

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES FISH AND WILDLIFE        )  
SERVICE, ET AL.,                        )  
  Petitioners,        )  
  v.                        ) No. 19-547  
SIERRA CLUB, INC.,                        )  
  Respondent.        )  
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Pages: 1 through 69  
Place: Washington, D.C.  
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Respondent. )  
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Washington, D.C.

Monday, November 2, 2020

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

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Department of Justice, Washington, D.C.;  
on behalf of the Petitioners.  
SANJAY NARAYAN, ESQUIRE, Oakland, California;  
on behalf of the Respondent.

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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 19-547, United States Fish and Wildlife Service versus Sierra Club.

Mr. Guarnieri.

ORAL ARGUMENT OF MATTHEW GUARNIERI

ON BEHALF OF THE PETITIONERS

MR. GUARNIERI: Mr. Chief Justice, and may it please the Court:

The December 2013 draft biological opinions are privileged, predecisional, deliberative material. They were written by staff at the Services as a recommendation to agency decisionmakers about the position the Services should adopt in the ongoing consultation with the EPA.

When the relevant decisionmakers were presented with these drafts, they did not adopt them, they did not sign them, and they did not even transmit them in full to the EPA. Instead, they decided that more work needed to be done before making a final decision.

The Ninth Circuit committed two

1 principal errors in concluding, nonetheless,  
2 that these drafts are outside the scope of the  
3 deliberative process privilege.

4 First, the Ninth Circuit treated the  
5 drafts as final, rather than predecisional,  
6 because it viewed them as the Services' last  
7 word on the version of the EPA rule under  
8 consideration in December 2013.

9 But the EPA modified its approach, and  
10 the Services never had any occasion to make a  
11 final decision about the abandoned version of  
12 the EPA rule. In the D.C. Circuit's memorable  
13 words, the December 2013 draft opinion "died on  
14 the vine" without ever blossoming into a final  
15 decision.

16 Second, the Ninth Circuit viewed these  
17 drafts as final documents because the drafts  
18 largely don't contain red-lining, marginal  
19 comments, or other obvious signs of still being  
20 in flux.

21 That reasoning is unsound. No one  
22 would confuse a law clerk's draft with a final  
23 decision by a judge, even if the draft is  
24 pristine. The key point is that the  
25 decisionmakers at the Services had not yet made

1 up their mind. Their deliberations had not yet  
2 come to an end. When the Services did make a  
3 final decision in May 2014, they released an  
4 85-page joint opinion explaining their reasoning  
5 to the public.

6 Here, Respondent seeks to compel the  
7 disclosure of earlier drafts which recommended  
8 reasoning that the Services never adopted about  
9 a version of the EPA rule that never saw the  
10 light of day.

11 The Court should reject Respondent's  
12 efforts to pry into those materials.

13 CHIEF JUSTICE ROBERTS: Mr. Guarnieri,  
14 before you can decide whether something is  
15 predecisional, you have to know what the  
16 decision is. And why -- why isn't the decision  
17 here EPA's final rule on the cooling water  
18 intake structures and the Services' opinion  
19 simply is predecisional from the perspective of  
20 that final rule?

21 MR. GUARNIERI: Mr. Chief Justice, we  
22 think the final decision here is the Services'  
23 decision in the ongoing consultation. So that  
24 -- that is -- the final decision occurred in May  
25 of 2014, when the Services exercised their

1 authority under the Endangered Species Act to  
2 render a biological opinion with respect to  
3 whether EPA's proposed action would cause  
4 jeopardy to endangered species.

5 CHIEF JUSTICE ROBERTS: But that  
6 doesn't do -- I mean, that itself doesn't rep --  
7 represent any action by the Service with respect  
8 to anything other than the EPA decision. I  
9 mean, it is predecisional with respect to that  
10 decision.

11 MR. GUARNIERI: That's right, Your  
12 Honor, but -- but we think the deliberative  
13 process that -- that should be the focus of the  
14 Court's attention here is the deliberations that  
15 were occurring within the Services about whether  
16 or not the EPA's proposed action would cause  
17 jeopardy and --

18 CHIEF JUSTICE ROBERTS: No, I know  
19 that's what you think. I'm trying to figure out  
20 -- figure out why. I mean, you talk about,  
21 within an agency, the different steps in the  
22 process, and you say: Well, none of those steps  
23 is actually, you know, final and decisional.

24 But, here, all of a sudden you get to  
25 the end of the Services' role and it's final and

1 not predecisional, even though it's just part of  
2 another ongoing process.

3 In other words, I'm not sure that your  
4 position doesn't prove too much.

5 MR. GUARNIERI: Mr. Chief Justice, we  
6 -- we think the statute itself makes clear that  
7 there is a decisionmaking process that concludes  
8 with the issuance of the final biological  
9 opinion. That's in Section 7(b)(2) of -- of the  
10 Endangered Species Act.

11 The implementing regulations also make  
12 clear that, with respect to the interagency  
13 consultation, it concludes with -- that -- that  
14 process concludes with the issuance of a final  
15 opinion.

16 Now, of course, if -- if the Court  
17 were to view the -- the deliberate -- the  
18 deliberations here more broadly as encompassing  
19 also the EPA's rulemaking, then it's clear that  
20 the EPA didn't make a final decision and didn't  
21 issue a -- a final rule in that rulemaking until  
22 May 2014. So the drafts that are at issue here  
23 would also be predecisional with respect to the  
24 EPA's final rule.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas.

3 JUSTICE THOMAS: Thank you, Mr. Chief  
4 Justice.

5 Counsel, the -- I'd like to follow up  
6 with the Chief Justice's line. The -- what if  
7 there were not a regulation that prohibited the  
8 issuance of a final opinion before or while the  
9 draft was under review by the requesting agency?

10 MR. GUARNIERI: Well, you know,  
11 certainly, we think it's helpful here that the  
12 -- the regulations clearly contemplate that  
13 there would be a sharing of drafts in some  
14 circumstances between the Services and the  
15 action agency.

16 And, here, the Services didn't  
17 actually even reach the point of sharing the  
18 draft opinion in December 2013. The drafts  
19 were never transmitted in full to the EPA at  
20 that point.

21 But -- but, counterfactually, if there  
22 were no regulation, then still at least on the  
23 facts here, it's clear that the Services had  
24 never made a final decision in the consultation  
25 in December 2013.

1           The declarations that have been  
2 submitted by agency officials make clear that  
3 the relevant decisionmakers did not adopt these  
4 drafts when the drafts were presented to them in  
5 December 2013.

6           So we really think that's dispositive  
7 here of the fact that the deliberations were  
8 ongoing at that point in time.

9           JUSTICE THOMAS: So what if you were  
10 right -- I'm trying to figure out, like, if  
11 you're right up to the line that there is --  
12 there is no more deliberation, that let's say  
13 it's there -- it's a final, final draft and you  
14 simply are call -- calling EPA to give a  
15 heads-up that you're about to send it in -- in  
16 five minutes.

17           Would you make the same argument?  
18 Anything short of actually sending it, that's  
19 what I'm getting at.

20           MR. GUARNIERI: Yes, Justice Thomas.  
21 Now, of course, we're quite far from that point  
22 in this particular case. But I -- I think, in  
23 general, the principle that we are advocating  
24 here is that until there is a -- until there is  
25 actually a final decision, the agency

1 decisionmakers are free to change their mind in  
2 a consultation.

3           And so that -- that is really the  
4 critical distinction between sort of having a  
5 mere final draft that is on the verge of being  
6 transmitted and actually having a final agency  
7 decision that represents the Services' final  
8 opinion in -- in the consultation.

9           And until reaching that point, the  
10 deliberations are -- are still ongoing and --  
11 and the Services, the decisionmakers at the  
12 Services, could change their mind about any  
13 aspect of the agency's analysis.

14           JUSTICE THOMAS: So anything short of  
15 -- of just pressing the send button is -- is --  
16 is non-final?

17           MR. GUARNIERI: Well, it's not -- to  
18 -- to be clear, it's not the transmittal. It's  
19 not hitting the send button to send it to the  
20 EPA that we think is the critical distinction.  
21 It's -- it's the point in time at which the  
22 agency decisionmakers actually exercise their  
23 authority to issue a biological opinion in the  
24 consultation. And -- and they were far short of  
25 that here in December of 2013.

1 JUSTICE THOMAS: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Breyer.

4 JUSTICE BREYER: Well, I'm not -- one,  
5 I'd like any comment you have about the test. I  
6 mean, the object is will this document, in fact,  
7 diminish agency decisionmaking quality by -- by  
8 discouraging the staff and others from debating  
9 if it's going to become public?

