

# FOIA DISCLOSURE AND THE SUPREME COURT

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A government by secrecy benefits no one.

It injures the people it seeks to serve; it injures its own integrity and operation.

It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.

—*Senate Report No. 88-1219, at 15 (1964)*

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## INTRODUCTION

This decade marks fifty years since a golden age of both transparency legislation and environmental law in the United States. In the late 1960s and early 1970s, both topics separately commanded strong bipartisan support that produced a flurry of legislative activity to protect the health of the environment and of American democracy itself.<sup>1</sup> Yet this era proved short-lived. By 1980, environmental law had become highly partisan, rendering future environmental protection efforts deeply imperiled.<sup>2</sup> The crown jewel of the government transparency movement, the Freedom of Information Act (“FOIA”, “the Act”),<sup>3</sup> has also undergone significant change since the enactment of the legislation, including a number of judicial decisions that have expanded the government’s ability to withhold information from the public.

Since its inception and increasingly over the last few decades, FOIA has served as a tool for environmentalists and concerned citizens to monitor environmental law and policy in the interest of raising awareness and checking abuse.<sup>4</sup> Yet in the past two years, two Supreme Court decisions concerning the scope of FOIA’s exemptions have chipped away at the Act’s utility for requesters of environmental information: *Food Marketing Institute v. Argus Leader Media*<sup>5</sup> and *U.S. Fish and Wildlife Service v. Sierra Club*.<sup>6</sup> Both cases broadened the respective FOIA exemptions at issue and further eroded the Act’s protections.<sup>7</sup>

The academic literature has not yet considered these cases side-by-side nor explored whether they reflect changes in the Court’s overall posture toward FOIA. This Note is also the first to consider the implications of these cases specifically for environmental requesters and litigants.<sup>8</sup> The following four parts

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1. See Richard J. Lazarus, *A Different Kind of “Republican Moment” in Environmental Law*, 87 MINN. L. REV. 999, 1001–02 (2003); Fred H. Cate et al., *The Right to Privacy and the Public’s Right to Know: The “Central Purpose” of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 46 (1994); HAROLD C. RELYEA, CONG. RSCH. SERV., RL32780, FREEDOM OF INFORMATION ACT (FOIA) AMENDMENTS: 110TH CONGRESS 1 (2008).
  2. See David W. Case, *The Lost Generation: Environmental Regulatory Reform in the Era of Congressional Abdication*, 25 DUKE ENV’T L. & POL’Y F. 49, 57 (2014).
  3. 5 U.S.C. § 552.
  4. See generally *infra* notes 102–06 and accompanying text; EPA v. Mink, 410 U.S. 73 (1973).
  5. 139 S. Ct. 2356 (2019).
  6. 141 S. Ct. 777 (2021).
  7. *Argus Leader* concerned Exemption 4. 139 S. Ct. at 2361. *Sierra Club* concerned Exemption 5. 141 S. Ct. at 783.
  8. For the purposes of this Note, environmental requesters and environmental litigants refer to those who have filed a FOIA request(s) seeking environmental information from a U.S. government agency or who are involved in litigation pursuant to such a FOIA request, respectively. One significant category of parties fitting this description is public interest environmental groups.

explore these issues. Part I details the history, exemptions, and recent developments of FOIA. Part II explains (a) what makes environmental law so ripe for FOIA requests; and (b) FOIA's role in promoting environmental accountability. Part III discusses the *Argus Leader* and *Sierra Club* decisions. In light of that examination, Part IV analyzes the implications of the two decisions, both in terms of their significance for the Court's evolving approach to FOIA and the resulting prospects for environmental litigants in future cases. The Court's reading of FOIA's exemptions in the two cases reflects a decreased willingness to account for context in construing FOIA exemptions and undermines protections for the environmental requesters and others whom FOIA's drafters intended to benefit.

## I. FOIA: AN ETHOS OF TRANSPARENCY

### A. FOIA's Foundations

The U.S. government has aspired to achieve transparency since the nation's founding but has faced perennial challenges in realizing this aim. In an 1822 letter, James Madison praised the value of "popular information, or the means of acquiring it" for the health of the young nation.<sup>9</sup> And yet, despite this approbation of transparency, when Madison convened with other leaders at the Constitutional Convention of 1787, a monumental event for the country's democracy, the Founding Fathers deliberately adopted the trappings of secrecy—a factor later credited with contributing to the success of the Convention.<sup>10</sup> This tension, between idolizing transparency for its democratic benefits and circumscribing transparency for certain government functions, has persisted.<sup>11</sup>

Government transparency came to the fore as a federal legislative issue in the midst of growing secrecy during the Cold War and the McCarthy era. Democratic Congressman John Moss of California (Third District), with support from the press, led hearings beginning in 1955 on excessive federal secrecy

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9. Letter from James Madison to W.T. Barry (Aug. 4, 1822), in JAMES MADISON PAPERS, 1723 TO 1859 (Libr. of Cong.), <https://perma.cc/6YWG-N74B> ("A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy, or perhaps both. . . . [A] people which mean to be their own Governors must arm themselves with the power which knowledge gives."). Democratic Senator Edward V. Long of Missouri invoked an excerpt of this language in introducing FOIA in the Senate. See S. REP. NO. 89-813, at 38 (1965).

10. See Paul Rosenzweig, *Transparency, Within Reason*, HERITAGE FOUND. (Mar. 14, 2005), <https://perma.cc/FY8P-JKYW>.

11. See Nate Johnson, *FOIA: A Colossus Under Assault*, UNREDACTED (Mar. 7, 2018), <https://perma.cc/C5LW-D99A> (describing efforts during the Obama Administration to limit the extent of FOIA reform even while working to expand transparency).

and the need for a transparency statute.<sup>12</sup> Document disclosure was then governed not by its own statute, but by section III of the Administrative Procedure Act of 1946<sup>13</sup> (“APA”).<sup>14</sup> Under the APA, agency heads could establish rules and limits for information access.<sup>15</sup> This permitted wide latitude to agencies seeking to withhold information and ultimately resulted in the creation of a restrictive patchwork of information disclosure rules among federal agencies.<sup>16</sup>

For the next eleven years, multiple presidential administrations lobbied Congress to avert any new transparency legislation.<sup>17</sup> Despite executive branch opposition, and with broad support from the news media, scientists, and consumer advocates,<sup>18</sup> Moss’s efforts culminated in the Freedom of Information Act of 1966.<sup>19</sup> The law sought to make wide-ranging public records available to the public upon request. This was a necessity, according to Moss, “[i]f the American public is to be adequately equipped to fulfill the ever more demanding role of responsible citizenship.”<sup>20</sup>

President Lyndon B. Johnson, concerned with the risks of greater public access, opposed the legislation.<sup>21</sup> He signed it into law without ceremony and removed some of the strongest transparency language from the signing statement.<sup>22</sup> His statement praised the statute, up to a point: “This legislation springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the Nation permits.”<sup>23</sup> He added, however, “[a]t the same time, the welfare of the Nation or the rights of individuals may require that some documents not be made availa-

12. *Freedom of Information at 40*, NAT’L SEC. ARCHIVE (July 4, 2006), <https://perma.cc/B2R6-6NAX>. Interestingly, champions of participatory democracy were not the only ones with an interest in increasing transparency. Senator Joseph McCarthy and his allies also expressed frustration with the scant insight that existing disclosure processes provided into internal government documents. See Reuel Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945–1970*, 53 VAND. L. REV. 1389, 1444 (2000).

13. Pub. L. No. 79-404, § 3, 60 Stat. 237, 238.

14. Paul M. Schoenhard, *Disclosure of Government Information Online: A New Approach from an Existing Framework*, 15 HARV. J.L. & TECH. 497, 498 (2002).

15. See Glenn Dickinson, *The Supreme Court’s Narrow Reading of the Public Interest Served by the Freedom of Information Act*, 59 U. CIN. L. REV. 191, 193–94 (1990).

16. See *id.*

17. Zachary D. Reisch, *The FOIA Improvement Act: Using a Requested Record’s Age to Restrict Exemption 5’s Deliberative Process Privilege*, 97 B.U. L. REV. 1893, 1900 (2017).

18. David E. Pozen, *Transparency’s Ideological Drift*, 128 YALE L.J. 100, 118 (2018).

19. Pub. L. No. 89-487, 80 Stat. 250; see *Freedom of Information at 40*, *supra* note 12.

20. Sarah Lamdan, *Beyond FOIA: Improving Access to Environmental Information in the United States*, 29 GEO. ENV’T L. REV. 481, 484 (2017) (quoting 112 CONG. REC. 13,641 (1966) (statement of Rep. Moss)).

21. See *Freedom of Information at 40*, *supra* note 12.

22. See *id.*

23. H.R. REP. NO. 104-795, at 8 (1996), as reprinted in 1996 U.S.C.C.A.N. 3448, 3451.

ble”—a reference to the importance of FOIA’s exemptions.<sup>24</sup> Privately, he feared that in signing the law he was “making a mistake.”<sup>25</sup> On July 4, 1967, FOIA became codified at 5 U.S.C. § 552.<sup>26</sup>

FOIA’s legislative history underscores the lofty aims of promoting transparency and enabling an informed citizenry that underpinned its passage. Its House Report lays out a fourfold purpose: “(1) foster democracy by ensuring public access to agency records and information; (2) improve public access to agency records and information; (3) ensure agency compliance with statutory time limits; and (4) maximize the usefulness of agency records and information collected, maintained, used, retained, and disseminated by the Federal Government.”<sup>27</sup> Promoting such information disclosures, Congress believed, would help ensure an “open and free” society.<sup>28</sup> Legislators hoped that the very presence of a federal transparency law on the books would prophylactically serve to help the government combat potential waste and abuse that could be exposed through FOIA requests.<sup>29</sup>

To that end, the law provides a “presumptive right” for the public to obtain federal government records from all fifteen departments and seventy-three agencies in the executive branch<sup>30</sup> without requiring a demonstration of a reason or need.<sup>31</sup> This access right enables “any person” to request any record from any such agency.<sup>32</sup> The agency receiving the FOIA request must respond within twenty business days of the receipt of the request<sup>33</sup> and provide an estimated date by which the action will be completed.<sup>34</sup> It must release the requested information unless the statute protects the applicable material from disclosure.<sup>35</sup> FOIA also includes a proactive disclosure component, whereby agencies must make specific materials publicly available, including final adjudication orders, agency guidance, and any information that has been released previously through

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24. Reisch, *supra* note 17, at 1901.

