No. 19-547

In The Supreme Court of the United States

UNITED STATES FISH & WILDLIFE SERVICE, ET AL.,

Petitioners,

v.

SIERRA CLUB, INC.,

Respondent.

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

BRIEF FOR *AMICI CURIAE* AMERICAN FOREST RESOURCE COUNCIL, NATIONAL ASSOCIATION OF HOME BUILDERS, NFIB SMALL BUSINESS LEGAL CENTER, AND AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF RESPONDENT

AMY CHAI
THOMAS J. WARD
NATIONAL ASSOCIATION OF HOME BUILDERS
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 266-8230

LAWSON E. FITE
Counsel of Record
SARA GHAFOURI
AMERICAN FOREST RESOURCE COUNCIL
700 N.E. Multnomah Street, Suite 320
Portland, OR 97232
(503) 222-9505
lfite@amforest.org

[Additional Counsel Listed On Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

KAREN R. HARNED
NFIB SMALL BUSINESS
LEGAL CENTER
555 12th Street, N.W.
10th Floor
Washington, D.C. 20004
(202) 314-2061

ELLEN STEEN
TRAVIS CUSHMAN
AMERICAN FARM BUREAU
FEDERATION
600 Maryland Avenue, S.W.
Suite 1000W
Washington, D.C. 20024
(202) 406-3600

Counsel for Amici Curiae

QUESTION PRESENTED

Exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. §552(b)(5) (2012), incorporates the deliberative process privilege. Does FOIA exempt from disclosure nominally draft biological opinions prepared under Section 7(a)(2) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. §1536(a)(2), which were shared in pertinent part with the action agency and were followed by significant changes to the proposed action to bring the action into ESA compliance?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICI CURIAE*[1]

Amici represent businesses, organizations and individuals in the regulated community subject to government restrictions imposed pursuant to Section 7 of the Endangered Species Act.

The American Forest Resource Council (AFRC) is a regional trade association whose purpose is to advocate for sustained-yield timber harvests on public timberlands throughout the West to enhance forest health and resistance to fire, insects, and disease. AFRC promotes active management to attain productive public forests, protect the value and integrity of adjoining private forests, and assure community stability. It works to improve federal and state laws, regulations, policies and decisions regarding access to and management of public forest lands and protection of all forest lands. AFRC represents over 50 forest product businesses and forest landowners throughout California, Idaho, Montana, Oregon, and Washington. These businesses provide tens of thousands of family-wage jobs in rural communities.

The National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing

---

[1] All parties have consented in writing to the filing of this *amicus* brief. *See* Sup. Ct. R. 37.3(a). No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. *See* Sup. Ct. R. 37.6.

and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and account for 80% of all homes constructed in the United States.

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center

frequently files *amicus* briefs in cases that will impact small businesses.

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization with member state Farm Bureau organizations in all 50 states and Puerto Rico. As a grassroots organization, AFBF seeks to enhance and strengthen the lives of rural Americans and to build strong, prosperous agricultural communities. AFBF's members are farm and ranch families, who grow and raise every type of agricultural product in the nation, on private and federal lands. Both AFBF and its individual members have been directly affected by the interpretation of various environmental laws, in particular the ESA and the Clean Water Act.

SUMMARY OF ARGUMENT

Under the particular facts of this case, the Ninth Circuit did not err in ordering the release of "final draft" biological opinions. We have been here before. Justice Scalia admonished that the text of ESA Section 7 must be read to "ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise." *Bennett v. Spear*, 520 U.S. 154, 176 (1997) (per Scalia, J. for a unanimous Court). The statute also directs the government "to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Id.* at 176–77. *Bennett* provided substantial protections to regulated interests by holding that an ESA

Biological Opinion (BiOp) is final agency action subject to judicial review. *Id*. at 178–79. This is true whether the BiOp determines that the proposed action violates the ESA or not—that is, whether the Services determine there is "jeopardy" or "no jeopardy."[2] Either determination is a final decision on the compatibility of a particular proposal with the ESA.

Petitioners' position turns *Bennett* on its head, asking the Court essentially to adopt a disclosure rule akin to the government's rejected *Bennett* argument that an opinion serves an "advisory function" only. *Id.* at 169, 178. "[I]n reality," Justice Scalia observed, such an opinion "has a powerful coercive effect on the action agency," of which the Services are "to put it mildly, keenly aware. . . ." *Id.* at 169–70. The Services here seek to withhold a final draft jeopardy opinion on the ground that it was merely a draft. Such a holding would hamstring the ability of industry stakeholders to prevent the type of economic dislocation Justice Scalia foresaw.

Not only is the Services' position at odds with *Bennett*, it is not grounded in the reality of ESA consultation as *amici* have experienced it. In *amici*'s world, the

---

[2] Section 7(a)(2) prohibits agencies from taking action that is "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. §1536(a)(2). The standards for adverse modification and jeopardy are essentially identical. *See* 50 C.F.R. §402.02. For ease of reference, we refer to BiOps as making "jeopardy" or "no jeopardy" determinations.

Services frequently impose draconian economic consequences—sometimes at regional scale—without ever having to explain their scientific rationale. Far from the Services' description of a unified "collaborative" process, consultation is highly structured, ordinarily arm's-length, and often contentious. A "jeopardy" opinion followed by revisions to the proposed action is the end of one Section 7 consultation process. Not until the action agency amends its proposal does the next Section 7 process start. The release of a jeopardy opinion is essential for public understanding of the line between jeopardy and no-jeopardy, a line whose particulars the Services jealously guard.

As members of the regulated community, *amici* have serious concerns about the implications of this case on efforts to hold the Services accountable for the substantial economic and social effects that can result from ESA consultation. Such dislocation is expected because the ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

Draft BiOps are frequent and probative subjects of judicial review. Particularly in cases brought by the regulated community, drafts may be the only way to determine the actual reasoning for the requirements imposed on the action agency or permit applicant. When an environmental group like respondent challenges a BiOp, the reviewing court will directly examine the BiOp's (usual) no-jeopardy conclusion. Here, though the Services call the documents at issue

"drafts," context shows the opinions terminated the first consultation on EPA's rule, so the opinions are not predecisional or deliberative.