10 And you might have a better choice or  
11 not, I'm curious, but the -- the words that have  
12 been used are predecisional and deliberative.  
13 Hmm, maybe. Okay. So that's one in the back of  
14 my mind. Anything you want to say?

15 And the other thing, at least in some  
16 of these documents, and we'll have to look  
17 through the record, it -- it seems to have  
18 reached a final stage. I mean, people say, when  
19 you make these final changes, which they made to  
20 the draft, I can e-mail the Assistant Director,  
21 and we have an autopen with his signature we can  
22 use to send it out, and they'll send it to the  
23 EPA. And, in fact, that's what they normally  
24 do.

25 I mean, normally what they do is they

1 send these things over before they're absolutely  
2 final. The EPA makes changes. And then it  
3 never appears. That happened apparently  
4 thousands of times, and only twice did they  
5 actually publish it.

6 So -- so those -- those -- those are  
7 -- do you get what I'm driving at? And, if so,  
8 I'd appreciate your -- your thoughts.

9 MR. GUARNIERI: Sure. Well, with  
10 respect to your second set of questions, Justice  
11 Breyer, the e-mails that you're referring to are  
12 e-mails about finalizing the draft for  
13 transmittal to the EPA.

14 And so it's abundantly clear in those  
15 e-mails, even in the e-mail suggesting that the  
16 transmittal letter could be signed by autopen,  
17 it's very clear that the Services understood  
18 themselves to still be working on draft  
19 biological opinions, and they had committed  
20 previously to sharing a draft with the EPA.

21 So even if they had transmitted that  
22 draft or transmitted those documents, they --  
23 they understood themselves to be transmitting a  
24 draft that did not yet represent a final  
25 decision.

1           With respect to Your Honor's first  
2 question, the lower courts have understood this  
3 Court's precedent on the deliberative process  
4 privilege to require that a document be both  
5 predecisional and deliberative in order to  
6 qualify for the privileges.

7           We're not taking issue with that. We  
8 think, if the Court were to apply that framework  
9 here, these documents would certainly satisfy  
10 it.

11           JUSTICE BREYER: Okay. Thank you.

12           MR. GUARNIERI: Justice Breyer, if I  
13 may also, your question alluded to the fact that  
14 there are relatively few jeopardy opinions.  
15 That -- that's certainly true. There are some  
16 -- there's an empirical study cited in the  
17 amicus briefs suggesting that jeopardy opinions  
18 are relatively rare. But we don't really see  
19 any particular problem with that.

20           And I think that could be simply a  
21 sign that the consultation process required by  
22 the Endangered Species Act is working as  
23 intended. Federal agencies are incorporating  
24 these standards into proposed agency actions and  
25 are applying law and avoiding actions that would

1 cause jeopardy.

2 CHIEF JUSTICE ROBERTS: Justice Alito.

3 JUSTICE ALITO: Are there examples of  
4 situations in which a jeopardy biological  
5 opinion has been issued, but the action agency  
6 has then gone ahead with the action in the face  
7 of that?

8 MR. GUARNIERI: Justice Alito, I'm --  
9 I'm not aware of such a -- such a -- such an  
10 example. There -- there are a handful of  
11 examples -- so, to -- to step back for a second,  
12 the Endangered Species Act -- as -- as the Court  
13 discussed in Bennett against Spear, the  
14 Endangered Species Act at least theoretically  
15 permits an action agency to decide that,  
16 notwithstanding the biological opinion, the  
17 action agency has decided that its agency's  
18 action would not cause jeopardy.

19 I -- I don't know that that's ever  
20 occurred. There are a handful of examples. The  
21 -- the statute also permits an action agency to  
22 obtain an exemption from a -- a -- a -- a  
23 cabinet-level committee, and that has occurred  
24 on -- on a handful of occasions.

25 JUSTICE ALITO: Well, if it -- if it

1 almost never occurs, then something that is  
2 labeled a draft biological opinion may really be  
3 tantamount to the Services' final word on the  
4 subject, unless it can be persuaded by the  
5 action agency to change its opinion or the  
6 action agency makes an adjustment in what it was  
7 previously proposing to do.

8           Isn't that the case?

9           MR. GUARNIERI: Well, I -- I think the  
10 -- the draft aspect of the opinion -- I mean,  
11 from our perspective, the key point here is that  
12 the agency decisionmakers at the Services had  
13 not yet actually made up their minds about  
14 whether the version of the rule that was under  
15 consideration in December of 2013 would cause  
16 jeopardy.

17           JUSTICE ALITO: Okay. Well, maybe  
18 that's -- maybe that's true, but I'm interested  
19 in where your argument goes, where we should  
20 draw the line.

21           Do you want us to draw a line between  
22 those draft biological opinions that do not  
23 reflect -- that reflect all of the deliberation  
24 that the Service intends to conduct internally,  
25 but -- and those that do not reflect all of the

1 deliberation that the Service wants to conduct  
2 internally, or does your argument logically lead  
3 to the conclusion that no draft biological  
4 opinion can ever be final?

5 MR. GUARNIERI: Well, I -- I think  
6 it's the latter, Justice Alito. No draft  
7 biological opinion -- by -- by definition, if it  
8 is a draft opinion, then it is predecisional and  
9 deliberative because the agency has not yet made  
10 up its mind. The Services have not yet made up  
11 their mind in the ongoing consultation.

12 And there are good reasons for that,  
13 and one of them is that, you know, as the  
14 regulations contemplate, the Services will often  
15 share these draft opinions with the action  
16 agency, and that process sort of -- the give and  
17 take between the Services and the -- the agency  
18 that is consulting the Services can be helpful  
19 to refine the -- the draft opinion and to -- for  
20 the Services to better understand the proposed  
21 agency --

22 JUSTICE ALITO: Thank --

23 MR. GUARNIERI: -- action.

24 JUSTICE ALITO: -- thank you, counsel.

25 My time has expired.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Sotomayor.

3 JUSTICE SOTOMAYOR: I am following up  
4 a little bit on Justice Alito's questioning. In  
5 Bennett, we held that biological opinions, while  
6 technically advisory, have "a powerful coercive  
7 effect" on the action of the agency.

8 Why is it that a draft jeopardy  
9 opinion doesn't have the same coercive effect?  
10 As I think the Ninth Circuit pointed out, what  
11 was at issue was the November rule that the EPA  
12 was proposing, and the draft that was sent to  
13 the EPA made them change their minds. They did  
14 something completely different. With respect to  
15 the decision relating to that November action,  
16 the draft opinion did exactly what a final  
17 opinion is intended to do.

18 So I -- I understand your basic  
19 argument that it wasn't clear the agency's final  
20 decisionmaker had accepted that that was the  
21 jeopardy opinion they were going to get, but I  
22 go back to Justice Thomas's question.

23 If that agency head was about to sign  
24 it and said, ah, I'll -- I'm just going to send  
25 it to them and tell them I'll sign it on -- on

1 Monday, I don't want to go into the office on  
2 Sunday, it would be your argument that that  
3 wouldn't be a final opinion worthy of  
4 disclosure?

5 MR. GUARNIERI: Well, Justice  
6 Sotomayor, to sort of take those questions in --  
7 in sequence, I think it's abundantly clear that  
8 in Bennett against Spear, the Court was  
9 discussing final biological opinions, as  
10 evidenced by the Court's focus on the legal  
11 force and effect of the incidental take  
12 statement that is issued when the agency -- when  
13 the Services render a jeopardy -- excuse me, a  
14 no jeopardy opinion.

15 So the -- the -- the Court's focus  
16 there was on the fact that the final biological  
17 opinion does have real force and effect. It has  
18 legal consequences. None of those consequences  
19 attach to a draft biological opinion. The  
20 statute and the regulation attach no legal  
21 consequences whatsoever to a draft biological  
22 opinion of the kind that are at issue here.

23 JUSTICE SOTOMAYOR: Counsel, I have  
24 one question I want to get to. In the Ninth  
25 Circuit, you agreed that a remand would be

1 appropriate to determine whether the documents  
2 contain segregable factual information. Do you  
3 think that if we were to rule in your favor, we  
4 would still have to remand for that to happen?

5 MR. GUARNIERI: Yes, Your Honor. That  
6 -- that would be appropriate. Under -- under  
7 Section 552(b), if a document qualifies for one  
8 of the exemptions set forth in subsection (b),  
9 then and only then would an agency determine  
10 whether, notwithstanding the fact that the  
11 document qualifies for an exception, there are  
12 portions of it that could be segregated and  
13 released.