25. Alfred C. Aman, Jr. & Landyn W. Rookard, *Private Government and the Transparency Deficit*, 71 ADMIN. L. REV. 437, 445 (2019).

26. H.R. REP. NO. 104-795, at 8, as reprinted in 1996 U.S.C.C.A.N. 3448, 3451.

27. *Id.* at 2.

28. *Id.* at 7.

29. *Id.*

30. 110 AM. JUR. TRIALS § 367, Westlaw (database updated Oct. 2021).

31. U.S. DEP’T OF JUST., FOIA GUIDE: PROCEDURAL REQUIREMENTS (2004 ed.), <https://perma.cc/24B8-HS8T>.

32. 5 U.S.C. § 552(a)(3)(A).

33. *Id.* § 552(a)(6)(A)(i).

34. *Id.* § 552(a)(7)(B)(ii).

35. Christine N. Walz & Charles D. Tobin, *The FOIA “Exclusions” Statute: The Government’s License to Lie*, 30 COMM’NS LAW. 10, 10 (2014).

a FOIA request.<sup>36</sup> Despite the availability of proactive disclosure, most disclosure occurs by request.<sup>37</sup>

### B. Exemptions

While FOIA intends to promote information disclosure, it also recognizes circumstances in which records should potentially be shielded from release. FOIA establishes nine exemptions under which an agency need not disclose requested information.<sup>38</sup> The exemptions cover information that (1) is classified to protect national security; (2) pertains to internal agency personnel rules; (3) is prohibited from disclosure by another statute; (4) constitutes trade secrets, or confidential or privileged commercial or financial information; (5) involves inter-agency or intra-agency memoranda or letters subject to privilege; (6) would invade an individual's personal privacy if disclosed; (7) is compiled for specific law enforcement purposes; (8) involves the supervision of financial institutions; (9) contains geological information about wells.<sup>39</sup>

Courts have played a significant role in interpreting the definitions and breadth of these exemptions.<sup>40</sup> Requesters whose requests are not fulfilled pursuant to an exemption may bring suit in federal court against the withholding agency to compel production of the requested records.<sup>41</sup> In such cases, the burden of proof for withholding requested information falls on the agency.<sup>42</sup> As courts hear cases involving records withheld under one or more of FOIA's exemptions, their decisions shape the meaning of the exemptions and the law.

These judicial decisions have also attracted the attention of Congress. Since FOIA's passage, Congress has reiterated its commitment to the law's

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36. Lamdan, *supra* note 20, at 484 (citing 5 U.S.C. § 552(a)(2)(A)); see David C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 39 ENV'T L. & POL'Y ANN. REV. 10,773, 10,773 (2009) ("Congress sought to fine-tune FOIA in 1996 when it enacted the Electronic FOIA Amendments (EFOIA) to place affirmative obligations on agencies to compile information that is of general interest to the public to make it available on the Internet. But agencies have by-and-large failed to comply with EFOIA's affirmative disclosure mandate, and thus FOIA remains predominantly a requester-driven statute.").

37. Lamdan, *supra* note 20, at 485; DANIEL J. SHEFFNER, CONG. RSCH. SERV., R46238, THE FREEDOM OF INFORMATION ACT (FOIA): A LEGAL OVERVIEW 11 (2020).

38. 5 U.S.C. §§ 552(b)(1)–(9).

39. *Id.*

40. See, e.g., EPA v. Mink, 410 U.S. 73 (1973); NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975); Dep't of the Air Force v. Rose, 425 U.S. 352 (1976); FBI v. Abramson, 456 U.S. 615 (1982); U.S. Dep't of Just. v. Repts. Comm. for Freedom of the Press, 489 U.S. 749 (1989); Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1 (2001). Many other cases have been heard in federal district and appellate courts, as well as the Supreme Court.

41. 5 U.S.C. § 552(a)(4)(B).

42. *Id.*

foundational principles.<sup>43</sup> After *Environmental Protection Agency v. Mink*,<sup>44</sup> an early environmental case, Congress's disapproval of the Court's ruling played a role in motivating the amendment of FOIA in response.<sup>45</sup> The case arose after the Environmental Protection Agency ("EPA") denied a FOIA request from thirty-three House Representatives regarding the agency's recommendations to President Richard Nixon on underground nuclear testing.<sup>46</sup> In 1973, the Supreme Court upheld the agency's withholding decision based on FOIA's national security exemption.<sup>47</sup> In response to this and other cases, in 1974, Congress amended FOIA to require greater agency disclosure and ensure *de novo* review of all exemption claims, even in the national security context.<sup>48</sup> The amendment required agencies, rather than a FOIA requester, to shoulder the burden of proof to justify withholding records under an exemption.<sup>49</sup> Further, the law required courts to move FOIA request matters to the front of their dockets.<sup>50</sup> The bill passed over President Gerald Ford's veto.<sup>51</sup> The amendment's provisions demonstrated the extent to which Congress entrusted courts with the stewardship of the public interest and sought a deliberate shift from past law in which deference to agency policy ruled the day.<sup>52</sup>

According to Professor Paul Verkuil, the Supreme Court's attitude toward FOIA began shifting to a more overtly resistant posture during the 1980s.<sup>53</sup> For instance, the Court's 1989 decision in *Department of Justice v. Reporters Com-*

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43. See Dickinson, *supra* note 15, at 211 ("The original FOIA struck the balance in favor of full disclosure, and subsequent amendments have not shifted the balance. Congress, in setting FOIA's broad mandate to make government records publicly available, has assigned the federal agencies substantial, and at times burdensome, responsibilities."); Cate et al., *supra* note 1, at 48.

44. 410 U.S. 73 (1973).

45. See Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 199 (2013).

46. *Mink*, 410 U.S. at 75.

47. *Id.* at 93. Justice William O. Douglas wrote a vociferous dissent, lamenting the broad leeway granted to the executive without "discernible relation to the interests sought to be protected by subsection (b)(1) of the Act." *Id.* at 110 (Douglas, J., dissenting).

48. Underscoring its importance, this marked the second time Congress "insisted" on *de novo* review of exemptions: first at the law's passage in 1966 and again in overruling *Mink* with the amendments. Kwoka, *supra* note 45, at 199–200.

49. Schiller, *supra* note 12, at 1446.

50. *Id.*

51. Kwoka, *supra* note 45, at 199–200.

52. Not all contemporaneous Court opinions read FOIA's exemptions broadly, however. See, e.g., *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) ("[L]imited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.").

53. See Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 715 (2002); see, e.g., *FBI v. Abramson*, 456 U.S. 615 (1982); *U.S. Dep't of State v. Ray*, 502 U.S. 164, 178 (1991).

*mittee for Freedom of the Press*<sup>54</sup> broadened the reach of FOIA Exemption 7(C)—which excludes law enforcement records on personal privacy grounds.<sup>55</sup>

Some scholars have criticized FOIA's exemptions, claiming that the exemptions and certain judicial interpretations "fully undermine FOIA's transparency aims."<sup>56</sup> They argue that the exemptions' bases for withholding information, as well as the ways courts have interpreted them, have weakened the disclosure function of the law.<sup>57</sup> Moreover, agencies do not always apply exemptions consistently, even within the same FOIA request.<sup>58</sup>

### C. Recent Developments

FOIA has evolved several times during its over fifty-year history. Significant changes to the law occurred through amendments in 1974 following the Watergate scandal<sup>59</sup> and *Mink* decision, as well as in 1996 through amendments applying FOIA to the internet.<sup>60</sup>

FOIA has also experienced major legislative activity over the past five years. On his first full day in office, President Barack Obama distributed a memorandum that praised FOIA as "the most prominent expression of a profound national commitment to ensuring an open Government."<sup>61</sup> The most recent congressional amendments to the Act, codified in the FOIA Improvement Act of 2016,<sup>62</sup> followed later that year. Changes included instituting the

54. 489 U.S. 749 (1989).

55. See Verkuil, *supra* note 53, at 716; see also Dickinson, *supra* note 15, at 193 (critiquing the *Reporters Committee* decision as one that "narrow[s] . . . the public interest inquiry employed in many of the federal circuits and finds scant support in the authorities on which the Court relied"). But see Cate et al., *supra* note 1, at 45 (calling the decision "an important step towards limiting the misuse of the FOIA").

56. Aman & Rookard, *supra* note 25, at 448; cf. David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1099 (2017) (describing how the Act being "shot through with exemptions" is a cause of its "deficien[cy]"). Yet exemptions are not the only factor contributing to the weakening of FOIA. See *id.* at 1099 (citing absence of monetary damages, virtual unavailability of sanctions, court deference to agency determinations, and other factors as relevant).

57. See Verkuil, *supra* note 53, at 715–16.

58. See Lamdan, *supra* note 20, at 485–86.

59. Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, 88 Stat. 1561 (codified as amended at 5 U.S.C. § 552).

60. Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048; Barbara B. Altera & Richard S. Pakola, *All the Information the Security of the Nation Permits: Information Law and the Dissemination of Air Force Environmental Documents*, 58 A.F. L. REV. 1, 7 (2006); see also *History of FOIA*, ELEC. FRONTIER FOUND., <https://perma.cc/6Z7B-CXQV>.

