). In a case like this one, however, where the consultation concerns the issuance of a regulation, there is no applicant and no general requirement that a draft opinion be released outside the government for comment. See *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 660 n.6 (2007) (explaining that there is no "independent right to public comment with regard to consultations conducted under § 7(a)(2)"). Accordingly, the question presented here is limited to "interagency" documents (Gov't Br. I), and the Court need not address the effect of sharing draft biological opinions with a private applicant. Cf. *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12-15 (2001).

Lastly, respondent contends (Br. 54-55) that the Services' internal policies reflect that "drafts belong in the public record." But the cited memoranda address whether drafts ought to be assembled as part of an administrative record for judicial review, not whether the agency should assert a claim of privilege over them. See

Memorandum from Lois J. Schiffer, Gen. Counsel, Nat'l Oceanic & Atmospheric Admin., *National Oceanic and Atmospheric Administration Guidelines for Compiling an Agency Administrative Record* 10 (Dec. 21, 2012) (stating that certain "[s]ignificant drafts" should be included in the administrative record "but flagged for potential listing, in whole or in part, on the agency's Privilege Log").[2] In any event, an agency that sometimes waives the deliberative process privilege and releases some pre-decisional drafts does not thereby waive the privilege as to any other documents. See *Mobil Oil Corp.* v. *United States Envtl. Prot. Agency*, 879 F.2d 698, 701 (9th Cir. 1989) (collecting cases). Any contrary rule would create perverse incentives, effectively punishing agencies for voluntary disclosures. See *id.* at 701-702.

3. Respondent's reliance on the purported effect of the draft opinions on EPA is misplaced

Respondent's principal counterargument appears to be that it does not matter whether decisionmakers at the Services adopted and signed the December 2013 draft biological opinions, because those draft opinions caused EPA to modify its draft final rule and therefore had the "force and effect" of a final decision. Resp. Br.

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[2] It is the position of the United States that agencies generally have no obligation to include deliberative materials in the administrative record. The D.C. Circuit recently endorsed that position, as advocated by the United States in litigation involving NMFS. See *Oceana, Inc.* v. *Ross*, 920 F.3d 855, 865 (2019) (explaining that "predecisional and deliberative documents are not part of the administrative record to begin with, so they do not need to be logged as withheld from the administrative record") (citation and internal quotation marks omitted); see also Gov't C.A. Br. at 37-50, *Oceana*, *supra* (filed Aug. 6, 2018) (No. 17-5247).

23 (quoting *Sears*, 421 U.S. at 155); see *id.* at 22-27. Respondent's proposed effects-based approach is inconsistent with the formal consultation process and this Court's precedent. Adopting it would also seriously erode the deliberative process privilege and would harm agency decisionmaking.

a. Section 7 of the ESA establishes that the Services, acting on behalf of the Secretaries, exercise their "decisive statutory authority" (Resp. Br. 2) by issuing a final biological opinion at the conclusion of a formal consultation. 16 U.S.C. 1536(b)(3)(A). By contrast, neither the statute nor the implementing regulations give any legal force or consequence to *draft* biological opinions, such as the ones at issue here. Draft biological opinions lack "operative effect" in the relevant sense because they lack "the force of law" under the ESA. *Grumman Aircraft*, 421 U.S. at 186.

In that respect, draft biological opinions are indistinguishable from the regional board reports that this Court found to be privileged in *Grumman Aircraft*. Under the statute at issue there, regional boards were charged with evaluating whether government contractors had realized "excessive" profits, but the regional boards lacked any "final decisional authority" and could only make a recommendation to the national Renegotiation Board. 421 U.S. at 173; see *id.* at 173-179. This Court held that the regional boards' reports were predecisional and privileged because "only the [national] Board has the power by law to make the decision whether excessive profits exist." *Id.* at 184; see *id.* at 185 (regional boards "had no legal authority to decide"); *id.* at 186-187 (regional boards lacked "decisional authority," and their recommendations "carrie[d] no legal weight") (emphasis omitted). Draft biological opinions

likewise carry no independent legal weight; they function instead to assist the actual agency decisionmakers in rendering a final opinion.

Whether EPA chose to alter its draft rule in response to the December 2013 draft biological opinions (which were not transmitted in full to it) has no bearing on whether the Services themselves had reached the end of their deliberations and actually exercised their delegated statutory authority to make a jeopardy determination. If a staffer at the Services had written a memorandum to EPA early in the consultation advising that, in the staffer's personal judgment, his supervisors were likely to make a jeopardy finding unless EPA altered its rule, no one would confuse the staffer's memorandum with a legally operative decision by the Services—even if the memorandum caused EPA to make changes that the Services could also have identified as RPAs in a final opinion (cf. Resp. Br. 25-26).