14 So that -- that did occur after the  
15 Ninth Circuit decision. That did occur with  
16 respect to three documents that the court of  
17 appeals found to qualify for Exemption 5. If  
18 this Court were to sustain our assertion of  
19 Exemption 5 here, then the same kind of analysis  
20 would follow on remand.

21 JUSTICE SOTOMAYOR: Thank you,  
22 counsel.

23 CHIEF JUSTICE ROBERTS: Justice Kagan.

24 JUSTICE KAGAN: Mr. Guarnieri, could I  
25 focus on the part of your argument which is that

1 the relevant decisionmakers were still working  
2 on the draft and give you a hypothetical, which  
3 is that there was -- the draft came to the  
4 relevant decisionmaker and he looked at it and  
5 he realized that it was going to cause a big  
6 problem for the EPA, and so he said: You know,  
7 I'm not going to send this over. I'm going to  
8 give the EPA head a call and just tell him  
9 everything in it, and that will ensure that  
10 there's nothing FOIA-able that -- in this  
11 document.

12 What -- what would your answer to that  
13 be? You know, he has the document, he's not  
14 working on it, but -- but he doesn't want to  
15 make it FOIA-able. And can he end-run this in  
16 that way?

17 MR. GUARNIERI: Justice Kagan, there  
18 is a body of existing law in the lower courts  
19 addressing circumstances in which an agency has  
20 implicitly made a final decision. Some of those  
21 principles might -- might be brought to bear on  
22 the hypothetical that Your Honor's posing.

23 But -- but, here, there's really  
24 nothing in the record to suggest that the  
25 agencies had implicitly made a final decision,

1 even if they had not memorialized that by, for  
2 example, signing and publicly issuing the  
3 biological opinion.

4           And -- and, in fact, here, the  
5 evidence is really all to the contrary. There  
6 are declarations from agency officials.  
7 Including for the Fish and Wildlife Service,  
8 there's a declaration from Assistant Director  
9 Frazer, who was himself the agency decisionmaker  
10 for Fish and Wildlife, and he says that he was  
11 presented with these draft declarations and he  
12 determined not to make a decision at that time  
13 because he felt that more work was needed in the  
14 consultation.

15           JUSTICE KAGAN: Yeah, it -- it -- it  
16 -- it's a very general statement. Do you have  
17 any sense of what more work needed to be done?  
18 Because one way to understand what happened here  
19 is that everybody really responded and acted as  
20 if there were a completed draft opinion. You  
21 know, there was sending the reasonable  
22 alternatives over, the AP -- the EPA starts  
23 talking to the Service about how to change its  
24 rule. The EPA does change its rule.

25           It was as if -- you know, everything

1 that happened was as if there had been a final  
2 draft opinion that was sent to the EPA.

3 MR. GUARNIERI: Well, Justice Kagan,  
4 among other things, Assistant Director Frazer  
5 said that -- and this is at page 58 of the Joint  
6 Appendix -- that elements -- key elements of the  
7 EPA's rule were still being deliberated within  
8 the EPA.

9 So I think the declaration reflects  
10 that there was a -- a -- a significant degree of  
11 fluidity here both as to the -- the -- what the  
12 Services planned to say in the consultation and  
13 -- and also what the EPA's final rule would look  
14 like.

15 Now it's difficult to describe exactly  
16 the conversations that occurred from December  
17 onwards without reviewing the substance of the  
18 agency's privileged discussions, but the  
19 declaration, I do think, makes clear that, you  
20 know, there -- there were a number of moving  
21 parts here. It wasn't simply EPA revising its  
22 rule in response to the draft biological  
23 opinion.

24 JUSTICE KAGAN: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch.

2 JUSTICE GORSUCH: Good morning,  
3 counsel.

4 Let's say EPA had decided at the end  
5 of it to just withdraw its rule and -- and give  
6 up, at least for the time being, maybe come back  
7 to it in five or 10 years. Would that be a  
8 final decision? And, if so, would that have  
9 made the last draft that the Service gave to EPA  
10 discoverable or not in your view?

11 MR. GUARNIERI: Justice Gorsuch, as I  
12 was trying to articulate earlier, we think the  
13 -- the key question here is whether the Services  
14 had made a final decision.

15 And so, if the Services rendered a  
16 final biological opinion finding jeopardy in the  
17 consultation and that caused the EPA not to  
18 proceed with its proposed action, then,  
19 certainly, there the Services' final opinion  
20 would itself not be privileged and -- and --  
21 and, actually, as a matter of agency practice --

22 JUSTICE GORSUCH: All right. I -- I  
23 --

24 MR. GUARNIERI: -- serve --

25 JUSTICE GORSUCH: -- I got that,

1 counsel. I guess what I'm asking -- so would  
2 the EPA decision itself not to proceed, it died  
3 on the vine, but would that be nonetheless final  
4 and itself discoverable?

5 MR. GUARNIERI: Would -- would the  
6 EPA's decision be final and discoverable?

7 JUSTICE GORSUCH: That's the question  
8 now.

9 MR. GUARNIERI: I -- I suppose it  
10 would depend. I mean, if the EPA memorializes  
11 its decision not to proceed in the rulemaking in  
12 some sort of agency document, then its  
13 explanation of -- of why it had chosen not to  
14 proceed would not -- hypothetically would not be  
15 predecisional or deliberative and therefore  
16 would be FOIA-able.

17 JUSTICE GORSUCH: But, if they just  
18 decided in its last draft, you know, we're not  
19 -- we just -- it's too hard, we can't do it, we  
20 give up, internally, but it doesn't -- it  
21 doesn't publish anything, would that be final?

22 MR. GUARNIERI: No, I -- I don't think  
23 that would be final. And, in fact, that would  
24 be reminiscent of the situation that this Court  
25 contemplated in Footnote 18 of its decision in

1 Spear, which is that, you know, you're -- you're  
2 going to have privileged internal deliberations  
3 that do not result in any final decision  
4 because, you know, you could have a degree of  
5 kind of agency brainstorming that doesn't  
6 ultimately lead to any final agency action.

7 And -- and in that circumstance, the  
8 agency's deliberations are privileged, even  
9 though they do not culminate in any specific  
10 final decision.

11 JUSTICE GORSUCH: And what if -- what  
12 if -- what if, alternatively, the leadership of  
13 the Service had, you know, signed that last  
14 draft and sent it over to EPA.

15 EPA didn't -- what -- whoever --  
16 whatever happened at EPA happened, but the --  
17 the Services signed something. EPA, though, you  
18 know, ultimately maybe decided not to do  
19 anything.

20 Would the Service document be  
21 discoverable?

22 MR. GUARNIERI: If -- if the Services'  
23 document remained in draft form and had never  
24 actually been issued as a final biological --

25 JUSTICE GORSUCH: No, I'm supposing

1 now it was signed by the leadership of the  
2 Service and sent over to EPA.

3 MR. GUARNIERI: Yeah, in -- in that  
4 circumstance --

5 JUSTICE GORSUCH: But EPA decided to  
6 do nothing. Its -- its regulation died on the  
7 vine.

8 MR. GUARNIERI: I -- I see. I see.  
9 Yes. That -- that would be the -- when the  
10 agencies reach a final decision in a  
11 consultation, they release their opinion, their  
12 biological opinion to the public. And --

13 JUSTICE GORSUCH: Oh, no, they didn't.  
14 They sent it over to EPA because EPA's was still  
15 in draft form, but the Service decided they'd  
16 come to a final view on the draft of EPA and  
17 they signed it. Then what?

18 MR. GUARNIERI: Then -- then that --  
19 that would be a decision that would -- we could  
20 not withhold under the deliberative process  
21 privilege because the Services had -- have  
22 reached a final decision. They have exercised  
23 their authority under the Endangered Species  
24 Act. And there was a --

25 JUSTICE GORSUCH: Counsel, thank you.

1 My -- my -- my time is over. Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Kavanaugh.

4 JUSTICE KAVANAUGH: Thank you, Chief  
5 Justice.

6 And good morning, Mr. Guarnieri.

7 Just to follow up on the Chief's  
8 questions and Justice Gorsuch's questions, it's  
9 possible, I think, in your view, that even a  
10 final agency opinion or memo could still be  
11 predecisional as part of a broader deliberative  
12 process, and a draft opinion, which we have in  
13 this case, in your view, is even more obviously  
14 predecisional. Is that correct in terms of a  
15 general statement?

16 MR. GUARNIERI: I -- I -- I do think  
17 that's correct. And -- and that's why in our  
18 briefing we -- we refer to these in places as  
19 drafts of drafts, because, here, the EPA -- the  
20 December 2013 draft biological opinion had not  
21 even reached the point of being transmitted as  
22 drafts to the EPA.