61. Freedom of Information Act: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683, 4683 (Jan. 21, 2009).

62. Pub. L. No. 114-185, 130 Stat. 538.



“presumption of disclosure,” requiring development of an online portal to submit FOIA requests, and placing a twenty-five-year limit on withholding documents under the deliberative process privilege of Exemption 5.<sup>63</sup> The FOIA Improvement Act also established a “foreseeable harm” standard whereby an agency should only withhold an exempt record if it is reasonably foreseeable that disclosure would harm an interest protected by one of the FOIA exemptions.<sup>64</sup> These measures garnered strong bipartisan support, passing the Senate by Unanimous Consent and the House by a voice vote.<sup>65</sup>

## II. IMPORTANCE IN THE ENVIRONMENTAL LAW LANDSCAPE

While FOIA applies to agencies serving wide-ranging functions across the federal government, the law bears particular significance in the environmental context. Understanding the defining characteristics of the environmental law arena helps shed light on the value of public information access in this space. Part II.A explains which features of environmental law attract such intense public interest. Part II.B examines the role of FOIA in promoting environmental accountability.

### A. *Environmental Law: Arena of Intense Interest*

Environmental law fundamentally pertains to avoiding or remediating environmental harm.<sup>66</sup> A large number of issues fall under its umbrella, and environmental law itself takes a number of forms: protecting species from extinction, preserving land from development, ensuring air quality and safe levels of toxins in water, and many others. These issues differ in some key respects from other policy areas. Environmental interests are ubiquitous, often of significant magnitude, potentially irreversible, and tied to health, the econ-

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63. *History of FOIA*, *supra* note 60.

64. 5 U.S.C. § 552(a)(8)(A). For a partially exempt record, the withholding agency must disclose nonexempt portions unless they are “inextricably intertwined” with exempt information—a matter determined *de novo* by a district court. *Freedom of Information Act—Exemptions*, 1 WEST’S FED. ADMIN. PRAC. § 708, Westlaw (2021) (citing *Barnard v. Dep’t of Homeland Sec.*, 531 F. Supp. 2d 131 (D.D.C. 2008)). An agency can also refuse to confirm or deny the very existence of a record that falls within an exemption, so long as it has not previously provided official acknowledgement of the record’s existence. *Id.*

65. *S.337 – FOIA Improvement Act of 2016*, CONGRESS.GOV, <http://congress.gov/bill/114th-congress/senate-bill/337/text> (last visited Feb. 2, 2022). The persisting allure of FOIA extends beyond U.S. borders. FOIA has been emulated in legislation in over 100 countries and in bills passed by all fifty U.S. states. Pozen, *supra* note 56, at 1098–99. However, FOIA is not without critics. See *infra* notes 107–11 and accompanying text.

66. See Mark Latham et al., *The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart*, 80 FORDHAM L. REV. 737, 742 (2011).

omy, and national security. These features add gravity and urgency to environmental concerns.

The intersection of environmental law with other rights has also made environmental interests controversial. Property rights constitute one area of the common law that sometimes conflicts with environmental protection efforts.<sup>67</sup> Furthermore, environmental laws face political resistance, in part because they are “invariably redistributive” in their allocation of costs and benefits.<sup>68</sup> Those who bear the costs of today’s environmental regulations may not overlap temporally or geographically with those who benefit.<sup>69</sup> Meanwhile, the benefits of environmental regulation cannot always be assessed with full precision, while the costs of such regulation—often accrued in the near-term—are easier to quantify and often significant.<sup>70</sup>

The nature of environmental regulations themselves also attracts interest and discord. Many environmental laws in place—multiple of which emerged in 1970, such as the National Environmental Policy Act<sup>71</sup> and the Clean Air Act Amendments of 1970<sup>72</sup>—are federal and sweeping.<sup>73</sup> These statutes are symbolic of the often “top down”<sup>74</sup> nature of environmental regulation, in which broad federal policies invoke collective rights rather than those of individuals.<sup>75</sup> This push and pull of property rights and regulation has helped shape debates about environmental law and policy over time.<sup>76</sup>

For over forty years, environmental law in the United States has been fractured along partisan lines.<sup>77</sup> Yet environmental regulation did not always spark such division in the United States. Notably, the rise of public concern about environmental protection in the late 1960s<sup>78</sup> coincided with the push toward

67. Steven J. Eagle, *The Common Law and the Environment*, 58 CASE W. RESV. L. REV. 583, 584 (2008). Consider the Endangered Species Act (“ESA”), described by the Supreme Court as “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 176 (1978). In that case, the ESA was used to set aside a nearly complete dam project on which \$100 million had been expended due to the resultant risk of extinction of a three-inch fish called the snail darter. *Id.* at 153–59.

68. Lazarus, *supra* note 1, at 1000.

69. *Id.*

70. *See id.* at 1000–01.

71. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended in scattered sections of 42 U.S.C.).

72. Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended in scattered sections of 42 U.S.C.).

73. Lazarus, *supra* note 1, at 1002.

74. Eagle, *supra* note 67, at 585.

75. *Id.*

76. *See id.* at 586.

77. *See Lazarus, supra* note 1, at 1005; *see also* Raphael J. Nawrotzki, *The Politics of Environmental Concern: A Cross-National Analysis*, 25 ORG. & ENV’T 286, 286 (2012).

78. *See Case, supra* note 2, at 55.

greater transparency in government.<sup>79</sup> During Richard Nixon’s presidency, leaders of both parties “unabashedly competed for the environmental mantle,” passing environmental protection bills with broad support on both sides of the aisle.<sup>80</sup> Beginning in the 1980s, however, bipartisan support for environmental protection began to fade as President Ronald Reagan championed policies eschewing federal environmental regulation.<sup>81</sup> Since 1990, Congress has not passed any major environmental laws.<sup>82</sup> As the twenty-first century dawned, the “republican moment” briefly experienced by the environmental movement in the United States had concluded.<sup>83</sup>

Owing in part to this widening chasm between viewpoints, changes in presidential administration sometimes precipitate dramatic law and policy pivots at environmental agencies. This occurred during the transition to the Trump Administration, which undertook a variety of actions to weaken environmental protections.<sup>84</sup> The Biden Administration, for its part, raced in its early days to undo the environmental policies of the previous Administration.<sup>85</sup> Predictably, environmental law and policy changes attract broad public interest in agency action—from interest groups, industry, the media, interested citizens, and others. Seeking information from the federal government about environmental policy or data about potential environmental harm, these groups often turn to FOIA.

### B. FOIA’s Role in Promoting Environmental Accountability

Amidst the intense interest in the activity of U.S. environmental and environmental-adjacent agencies—and most prominently, EPA—FOIA has emerged as a powerful tool. Not only is the information obtainable through FOIA substantial, but FOIA also makes information available that would otherwise be inaccessible.

The data housed by EPA is significant. Annually, the agency receives around 365 million responses to various forms, providing data valued at \$2.8

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79. Cate et al., *supra* note 1, at 46.

80. See Lazarus, *supra* note 1, at 1002.

81. See Case, *supra* note 2, at 53, 57–58.

82. *Id.* at 50–51.

83. See Lazarus, *supra* note 1, at 999–1002; see also Case, *supra* note 2, at 51 (describing “Congress’ wholesale abdication since 1990 of its responsibility to improve, modernize, and reform a badly outdated federal environmental regulatory system”).

84. Nadja Popovich et al., *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here’s the Full List.*, N.Y. TIMES (Jan. 20, 2021), <https://perma.cc/QLH8-2ZAW>.

85. See Coral Davenport, *Restoring Environmental Rules Rolled Back by Trump Could Take Years*, N.Y. TIMES (Jan. 27, 2021), <https://perma.cc/WJ2B-N9WF>.

billion.<sup>86</sup> Of this information, EPA shares thousands of datasets with the public online.<sup>87</sup> However, EPA chooses not to make available countless others.<sup>88</sup> FOIA requests and lawsuits may be the only or the most practicable method of accessing some of this information or contesting government reasons for withholding it.<sup>89</sup>

Without FOIA, there are few means by which the public may access full government environmental information. The United States has numerous statutes directed toward environmental disclosure, such as those requiring environmental impact statements,<sup>90</sup> as well as other reporting and labeling provisions.<sup>91</sup> However, environmental information in the United States is often decentralized, too complex for lay audiences, or unavailable altogether.<sup>92</sup> The U.S. environmental law regime also lacks some disclosure features present in laws in other countries.<sup>93</sup> The United Kingdom, for instance, has a process for disclosing environmental information that is separate from its general information disclosure regime and that includes fewer exemptions.<sup>94</sup> EPA and other organizations have taken strides toward making environmental information

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86. NICK HART & DANIEL D'ARCY, MEANINGFUL TRANSPARENCY AT EPA: A FRAMEWORK FOR RATIONALIZING APPROACHES TO PROMOTE OPEN SCIENCE AND DATA SHARING FOR EVIDENCE-BASED POLICYMAKING 5 (2019).

87. *See id.*

88. *See id.*

89. For the argument on the importance of access to environmental information, see Vladeck, *supra* note 36, at 10,781 (“[E]nvironmental information’ is different from the other information that companies submit to the government and should, almost without exception, be made public. . . . Environmental information uniquely affects the American public; it identifies the toxic substances to which we and our families are exposed.”).

90. *See* 42 U.S.C. § 4332(2)(C).

91. *See* Lamdan, *supra* note 20, at 487–91.

92. *See id.* at 492.

93. *See id.* at 507–08.