The Services would have the Court further cloak their tremendous regulatory power, furthering neither the ESA's purposes nor the supposed goals of the deliberative process privilege. It places *amici* in a similar, impossible position as the permit applicants in *Sackett* and *Hawkes*.

For these reasons, *amici* believe the Court should affirm the Ninth Circuit decision ordering disclosure. Alternatively, since the absolute privilege claimed by the Services is inconsistent with Exemption 5's text, the Court should affirm on the ground that the public interest in disclosure outweighs any governmental secrecy interest.

ARGUMENT

I. Disclosure of These and Similar Opinions Is Important to the Regulated Community.

A. The Services' description of the subject documents as exempt "drafts" is not consistent with *amici*'s experience of the Section 7 consultation process.

Stripped of ornament, labeling, and careful declaration drafting, what actually happened becomes visible. EPA prepared a regulation and submitted it to the Services for formal programmatic consultation. The

Services duly prepared their biological opinions and transmitted portions of them, at which point EPA decided it had heard enough; either the opinion was not acceptable or the reasonable and prudent alternatives impractical. It "notif[ied] the Service of its final decision on the action" following a jeopardy opinion, 50 C.F.R. §402.15(b), which was to withdraw the original regulation from consultation and submit a modified regulation. Thus the 2013 final drafts did not concern, as the Services would have it, "a proposed agency action that was later modified in the consultation process." Pet. Br. I. Nor were they part of "ongoing deliberations." Pet. Br. 2. Rather, the proposed agency action was modified because of the consultation process, and then resubmitted to a new consultation.

ESA consultation is ordinarily arm's-length and frequently adversarial, and this case is no exception. As formal consultation neared the end on the first version of the intake rule, the Services purportedly "decided that 'additional consultation [with EPA] was needed to better understand and consider the operation of key elements of EPA's rule,'" and "[t]he Services and EPA thereafter all 'agreed that more work needed to be done and [they] agreed to extend the time frame for the consultation.'" Pet. 7 (citations omitted). The Ninth Circuit held the documents "represent the final view of the Services regarding the then-current November 2013 proposed rule." Pet. App. 18a; *Sierra Club v. U.S. Fish & Wildlife Serv.*, 925 F.3d 1000, 1013 (9th Cir. 2019). As such, they were not pre-decisional. *Id.*

The Services assert the Section 7 regulations "provide for the interagency consultation process to be collaborative." Pet. Br. 7. They claim "EPA and both Services worked collaboratively to achieve a regulatory solution that would allow EPA to fulfill its legal obligations under the ESA and other applicable statutes." Pet. 6; Pet. Br. 8. This is in keeping with the Services' assertion that they "and the action agency work together to determine the likely effects on listed species and critical habitat from the agency's action, and if necessary, how best to mitigate adverse effects." Pet. Br. 7. The Services do not claim, however, that there was any "optional collaborative process" adopted under 50 C.F.R. §402.14(h)(4).

The Services rest their claim of privilege on the assertion they created the final drafts "to facilitate their 'deliberations' in assessing" the proposed rule. Pet. Br. 27. In the Services' view, consultation on the rule merely continued until the final BiOp issued in 2014. Pet. Br. 8–11, 27–28. In the Services' telling, this was a highly collaborative process where the agencies met "routinely." *Id.* at 8. They contend this means the 2013 opinions "died on the vine" and are privileged. Pet. Br. 39.

But the reason the drafts were not adopted as the final BiOp was that the underlying *action* was changed, leading to a new consultation process. *See* 50 C.F.R. §402.14(m)(2). Consultation is based on the specific proposed action submitted by the agency, not on the general task or goal the agency is looking to address. 16 U.S.C. §1536(a)(2), 1536(b)(3)(A), 50 C.F.R.

§§402.14(c)(1), (g)(3), 402.14(h)(1)(iii)–(iv); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 521 (9th Cir. 2010). The Services' Consultation Handbook directs, as well, that "[d]etermining the action area relates only to the action proposed by the action agency." *Final ESA Section 7 Consultation Handbook*, March 1998, at 4–18.

The "draft" was not rejected by a higher authority. Instead, it had the same effect on EPA as if a final jeopardy BiOp had been issued. EPA decided to change the subject action. *See* 50 C.F.R. §§402.14(m)(1)–(2). It is well-settled that Exemption 5 does not privilege "communications that promulgate or implement an established policy. . . ." *Ryan v. Dep't of Justice*, 617 F.2d 781, 790–91 (D.C. Cir. 1980); *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975). Unlike the subsidiary offices in *Grumman*, but like an opinion of a federal district court, the Services' opinions have "real operative effect" independent of the action agency's ultimate course. *See id.* at 186–87; *Bennett*, 520 U.S. at 169–70. The Court of Appeals, in applying these principles to the documents at issue, properly accounted for the statutory and regulatory context.

EPA, despite the Services' implication, was not a higher authority on the BiOp; if an agency disagrees with a BiOp, it cannot require changes, though it is "free to disregard the Biological Opinion and proceed with its proposed action, but it does so at its own peril. . . ." *Bennett*, 520 U.S. at 170; 16 U.S.C. §1536(b). The Services told EPA all it needed to know to

terminate the consultation, meaning the jeopardy opinions served as the Services' veto on that version of EPA's rule. Thus, when officials at the Services concluded that further consultation was required, Pet. Br. 10, the "further" consultation was due to EPA's modification of the rule. It was not on the initiative of any decisionmakers at the Services. Indeed, the record shows this decision was made "based on 'internal review and *interagency* review in December. . . .'" Pet. App. 32a; 925 F.3d at 1020; *cf.* Pet. Br. 10, J.A. 37, 58 (noting EPA was considering modifying the proposed rule).