23 JUSTICE KAVANAUGH: To follow up on  
24 something that Justice Kagan asked, does the  
25 motive of the agency official with respect to

1 FOIA play a role in determining how a court  
2 should assess whether it's obtainable under  
3 FOIA?

4 MR. GUARNIERI: It -- it has not  
5 traditionally been a part of the analysis that  
6 this Court has engaged in for the deliberative  
7 process privilege.

8 As I -- as I said to Justice Kagan, I  
9 think there are existing doctrines that can  
10 address any concerns along those lines,  
11 including doctrines under which an agency may be  
12 determined to have implicitly reached a final  
13 decision, even though a document might be  
14 notionally labeled a recommendation or a draft.

15 But -- but those are simply  
16 inapplicable here. There's really no basis to  
17 infer that the Services -- that the  
18 decisionmakers at the Services had made a final  
19 decision in December of 2013.

20 JUSTICE KAVANAUGH: I think there's a  
21 concern lurking in this case that executive  
22 branch officials might just stamp drafts on  
23 everything and, therefore, evade FOIA.

24 Can you respond to that concern?

25 MR. GUARNIERI: Sure. You know, I --

1 I -- I take the point, Justice Kavanaugh, but  
2 we're just very, very far from that here.

3 Here, we are in the molten core of the  
4 deliberative process privilege, where it's --  
5 it's clear from the record that the agency --  
6 the decisionmakers at the Services did not adopt  
7 the draft opinions when they were first entered.

8 JUSTICE KAVANAUGH: Well, if I could  
9 interrupt, I -- I understand that point as to  
10 this case, but how we frame the rule or the  
11 principle will matter.

12 And how exactly would you have us  
13 frame the principal law that governs here?

14 MR. GUARNIERI: Well, we -- we accept  
15 that the -- the lower court's formulation that a  
16 document must be both predecisional and  
17 deliberative is -- is a sort of -- accurately  
18 captures the substance of this Court's case law.

19 With respect specifically to whether  
20 or not a document is labeled draft, we do think  
21 that is important. I mean, it has a significant  
22 meaning within the executive branch when a  
23 document is labeled "draft." It's a signal to  
24 other parties that the document has not yet been  
25 finalized.

1                   But, you know, of course, to address  
2                   the concern that -- that Your Honor has  
3                   mentioned, the labeling of a document as draft  
4                   wouldn't necessarily be dispositive. It would  
5                   be an important factor. But a court could also  
6                   look to other factors to ascertain whether a  
7                   document was still, in fact, in draft format.

8                   JUSTICE KAVANAUGH: Okay. Thank you.

9                   CHIEF JUSTICE ROBERTS: Justice  
10                  Barrett.

11                  JUSTICE BARRETT: I want to pick up on  
12                  the thread that Justice Kavanaugh was just  
13                  exploring with you.

14                  You said that if a government official  
15                  simply stamps "draft" on it and sent it over  
16                  and, as Justice Kavanaugh is positing, did so in  
17                  order to avoid FOIA disclosure requirements, you  
18                  said that a court might look at other factors to  
19                  determine whether it's still final.

20                  What other factors would a court  
21                  consider?

22                  MR. GUARNIERI: I -- I think a court  
23                  might look to the -- the -- the treatment of the  
24                  document within the agency's process. And there  
25                  are circumstances in which the lower courts have

1 found that the labeling of a document as draft  
2 might be considered pretextual, if you will, in  
3 light of other evidence about the processes that  
4 generated the document or the consequences that  
5 were attached to the document within the  
6 agency's administrative process.

7 But, you know, here, those factors tip  
8 decisively in our favor. We have the  
9 declarations making clear that the agency  
10 decisionmakers didn't reach a final decision.  
11 We know that they didn't publicly issue the  
12 December 2013 draft, even though a final  
13 biological opinion publicly issued. And we know  
14 that they had committed in advance to share a  
15 draft with the EPA and they didn't even reach  
16 that point because they determined that more  
17 work needed to be done with the -- with the  
18 draft opinions that were presented to them in  
19 December 2013. So those are --

20 JUSTICE BARRETT: I mean, that's --

21 MR. GUARNIERI: -- all kinds of  
22 peripheral considerations that a court might  
23 take into account in determining that the label  
24 of a document as draft is -- is, in fact,  
25 accurate.

1 JUSTICE BARRETT: That's a pretty  
2 fact-intensive determination then. So it's not  
3 your position that we should adopt some sort of  
4 bright line saying, listen, it's not over until  
5 it's over, it's not until it's actually issued  
6 in the sense of being final, maybe even in the  
7 Bennett versus Spear sense of the word, you're  
8 not asking for a rule that's that bright?

9 MR. GUARNIERI: Well, we -- we think  
10 that those considerations for this particular  
11 scheme, the line is very easy to draw because  
12 it's so clear that the Endangered Species Act  
13 and its implementing regulations set up a  
14 process in which the deliberations conclude with  
15 the issuance of a final biological opinion.

16 And I think the Court could dispose of  
17 this case on that ground alone. But, if there  
18 are concerns that, you know, disposing of the  
19 case on those grounds might lead to evasions or  
20 pretextual -- the -- the pretextual use of the  
21 label draft in the future, then I -- I was just  
22 trying to give the Court some comfort that there  
23 are other considerations that could also be  
24 brought to bear to -- to make sure that that  
25 isn't occurring.

1                   JUSTICE BARRETT: So your first order  
2 of preference would be the kind of formalistic  
3 line that I was just describing, and then your  
4 backup argument would be, if the Court was  
5 uncomfortable about the possibility of avoiding  
6 FOIA obligations by, say, the stamping draft on  
7 the top, that we go with the more kind of  
8 multi-factor fact-specific test, you know, maybe  
9 to see was the agency holding this out as a  
10 final opinion?

11                   MR. GUARNIERI: Yes, Your Honor. Yes.  
12 I -- I think that that captures the -- the --  
13 the way that we think the case ought to be  
14 resolved. The -- the deliberative process  
15 privilege here ought to extend to all of the  
16 deliberations that precede the issuance of the  
17 actual final biological opinion.

18                   JUSTICE BARRETT: Thank you.

19                   CHIEF JUSTICE ROBERTS: Mr. Guarnieri,  
20 do you want to take a minute to wrap up?

21                   MR. GUARNIERI: Thank you, Mr. Chief  
22 Justice.

23                   I -- I would just emphasize again, as  
24 I've tried to several times this morning, that  
25 -- that there can be no real dispute on the

1 facts of this case, that the decisionmakers at  
2 the Services did not make a final decision in  
3 December 2013.

4 The -- the record is clear that they  
5 did not make a final decision in the ongoing  
6 consultation until May of 2014. And when they  
7 made that final decision, they -- they released  
8 an 85-page joint opinion with -- with several  
9 hundred pages of appendices explaining to the  
10 public the reasoning that led them to issue a no  
11 jeopardy opinion in this particular  
12 consultation.

13 Until that point in time, the agency  
14 decisionmakers were free to change their mind.  
15 And the deliberative process within the agency  
16 had not yet come to an end.

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Mr. Narayan.

21 ORAL ARGUMENT OF SANJAY NARAYAN

22 ON BEHALF OF THE RESPONDENT

23 MR. NARAYAN: Thank you, Mr. Chief  
24 Justice, and may it please the Court:

25 I'd like to begin with the standard

1 that follows from Spear and which should resolve  
2 this case. If a document explains the decision  
3 made by the agency with appreciable legal  
4 consequences, Exemption 5 does not apply.

5 The opinions here explain a decision  
6 made by the Services, that EPA's proposed  
7 regulation jeopardized protected species. And  
8 Bennett holds that jeopardy decision has legal  
9 consequence.

10 Because the Services' conclusions  
11 invariably get deference, the Services' jeopardy  
12 determination made it very likely that EPA's  
13 regulation would be overturned unless EPA  
14 adopted additional protections.

15 None of that turns on whether the  
16 Services label their opinions draft or final.  
17 Indeed, as the amicus briefs explain, the  
18 Services almost never exercise their jeopardy  
19 authority through final jeopardy opinion.

20 The jeopardy decision reached earlier  
21 in the process achieved the same legal  
22 consequence. It forecloses the agency's  
23 proposed action and requires adoption of a more  
24 protective alternative.