94. The UK has its own system of Environmental Information Regulations (“EIRs”) for disclosing environmental information. The Environmental Information Regulations 2004, SI 2004/3391 (UK). The exemptions to disclosure under these regulations are more circumscribed than the exemptions under the U.S. FOIA law and its UK equivalent. Lamdan, *supra* note 20, at 507–08.

easier to access.<sup>95</sup> Yet much environmental information remains solely accessible through FOIA.<sup>96</sup>

FOIA's role and perceived value in the environmental context came to the fore during the Trump Administration. FOIA requests directed to environmental and environmental-adjacent agencies, such as EPA and the U.S. Department of the Interior ("DOI"), surged during President Donald Trump's tenure.<sup>97</sup> According to data published by the FOIA Project, as compared to 100 FOIA lawsuits filed against EPA during eight years of the Obama Administration (2009–2016), EPA saw 139 lawsuits filed during just four years of the Trump Administration (2017–2020).<sup>98</sup> The disparity in FOIA lawsuits filed against DOI in the two administrations is even more striking, with 299 filed during four years of the Trump Administration, as compared to 181 during the previous eight years.<sup>99</sup>

This difference cannot be explained solely by politics, however. The number of lawsuits was relatively low during the George W. Bush Administration, which—like the Trump Administration—was not favored by environmental advocates.<sup>100</sup> Furthermore, the number of lawsuits only indicates part of the picture of FOIA activity. It is dwarfed by the total number of FOIA requests filed with the agencies, as resource hurdles and time constraints prevent many denied requests from reaching the litigation stage.<sup>101</sup>

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95. In the past ten years, EPA has granted public access to the ChemView database to monitor data on Toxic Substances Control Act, 15 U.S.C. §§ 2601–2629, chemicals; EJSSCREEN, a demographic-based environmental justice-related tool; and others. *See* HART & D'ARCY, *supra* note 86, at 11. Yet these resources can provide an incomplete picture of governmental environmental information. For instance, EPA has been criticized for paring down the information made available under the Toxics Release Inventory ("TRI") program of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001–11050, which monitors the release of harmful chemicals. *See* Vladeck, *supra* note 36, at 10,773.

96. *See* Lamdan, *supra* note 20, at 483 ("[T]he United States rests on the laurels of the Freedom of Information Act ('FOIA'), which is only partially effective for environmental information access. This has left U.S. citizens without reliable, centralized access to critical environmental information.").

97. *FOIA Lawsuits: Environmental Protection Agency*, FOIA PROJECT, <https://perma.cc/4UC2-7C8R> (showing results filtered to DOI and EPA). Note that the actual number may be higher; data were updated through September 30, 2020.

98. *Id.*

99. *Id.* (showing results filtered to DOI). Note that the actual number may be higher; data were updated through September 30, 2020.

100. *See* Emily Holden, *Anti-Secrecy Lawsuits Soaring Against Pruitt's EPA*, POLITICO (Feb. 26, 2018), <https://perma.cc/QF8L-ZSVM>.

101. *Cf.* Caitlyn Jordan, *RCFP Legal Director Offers Tips for Navigating Freedom of Information Act During Investigative Reporters and Editors Panel*, REPS. COMM. FOR FREEDOM OF THE PRESS (Oct. 26, 2020), <https://perma.cc/FNB3-N4P9> (recounting a discussion explaining to journalists that the hurdles to FOIA litigation are lower than they may expect).

In the lawsuits filed, environmental groups achieved a number of successes. The results of FOIA requests related to former EPA Administrator Scott Pruitt's calendar and use of taxpayer dollars, among other topics, catalyzed media coverage and contributed to his resignation.<sup>102</sup> In a different FOIA litigation, EPA was compelled to release its core modeling program used to set fuel emission standards for new vehicles.<sup>103</sup> The model at issue had been developed to replace the previous Administration's model for reducing automotive greenhouse gas emissions.<sup>104</sup> FOIA requests of EPA produced 1,700 pages of communications between EPA and members of advisory committees regarding a controversial policy banning scientists who receive grants from EPA from serving on such committees.<sup>105</sup> FOIA disclosures also included proposed changes to the FOIA process itself, as well as information connected to potential conflicts of interest within environmental agencies.<sup>106</sup> These outcomes indicate the potential power of litigation to contest information withheld under FOIA.

Despite its successes, FOIA is not a panacea for the right to access environmental information. Its shortcomings are numerous and subject to calls for reform.<sup>107</sup> The FOIA process itself can last years.<sup>108</sup> The records producible under FOIA also contain important gaps, such as information created by government contractors.<sup>109</sup> When an agency withholds information in response to a FOIA request and subsequently denies an administrative appeal, litigation becomes the only way to continue pursuing the request—a time-consuming and expensive path with uncertain outcomes.<sup>110</sup> Yet in spite of its shortfalls, the absence of a comparable means of acquiring wide-ranging environmental infor-

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102. *ELP FOIA Work Plays Crucial Role in Pruitt Resignation*, SIERRA CLUB, <https://perma.cc/33YU-JQ8G>; Jake Lucas, *How Times Reporters Use the Freedom of Information Act*, N.Y. TIMES (July 21, 2018), <https://perma.cc/YK85-TWFW>.

103. Dana Drugmand, *Court Rules EPA Can't Keep Secret Key Model Used in Clean Car Rule Rollback*, DESMOG (Apr. 1, 2020), <https://perma.cc/5GWT-NC3F>.

104. *Id.*

105. *Attorney General's 22nd Legal Victory Against the Trump Administration Forces EPA to Hand Over Public Records*, SAN JUAN ISLANDER (May 10, 2019), <https://perma.cc/MY8J-7KTP>.

106. See Sylvia Carignan, *EPA Releases Documents on FOIA Policies to Sierra Club*, BLOOMBERG L. NEWS (Jan. 8, 2021), <https://perma.cc/Q6VN-SLDQ>.

107. See, e.g., Vladeck, *supra* note 36, at 10,773; Pozen, *supra* note 56, at 126–27; Lamdan, *supra* note 20, at 483.

108. Lamdan, *supra* note 20, at 497; see also Vladeck, *supra* note 36, at 10,777 (“FOIA remains a viable tool to pry loose environmental data if—but only if—there is no urgent need for the records and one has access to a legal team that can sustain the effort over a long haul.”).

109. Lamdan, *supra* note 20, at 485.

110. See Vladeck, *supra* note 36, at 10,777.

mation likely foretells FOIA's continued importance in the environmental arena for the foreseeable future.<sup>111</sup>

### III. *ARGUS LEADER* AND *SIERRA CLUB* DECISIONS

Disclosure laws such as FOIA are “only as effective as courts say they are.”<sup>112</sup> In two decisions over the past two years, the Supreme Court has taken up major questions of FOIA interpretation.<sup>113</sup> In each, it reduced FOIA's effectiveness by expanding the scope of information potentially foreclosed from FOIA disclosure.

#### A. Food Marketing Institute v. Argus Leader Media

##### 1. Case Overview

The *Argus Leader* case emerged out of a FOIA request for food stamp information by a South Dakota newspaper.<sup>114</sup> The paper had filed a FOIA request with the U.S. Department of Agriculture for information on retail stores participating in the Supplemental Nutrition Assistance Program (“SNAP”) and annual, store-level SNAP redemption data.<sup>115</sup> The U.S. Department of Agriculture released the former, but relied on FOIA Exemption 4—which protects from mandatory disclosure “commercial or financial information obtained from a person and privileged or confidential”<sup>116</sup>—to decline the request for the latter.<sup>117</sup> The Supreme Court held that the failure to release the requested information was proper under Exemption 4.<sup>118</sup> In doing so, the Court reshaped the requirements for Exemption 4 and overturned forty-five years of D.C. Circuit precedent.

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111. FOIA's benefits for requesters of environmental information accrue to a wide range of requesters, some of whom have interests at odds with those of environmental advocates. See Holden, *supra* note 100; see also Pozen, *supra* note 18, at 100 (arguing that while transparency used to bear a liberal valence geared toward egalitarian governance, it has now taken on a more libertarian, neoliberal mantle as it seeks to make government smaller); Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 667 (1984) (“The Act has been charged with turning agencies into information brokers between companies pursuing each other, rather than acting as a window for public assessment of how government conducts itself.”).

112. Vladeck, *supra* note 36, at 10,774.

113. Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356 (2019); U.S. Fish & Wildlife Serv. v. Sierra Club, Inc., 141 S. Ct. 777 (2021).

114. *Argus Leader*, 139 S. Ct. at 2361.

115. *Id.*

116. 5 U.S.C. § 552(b)(4).

117. *Id.*

118. *Argus Leader*, 139 S. Ct. at 2366.

From 1974 until the *Argus Leader* decision, federal courts assessed whether information was confidential based on the D.C. Circuit decision in *National Parks & Conservation Ass'n v. Morton*.<sup>119</sup> That case determined that a “commercial or financial matter is ‘confidential’ [only] if disclosure of the information is likely . . . (1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.”<sup>120</sup>

While the FOIA statute does not reference competitive harm, the reasoning behind the *National Parks* standard centered on the congressional purpose and history of the exemption.<sup>121</sup> In discerning the meaning of “confidential” in the context of Exemption 4, the D.C. Circuit noted that the statute does not define the term.<sup>122</sup> It then examined the dual purposes of FOIA exemptions: “[T]hat of the Government in efficient operation and that of persons supplying certain kinds of information in maintaining its secrecy.”<sup>123</sup> Exemption 4, the court in *National Parks* noted, served both interests.<sup>124</sup> The competitive harm standard laid out by the D.C. Circuit arose from the House and Senate Reports and hearings on FOIA, which recognized the need to protect “persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication.”<sup>125</sup> Prior to the *Argus Leader* decision, most factual disputes in FOIA litigation involved the second prong of the *National Parks* standard, which concerned substantial competitive harm.<sup>126</sup>

In *Argus Leader*, the Supreme Court abrogated the *National Parks* standard for Exemption 4 and replaced it with a lower bar for considering information confidential. Writing for the majority, Justice Neil Gorsuch criticized the D.C. Circuit’s “casual disregard of the rules of statutory interpretation” in *National Parks*.<sup>127</sup> Like in the *National Parks* opinion, the Court began by noting that FOIA Exemption 4 does not define “confidential.”<sup>128</sup> It sought to determine what information classifies as confidential under the exemption by reference to its meaning at the time of FOIA’s enactment in 1966.<sup>129</sup>

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119. 498 F.2d 765 (D.C. Cir. 1974).