In the context of Section 7 consultation as it actually works, this can only mean one thing. As EPA came to understand the Services' jeopardy opinions, it decided to amend the rule to comply with the ESA, and accordingly persuaded the Services to hold off from formal public issuance of the opinions.

Formal consultation is highly structured, with particular actions outlined rather than the "give-and-take" of a deliberative process. 50 C.F.R. §§402.12–15; *see Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (R. Ginsburg, J.). While the Services may be sincere in their description of a collaborative process, their rose-colored view is not shared by their sister agencies, affected stakeholders, or by this Court. Nor is it supported by the record which reveals failures to collaborate. J.A. 88–92. And, as *Bennett* recognized, the Services are "to put it mildly, keenly aware of the virtually determinative effect of [their] biological opinions." 520 U.S. at 170.

The action agency and the Services may mutually agree to waive any number of provisions of the consultation regulations, *see* 50 C.F.R. §402.14(e), just as, for example, litigants may agree to waive initial disclosures or to extend discovery response deadlines. Fed. R. Civ. P. 26(a)(1)(A), 29(b), 33(b)(2), 34(b)(2)(A), 36(a)(3). These practicalities do not mean litigation is a "collaborative" process. Nor is ESA consultation.

In practice, the formalized steps of the consultation process may be elided or glossed over. The Services may simply delay providing a BiOp if unsatisfied with the action agency, or the agency will modify the action during consultation without formal communication of that fact, leading to a BiOp imposing terms and conditions that the action agency has already agreed to. *Cf.* 50 C.F.R. §402.14(*i*)(1)(iv). Where the Services are ready to issue a jeopardy opinion, it is very much in their interest to get the message across with a minimum of fingerprints so that the Services' future freedom of action is not constrained.

Moreover, agencies often depart from the structure at the front end by modifying proposed actions *before* submitting them to formal consultation. This is because the Services have "unilateral authority to determine when a consultation package is complete, and therefore when formal consultation commences." Paul Weiland et al., *Analysis of data on endangered species consultations reveals nothing regarding their economic impacts*, 113 Proc. Nat'l Acad. Sci. E1593 (2016). In the experience of the regulated community, "substantial

time and resources frequently are expended before the Service[s] agree[ ] to initiate formal consultation." *Id.*

It sheds some light to understand that "jeopardy" biological opinions are hardly ever issued. A 2015 study found that over a several-year period, of the 6,829 formal consultations, "only two (0.0023%) resulted in jeopardy, one of which also resulted in destruction/adverse modification of critical habitat." Jacob W. Malcom & Ya-Wei Li, *Data Contradict Common Perceptions About a Controversial Provision of the US Endangered Species Act*, 112 Proc. Nat'l Acad. Sci. 15,844, 15,845 (2015). The study found "federal agencies are now more inclined to continue negotiating the scope of their proposed projects in response to FWS issuing a draft biological opinion with a jeopardy or destruction/adverse modification conclusion. If negotiations are successful, the final biological opinion will have neither of those conclusions." Malcom & Li at 15,847; *cf.* Gov't Accountability Office, *Federal Agencies Have Worked to Improve the Consultation Process, but More Management Attention Is Needed*, GAO-04-93, Mar. 29, 2004, at 48 ("Some action agency officials said that they feel they are forced to compromise their project designs too much in order to avoid receiving [a jeopardy] opinion from the Services."). While this may have beneficial effects of protecting species and permitting some sort of agency action to occur, it obscures the reasons the agencies acted as they did.

To that end, the D.C. Circuit in *Vaughn v. Rosen* sensibly rejected the Civil Service Commission's reliance on *Grumman* to claim an "entire process of

management appraisal, evaluation, and recommendations for improvement is a seamless whole, that it is in its entirety a deliberative process, and that it is this process which the Government seeks to protect as an ongoing continuous affair." 523 F.2d 1136, 1145 (D.C. Cir. 1975). *Vaughn* held "the phrase 'management process' or 'personnel improvement process' would swallow up a substantial part of the administrative process, and virtually foreclose all public knowledge regarding the implementation of personnel policies in any given agency." *Id*. Similarly, deeming deliberative the "consultation process" as the Services describe it would obscure much of the important day-to-day work of ESA implementation.

The documents at issue are necessary to understand "the reasons which did supply the basis for an agency policy actually adopted," *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 152 (1975), and to understand where the Services believe the jeopardy threshold to lie. They accordingly make up the Services' working law, which should not become secret law.

B. Disclosure informs the public of the rationale for imposing potentially severe economic impacts for the purpose of species conservation.

This case highlights a factual scenario that *amici* have encountered with some frequency, where an agency will assert that it cannot select a particular course of action because it would not pass muster with

the Services. It is very difficult to pinpoint the influence of the Services to test their conclusions under the ESA, as the Services, along with Federal action agencies, tend to structure consultation to avoid issuing jeopardy opinions. For one example, take the 1994 Clinton Northwest Forest Plan.[3] Then-President Bill Clinton sold the Plan as "a balanced, comprehensive and long-term policy for the management of over 24 million acres of public land."[4] Secretaries Babbitt and Espy considered ten Plan alternatives, but represented "we think it is unlikely" that Plan alternatives that cause less economic dislocation "would be deemed to satisfy the requirements of the Endangered Species Act."[5] Thus, the agencies submitted only their preferred alternative to ESA section 7 consultation.[6] The Fish & Wildlife Service prepared a no-jeopardy opinion for the preferred alternative but not for any of the others,[7] and the Service strongly advocated for that option.[8]

---

[3] U.S. Dep't of Agric., Forest Serv.; U.S. Dep't. of the Interior, Bureau of Land Mgmt., *Record of decision for amendments to Forest Service and Bureau of Land Management planning documents within the range of the northern spotted owl*, Apr. 13, 1994; https://www.fs.fed.us/r6/reo/library/docs/NWFP-ROD-1994.pdf.

[4] *Id.* at 1.