25 Petitioners have expressed concern as

1 to the workability of the standard insofar as it  
2 allows courts to look past labels like draft or  
3 non-binding. But the lower courts have been  
4 doing just that for 40 years with no unusual  
5 difficulty. Those cases, like this one, follow  
6 the standard FOIA practice. They're resolved on  
7 summary judgment based on the governing statutes  
8 and regulations, together with the agency's  
9 record and declarations, and, if necessary,  
10 examination of the documents themselves.

11 The Endangered Species Act may call  
12 the Services' review a consultation, but, in  
13 reality, the statute gives the Services decisive  
14 gatekeeping authority over other agencies'  
15 action. At stake here is whether the public has  
16 access to the reasons underlying the Services'  
17 exercise of that statutory authority.

18 CHIEF JUSTICE ROBERTS: Counsel,  
19 government decisionmaking often involves several  
20 different layers, you know, the issues addressed  
21 by the section and then it turns over to the  
22 bureau, then it goes to the division, and,  
23 eventually, say, to the final decisionmaker.

24 What -- what if that decisionmaker,  
25 looking at all this, says, you know, I think --

1 I think the bureau got it right; I don't think  
2 the division did much at all; I liked what they  
3 did? Does that mean -- in other words: And  
4 that's why I'm making the decision I am, because  
5 I think the bureau analysis was right.

6 Does that mean that the bureau  
7 analysis is disclosable because it is the one  
8 that had operative effect?

9 MR. NARAYAN: If a decisionmaker on  
10 behalf of the agency adopts that bureau's view  
11 as a basis of the agency's decision, then, yes,  
12 I think that is the basis of a decision that is  
13 actually adopted.

14 CHIEF JUSTICE ROBERTS: Well, but that  
15 -- that's certainly predecisional. I mean, it  
16 goes up to the division and then only then to  
17 the -- the agency director. I mean, the -- the  
18 agency did not adopt the final recommendation  
19 from the division but, rather, something that  
20 certainly was predecisional.

21 MR. NARAYAN: I'm sorry. We're  
22 talking about the decision that the director  
23 chooses as the basis of the agency's decision?

24 CHIEF JUSTICE ROBERTS: Yeah. In its  
25 -- in this chain of -- of responsibility that

1 leads up to him, he picks one in the middle. He  
2 says, that's what is going to affect -- that --  
3 that's what I'm going with.

4 Is that -- even though it's  
5 predecisional in the sense that there were  
6 several other layers before it got to him.

7 MR. NARAYAN: I think it is under  
8 Spear because Spear says that if an agency  
9 chooses to adopt a document that was  
10 predecisional, but it makes it the basis of its  
11 actual decision, then, you know, that doesn't  
12 raise concerns for two reasons.

13 One is that that's the decision of the  
14 agency. Any criticism is going to going to the  
15 agency, its decision.

16 And the second is that, in general --  
17 again, this is -- this is Spear, not me, but,  
18 when that happens, the lower decisionmaker's not  
19 embarrassed. They -- they generally tend to  
20 like the fact that agency has taken their  
21 decision and the decisionmaker has chosen it as  
22 his or her own decision.

23 CHIEF JUSTICE ROBERTS: Well, counsel,  
24 your -- the operative effects test seems sort of  
25 tailor-made for the facts here, but it doesn't

1 seem to be very helpful in most cases. In most  
2 cases, you can't pick a particular item in the  
3 decisional process and say this is the one that  
4 drove the decision.

5 So how would your effect -- your test  
6 work in the typical case?

7 MR. NARAYAN: If -- if there is no  
8 statement of basis there at all -- you know,  
9 FOIA doesn't require an agency to write one up,  
10 so, you know, one feature here is that the  
11 regulations do require the Services to have a  
12 statement of basis that is their opinion, their  
13 jeopardy opinion, available if the action agency  
14 asks for it. Therefore --

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 Justice Thomas.

18 JUSTICE THOMAS: Yes, I'd like to pick  
19 up a bit on what the Chief -- on the Chief's  
20 line of questioning. How far back would you go  
21 in the process? We asked the government how  
22 close to the line of actually sending the  
23 proposal out or the rule out would he -- would  
24 he -- can he come to before it ceases being a  
25 draft.

1 I'd like to ask you, how far back in  
2 the process can we go before it is not  
3 discoverable and it's a part of the deliberative  
4 process, as opposed to something that is subject  
5 to FOIA?

6 MR. NARAYAN: Well, I mean, in this  
7 case, I think the important thing is that by all  
8 indications of the record, this analysis that  
9 it's a jeopardy opinion was complete and reached  
10 a conclusion.

11 I don't think it goes much further  
12 past that. That is, if the analysis is not  
13 complete and they haven't -- and they're still  
14 working on it, then that is legitimately  
15 deliberative and predecisional and is not  
16 disclosed.

17 JUSTICE THOMAS: So how do you  
18 determine that? The -- the government says as  
19 long as they still -- they have not said it's  
20 final, it's still a part of the deliberative  
21 process.

22 Why don't we take them at their word?

23 MR. NARAYAN: Well, I mean, I think  
24 the reason not to take them at their word is  
25 that that then hands control of disclosure to

1 the government based on how they choose to  
2 characterize documents.

3 In this case, I really do think it is  
4 the record as a whole, and there are four  
5 elements in particular that I think deserve  
6 attention, keeping in mind that the burden is on  
7 the Services here.

8 I mean, the first is that we know the  
9 Services had a decision to make. EPA gave them  
10 their regulation so they could decide: Does it  
11 pass muster under the Endangered Species Act?

12 And the second is that when the time  
13 came to make that decision, under the schedule  
14 that the agencies agreed to at Joint Appendix  
15 91, the Services conveyed the conclusion that  
16 the regulation caused jeopardy and that the next  
17 steps were reasonable and prudent alternatives.

18 And we know that there were no further  
19 deliberations, either contemplated or that  
20 occurred, as to the viability of the proposed  
21 regulation. And in EPA's final rule, it said  
22 these changes were the result of the Services'  
23 consultation in order to avoid jeopardy.

24 I mean, all of that lends no support  
25 to the Services' claim that their analysis was

1 somehow not yet done or incomplete or -- or  
2 inconclusive.

3 JUSTICE THOMAS: So what's at stake  
4 here? EPA's first rule, it doesn't -- it's gone  
5 now. They've got a different rule. So what's  
6 at stake? Why do you need -- what information  
7 are you trying to get about a rule that's no  
8 longer in place?

9 MR. NARAYAN: Well, in this rule, what  
10 they've said is that they are going to make  
11 permit-by-permit determinations as to what is  
12 required to avoid jeopardy and protect the  
13 species.

14 And what the Sierra Club's interested  
15 is -- in is knowing that those future decisions  
16 are consistent with the basis by which they have  
17 made these changes so that if, for example, it's  
18 turtles at a certain kind of plant, that future  
19 permits protect turtle -- turtles at -- at those  
20 plants. And industry has a different set of  
21 concerns, which is simply knowing that when the  
22 agencies exercise this authority, they're doing  
23 it on sound grounds.

24 JUSTICE THOMAS: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Breyer.

2 JUSTICE BREYER: Well, this is  
3 complicated because I think there are several  
4 documents here. So I'm going to ask you just to  
5 check me. And don't say I'm right if I'm not  
6 right, okay?

7 MR. NARAYAN: Okay.

8 JUSTICE BREYER: Okay. First, we are  
9 talking about the -- the animals, the Fish and  
10 Wildlife Department and the Marine Fisheries,  
11 okay? What they're supposed to do is they write  
12 a document called a biological opinion, is that  
13 right?

14 MR. NARAYAN: Yes.

15 JUSTICE BREYER: Okay. In the history  
16 of this Act, that document, once they publish  
17 it, will force EPA to change, basically, and  
18 that document has been actually issued never. I  
19 mean, let me not exaggerate. In 7,000 cases in  
20 seven years, they issued one exactly twice.

21 Now the reason is there is a different  
22 document called a draft biological opinion, and  
23 what happens when they write that draft is they  
24 send it to EPA and they negotiate, and EPA  
25 eventually ends up probably doing what they

1 finally agree to do.

2 So we're talking about that draft  
3 biological opinion, and it has two things about  
4 it. One, we're going to negotiate this with  
5 EPA; and, two, private people, who are nothing  
6 to do with the EPA, can get a hold under FOIA of  
7 that document. Is that right?

8 MR. NARAYAN: Yes, except I think that  
9 what is being negotiated is not the jeopardy  
10 conclusion but what happens next; that is --

11 JUSTICE BREYER: Yeah. All right.  
12 What happens next, but there is a document  
13 called draft biological thing, and things happen  
14 as a result of that, and it's pretty clear that  
15 private people can get ahold of it. Indeed,  
16 there's a reg to that effect. Is that right?