120. *Id.* at 770.

121. *Id.* at 767.

122. *Id.* at 766.

123. *Id.* at 767.

124. *Id.*

125. *Id.* at 768.

126. Stuart Turner et al., *Argus Leader After a Year in the Wild: Judicial Application of FOIA Exemption 4 in the Post-Argus Leader World*, 63 GOV'T CONTRACTOR ¶ 9 (2021).

127. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019).

128. *Id.* at 2362.

129. *Id.*



The majority established two conditions to consider information confidential, based on dictionary definitions: First, something is confidential “whenever it is customarily kept private, or at least closely held, by the person imparting it.”<sup>130</sup> Second, it is confidential “only if the party receiving it provides some assurance that it will remain secret.”<sup>131</sup> The first condition must be met for Exemption 4 to apply, but the Court left unresolved the question of whether the second condition must be satisfied.<sup>132</sup> Finally, the Court dismissed the policy considerations in *National Parks* about construing FOIA exemptions narrowly, emphasizing that “important interests [are] served by [its] exemptions.”<sup>133</sup>

This change marks a step that the Court resisted for nearly half a century. The *National Parks* standard had been affirmed by the D.C. Circuit in *Critical Mass Energy Project v. Nuclear Regulatory Commission*,<sup>134</sup> largely on *stare decisis* grounds, though it confined the test to information required to be provided to the government—as opposed to conveyed voluntarily.<sup>135</sup> The Court denied a petition for certiorari to review *Critical Mass* in 1993.<sup>136</sup> In the ten times that Congress amended FOIA since *National Parks*, it also declined calls to alter or clarify Exemption 4.<sup>137</sup>

## 2. Analysis

The replacement of FOIA Exemption 4’s longstanding “substantive competitive harm” test with the plain meaning of “confidential” in *Argus Leader* has wide-reaching implications for the availability of information through FOIA. The submitter of information to the government no longer need show that its disclosure would create competitive harm; now it only need demonstrate that

130. *Id.* at 2363.

131. *Id.*

132. *See id.* (“Can privately held information lose its confidential character for purposes of Exemption 4 if it’s communicated to the government without assurances that the government will keep it private? As it turns out, there’s no need to resolve that question in this case because the retailers before us clearly satisfy this condition too.”). Thus far, “[a]lthough several district courts have resolved Exemption 4 disputes since *Food Marketing*, none has held that this potential second prong must be met.” *Renewable Fuels Ass’n v. EPA*, 519 F. Supp. 3d 1, 12 (D.D.C. 2021).

133. *Argus Leader*, 139 S. Ct. at 2366 (quoting *FBI v. Abramson*, 456 U.S. 615, 630–31 (1982)).

134. 975 F.2d 871 (D.C. Cir. 1992).

135. *See id.* at 875. *Critical Mass* separated information voluntarily provided to the government, granting it categorical protection so long as it is typically kept confidential by the submitter. *Exemption 4 After the Supreme Court’s Ruling*, in *Food Marketing Institute v. Argus Leader Media*, U.S. DEP’T OF JUST. (2019), <https://perma.cc/LP7X-LKR9>.

136. *Exemption 4 After the Supreme Court’s Ruling*, in *Food Marketing Institute v. Argus Leader Media*, *supra* note 135.

137. Brief of Freedom of Information Act and First Amendment Scholars as Amici Curiae Supporting Respondents at 10, *Argus Leader*, 139 S. Ct. 2356 (2019) (No. 18-481).

the information is treated as private by its owner.<sup>138</sup> This lowers the bar for information submitters and might encourage them to liberally mark and treat information as confidential—thereby heightening barriers to public access. As one report described the decision’s implications, “[i]ndeed, if the submitter treats the information as confidential and the agency accepts it as such, then it is the ‘End of analysis: exemption assured.’”<sup>139</sup> The full consequences of the decision are still unknown. They may vary based on how lower courts interpret the second prong regarding private information submitted to the government absent an assurance of confidentiality.

Yet what is clear is how the approach of the modern Court rang the death knell for the *National Parks* standard. *Argus Leader* rejected the Court’s eagerness in cases such as *National Parks* to understand and interpret FOIA in light of its purpose and legislative history.<sup>140</sup> Indeed, the Court took direct aim at this approach, noting that “[e]ven those of us who sometimes consult legislative history will never allow it to be used to ‘muddy’ the meaning of ‘clear statutory language.’”<sup>141</sup>

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138. *Friends of Animals v. Bernhardt*, No. 19-CV-01443-MEH, 2020 WL 2041337, at \*10 (D. Colo. Apr. 24, 2020).

139. *Effects on Exemption 4 of the Supreme Court’s 2019 Argus Decision*, 2 FED. INFO. DISCLOSURE § 14:2, Westlaw (updated Dec. 2020).

140. *See, e.g.*, *U.S. Dep’t of Just. v. Tax Analysts*, 492 U.S. 136, 151 (1989) (“Consistent with the Act’s goal of broad disclosure, these exemptions have been consistently given a narrow compass.”); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975) (“This conclusion is powerfully supported by the other provisions of the Act. The affirmative portion of the Act . . . represents an affirmative congressional purpose to require disclosure of documents which have ‘the force and effect of law.’” (citing H.R. REP. NO. 1497, at 7 (1966), as reprinted in 1966 U.S.C.C.A.N. 2418, 2424)); *Milner v. Dep’t of the Navy*, 562 U.S. 562, 571–72 (2011) (“We would ill-serve Congress’s purpose by construing Exemption 2 to reauthorize the expansive withholding that Congress wanted to halt.”); *EPA v. Mink*, 410 U.S. 73, 86 (1973) (“Still, the legislative history of Exemption 5 demonstrates that Congress intended to incorporate generally the recognized rule that ‘confidential intra-agency advisory opinions . . . are privileged from inspection.’”) (using legislative history to read exemption broadly, but relying upon it nonetheless); *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 360–62 (1976) (“[FOIA] revises § 3, the public disclosure section, of the Administrative Procedure Act, 5 U.S.C. § 1002 (1964). The revision was deemed necessary because ‘Section 3 was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute.’ Congress therefore structured a revision whose basic purpose reflected ‘a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.’ . . . Mindful of the congressional purpose, we then turn to consider whether mandatory disclosure of the case summaries is exempted by either of the exemptions involved here, discussing, First, Exemption 2, and, Second, Exemption 6.” (citing S. REP. NO. 89-813, at 3 (1965)); *Rizzo v. Tyler*, 438 F. Supp. 895, 899 (S.D.N.Y. 1977) (“This provision of the FOIA, which predates the 1974 Amendments, reflects Congress’s intent to provide greater judicial scrutiny over an agency’s FOIA determinations than over other agency rulings.” (citations omitted)).

141. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019).

The Court's criticism of *National Parks*, in itself, is not particularly striking. *National Parks* had been faulted for developing a standard with little support in the statutory text.<sup>142</sup> More remarkable are the lengths to which the opinion goes to distance itself from *National Parks*, given that the term at issue is undefined in the statutory text and was understood to carry a specific contextual meaning for nearly half a century.<sup>143</sup> The Court completely separated the concept of harm from its interpretation of "confidential," even though confidentiality is often understood in relation to harm in daily usage.<sup>144</sup> Justice Stephen Breyer argued in his partial dissent that an understanding of confidentiality that incorporates a limited role for harm is feasible based on the text.<sup>145</sup> Such an approach, taken in light of the pro-disclosure foundations of FOIA, could justify an interpretation of Exemption 4 that is broader than that of *National Parks*, but narrower than the majority's reading permits.<sup>146</sup>

Moreover, the Court's criticism of *National Parks* may also be misplaced. Courts have extensively construed FOIA exemptions, often using language absent from the statute itself. For instance, in a major FOIA case in 1975, the Supreme Court interpreted FOIA Exemption 5 to "exempt those documents, and only those documents that are normally privileged in the civil discovery context."<sup>147</sup> This incorporation of civil discovery privileges into Exemption 5, like the competitive harm test of Exemption 4, was not explicitly written into the text of FOIA. Instead, it reflects an effort to draw a reasonable inference in light of open-ended text. Given this history, *Argus Leader's* rebuke of the *National Parks* decision may hold the D.C. Circuit to a standard even the Supreme Court has not consistently met in the FOIA context.

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142. See, e.g., Richard L. Rainey, *Stare Decisis and Statutory Interpretation: An Argument for a Complete Overruling of the National Parks Test*, 61 GEO. WASH. L. REV. 1430, 1468–71 (1993); John C. Brinkerhoff Jr., *FOIA's Common Law*, 36 YALE J. ON REG. 575, 585 (2019).

143. Moreover, the D.C. Circuit's *National Parks* standard, or one like it, had been widely adopted across U.S. courts of appeal. See *Critical Mass Energy Project v. Nuclear Regul. Comm'n*, 975 F.2d 871, 876 (D.C. Cir. 1992).

144. See *Argus Leader*, 139 S. Ct. at 2368 (Breyer, J., concurring in part) ("And a speaker can more sensibly refer to his Social Security number as 'confidential' than his favorite color, in part because release of the former is more likely to cause harm. 'Confidential,' in this sense, conveys something about the nature of the information itself, not just (as the majority suggests) how it is kept by those who possess it.").