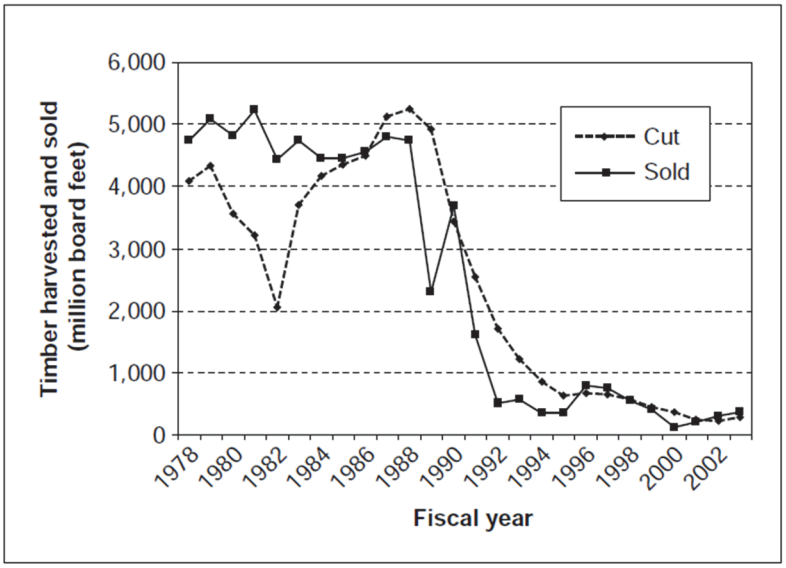
[5] *Id.* at 27.

[6] *Id.* at 50–51.

[7] *Id.*

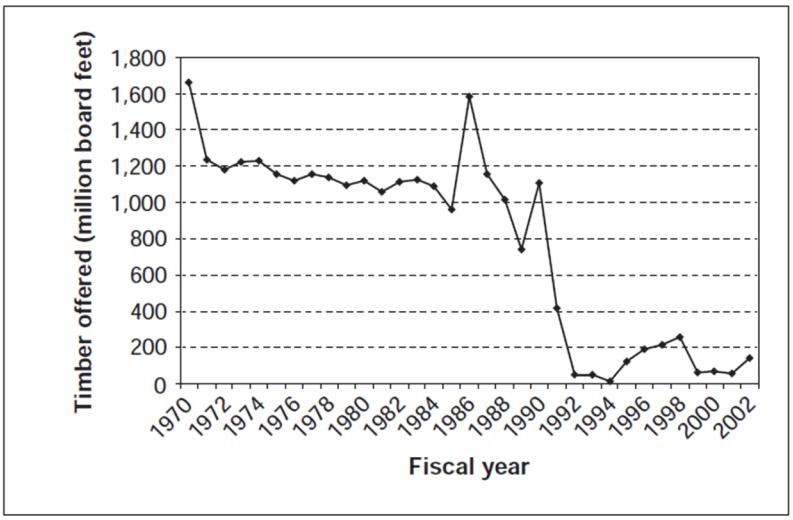
[8] U.S. Fish & Wildlife Serv., *Biological Opinion for the Preferred Alternative (Alternative 9) of the Supplemental Environmental Impact Statement on Management of Habitat for Late Successional and Old Growth Forest Related Species on Federal*

Once the Clinton Plan was adopted, this is what happened: [9]



Lands Within the Range of the Northern Spotted Owl, Feb. 10, 1994, at 3; https://www.fs.fed.us/r6/reo/library/docs/NWFP-FSEIS-1994-II.pdf.

[9] 2 Susan Charnley et al., *Northwest Forest Plan—The First 10 Years (1994–2003): Socioeconomic Monitoring Results* 8, Figs. 2–3 (2006); https://www.fs.fed.us/pnw/pubs/pnw_gtr649.pdf. Figure 2 (above): Timber harvested and sold on Northwest Forest Plan area national forests, fiscal year 1978–2002 (long log). Figure 3 (p. 16): Timber offered for sale on western Oregon Bureau of Land Management districts, fiscal years 1970–2002 (short log).



Timber harvests decreased by 85% on federal lands,[10] leading to socioeconomic carnage—direct loss of over 25,000 family-wage jobs and over half a million more people living in communities with low or very low social well-being,[11] and forests overrun with illegal marijuana grow operations.[12]

Dislocation of this magnitude may be inevitable where, as the Court has held, it is "beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *T.V.A. v. Hill*, 437 U.S. at 174;

---

[10] Deanna H. Olson et al. ed., *People, Forests, and Change: Lessons from the Pacific Northwest* 52–54 (2017).

[11] 2 Charnley, 6–10 (2006); 3 Charnley 28, 40–43.

[12] Scott Bauer et al., *Impacts of Surface Water Diversions for Marijuana Cultivation on Aquatic Habitat in Four Northwestern California Watersheds*, 10(3) PLOS ONE e0120016 (2015); https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0120016.

cf. Alyson C. Fluornoy, *Beyond the "Spotted Owl Problem": Learning from the Old-Growth Controversy*, 17 Harv. Envtl. L. Rev. 261, 323 (1993) (acknowledging "the legal system fails to provide an adequate response to the short-term economic dislocation environmental protection creates."). According to *Hill*, "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." 437 U.S. at 184. Decades later, FWS realized it swung the pendulum too far.[13] Due to the structure of the decision-making process, the dislocation from the Clinton Plan was imposed without clear explanation as to whether it was based on "speculation or surmise." Instead, stakeholders from across the spectrum indicated the owl was a surrogate for a different objective, that of forest preservation generally.[14]

In this case, EPA proposed to issue one version of the cooling-water intake rule, but was advised of the Services' jeopardy opinion. This concluded the Section 7 process on that version of the rule, as EPA's next step was to revise the rule and submit that rule to a new

---

[13] FWS, *Revised Recovery Plan for the Northern Spotted Owl*, at II-10–12, III-11–19, 37–38, 52 (2011) ("Federal, State, and local managers should consider long-term maintenance of local forest management infrastructure as a priority in planning and land management decisions."); https://www.fws.gov/wafwo/ pdf/NSO%20 Revised%20Recovery%20Plan%202011.pdf.