17 MR. NARAYAN: That's right if there's  
18 an applicant involved with the process.

19 JUSTICE BREYER: An applicant can get  
20 ahold of it. So I thought that that was, once  
21 you write that draft biological opinion, you've  
22 got something that's final enough that somebody  
23 can get it under FOIA.

24 Now the question here is: Well, what  
25 about the draft leading up to that draft? And

1 that's what we're trying to get or not get. Is  
2 that right?

3 MR. NARAYAN: No, Your Honor. I think  
4 our position is that this document is that  
5 draft. I mean, EPA didn't ask for it.

6 JUSTICE BREYER: Yeah, yeah, yeah,  
7 yeah, but it doesn't say it. And so the  
8 government says: Well, this is just a draft of  
9 the draft, or maybe the government means, no,  
10 you can't get ahold of the draft, in which case  
11 you can never get ahold of anything because they  
12 never use anything beyond the draft. Is that  
13 right?

14 MR. NARAYAN: That's how I understand  
15 the government's position. But, to be clear,  
16 you know, all they said is that EPA didn't ask  
17 for it, so it was never formally transmitted.

18 JUSTICE BREYER: All right.

19 MR. NARAYAN: They did send over a  
20 portion, and this does appear to be the  
21 statement of basis for the jeopardy conclusion,  
22 as we --

23 JUSTICE BREYER: So your view is I  
24 looked through the nine -- or the -- the  
25 documents that are supposed to be turned over or

1 not, I read this record, and I ask myself: Is  
2 this, in effect, the draft biological opinion,  
3 or is this a document that is part of the debate  
4 within the agency that will lead up to the draft  
5 biological opinion that will serve as a basis  
6 for discussion with EPA. Have I got that right?

7 MR. NARAYAN: Yes, along with the rest  
8 of the record, right.

9 JUSTICE BREYER: Okay. Okay. Now I  
10 know what to do. That's extremely helpful.  
11 Thank you.

12 CHIEF JUSTICE ROBERTS: Justice Alito.

13 JUSTICE ALITO: Well, I really don't  
14 know what to do. We face a conundrum. One  
15 possibility is for us to say that, if it's a  
16 draft, it's -- it's privileged.

17 The other is to try to draw a  
18 distinction between different kinds of drafts.  
19 So let me ask you this: Suppose that the  
20 Services went through a three-step process in  
21 issuing a biological opinion, and the draft  
22 produced at Step 1 turns out to be what the  
23 Service will ultimately issue 90 percent of the  
24 time. What emerges from Step 2 is what it will  
25 issue 97 percent of the time. And what emerges

1 from Step 3 is the final product.

2 Now at what point do you think a  
3 document would become non-privileged?

4 MR. NARAYAN: So I think the answer is  
5 going to depend on the particular process --  
6 decisionmaking process that actually occurs  
7 because, you know, there aren't -- they've given  
8 themselves a lot of flexibility.

9 So, in a case like this one, where  
10 there was no further deliberation that seemed to  
11 have been contemplated or that occurred, then,  
12 you know, it is the -- the 90 percent draft  
13 because, you know, the 10 percent simply doesn't  
14 seem to be at issue in this case. EPA chose not  
15 to interrogate their -- their determination  
16 here, as agencies normally do.

17 JUSTICE ALITO: Well, you know, with  
18 respect, counsel, I don't know how satisfactory  
19 that answer is because, if a Service is  
20 determined not to have this released under FOIA,  
21 all they need to do at every step is simply to  
22 say: This is what we think up to this point,  
23 but, of course, this isn't our final word, we're  
24 open to hearing other information about this so  
25 that it's made explicitly non-final, subject to

1 further internal deliberations, until it's  
2 finally issued.

3 MR. NARAYAN: Well, no, I mean, the  
4 fact that they could change their mind in their  
5 own discretion is clearly not enough. I mean,  
6 Sears said that at Footnote 25. Grumman does  
7 not stand for that proposition.

8 So, if -- if all they say is, well, in  
9 our discretion, we have some room to move, I  
10 mean, that's even true about final biological  
11 opinions. I think, you know, what I'm saying is  
12 that if you have a situation in which, you know,  
13 they have a -- a process set up where they say,  
14 well, we're giving you a draft and we want your  
15 opinion and we intend to respond to it, you  
16 know, if a real deliberative process is set up  
17 within the rulemaking, then that's a different  
18 kind of draft.

19 JUSTICE ALITO: Well, so help me.  
20 Could you just say as succinctly and precisely  
21 as possible what you think the test is we should  
22 apply in distinguishing among opinions that are  
23 labeled drafts?

24 MR. NARAYAN: If the draft opinion  
25 reflects a decision made by the agency with

1 appreciable legal consequences, then it needs to  
2 be released.

3 JUSTICE ALITO: Well, I mean, if it  
4 was -- if Step 1 was followed 50 percent of the  
5 time, that would have appreciable legal  
6 consequences, wouldn't it?

7 MR. NARAYAN: I -- I think it would.  
8 I just want to be clear that, you know,  
9 50 percent -- I mean, if it is a -- a  
10 discretionary reconsideration process and, you  
11 know, the Services have all the power to control  
12 what happens in that other 50 percent, then,  
13 yes, that's --

14 JUSTICE ALITO: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Sotomayor.

17 JUSTICE SOTOMAYOR: Counsel, I'm -- I  
18 guess I'm getting bogged down in the details,  
19 but I do want to a little bit.

20 In this case, what is clear is that  
21 all we know is that portions of the draft  
22 jeopardy opinion went to the EPA. And I know  
23 that -- or at least my law clerk has looked  
24 through the record and not been able to find an  
25 answer as to what portions. But how can we say

1 that there was a final draft jeopardy opinion  
2 that was signed off if the EPA never saw it?

3 And if they never saw it and were  
4 working in a collaborative process thereafter to  
5 change their rule, how could -- how can it help  
6 you to look at that draft when the EPA, in  
7 following whatever it's doing now, was never  
8 informed by the draft?

9 MR. NARAYAN: So, in answer to, I  
10 think, the first part of your question, if you  
11 look at 402.14(g)(5), what it says is that when  
12 the Services reach this stage of the process,  
13 when they make a jeopardy conclusion as to the  
14 regulation they have been given, they need to  
15 have essentially a statement of basis available  
16 to the action agency if the action agency wants  
17 to submit comments.

18 And, you know, here, EPA, again, chose  
19 not to submit comments. It didn't want to  
20 interrogate the Services' opinion apparently.

21 But, you know, that is still a  
22 statement of basis that provided -- that  
23 explains the Services' decision. And, you know,  
24 that EPA didn't ask for the thing to be formally  
25 transmitted, I mean, doesn't really affect that

1 -- that document's purpose or the operative  
2 effect of the decision itself.

3 As to why we want to see it even if  
4 EPA hasn't, the problem is that these jeopardy  
5 decisions don't just affect the action agency.  
6 You know, ultimately, they affect the public and  
7 regulated communities -- the regulated community  
8 and everybody else.

9 So, for our purposes, you know, that  
10 -- the Services going down the line as they  
11 exercise their supervisory -- supervisory  
12 authority behave in a way that is consistent  
13 with the conclusions they reached here remains  
14 important.

15 JUSTICE SOTOMAYOR: All right. Could  
16 you articulate for me your rule again? We know  
17 there has to be some collaborative process.  
18 There has to be some collaborative process  
19 within the Services and one -- and then with the  
20 EPA.

21 At what point is that draft biological  
22 opinion articulate the rule that you want us to  
23 write final, in your judgment, or subject to  
24 disclosure?

25 MR. NARAYAN: I mean, when the draft

1 opinion provides the basis for a decision made  
2 by the Services, that is, the agency as a whole,  
3 that has appreciable legal consequences, then  
4 that opinion needs to be disclosed.

5 JUSTICE SOTOMAYOR: Thank you,  
6 counsel.

7 CHIEF JUSTICE ROBERTS: Justice Kagan.

8 JUSTICE KAGAN: Mr. Narayan, assume I  
9 agree with you for the moment that what we might  
10 call a final draft opinion is FOIA-able, you  
11 know, the one that triggers the back and forth  
12 between the Service and the agency, but the  
13 government here says: Well, this was not such a  
14 final draft opinion. It -- you know, it  
15 characterizes it as a draft of a draft. And  
16 they point to the various decisionmakers'  
17 declarations.

18 So what evidence do you have that the  
19 government is wrong to say that?

20 MR. NARAYAN: Well, I think the  
21 measure of those sorts of simply conclusory  
22 statements, right, like this was deliberative,  
23 is the fact that the government has offered to  
24 support their conclusion.