145. *Id.* As another potential avenue, in keeping with the Court's focus on the meaning of the statute in 1966, the Court might have examined the meaning of "confidential" in the broader context of the pro-disclosure statutory text and the potential for redundancy with the language in the rest of the exemption. See *King v. Burwell*, 576 U.S. 473, 486 (2015) ("But oftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.' So when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.'" (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 133 (2000))).

146. See *Argus Leader*, 139 S. Ct. at 2367–68.

147. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).

While *Argus Leader* will not stop courts from considering FOIA cases in the context of their broader statutory schemes, the Court's posture in the case augurs a low likelihood that the Court will robustly incorporate such discussions into future opinions in FOIA cases. This approach not only departs from the way that the Court has often interpreted FOIA cases, but it also threatens to reduce the importance of many of the bedrock principles upon which FOIA was established.

## B. U.S. Fish and Wildlife Service v. Sierra Club

### 1. Case Overview

In *Sierra Club*, a more recent decision from the Court's October Term 2020, the Court again encountered an opportunity to rule on the scope of a FOIA exemption. This time, the exemption at issue was FOIA Exemption 5, which protects from disclosure "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency."<sup>148</sup> This exemption has been read to incorporate privileges available in civil discovery, including the attorney-client privilege, attorney work-product privilege, and the deliberative process privilege.<sup>149</sup> The Court adopted a broad reading of the FOIA exemption in favor of the agency petitioners, holding that Exemption 5's deliberative process privilege protects in-house drafts that "proved to be the agencies' last word about a proposal's potential threat to endangered species."<sup>150</sup>

The facts of *Sierra Club* shed light on the role of FOIA in the environmental law setting. The case stemmed from a 2011 EPA proposed rule about "cooling water intake structures," which draw in large amounts of water to cool industrial machinery.<sup>151</sup> In the operation of these structures, fish and other aquatic wildlife, including endangered species, may become trapped and die.<sup>152</sup> This risk triggered the requirements of the Endangered Species Act of 1973<sup>153</sup> ("ESA").<sup>154</sup> Under the ESA, EPA was obligated to consult the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Services ("NMFS") (together, "the Services"), which would produce an official "biological opinion" of "jeopardy" or "no jeopardy" regarding whether the agency's pro-

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148. 5 U.S.C. § 552(b)(5).

149. See *Hall & Assocs. v. EPA*, 956 F.3d 621, 624 (D.C. Cir. 2020); see also *Sears, Roebuck & Co.*, 421 U.S. at 149 (establishing that the exemption treats as "exempt those documents, and only those documents, normally privileged in the civil discovery context").

150. *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 783 (2021).

151. *Id.*

152. *Id.*

153. 16 U.S.C. §§ 1531–1544.

154. *Sierra Club*, 141 S. Ct. at 783.

posed rule would jeopardize the existence of a threatened or endangered species.<sup>155</sup> A “jeopardy opinion” by the Services would require the agency to terminate its rulemaking, adopt “reasonable and prudent” alternatives proposed by the Services, or seek an exemption from the Endangered Species Committee.<sup>156</sup>

Under the ESA, the Services may provide the consulting agency with a draft biological opinion prior to the issuance of the final biological opinion.<sup>157</sup> In the vast majority of cases, draft opinions finding a likelihood of jeopardy lead the agency to revise its proposed rule before a final jeopardy opinion is issued.<sup>158</sup> As an illustration, of 6,829 formal consultations between 2008 and 2015, FWS issued only two final jeopardy opinions.<sup>159</sup>

In December 2013, after EPA requested a formal consultation with the Services, FWS and NMFS produced draft biological opinions.<sup>160</sup> Those opinions concluded that EPA’s proposed rule likely jeopardized aquatic species and proposed reasonable and prudent alternatives.<sup>161</sup> Services staff sent the drafts to the “relevant decisionmakers” within each respective Service, but those decisionmakers neither granted approval of the drafts nor distributed them to EPA.<sup>162</sup> Instead, consultations continued between the Services and EPA, and the latter revised its proposed rule in 2014.<sup>163</sup>

The Sierra Club submitted a FOIA request for records pertaining to the consultations between EPA and the Services.<sup>164</sup> The Services’ draft biological opinions regarding EPA’s 2013 proposed rule were withheld under the deliberate process privilege of Exemption 5.<sup>165</sup> This privilege shields from disclosure records generated during an agency’s policy deliberations, rather than records reflecting a policy the agency adopts.<sup>166</sup> The Services claimed that the records

155. *Id.* at 783–84.

156. *Id.* at 784.

157. 50 C.F.R. § 402.14(g)(5) (2020).

158. Brief for Center for Biological Diversity and Defenders of Wildlife as Amici Curiae Supporting Respondents at 22–23, *Sierra Club*, 141 S. Ct. 777 (No. 19-547).

159. *Id.*

160. *See Sierra Club*, 141 S. Ct. at 788. While the Court ultimately characterized the opinions as “drafts of draft” opinions, as explained in the following paragraphs of this Part, this Note uses the “draft biological opinion” nomenclature consistent with Court usage. *See id.* (concluding in its final paragraph that the “deliberative process privilege protects the draft biological opinions from disclosure. . .”).

161. *Id.* at 784.

162. *Id.*

163. *Id.* The new rule received a “no jeopardy” opinion from the Services, and EPA issued its final rule the same day. *Id.*

164. *Id.* at 784–85.

165. *Id.* at 785.

166. *Id.*

were protected because they were not final.<sup>167</sup> The Sierra Club then filed suit against the Services in the U.S. District Court for the Northern District of California.<sup>168</sup> The district court and Ninth Circuit found in favor of the Sierra Club, holding that the documents were not privileged because they reflected the Services' final opinion on EPA's 2013 proposed rule.<sup>169</sup>

The Supreme Court disagreed. Justice Amy Coney Barrett, in her first merits opinion on the bench, held that the draft biological opinions at issue were predecisional and deliberative, and thus protected from disclosure under Exemption 5 of FOIA.<sup>170</sup> To reach this conclusion, she examined whether the documents at issue communicated the agency's "settled position" based on "whether the agency treats the document as its final view on the matter."<sup>171</sup> The agency's position was not final, the Court concluded, because the Services had used a "draft" label, suggestive of future change; scheduled a separate date by which a final opinion would be issued; and—most critically—had not carried out the process of approving and sending the "draft" biological opinions to EPA.<sup>172</sup> Rather, the parties extended their consultation period.<sup>173</sup> Based on this sequence, the Court considered the opinions to be more appropriately characterized as "drafts of draft biological opinions"—a far cry from a final agency decision.<sup>174</sup> The Court wrote: "The recommendations were not last because they were final; they were last because they died on the vine."<sup>175</sup> Prior to this case, federal courts had rarely, if ever, categorized a document as a "draft of a draft" for purposes of Exemption 5 in a published opinion.

## 2. Analysis

The Court in *Sierra Club* took a different approach than in *Argus Leader* to expanding a FOIA exemption, but its analysis similarly tends to favor agencies. The Court rejected the effects-based test proffered by the Sierra Club, which focused on a factual inquiry about the practical effects of a record in assessing its privilege, in favor of considering "not whether the drafts provoked a response from EPA but whether the Services treated them as final."<sup>176</sup> This latter approach appears to leave the door open to fact-intensive inquiries about final-

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167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 788.

171. *Id.* at 786.

172. *See id.* at 786–88.

173. *Id.* at 784.

174. *Id.* at 788.

175. *Id.* Although the Court acknowledged that the draft opinion could carry practical consequences, it maintained that the proper indicium of finality is legal effect. *Id.* at 787.

176. *Id.* at 788.

ity as opposed to a bright-line determination. However, the Court's application of its test of finality indicates a willingness to apply it in a relatively formal manner that leaves little room for potential litigants to dispute an agency's purported determination.

The manner in which the Court concluded that the draft biological opinions were not final suggests that future inquiries into finality may be more agency-favoring than some litigants may hope. Although the Court rightly noted that the Services' draft opinions were not approved and fully transmitted to EPA, this fact need not have been dispositive. Indeed, the Services are only required to provide a draft biological opinion to the relevant federal agency upon request.<sup>177</sup> The Court could have instead referenced another marker as a measure of finality.

In his dissent, Justice Stephen Breyer's brief discussion of the Court's "draft of a draft" designation evinced how the Court's approach missed an opportunity to perceive the nuance of the documents. He recognized that NMFS's documents contain "highlighting and editing marks reflective of a work-in-progress," whereas those of FWS appear "complete but for a final signature."<sup>178</sup> This distinction, in his view, ought to guide a court in determining whether a draft or a "draft of a draft" designation is most appropriate and whether a segregability analysis should follow.<sup>179</sup>

Additionally, the Court's characterization of the jeopardy opinions as "drafts of a draft" deemphasized some of the facts in the record that underlaid the Ninth Circuit's opposite conclusion. For instance, while the Services did not send the full jeopardy opinions to EPA, they did send "portions."<sup>180</sup> The opinion of the Ninth Circuit explained:

On December 12, 2013, the FWS Deputy Solicitor called and emailed the EPA General Counsel to "touch base . . . about transmitting a document to EPA." He also emailed "the current draft [Reasonable and Prudent Alternatives ('RPAs')]" to the EPA that same day. On December 17, 2013, the NMFS sent a "Revised Combined NMFS and USFWS RPA" to the EPA.<sup>181</sup>

The fact that the RPAs were sent is particularly significant, as the express statutory rationale for sharing draft biological opinions between the Services

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177. See 50 C.F.R. § 402.14(a) (2020).

178. *Sierra Club*, 141 S. Ct. at 791–92 (Breyer, J., dissenting).

179. *Id.* at 792.

180. *Sierra Club, Inc. v. U.S. Fish & Wildlife Serv.*, 925 F.3d 1000, 1008 (9th Cir. 2019), *rev'd and remanded*, 141 S. Ct. 777 (2021).