[14] William Dietrich, *The Final Forest: The Battle for the Last Great Trees of the Pacific Northwest* (1992), at 85 (environmental advocate describing owl as "the wildlife species of choice to act as a surrogate for old-growth protection"), 231 (Forest Service official stating, "This issue was never just about a bird . . . The owl was a surrogate.").

consultation process. The resulting final rule imposes unusually intensive supervision of each permit application by the Services. Neither the public nor the potential applicants have been told why that supervision is necessary.

II. Draft Biological Opinions Are Frequent and Probative Sources of Guidance for Stakeholders, Agencies, and Courts.

A. The public and the courts rely on critical information contained in draft BiOps.

The opinions at issue here are not true drafts, despite the label. Whatever label applies, *amici* have found that draft biological opinions are often highly probative of whether a final biological opinion is arbitrary or capricious. *Amici* have also frequently been forced to defend agency actions despite inconsistencies in drafts or preliminary statements, including before this Court. *NAHB v. Defs. of Wildlife*, 551 U.S. 644, 657–61 (2007).

Like respondent, *amici* on occasion seek to obtain agency documentation through FOIA in order to better understand an agency's decisional process and to inform their membership of the workings of the Services. Some *Amici* have filed FOIA requests in recent years that seek draft biological opinions, consultation-related communications, and other related documents. As applicants for federal permits and purchasers of federal resources, *amici*'s members have often been

frustrated by delays or restrictions imposed by the consultation process.

BiOps are not themselves subject to the APA's notice and comment process. However, draft BiOps are frequently disclosed as part of an administrative record. Courts have found that these draft documents provide important context and relevant evidence in determining whether the Services' findings in the final BiOp were arbitrary and capricious. *See, e.g.*, *Nat. Res. Def. Council v. Zinke*, No. 1:05-cv-01207-LJO-EPG, 2017 WL 3705108, at *11 (E.D. Cal. Aug. 28, 2017) (adding draft BiOp to administrative record in action challenging result of ESA consultation); *Nat'l Audubon Soc'y v. FWS*, 55 F. Supp. 3d 316, 354 (E.D.N.Y. 2014) (relying on draft BiOp to uphold final opinion).

For example, the Services' failure to respond to comments to the analysis in a draft BiOp may inform whether the final BiOp made a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). In *Dow AgroSciences LLC v. National Marine Fisheries Service*, 707 F.3d 462 (4th Cir. 2013), three pesticide manufacturers challenged the National Marine Fisheries Service's (NMFS) BiOp for EPA's registration of various pesticides, which found that the pesticides would jeopardize the viability of certain Pacific salmonids and their habitat. NMFS produced a 389-page draft BiOp to the EPA concluding that certain pesticides would result in jeopardy. *Id*. at 465–66. EPA placed the draft BiOp on a public docket and invited

comments. *Id.* at 466. In response, EPA, pesticide manufacturers, several States, and others commented on the draft and criticized many of NMFS' assumptions in its analysis. *Id*. at 466.

For two of the claims related to the manufacturers' challenge to the BiOp, the Fourth Circuit's consideration of the draft BiOp was critical to the determination of: (1) whether the NMFS "failed to justify its model's assumption that juvenile salmonids would be exposed to a lethal level of pesticides continuously for 96 hours"; and (2) whether NMFS' "BiOp fail[ed] to justify its reliance on water monitoring data that the manufacturers allege were outdated and not representative of current conditions." *Id.* at 469.

For the 96-hour exposure assumption claim, the Fourth Circuit noted that after NMFS released the draft BiOp and posted it for comment, those assumptions were "severely criticized" and NMFS "added nothing to the final [biological opinion] to respond to it." *Id.* at 471. For the water monitoring data, the Fourth Circuit noted how public comments "promptly noted the flaws in the U.S. Geological Survey data and directed [NMFS] to more recent available data," but NMFS "continued to rely on the older U.S. Geological Survey data." *Id.* at 472. The Fourth Circuit concluded that the final BiOp was not well-reasoned since it failed to explain or support several assumptions from the draft critical to NMFS' jeopardy finding. *Id.* at 464, 472–73.

Judicial review of a draft BiOp is also useful in analysis of whether the Services relied on the "best

available science" in their final BiOp as required by ESA Section 7(a)(2). *Bennett*, 520 U.S. at 176–77. In *Village of False Pass v. Clark*, 733 F.2d 605 (9th Cir. 1984), the Village challenged the proposed sale of oil leases in the Bering Sea. *Id*. at 607. The Village argued that the Secretary violated the "interagency consultation" and "best available data" requirements under the ESA by issuing the Final Notice of Sale only two days before receiving the Fisheries Service's final BiOp on the oil lease sale. *Id.* at 609. The Village argued that the difference between the draft and final version of the BiOp demonstrated that the Secretary did not act on the "best scientific . . . data available." *Id.* at 610 (internal quotation marks omitted; omission in original). The Ninth Circuit ultimately rejected the best available science argument and found that the Final Notice of Sale decision appropriately incorporated the findings in the final BiOp. *Id.*

B. Draft BiOps help the public and courts determine whether an action is arbitrary or capricious.

Courts have found that the prior inconsistent findings by the Services are relevant data that require a satisfactory explanation as to why the agency would change its position. *See*, *e.g.*, *Selkirk Conservation All. v. Forsgren*, 336 F.3d 944, 955–57 (9th Cir. 2003) (the court upheld FWS's no jeopardy finding despite the plaintiffs' concerns that the Conservation Agreement failed to address concerns raised in the draft BiOp, which had concluded the effect of roads and harvesting timber would jeopardize the survival of grizzly bears);

Defs. of Wildlife v. Zinke, 856 F.3d 1248, 1262 (9th Cir. 2017) ("Under certain circumstances, an agency's prior factual findings or conclusions may be relevant data such that an agency must articulate a satisfactory explanation when it changes its mind." (internal quotation marks omitted)); *Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1051 (9th Cir. 2010) (acknowledging that agencies do not have a "duty to identify any potential tensions between current and earlier factual determinations in marginally related administrative actions," but explaining that the impact of fisheries compared to that of sea lion predation "ha[d] occupied the center of this controversy from the start" and the prior fishery environmental assessments were therefore relevant data that required an explanation).