25 JUSTICE KAGAN: Well, it's not just

1       conclusory statements.  I mean, you have the  
2       Service head saying, I -- I -- I -- I thought  
3       that more work needed to be done on it.  I was  
4       not ready to sign off on this.

5               MR. NARAYAN:  That's correct.  But the  
6       only work that they have described is coming up  
7       with an alternative that they would approve,  
8       right?  So, yes, more work needs to be done.  
9       But then, in this particular process, there  
10      appears to have been no work either contemplated  
11      or that occurred as to the permissibility of the  
12      proposed regulation.

13              And the only reason they give for  
14      changing their jeopardy conclusion is that EPA  
15      agreed to add these additional measures, which,  
16      again, EPA itself ascribed to the Services'  
17      jeopardy determination through the consultation.

18              So, you know, again, I think it's fair  
19      to say that more work needs to be done, but if  
20      the only work that needs to be done is to  
21      essentially follow through on the consequences  
22      of the jeopardy determination, then I think  
23      that's not enough.

24              JUSTICE KAGAN:  Well, suppose that --  
25      suppose that the -- the -- the -- the Service

1 head got a memo from a staffer saying this is --  
2 this is a bad idea, there's going to be all  
3 kinds of jeopardy, and the Service head really  
4 had not -- did -- did not look at it very  
5 closely, you know, it hadn't decided whether he  
6 was ready to sign off on it, but he did realize  
7 that there were some issues here, and he calls  
8 up the EPA and he says: Look, I -- I haven't  
9 gotten all the way through this, I haven't made  
10 a final decision yet, but I -- I think that  
11 there might be a problem here, and I want to get  
12 you to talk to my guys and to try to work this  
13 out informally.

14           Would -- would you say that there's a  
15 FOIA-able document there?

16           MR. NARAYAN: No, I wouldn't. I mean,  
17 our point here is that the Services haven't made  
18 that showing in this record. And the other  
19 point is that they are required to have a  
20 statement of basis available under 402.14(g)(5),  
21 when they reach this stage; that is, when they  
22 make a jeopardy conclusion. So --

23           JUSTICE KAGAN: Well, I guess why  
24 isn't my hypothetical essentially this case? If  
25 we -- if we treat declarations as -- as serious

1 and as worthy of, you know, being -- you know,  
2 we should respect them unless we see something  
3 to the contrary, that basically the head of the  
4 Service looked at this and said: I don't know  
5 if I'm ready to sign off on this. I think maybe  
6 more work would need to be done, to put this on  
7 final form. I think that there's probably a --  
8 a -- an issue here. I want to get everybody to  
9 start talking about it.

10 MR. NARAYAN: Well, I think the -- the  
11 reason the lower court didn't reach that factual  
12 conclusion is that by all indications this  
13 document was ready to go to EPA, if the EPA  
14 asked for it. All that happened is that EPA  
15 didn't ask for it.

16 JUSTICE KAGAN: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Gorsuch.

19 JUSTICE GORSUCH: Good morning,  
20 counsel.

21 I -- I think we all understand the  
22 problem of -- of the government effectively  
23 stamping everything "draft" and -- and the  
24 concerns that attach to that. But I just wanted  
25 to explore the concerns on the other side of the

1 coin too, and that is, you know, without  
2 adequate room to kind of back down privately,  
3 the government sometimes winds up making worse  
4 decisions rather than better ones.

5           And here it does seem like that  
6 because of the back and forth privately, thanks  
7 to the Services' intervention, EPA came up with  
8 a -- a rule that might be better from your  
9 perspective.

10           To what -- what -- how do we balance  
11 that concern and allow agencies sufficient room  
12 to maneuver privately to avoid having, you know,  
13 the -- to embarrass themselves later and allow  
14 them to save face to get to better policy  
15 results?

16           MR. NARAYAN: You know, if an agency  
17 puts those facts into the record, then I think,  
18 fair enough, but the key point is that if -- if  
19 the agency is going to back down, it has to back  
20 down from its decision, right? It can't make  
21 the decision and then say, well, we're not --

22           JUSTICE GORSUCH: I guess I'm asking  
23 you to abstract up a level with me, counsel, and  
24 say: You know, I think you would agree here EPA  
25 got to a better result thanks to the Services'

1 informal interventions, right?

2 MR. NARAYAN: Yes, we'd agree.

3 JUSTICE GORSUCH: Okay. And -- and --  
4 and so there has got to be some room for that  
5 kind of private negotiation; don't you think?

6 MR. NARAYAN: Yes. To be clear, we're  
7 not complaining about the Services' making EPA  
8 make its regulation more protective. And an  
9 important fact here is that the Services really  
10 do have the authority.

11 JUSTICE GORSUCH: Well, I guess I'm  
12 more -- I'm asking don't -- do you -- are you at  
13 all concerned that a more invasive rule might  
14 deter this kind of productive back-and-forth  
15 discussion? And how do we -- how do we balance  
16 that concern?

17 MR. NARAYAN: No, Your Honor. I mean,  
18 we're not concerned, I think, for a couple  
19 reasons. One is that the biological opinion  
20 really is a mostly science -- scientific studies  
21 and facts. You know, so it's not the sort of  
22 thing that lends itself to the sorts of  
23 embarrassment. Those things are normally  
24 subject to peer review, right?

25 So -- and then, you know, in this sort

1 of back and forth, I mean, what's important is  
2 that you have a position -- you have one party  
3 who has authority, effective authority, and one  
4 who's acting like a subordinate, and that's the  
5 action agency.

6 And in that circumstance, I think, you  
7 know, yes, there is some balancing, but it is  
8 really important to know why the Services are  
9 saying what they're saying, at least when they  
10 effectively foreclose a -- a proposed  
11 regulation, that from EPA's purposes, that they  
12 had said: We've -- we've reached the end of the  
13 line for our -- the -- the Endangered Species  
14 Act for us.

15 JUSTICE GORSUCH: Thank you, counsel.

16 MR. NARAYAN: All we need to know from  
17 you is, you know, are we good?

18 CHIEF JUSTICE ROBERTS: Justice  
19 Kavanaugh.

20 JUSTICE KAVANAUGH: Thank you  
21 Mr. Chief Justice. And good morning,  
22 Mr. Narayan.

23 I wanted to pick up first on Justice  
24 Thomas and Breyer and Alito and -- and others  
25 have talked about. What is the agency decision?

1 I would have -- I would have thought that the  
2 way to do this is to start by figuring out what  
3 is the decision, capital D decision, and then  
4 everything that led up to that decision is -- is  
5 predecisional.

6 And that would be a pretty simple  
7 formula. And, obviously, there would be  
8 questions in some cases about what the decision  
9 is. Here, theoretically, you could argue EPA's  
10 decision, but the government acknowledges that  
11 the Services' opinions are the decision.

12 What's wrong with that framework?

13 MR. NARAYAN: I don't think anything  
14 is wrong with it so long as we recognize that  
15 when EPA gives a proposed regulation to the  
16 Services and asks does it past muster under the  
17 Endangered Species Act, that is a capital D  
18 decision.

19 JUSTICE KAVANAUGH: And the second  
20 question I wanted to ask is the need for clear  
21 rules in the FOIA context. So the -- the need  
22 for that, I think, is multi-pronged.

23 First, the agency officials who are  
24 engaged in deliberations need to be able to  
25 speak with candor, as Justice Gorsuch was just

1 saying.

2 Second, FOIA officers, who are rampant  
3 throughout the executive branch spend an  
4 enormous amount of time and resources on FOIA,  
5 could use clarity.

6 And then district court judges in the  
7 District of Columbia and elsewhere, if you talk  
8 to, would lament the lack of clarity and clear  
9 rules in -- in FOIA cases.

10 So that raises the concern that the  
11 effects-based test or looking at the effects of  
12 -- of the memo could become so fact-intensive  
13 and could really blur the long-standing  
14 predecisional principle of the deliberative  
15 process privilege because lots of drafts have --  
16 have real effects within the executive branch.

17 Can you respond to all of that?

18 MR. NARAYAN: Yes. I mean, so I'll  
19 start with the agencies because it -- I think it  
20 is important here that the Services have them --  
21 themselves developed workable standards, see the  
22 memos we cited at page 55 of our draft, in which  
23 they do distinguish between drafts that have  
24 decisional weight and those drafts that really  
25 are deliberative.

1           So there's no suggestion or at least  
2 there's no evidence that there's any lack of  
3 clarity that has -- is -- is impeding their  
4 activities in this context.

