***U.S. Fish and Wildlife Service* v. *Sierra Club, Inc.*, No. 19-547**

Introduction: In a 7-2 opinion issued today—the first opinion for the Court from Justice Barrett—the Supreme Court held that the Freedom of Information Act's (FOIA) deliberative-process privilege protects from disclosure agencies' in-house, draft biological opinions.

Background: FOIA requires that federal agencies make records available to the public upon request unless the records fall within a statutory exemption. One exemption protects records not routinely disclosed in civil discovery. That includes material subject to the deliberative-process privilege, which protects records generated during an agency's deliberations about a policy, as opposed to documents that embody an agency's final decision. Here, as required by the Endangered Species Act, the Environmental Protection Agency (EPA) sought the "biological opinion" of the Fish and Wildlife Service (FWS) on whether a proposed EPA rule could jeopardize protected species. FWS staff prepared a draft biological opinion, which found that EPA's proposed rule would jeopardize species. However, the relevant FWS decisionmakers neither approved nor sent the draft to EPA. Eventually, EPA revised the proposed rule, which FWS concluded would not jeopardize species. Sierra Club brought a FOIA lawsuit to obtain FWS's draft biological opinion. The 9th Circuit held that the draft is not protected by the deliberative-process privilege.

Issue: Whether FOIA's deliberative-process privilege protects draft biological opinions from compelled disclosure.

Court's Holding: The Supreme Court held that FOIA's deliberative-process privilege protects FWS's in-house, draft biological opinions, even if the drafts reflect the agency's last views on a proposal. Relying on administrative context, the Court found that the document was correctly labelled a draft since it was neither approved by FWS decisionmakers nor sent to EPA. The Court rejected Sierra Club's position that the draft should be treated as final because it allegedly prompted EPA to revise the proposed rule. A draft biological opinion is not final until FWS treats it as such, even if the draft provokes a response from EPA. Finally, the Court found that the draft was FWS's last word on EPA's original proposed rule not because that draft was functionally final, but rather because EPA abandoned that proposal.

Justice Breyer authored a dissent, in which Justice Sotomayor joined, saying that FOIA's deliberative-process privilege should not apply to draft biological opinions because they impose regulation-based legal constraints on EPA and, in practice, such drafts inform EPA of FWS's conclusions on whether a proposed rule will jeopardize species.

Read the opinion here.