Draft BiOps may also reveal that politics, economics, and the like may have inappropriately influenced the jeopardy analysis in the Final BiOp. Both FWS and NMFS have a policy that requires "management-level review of documents developed and drafted by Service biologists to verify and assure the quality of the science used to establish official positions, decisions, and actions taken by the Services during their implementation of the Act." *Notice of Interagency Cooperative Policy on Information Standards Under the Endangered Species Act*, 59 Fed. Reg. 34271 (July 1, 1994). However, such "management level review" can also present an opportunity for agencies to impose regulation that is not supported by the best available science.

Moreover, it is fundamentally unfair for the Services to selectively disclose draft BiOps in some circumstances but not others. "[S]elective" disclosure "is

offensive to the purposes underlying the FOIA and intolerable as a matter of policy. Preferential treatment of persons or interest groups fosters precisely the distrust of government that the FOIA was intended to obviate." *North Dakota ex rel. Olson v. Andrus*, 581 F.2d 177, 182 (8th Cir. 1978). The Services, as all parties agree, have frequently included such documents in administrative records without any claim of privilege. Pet. Br. 46–48. Uniformity in the disclosure of these draft consultation documents will lead to fairness and more informed judicial review of the challenged agency action.

III. Judicial Review and FOIA should be available at multiple steps in the regulatory process to ensure adequate safeguards against regulatory overreach.

The eventual no-jeopardy BiOp was premised on a "built-in" process to avoid jeopardy by "giving the Services a meaningful opportunity to review permit applications and to recommend control measures and requirements for monitoring and reporting." *Cooling Water Intake Structure Coal. v. U.S.E.P.A.*, 905 F.3d 49, 71 (2d Cir. 2018). That is, the Services will have the opportunity not just to veto an insufficient rule but every individual permit application. Because of the programmatic nature of the consultation, applicants will not be impacted directly until the Service undertakes its secret pre-permitting review under the process EPA finally adopted. 40 C.F.R. §125.98(h). It is unfair to subject those permittees to additional

requirements for the benefit of listed species without any explanation. Applicants should not be forced to "assume such risks" while waiting for an agency to "'drop the hammer.'" *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1815 (2016) (citation omitted). Moreover, because such schemes can present ripeness issues if challenged directly,[15] access to the full consultation record will at least better equip applicants to engage with objections from the Services. *Amici* do not contend the drafts themselves are subject to judicial review under *Bennett*. Rather, the hidden role of the Services threatens to impose regulatory burdens well in advance of likely judicial review. Transparency is an important safeguard against regulatory overreach.

In *Sackett v. E.P.A.*, 566 U.S. 120 (2012), the Petitioners, in preparation of building a home, added fill dirt to their lot. The EPA issued the Sacketts a compliance order claiming various Clean Water Act violations because, according to EPA, the lot contained wetlands. *Id.* at 122. The Sacketts disputed EPA's conclusions and initiated a lawsuit. The Ninth Circuit Court of Appeals held that the Clean Water Act precluded judicial review of compliance orders and dismissed the case for want of jurisdiction. *Id.* at 125. The Supreme Court reversed.

Among other reasons, the Court found that judicial review of the compliance order was appropriate

---

[15] *Cf.*, *e.g.*, *Oregonians for Floodplain Prot. v. U.S. Dep't of Commerce*, 334 F.Supp.3d 66, 72 (D.D.C. 2018).

due to the legal consequences flowing from it. For example, the order exposed the Sacketts to double penalties in future enforcement proceedings and limited their opportunity to obtain a permit for the fill dirt. *Id.* at 126. Furthermore, the EPA argued that the compliance order was just a step in a deliberative process that ended with the government filing an enforcement action. The Court rejected the EPA's contention. It explained that the EPA's "deliberations" as to the legality of the Sacketts' actions were at an end and EPA's only other decision was whether it should initiate litigation over the order. *Id.* at 129.

Similarly, in *Hawkes*, property owners who mined peat had obtained "jurisdictional determinations" (JDs) from the Corps of Engineers. 136 S. Ct. at 1812–13. The JDs determined that their property contained Clean Water Act jurisdictional wetlands and that permits would be needed to impact them. *Id*. The property owners disagreed and sought review. Ultimately, this Court held that judicial review was warranted.

As in *Sackett*, the Court determined that there were legal consequences that flowed from the JD. It explained that if a JD provided that no wetlands exist on a site, then the Corps was bound by that determination for five years. Similarly, if the Corps' JD determined that wetlands exist, then the property owner would lose the five-year safe harbor. *Id.* at 1814–15. The Court also rejected the Corps' argument that a JD is just a step in a process that ends with a permit and it is the permit that is reviewable in court. The Court explained that just because a permit is reviewable does

not mean that a JD cannot also be reviewable. *Id.* at 1816.

Thus, in both *Sackett* and *Hawkes*, the Court found that the APA allows for judicial review of interim steps along a process.[16] In *Sackett*, the ultimate agency action was an EPA enforcement action, yet the Court allowed review of the compliance order. In *Hawkes*, the ultimate agency action was a permit, yet the court allowed review of the JD.