181. *Id.*

and the federal agency involved is for the agency to review the RPAs.<sup>182</sup> This history supports an assessment that the biological opinions may have borne greater finality among its users than the Supreme Court acknowledged.

The dissent also highlighted the ways that the majority's approach toward draft biological opinions could have included a more expansive assessment of facts and context.<sup>183</sup> It argued that an examination of the context of the ESA and biological opinions illustrates five ways that draft opinions can operate with significant finality. First, a draft biological opinion contains content that is final and unlikely to change.<sup>184</sup> Second, a draft biological opinion serves an identical function to a final biological opinion in explaining the Services' findings.<sup>185</sup> Third, a draft biological opinion signals the Services' conclusions to EPA so that the agency can decide how to respond before the opinion takes legal effect.<sup>186</sup> Fourth, permitting disclosure of draft biological opinions is unlikely to chill candor within the Services since staff expect that the documents may be released publicly.<sup>187</sup> Fifth, a draft biological opinion produces legal consequences.<sup>188</sup>

Focusing on the Services' treatment of the drafts and understanding the drafts as narrowly as the Court did reflects a blinkered approach to the practical, real-world effects and the ways agencies interact with one another. The Court's approach will likely have the effect of favoring agencies and record submitters, which have the opportunity to frame the classifications and narratives surrounding various records in the first instance. Actions such as marking documents as "drafts" or "drafts of drafts" can steer a court toward a finding of privilege. Under this reading, documents that the agency does not intend to make public could fall within the exemption, even though they are meant to directly influence or bear on the decisions of that agency or a peer agency.<sup>189</sup>

The majority provided some reassurance to litigants, however, that it will not adopt a fully bright-line approach to determinations of the deliberative process privilege. For instance, the Court sought to diminish concerns that agencies will label all documents as "drafts" to invoke Exemption 5 by noting that such a "charade" would be uncovered by a court.<sup>190</sup> Yet the approach in *Sierra*

182. 50 C.F.R. § 402.14(g)(5) (2020) ("If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives.")

183. See *Sierra Club*, 141 S. Ct. at 789 (Breyer, J., dissenting).

184. *Id.*

185. *Id.* at 790.

186. *Id.*

187. *Id.* at 790–91.

188. *Id.* at 791.

189. Bernard Bell, *A "Draft of a Draft" or a "Charade:" U.S. Fish & Wildlife Service v. Sierra Club*, YALE J. ON REG. NOTICE & COMMENT (Mar. 10, 2021), <https://perma.cc/GVC3-LDJ7>.

190. See *Sierra Club*, 141 S. Ct. at 788 (majority opinion).



*Club* raises questions about the extent to which today's Court would be willing to challenge agency designations of finality and draft status. Underscoring this point, its recognition of the draft of a draft category provides an additional outlet on which agencies can potentially lean to avoid record disclosure. This could make certain records more difficult to obtain in the future.

#### IV. DISCUSSION: IMPLICATIONS OF *ARGUS LEADER* AND *SIERRA CLUB*

The Court's broadening of FOIA's exemptions in *Argus Leader* and *Sierra Club* likely foretells a future willingness to stray from the narrow reading of exemptions prescribed by the objectives and context of the statute and recognized in many judicial decisions over time.<sup>191</sup> The two cases further limit FOIA's reach, reflective of a Court that remains skeptical of FOIA. Yet this skepticism is not warranted. It departs from FOIA's embrace of the courts' role as an ardent guardian of the public interest. The Court's treatment of FOIA exemptions in these two cases raises hurdles for the litigants whom FOIA aims to empower.

##### A. FOIA Implications

While each of the two decisions takes a different approach, they both move toward broadening exemptions to make them more inclusive and easier to satisfy. Both *Argus Leader* and *Sierra Club* appear to lessen the emphasis on context in assessing confidentiality or finality, respectively. The decisions also invite a greater likelihood of affording deference to the characterization of records provided by the information submitter or agency. This will ultimately increase barriers for requesters seeking information through FOIA.

The mere fact of this effect is not particularly striking; judicial interpretation of FOIA's exemptions is to be expected and welcomed. Rather, what makes these decisions so notable, taken together, is the way they quietly erode the goals FOIA set out to achieve. FOIA's rich history makes clear that it was developed out of a philosophy that access to information is in the public interest and ought to be promoted to the fullest extent practicable.<sup>192</sup> The end it serves is unique; sometimes, providing information of interest is simply the end in itself. While the "[public] watchdog function was perhaps the principal inspira-

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191. It bears emphasis that *Sierra Club* lends itself to a more subtle and less straightforward analysis, owing in large part to the complex nature of the role of drafts in the consultation process between the Services and the consulting government agency.

192. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 365 (1976) (recognizing "the clear legislative intent (of the FOIA) to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests").

tion for the FOIA and has remained its symbolic central pillar,<sup>193</sup> it was also sufficient, Representative Moss said, to file a FOIA request to “sharpen the wit or satisfy the curiosity.”<sup>194</sup>

The nine FOIA exemptions were carefully refined to help achieve the balance of interests involved in access to information, while “[t]he policy of the Act requires that the disclosure requirements be construed broadly, the exemptions narrowly.”<sup>195</sup> When an exemption does apply, the government must disclose “[a]ny reasonably segregable portion of a record,” the “amount of information deleted, and the exemption under which the deletion is made.”<sup>196</sup> This suggests a strong legislative preference for disclosure and underscores the democratic and egalitarian basis of the bipartisan statute.

Indeed, FOIA stemmed from the potential risks of the government withholding information—a reason the exemptions should properly be understood narrowly.<sup>197</sup> In situations of FOIA withholding, unlike many agency administrative actions, the self-interest of the agency may be on the line.<sup>198</sup> For this reason, the agency may not be neutral in assessing a FOIA request. Concerns about embarrassment to the agency or potential repercussions for the individual making the disclosure decision could affect the ultimate determination.<sup>199</sup> In other cases, the decision to withhold can be used to obstruct oversight and hide misconduct from public view.<sup>200</sup> This is particularly true with regard to the Exemption 5 deliberative process privilege, which may, against agency wishes, invoke issues of “secret law” policies about which the public does not have information.<sup>201</sup> Agencies have been found to prioritize these concerns and wrongfully withhold information as a result.<sup>202</sup>

Congress had carefully selected the courts as arbiters of FOIA because it believed that the judicial branch would best protect the interests of the “little guy.”<sup>203</sup> This was a deliberate shift from the previous disclosure regime, in

193. Dickinson, *supra* note 15, at 197.

194. 112 CONG. REC. 13,007, reprinted in STAFF OF S. COMM. OF PRAC. & PROC., COMM. ON THE JUDICIARY, 93D CONG., FREEDOM OF INFORMATION ACT SOURCEBOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 47 (Comm. Print 1974).

195. *Rose*, 425 U.S. at 366 (quoting *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971)).

196. 5 U.S.C. § 552(b).

197. *See Milner v. Dep't of the Navy*, 562 U.S. 562, 571 (2011) (“We have often noted ‘the Act’s goal of broad disclosure’ and insisted that the exemptions be ‘given a narrow compass.’” (quoting *U.S. Dep't of Just. v. Tax Analysts*, 492 U.S. 136, 151 (1989))).

198. Kwoka, *supra* note 45, at 186.

199. *See id.* at 202.

200. *Id.*

201. *Id.* at 220.

202. *See id.* at 202.

203. Antonin Scalia, *The Freedom of Information Act Has No Clothes*, 6 REGULATION 14, 16 (1982) (“The act and its amendments . . . were promoted as a boon to the press, the public interest group, the little guy; they have been used most frequently by corporate lawyers.”); *see*

which the APA granted the withholding agency the ultimate authority to determine the appropriateness of disclosures.<sup>204</sup> Congress's choice of the courts to review FOIA determinations "reflects Congress's intent to provide greater judicial scrutiny over an agency's FOIA determinations than over other agency rulings," and "exerts a profound effect upon the amount of respect the court must yield to agency determinations."<sup>205</sup> This intent manifests in additional ways. One is the standard of review that Congress determined appropriate for judicial review of agency withholding decisions: *de novo*.<sup>206</sup> This standard—the most rigorous standard of judicial review available to courts<sup>207</sup>—marks a stark departure from the deference courts typically afford to agencies under the APA through the "arbitrary and capricious" and "substantial evidence" standards.<sup>208</sup>

Over time, the Supreme Court has become more skeptical of FOIA, with *Argus Leader* and *Sierra Club* signifying the latest manifestations of this trend. As explained in Part I, the Court has shifted from "supportive" to possibly "resistan[t]" to FOIA and its aims.<sup>209</sup> *Argus Leader* and *Sierra Club* manifest a twenty-first-century approach toward further scaling back FOIA's protections.

### B. Harm to Environmental Interests

These broad readings of the two FOIA exemptions signal cause for concern among the environmental actors whom FOIA aims to empower. Environmental information is one category of information that FOIA's drafters had in mind.<sup>210</sup> In fact, the Electronic FOIA House Report affirmatively referenced "environmentalists" as a group making use of the disclosure process.<sup>211</sup> Yet today, their use of FOIA is in greater jeopardy.

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*also* Schiller, *supra* note 12, at 1443 (recounting that FOIA stemmed from "participatory, legal-liberal thinkers and litigators of the 1960s . . . [who] sought to make the administrative state more inclusive by giving courts more power over agency actions"); Kwoka, *supra* note 45, at 187.

204. Schiller, *supra* note 12, at 1445.

205. Kwoka, *supra* note 45, at 198 (first quoting *Rizzo v. Taylor*, 438 F. Supp. 895, 899 (S.D.N.Y. 1977), then quoting *Wash. Post Co. v. U.S. Dep't of State*, 840 F.2d 26, 31 n.42 (D.C. Cir. 1988), *vacated on other grounds*, 898 F.2d 793 (D.C. Cir. 1990)).