Respondent's backwards approach—reasoning that, because EPA made changes to its draft rule, the Services must have compelled those changes, thereby transforming draft biological opinions into final decisions to which the deliberative process privilege does not attach—not only fails as a logical matter but is also inconsistent with the agencies' own contemporaneous understandings. Respondent identifies no evidence that, after December 2013, the Services or EPA understood themselves to be in the process of formulating or implementing RPAs for a jeopardy determination that had already been made. Neither the joint final biological opinion nor EPA's final rule describes the consultation in those terms. Respondent asserts that the Services did not, after December 2013, continue to deliberate about whether the December version of the EPA

rule would cause jeopardy, and that the December 2013 draft biological opinions were "not subject to further inter-agency deliberation." Resp. Br. 26; see *id.* at 23-24. But those observations are entirely consistent with EPA voluntarily choosing to make changes to its rule, after which further deliberations about draft opinions addressing a version of the rule that EPA had abandoned would have been pointless.

Moreover, respondent's apparent assumption that the December 2013 draft biological opinions caused all the subsequent changes to EPA's rule is not supported by the record. In December 2013, EPA was still "deliberat[ing]" internally over "key elements" of its draft final rule, J.A. 58, notwithstanding its prior efforts to produce a "final" version for the Services to review, J.A. 88-89. To the extent that EPA made changes to its draft rule in response to the preliminary analysis in the December 2013 draft biological opinions, that is simply how interagency consultation is supposed to work—not a reason to treat the Services' never-adopted, never-signed, and never-circulated drafts as final opinions subject to compelled disclosure under FOIA.

b. Respondent errs in suggesting (Br. 32-34) that draft biological opinions should be treated as final decisions for FOIA purposes under the logic of *Bennett* v. *Spear*, 520 U.S. 154 (1997). In *Bennett*, this Court held that a biological opinion constitutes final agency action under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and that the plaintiffs there had asserted an injury "fairly traceable" to a particular biological opinion, even though the action agency was "technically free to disregard" the opinion. 520 U.S. at 170-171; see *id.* at 177-178. The Court explained that a biological opinion "theoretically serves an 'advisory function,'" in that

the ESA vests the ultimate responsibility to decide whether a proposed agency action will cause jeopardy in the action agency, not the Services. *Id.* at 169 (quoting 51 Fed. Reg. at 19,928); see 16 U.S.C. 1536(b)(3)(A). The Court reasoned, however, that a biological opinion also "alters the legal regime to which the action agency is subject," *Bennett*, 520 U.S. at 169—noting, in particular, that any takings of endangered species that occur in compliance with the terms and conditions of an incidental take statement are deemed by statute not to violate the ESA's prohibition on takings, see *id.* at 170 (citing 16 U.S.C. 1536(*o*)(2)). The Court also observed that an "inexpert" action agency disregards the Services' conclusions in a biological opinion "at its own peril." *Id.* at 169-170.

Respondent contends (Br. 33) that a draft biological opinion likewise reflects the "Services' wildlife-related expertise," which action agencies are not, as a practical matter, free to ignore. But the Court in *Bennett* was plainly discussing the "direct and appreciable legal consequences," 520 U.S. at 178, of *final* biological opinions like the one that had been issued in that case, see *id.* at 159. The Court's focus on the legal effects of an incidental take statement makes that clear; an incidental take statement is issued only in conjunction with a final opinion. 50 C.F.R. 402.14(i). If anything, *Bennett* confirms that a draft biological opinion lacks the "direct and appreciable legal consequences" of a final biological opinion, 520 U.S. at 178, because (as respondent does not dispute) a draft opinion is *not* final agency action for APA purposes and does *not* trigger the statutory safe-harbor for incidental takings. The Court in *Bennett* also distinguished between a final biological opinion and the mere "recommendations" to decisionmakers at issue in

two earlier cases. See *ibid.* (discussing *Franklin* v. *Massachusetts*, 505 U.S. 788, 798 (1992), and *Dalton* v. *Specter*, 511 U.S. 462, 469-471 (1994)).

c. Adopting respondent's approach to the deliberative process privilege would fundamentally undermine the privilege, "to the detriment of the decisionmaking process." *Sears*, 421 U.S. at 150-151 (citation and emphasis omitted). For the privilege to serve its intended purpose of encouraging candor during internal government deliberations, see *ibid.*; *EPA* v. *Mink*, 410 U.S. 73, 86-87 (1973), agency personnel must be able to reliably know in advance "that the privilege will apply and that [a] draft will remain confidential," *National Security Archive*, 752 F.3d at 463. Agency personnel would never have that certainty if the availability of the deliberative process privilege turned on whether a recommendation happened to cause some downstream effect later deemed by a court to be comparable to the effect of a final decision, even though the recommendation was never adopted as official agency policy. A privilege contingent on such unpredictable future events "would be an uncertain privilege, and as [this] Court has said, an uncertain privilege is 'little better than no privilege at all.'" *Ibid.* (quoting *Upjohn Co.* v. *United States*, 449 U.S. 383, 393 (1981)); cf. *Swidler & Berlin* v. *United States*, 524 U.S. 399, 409 (1998).