Here, "[t]he Services argue that all the documents at issue are deliberative because they were created as part of a 'lengthy and complicated' consultation process. . . ." Pet. App. 22a; 925 F.3d at 1015. The Court rejected similar arguments in *Sackett* and *Hawkes* with respect to judicial review, and it should reject those arguments with respect to FOIA. Here, the final BiOps are the ultimate agency action and all agree that they are not exempt from FOIA. However, like the

---

[16] Similarly, the APA "notice-and-comment requirement helps to ensure that [new rules are] subjected to thoroughgoing analysis and critique by interested parties" before they become final. *Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1134 (D.C. Cir. 1995). Thus, the public is not simply informed of new rules once they are complete. The APA demands public participation during the process. *See Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 201 (D.C. Cir. 2007) (vacating portions of a rule because the agency did not disclose part of its modeling until the rule was published—"too late for interested parties to comment."); *Small Refiner Lead Phase-Down Task Force v. U.S.E.P.A.*, 705 F.2d 506, 540 (D.C. Cir. 1983) (explaining that it was "highly improper" for EPA to rely on evidence that it added near or after the end "of the comment period and too late for effective rebuttal.").

order in *Sackett* and the JD in *Hawkes*, the draft jeopardy BiOps[17] that the government wishes to withhold are steps in a process and have legal consequences. "Following the issuance of a 'jeopardy' opinion, the agency must either terminate the action, implement the proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee pursuant to 16 U.S.C. § 1536(e)." *NAHB v. Defs. of Wildlife*, 551 U.S. at 652. Here, once the Services issued the draft jeopardy BiOps, the EPA chose to "terminate" its current proposal and change it to comply with the law. Clearly a legal consequence flowed from the draft jeopardy BiOps.

Thus, the Court has granted judicial review to steps along a process when legal consequences flow from those steps. By analogy, here it should grant public review to documents that are steps along a process under FOIA as legal consequences flow from the documents.

FOIA, APA notice and comment requirements, and judicial review combine to provide the public meaningful access to the government actions that impact their lives. The D.C. Circuit recognized the importance Congress attached to public participation in tones similar to the rationale for FOIA. *See Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (noting that one of the purposes of notice and comment opportunities were to "reintroduce public participation and fairness to affected parties after governmental

[17] *Amici* are here referring to the December 2013 BiOps.

authority has been delegated to unrepresentative agencies.") (internal quotation marks omitted). As with FOIA, courts have held that the APA's notice and comment requirement is broadly applicable and exceptions must be narrowly interpreted. *See California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) ("Exceptions to notice and comment rulemaking 'are not lightly to be presumed.' ") (internal citations omitted); *Bowen*, 834 F.2d at 1044 ("We begin our analysis by noting that Congress intended the exceptions to § 553's notice and comment requirements to be narrow ones."). These are necessary tools for the governed to hold their governors to account, *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978), and this Court has time and again affirmed the need for them to be broadly construed. That trend should continue here.

IV. The Absolute Privilege Sought by the Services Has No Grounding in FOIA's Text.

In the event the Court determines the BiOps are deliberative, it should still affirm on the basis that the public interest in the documents outweighs the government's secrecy interest. *Bennett*, 520 U.S. at 166 ("A respondent is entitled . . . to defend the judgment on any ground supported by the record."). This result would be most faithful to the history of the privilege and to FOIA's text.

A. Deliberative process is traditionally a qualified privilege.

In civil litigation, the deliberative process privilege "is a qualified privilege and can be overcome by a sufficient showing of need." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); *F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984).

E.P.A. v. Mink held the text of Exemption 5 "clearly contemplates that the public is entitled to all such memoranda or letters that a private party *could* discover in litigation with the agency." 410 U.S. 73, 86 (1973) (emphasis added). Thus, the Court held "Exemption 5 contemplates that the public's access to internal memoranda will be governed by the same flexible, common-sense approach that has long governed private parties' discovery of such documents involved in litigation with Government agencies." *Id*. at 91.

The Court remarked in *Sears* that "it is not sensible to construe the Act to require disclosure of any document which would be disclosed in the hypothetical litigation in which the private party's claim is the most compelling." *Sears*, 421 U.S. at 149 n.16. It concluded that the FOIA "House Report says that Exemption 5 was intended to permit disclosure of those intra-agency memoranda which would 'routinely be disclosed' in private litigation, H.R. Rep. No. 1497, p. 10, *and we accept this as the law*." *Id.* (emphasis added).

From there the Court tightened the screws. "It makes little difference," the Court held, "whether a

privilege is absolute or qualified in determining how it translates into a discrete category of documents that Congress intended to exempt from disclosure under Exemption 5. Whether its immunity from discovery is absolute or qualified, a protected document cannot be said to be subject to 'routine' disclosure." *F.T.C. v. Grolier Inc.*, 462 U.S. 19, 27 (1983). Concurring, Justice Brennan opined that "[i]f a document is work product under the Rule, and if it is an 'inter-agency or intra-agency memorandu[m] or lette[r]' under the Exemption, it is absolutely exempt." *Grolier*, 462 U.S. at 32 (Brennan, J., concurring) (brackets in original).

B. *Grolier*'s categorical rule departs from FOIA's text.

Exemption 5 provides that FOIA does not extend to "inter-agency or intra-agency memorandums or letters that *would not* be available" to a party in litigation. 5 U.S.C. §552(b)(5) (emphasis added). This Court has "long maintained that 'FOIA reflects a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'" *N.H. Right to Life v. Dep't of Health & Hum. Servs.*, 136 S. Ct. 383 (Thomas, J., dissenting from denial of *certiorari*) (2015) (quoting *U.S. Dep't of Def. v. Fed. Lab. Relats. Auth.*, 510 U.S. 487, 494 (1994)). And the Court has "rejected interpretations of other FOIA exemptions that diverge from the text." *Id.* (citing *Milner v. Dep't of Navy*, 562 U.S. 562, 573 (2011)).

"Would not" is an absolute rather than an expectation. A traveler told that there "would not" be room at an inn on Christmas Eve would understand the need to find other options. Thus, although "would" is conditional, "would not" denies any such conditions and becomes mandatory and absolute. *Cf. Commw. v. Dalton*, 467 Mass. 555, 558, 5 N.E.3d 1206, 1209 (2014).