5           As to the district courts, you know,  
6 the district courts have not -- I mean, yes,  
7 they are perhaps fact-intensive judgments, but  
8 really no more so than those required under  
9 other elements of the APA. And it is always  
10 possible for an agency to submit declarations  
11 that don't speak to the standards and then say:  
12 Well, these standards are unworkable.

13           For an agency to put in facts like,  
14 you know, in fact, there are elements of the  
15 biological analysis we -- with which we did not  
16 agree or -- you know, all of those things are in  
17 their possession. And the reason FOIA places  
18 the burden on the agency is because they're the  
19 only ones that have it, right?

20           So, again, in general, these cases  
21 have been resolved in really typical FOIA  
22 fashion. I mean, you look at the regulations  
23 and the statute, you look at their declarations  
24 in the record, and if all of that isn't clear,  
25 then there's the option of in camera review.

1 JUSTICE KAVANAUGH: Okay, thank you.  
2 That's helpful.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Barrett.

5 JUSTICE BARRETT: Counsel, I have a --  
6 a question following up on Justice Breyer, when  
7 he gave you the hierarchy of documents that  
8 might be at stake here. I want to be sure that  
9 I understand the consequences that flow from  
10 each.

11 So, you know, in your conversation  
12 with Justice Breyer, you identified the  
13 biological opinion, which is almost never  
14 issued; the draft biological opinion, which is  
15 available by regulation; and then the draft of a  
16 draft, which the government says this was.

17 Is it true that the draft biological  
18 opinion, that second one in the hierarchy, is  
19 always FOIA-able and that there's no controversy  
20 about that?

21 MR. NARAYAN: Well, no, no, there is  
22 controversy about that.

23 JUSTICE BARRETT: Okay.

24 MR. NARAYAN: I mean, it is -- it is  
25 available if there's an applicant involved

1 because in that case, it's -- it's not a purely  
2 interagency document, and so under Klamath,  
3 those are -- are produced.

4 JUSTICE BARRETT: Okay.

5 MR. NARAYAN: I mean, one of the  
6 controversies here is if -- is that kind of  
7 draft document available or not?

8 JUSTICE BARRETT: Okay. Thank you. I  
9 wanted to clarify that.

10 My next question has to do with the --  
11 what you characterized as the legal effect of  
12 this document.

13 Why was it a legal effect as opposed  
14 to simply a practical effect when having this  
15 document caused the EPA to abandon the 2013  
16 regulation and then move on to the 2014  
17 regulation?

18 MR. NARAYAN: Well, I think Bennett  
19 really suggests three reasons why under the  
20 Endangered Species Act there are legal  
21 consequences and not just practical influence.

22 I mean, the first is that there's a  
23 statutory prohibition in Section 7, right, no  
24 actions are allowed that create jeopardy.

25 The second is that the -- the -- the

1 Services have a mandatory statutory role and in  
2 enforcing that prohibition. So it's not a  
3 matter of -- of just asking for advice from  
4 somebody. They have to be involved.

5 JUSTICE BARRETT: But, I'm sorry,  
6 counsel. Let me just interrupt for one second.

7 I think that's true if you have a  
8 final biological opinion, but in this case,  
9 would you say that if EPA simply got -- I'm  
10 sorry -- if EPA simply got wind of what the  
11 Services were thinking and said: Oh, well, it  
12 doesn't look like this is going to be on a good  
13 track for us with respect to jeopardy, and so  
14 abandoned it, that seems to be a practical  
15 consequence, and that might be the same kind of  
16 consequence that flows from a draft opinion as  
17 opposed to a biological opinion, which does have  
18 force in the scheme.

19 MR. NARAYAN: But -- no, I -- I agree  
20 with you that in that scenario it -- it would be  
21 privileged. I think the point here is that the  
22 Services reached a conclusion, conveyed the  
23 conclusion to EPA, and EPA responded exactly as  
24 the Services expect them to respond.

25 When they say jeopardy, EPA then moves

1 to change its regulation.

2 JUSTICE BARRETT: But how can a draft  
3 opinion give rise to that legal consequence?

4 MR. NARAYAN: Well, what Bennett says  
5 is that what's important is that when the  
6 Services reach a conclusion, the action agency  
7 knows that that conclusion is based on an  
8 administrative record that is going to get  
9 deference.

10 So -- so as long as EPA knows the  
11 Services have reached this conclusion, none of  
12 what Bennett describes really depends upon  
13 whether the -- the analysis in the record is --  
14 is currently labeled draft or final.

15 What they need to know is the analysis  
16 is there and they really are going to have no  
17 chance of contesting it in court.

18 JUSTICE BARRETT: Thank you, counsel.

19 CHIEF JUSTICE ROBERTS: A minute to  
20 wrap up, counsel.

21 MR. NARAYAN: The problem with the  
22 Services' standard is that it boils down to it's  
23 privileged if we say it's privileged. And the  
24 upshot here would be to deprive the public of  
25 access to the reasons underlying the Services'

1 jeopardy decision which, again, virtually never  
2 appear in final opinions.

3 Those decisions are enormously  
4 consequential, not just to the action agency or  
5 to the Sierra Club, but to the regulated parties  
6 who ultimately have to comply with the measures  
7 the Services demand.

8 The importance of looking to those  
9 legal consequences, rather than just labels, is  
10 that it tracks FOIA's core concern, making sure  
11 the public knows how agencies are actually using  
12 the authority Congress gave them.

13 Thank you very much.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel. Mr. Guarneri, three minutes for  
16 rebuttal.

17 REBUTTAL ARGUMENT OF MATTHEW GUARNIERI  
18 ON BEHALF OF THE PETITIONERS

19 MR. GUARNIERI: Thank you, Mr. Chief  
20 Justice.

21 In our view, the general rule here  
22 should be a clear bright-line test that, until a  
23 biological opinion is signed and formally  
24 issued, there is no final decision in an  
25 interagency consultation.

1           The deliberative process privilege  
2 really requires that degree of certainty. Any  
3 exception should -- should be rare.

4           In -- in -- in that respect, it's  
5 really no different, the biological opinion here  
6 is really no different than a judge's or a  
7 court's opinion, which is not actually final  
8 until it's adopted by the judge and -- and  
9 issued as an official opinion.

10           Now, turning to Respondent's  
11 alternative, first, Respondent really this  
12 morning has made no effort to defend the actual  
13 reasoning of the court of appeals.

14           Respondent does not defend the kind of  
15 last version rationale that the court of appeals  
16 employed to conclude that the December 2013  
17 draft biological opinions were -- were not  
18 predecisional and deliberative.

19           Respondent's alternative instead is  
20 this appreciable legal consequences test, which  
21 I don't think works for a number of reasons.  
22 First of all, as -- as -- as Justice Barrett's  
23 questioning illustrated, there is no appreciable  
24 legal consequence to a draft biological opinion.  
25 Legal consequences attach only to the final

1 biological opinion.

2           Second, as Justice Kagan's  
3 hypothetical illustrated, the appreciable legal  
4 consequences test that Respondent has proposed  
5 here really proves too much because the same --  
6 the same consequences that Respondent is relying  
7 on here could have flowed from, for example, an  
8 informal recommendation made by a subordinate  
9 staff member at one of the Services.

10           You know, we use -- we use this  
11 example in our reply brief that, if a junior  
12 staffer at one of the Services had sent an  
13 e-mail to the EPA at the very outset of the  
14 consultation saying: Well, in my view, my  
15 supervisors might make a jeopardy determination  
16 here unless you change the following things  
17 about your proposed rule, no one would confuse  
18 that with a final decision.

19           Respondent's -- Respondent's only real  
20 answer to those problems is to insist that in  
21 this particular consultation the Services, in  
22 fact, made a decision in December 2013.

23           And that contention is just at odds  
24 with the record of the proceedings here. It's  
25 clear that the agency decisionmakers at the

1 Service never adopted the December 2013 draft as  
2 an official agency position. They never signed  
3 them. They never publicly issued those  
4 documents. And they never even transmitted them  
5 in full to the EPA.

6 What Respondent is seeking to obtain  
7 here is not an explanation of the decision the  
8 agencies actually made. As Respondent  
9 confirmed, Respondent would like these drafts in  
10 order to impeach the decision that the agency's  
11 made in future challenges to the application of  
12 the EPA's rule to particular permits.

13 So Respondent is seeking to mount a  
14 sort of collateral attack against the agency's  
15 decision, not to understand the basis for that  
16 decision. The Court should reject that effort.

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel. The case is submitted.

20 (Whereupon, at 11:10 a.m., the case  
21 was submitted.)

22

23

24

25

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