Injecting such uncertainty into the deliberative process would be particularly harmful in the context of Section 7(a)(2) consultation. As this case demonstrates, formal consultation often involves the iterative exchange of views between the Services and an action agency over an extended period of time. See J.A. 58 (explaining that the consultation here involved "frank discussions" over "multiple options," "many" of which

were "rejected"). Many of the preliminary drafts generated during that process might be viewed as causing the action agency to change its approach, while nonetheless falling far short of representing the considered and authoritative views of the relevant Service. Agency personnel should not be left to guess whether those internal and pre-decisional drafts, if submitted to supervisors, might be deemed final and non-privileged as a result of "case-by-case inquiry" (Resp. Br. 57) in future litigation. See *National Security Archive*, 752 F.3d at 462 ("If agencies were 'to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer.'") (citation omitted).

B. The Decision Below Is Incorrect

This Court should also reject the Ninth Circuit's reasoning, which respondent largely does not defend. As previously explained (Gov't Br. 36-40), the panel majority in the court of appeals acknowledged that the Services did not issue the December 2013 drafts as final biological opinions, in light of EPA's later changes to its draft rule; the majority nonetheless held that those draft documents were not privileged because they were, according to the majority, the Services' last word on EPA's "then-proposed regulation." Pet. App. 26a; see *id.* at 20a. That reasoning is incorrect, conflicts with the prevailing approach in other courts of appeals, and would curtail the authority of agency decisionmakers to determine when (and whether) to adopt a draft recommendation as official agency policy. See Gov't Br. 39 (citing cases). As then-Judge Kavanaugh explained for the D.C. Circuit in *National Security Archive*, a draft agency document that "died on the vine * * * is still a

draft and thus still pre-decisional and deliberative." 752 F.3d at 463.

Respondent argues (Br. 34-36) that the December 2013 draft biological opinions did not "die on the vine" but rather operated as final opinions, compelling EPA to alter its rule. That argument, however, merely recycles respondent's own unsupported assertion that the December 2013 draft biological opinions were adopted by the Services in an "exercise of their ESA authority." Resp. Br. 35. EPA indisputably never issued the version of its rule that was the subject of the December 2013 draft biological opinions, and the Services had no occasion to reach a jeopardy decision for that version because EPA declined to pursue it. See J.A. 39 (NMFS "abandoned" its December 2013 draft biological opinion and reached a decision in May 2014 only about EPA's "final [r]egulation, which differed from EPA's 2013 draft"); J.A. 58-59 (FWS "concluded that additional consultation was needed to better understand and consider the operation of key elements of EPA's rule" as proposed in December 2013, and the Services ultimately issued a joint opinion "based on changes to the regulation").

The panel majority also erroneously concluded that the December 2013 draft biological opinions did not qualify for the deliberative process privilege because the drafts were, in its view, *close enough* to being final, given the absence of unresolved marginal comments or line edits on them. See Pet. App. 18a, 25a. Respondent does not defend that reasoning, which reflects a misunderstanding about the scope of the deliberative process privilege. A draft prepared to assist an agency decisionmaker in reaching a final decision remains predecisional and deliberative, even if the draft is pristine,

unless and until the agency decisionmaker actually finalizes and adopts the draft. Gov't Br. 43. For the same reason, a draft judicial opinion would not be properly described as final even if it were prepared by a law clerk exactly according to the judge's instructions and needed no further revisions, unless and until the judge herself adopts the opinion. Moreover, the compelled disclosure of even late-stage or near-final agency drafts could substantially harm an agency's decisionmaking process—for example, by illuminating the agency's internal mental processes with respect to any last sticking points. And in this particular case, the implementing regulations themselves draw a clear and easily administrable line demarcating a final decision: the consultation concludes only when the Services issue a final biological opinion to the action agency, which did not occur here until May 2014. 50 C.F.R. 402.14(m)(1). Until that time, the responsible agency officials had the authority and discretion to change course, and the deliberative process privilege protects their ability to receive and review, but ultimately not adopt, draft decision documents.

Respondent's amici alternatively contend that a draft biological opinion is not privileged insofar as it contains "factual, technical, and scientific" information. Center for Biological Diversity Amici Br. 11; see *id.* at 4-11; Rosenberg Amici Br. 7-11. This Court observed in *Mink* that "purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation" with an agency. 410 U.S. at 88; see 5 U.S.C. 552(b). In this case, however, the Services reasonably determined that any discussion of purely fac-

tual matters in the December 2013 draft biological opinions was not segregable from the "agency's preliminary analysis" about those matters and therefore could not be separately disclosed. J.A. 40; see J.A. 39-40, 66; cf. Resp. Br. 17 n.3 (acknowledging that the Services did release non-privileged portions of some other segregable documents). Moreover, the amici's argument could not save the judgment below because the court of appeals ordered the complete disclosure of the draft documents at issue. That decision was incorrect, and this Court should reverse it.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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