Contrary to this text, *Sears* "accepted," 421 U.S. at 149 n.16, and *Grolier* held, 462 U.S. at 27, that Exemption 5 applies to any document that would not "routinely" be available in litigation. This turned a traditionally qualified privilege into an absolute one. FOIA's text does not exempt materials that would be "ordinarily" or "routinely" unavailable; it extends the exemption only to materials which "would not be available by law to a party. . . ." *Id.* at 21. Thus, this Court has done something it usually does not, which is to "read into statutes words that aren't there." *Romag Fasteners, Inc v. Fossil, Inc.*, 140 S. Ct. 1492, 1495 (2020).

The Court disfavors taking a "red pen" to any statute, *Milner*, 562 U.S. at 573, but that disfavor is pronounced in FOIA cases. The Court stalwartly maintains that in interpreting FOIA, "a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). Because legislative history cannot be used "to 'muddy' the meaning of 'clear statutory language,'" this Court "has repeatedly refused to alter FOIA's plain terms on the strength only of arguments

from legislative history." *Id*. at 2364 (quoting *Milner*, 562 U.S. at 572). *Food Marketing* is one of a series of cases where the Court has overturned atextual FOIA exemptions, regardless of their entrenchment in the Courts of Appeals. 139 S. Ct. at 2364 (overruling interpretation of Exemption 4 by lower courts); *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 804 (1984) (holding "[w]e therefore simply interpret Exemption 5 to mean what it says"); *Dep't of Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 12 (2001) (rejecting expansive reading of Exemption 5 that lacked "textual justification"); *Milner*, 562 U.S. at 573 (2011) (overruling so-called "High-2" Exemption created by lower courts). An absolute deliberative exemption neither squares with the statute nor with this Court's decisions.

C. A qualified privilege will better serve the purpose of Exemption 5 and keep up with rapid changes in discovery practice.

Sears described the "ultimate purpose" of deliberative process privilege as preventing "injury to the quality of agency decisions." *Sears*, 421 U.S. at 151. The Services assert the privilege therefore serves important "governmental" purposes. Pet. 16–17. Perhaps. But the true purpose of quality decisions is to serve the public, and to ensure agencies follow the law. This is true of any executive privilege. *United States v. Nixon*, 418 U.S. 683, 708 (1974) (recognizing "necessity for protection of *the public interest* in candid, objective, and

even blunt or harsh opinions in Presidential decisionmaking") (emphasis added); *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 382 (2004). The Services' institutional interests must take a back seat to the public interest in knowing what its Government is up to. *See Dep't of Justice v. Reporters Cmte. for the Freedom of the Press*, 489 U.S. 749, 772 (1989). The danger of executive privilege claims lies in paternalism, the paradox that "so as to enable the government more effectively to implement the will of the people, the people are kept in ignorance of the workings of their government." *Herbert v. Lando*, 441 U.S. 153, 196 (1979) (Brennan, J., dissenting).

The broad scope of the privilege and its underlying rationales have generated substantial criticism. Bureaucracies "have inherent in them a drive to enhance their power by keeping secrets." Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 Ind. L.J. 845, 885 (1990) (citing *Max Weber: Essays in Sociology* 233 (Gerth & Mills eds. 1946)). This drive is borne out in the context of ESA consultation. By keeping action agencies, and especially public stakeholders, guessing about the line between jeopardy and no-jeopardy, the Services increase their already significant regulatory powers.

The Court has recognized the existence of other qualified privileges under Exemption 5. *Fed. Open Mkt. Cmte. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360 (1979) (holding "Exemption 5 incorporates a qualified privilege for confidential commercial information"). And the Court has ample experience in balancing the

needs of the public (as opposed to the requester) against the needs of the government. *See*, *e.g.*, *U.S. Dep't of Def. v. Fed. Lab. Relats. Auth.*, 510 U.S. at 495 (holding "a court must balance the public interest in disclosure against the interest Congress intended the [e]xemption to protect") (quoting *Reporters Cmte.*, 489 U.S. at 776 (Exemption 6) (brackets in original); *Bibles v. Or. Nat. Desert Ass'n*, 519 U.S. 355, 355–56 (1997) (Exemption 6) ("[T]he extent to which disclosure of the information sought would she[d] light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to.") (internal quotation marks omitted). A similar balancing of the public's need for the information, and for understanding the workings of government, against the interest of the government in avoiding deliberations in a "fishbowl," will better implement the *text* of FOIA as well as its "intent" as characterized by *Sears* and *Grolier*.

A further complication is the evolving scope of discovery to account for the surfeit of electronically stored information. Parties may now "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case*, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1) (emphasis added). The 2015 Advisory Notes reflect an intent to "restore" proportionality to the place initially given it in 1983,

coincidentally or not the same year as *Grolier*. Does the "routinely" test now include a proportionality requirement? Presumably not. But the logic of *Grolier* would require imposing a proportionality test, showing *Grolier*'s obsolescence.

Congress enacted FOIA "in response to a persistent problem of legislators and citizens, the problem of obtaining adequate information to evaluate federal programs and formulate wise policies." *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971). Moreover, "Congress recognized that the public cannot make intelligent decisions without such information." *Id.* Members of the regulated community rely on the information sought here to make reasoned decisions about their businesses, programs, and livelihoods. Disclosure furthers this purpose.

CONCLUSION

For the reasons above, *Amici* respectfully request that the Court affirm the judgment of the court of appeals.

August 3, 2020

Respectfully submitted.

AMY CHAI
THOMAS J. WARD
NATIONAL ASSOCIATION OF HOME BUILDERS
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 266-8230

LAWSON E. FITE
Counsel of Record
SARA GHAFOURI
AMERICAN FOREST RESOURCE COUNCIL
700 N.E. Multnomah Street, Suite 320
Portland, OR 97232
(503) 222-9505
lfite@amforest.org

KAREN R. HARNED
NFIB SMALL BUSINESS LEGAL CENTER
555 12th Street, N.W.
10th Floor
Washington, D.C. 20004
(202) 314-2061

ELLEN STEEN
TRAVIS CUSHMAN
AMERICAN FARM BUREAU FEDERATION
600 Maryland Avenue, S.W.
Suite 1000W
Washington, D.C. 20024
(202) 406-3600

Counsel for Amici Curiae