206. *See id.*; Verkuil, *supra* note 53, at 713.

207. Verkuil, *supra* note 53, at 713.

208. *Id.* at 712.

209. *Id.* at 715; *see supra* notes 53–55 and accompanying text.

210. *See* H.R. REP. NO. 104-795, at 10 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 3448, 3453 ("The FOIA has become a popular tool used by various quarters of American society—the press, business, scholars, attorneys, consumers, and environmentalists, among others.").

211. *Id.*

### 1. Prevalence of the Exemptions

The two exemptions at issue in *Argus Leader* and *Sierra Club* have a substantial bearing on environmental requesters, in part, due to their omnipresence in environmental FOIA cases. Generally speaking, Exemptions 4 and 5 have posed some of the most significant hurdles to efforts toward promoting transparency in environmental law and other areas.<sup>212</sup> For instance, Exemption 4 is the foremost justification used to deny public access to environmental information.<sup>213</sup> It is often invoked in the environmental context to protect commercial information involving chemicals that are produced and emitted by industry, including in pesticides and by factories.<sup>214</sup> Information of this nature can help the public understand the risk emanating from products they use and from manufacturing plants in their communities.

Exemption 5 has consistently proven one of the “most problematic” FOIA exemptions, prompting a slew of litigation.<sup>215</sup> Successful litigation of Exemption 5 in the environmental context has been used to reveal both EPA’s non-acquiescence with an adverse circuit court decision regarding EPA regulations<sup>216</sup> and the core computer model used to forecast automakers’ predicted responses to greenhouse gas emission standards.<sup>217</sup> The prevalence of these exemptions in withholding records related to the environment raises the stakes for the implications of *Argus Leader* and *Sierra Club*.

### 2. Patterns of Deference

Both *Argus Leader* and *Sierra Club*, to a lesser extent, increase hurdles for requesters seeking environmental information by granting additional deference to submitters and agencies in their framing of records, such as through designations of “confidential,” “draft,” or “draft of a draft.” Exemption 4 runs into a problem of information asymmetry, in which corporate submitters have the most information about their own records and have significant leeway to label them as they wish. Agencies, by comparison, are “ill-equipped to deal” with

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212. See Gary D. Bass & Sean Moulton, Comment, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 39 ENV’T L. & POL’Y ANN. REV. 10,773, 10,787 (2009).

213. See Vladeck, *supra* note 36, at 10,774.

214. Lamdan, *supra* note 20, at 496.

215. Bass & Moulton, *supra* note 212, at 10,787 (“[S]ome of the most problematic exemptions over the years have been Exemption 5, which applies to inter-agency and intra-agency materials that would not be available under litigation, and Exemption 4, for trade secrets and confidential business information. Without creating some clearer definitions or establishing some checks and balances for the use of these exemptions, enormous amounts of information will never be disclosed.”).

216. See generally *Hall & Assocs. v. EPA*, 956 F.3d 621 (D.C. Cir. 2020).

217. See generally *Nat. Res. Def. Council v. EPA*, 954 F.3d 150 (2d Cir. 2020).

corporate determinations of confidentiality and “generally rubber-stamp” such claims.<sup>218</sup> While most environmental information withheld under Exemption 4 may not actually be sensitive,<sup>219</sup> companies wield significant power to make such determinations. As then-U.S. District Court Judge William Alsup<sup>220</sup> wrote in a 2019 opinion reluctantly applying *Argus Leader* to an Exemption 4 case: “[T]he undersigned judge has learned in twenty-five years of practice and twenty years as a judge how prolifically companies claim confidentiality, including over documents that, once scrutinized, contain standard fare blather and even publicly available information.”<sup>221</sup>

Whereas environmental litigants may have previously had a greater case for accessing such records—namely, on the grounds that disclosing them would not create substantial competitive harm to the submitter—the standard has shifted. *Argus Leader* lowered the bar for what constitutes “confidential.” This almost certainly means that entities submitting information to the government will have a greater ability to avoid disclosing details about their products, emissions, and environmental effects.<sup>222</sup>

In contrast to Exemption 4’s focus on corporate perceptions of confidentiality, Exemption 5’s deliberative process privilege turns on the consideration of a record by the agency itself. Here, the Court’s decision is more mixed for environmental requesters. While the Court sought to provide assurance that it will not apply an entirely categorical determination of finality under the deliberative process privilege, *Sierra Club* reveals the way that the Court’s assessment may still be limited in a manner that favors agencies.

The obvious example, from the case itself, is that the Court’s holding will make it much more difficult to receive information about draft biological opinions through FOIA. The Court’s opinion fully sets aside the “practical consequence” of the Services’ biological opinions—namely, that such jeopardy

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218. See Vladeck, *supra* note 36, at 10,774.

219. See *id.*

220. *District Judge William Alsup Assumes Senior Status*, U.S. DIST. CT., N. DIST. OF CAL. (2021), <https://perma.cc/B8K3-75EB>.

221. *Am. Small Bus. League v. Dep’t of Def.*, 411 F. Supp. 3d 824, 833 (N.D. Cal. 2019) (granting summary judgment on some issues pursuant to FOIA Exemption 4 following the Supreme Court’s decision in *Argus Leader*).

222. One additional variable will involve how courts interpret the FOIA Improvement Act of 2016, which imposed a “foreseeable harm” requirement on FOIA exemptions. See *supra* note 64 and accompanying text. While not all subsequent lower court cases have considered this issue, those that have disagree on the extent to which “[t]he FOIA Improvement Act’s ‘foreseeable harm’ requirement replaces to some extent the ‘substantial competitive harm’ test that the Supreme Court overruled in [*Argus Leader*].” *Ctr. for Investigative Reporting v. U.S. Customs & Border Prot.*, 436 F. Supp. 3d 90, 113 (D.D.C. 2019). *Argus Leader*, for its part, involved records withheld before the FOIA Improvement Act went into effect. *Id.* It remains to be seen whether the 2016 amendments will be applied to blunt the effects of *Argus Leader*.

opinions signal to the agency to change its proposed rule.<sup>223</sup> As a result, information about the Services' assessments and considerations under the ESA will become more difficult for the public to obtain.

If the Court's limited assessment of context from *Sierra Club* extends to future cases and different exemptions, that spells further trouble for environmental requesters, including those seeking information withheld under Exemptions 4 or 5. Without the substantial competitive harm test, for instance, Exemption 4 inquiries after *Argus Leader* will likely rely more heavily on declarations of confidentiality. These trends are likely to pervade future environmental FOIA cases.

### 3. *Effects on Subsequent Cases*

Both decisions are likely to produce effects throughout the federal courts, though insufficient time has passed in which to assess their full impact. *Argus Leader* has already begun reverberating through lower courts with implications for environmental interests. For instance, based on *Argus Leader*, the Ninth Circuit vacated an order granting summary judgment to the Center for Biological Diversity in a FOIA matter regarding information from FWS about imported and exported wildlife.<sup>224</sup> As the *Argus Leader* test was described in another opinion, "it appears most courts have found it to be significantly less demanding" than the previous test.<sup>225</sup>

Some judges have begun lamenting its effects. A federal judge wrote:

The Court is sympathetic to plaintiff's steep uphill battle under the new Exemption 4 standard. Under *Food Marketing*, it appears that defendants need merely invoke the magic words—"customarily and actually kept confidential"—to prevail. And, unless plaintiff can show that the information is in fact publicly available or possibly point to other competitors who release the information, defendants can readily ward off disclosure.<sup>226</sup>

*Sierra Club's* effects in the case law have thus far been more limited, owing primarily to its newness but secondarily to the more limited nature of its hold-

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223. See *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 787 (2021).

224. See *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 802 F. App'x 309, 310 (9th Cir. 2020) ("We agree with the parties that *Food Marketing* alters the governing standard for evaluating whether Exemption 4 bars disclosure.").

225. *N.Y. Times Co. v. FDA*, 529 F. Supp. 3d 260, 281–82 (S.D.N.Y. 2021).

226. *Am. Small Bus. League*, 411 F. Supp. 3d at 832. Yet other courts have suggested that this interpretation is overly simplistic. See *N.Y. Times Co.*, 529 F. Supp. 3d at 284–85 ("The takeaway from cases in the wake of *Argus Leader*, then, is that a company cannot readily ward off disclosure simply by 'invok[ing] the magic words—customarily and actually kept confidential,' but must instead adequately describe the steps it takes to keep the information at issue confidential." (citations omitted)).

ing in relation to that of *Argus Leader*. It is unlikely that *Sierra Club* will produce as significant rumblings throughout the lower courts as *Argus Leader*. However, the case has not gone without notice. In an April 2021 case in the U.S. District Court for the District of Columbia, *Sierra Club* was quoted no fewer than eighteen times.<sup>227</sup> In that decision, *Sierra Club's* reasoning was carefully applied to find that withholding over 450 pages of records regarding pilot market assessments for veteran medical care was justified under Exemption 5.<sup>228</sup> It is difficult to say whether that court would have reached a different conclusion before *Sierra Club*, but it does seem certain that *Sierra Club* greatly influenced the court in its conclusion.<sup>229</sup> Meanwhile, in a recent environmental case in the same district court, *Sierra Club's* reasoning seemed to play a less prominent role.<sup>230</sup> Court watchers will continue to monitor follow-on cases, and it is to be expected that as a result of the decision, some types of environmental information will become more difficult to obtain.

## CONCLUSION

In 1983, former EPA Administrator William D. Ruckelshaus released a famous memorandum pledging that EPA would “operate ‘in a fishbowl.’”<sup>231</sup> The memo came during a time of “controversy” at EPA, and it emphasized the agency’s commitment to transparency and public accountability.<sup>232</sup> Ruckelshaus’s sentiments harkened back to just a decade earlier, when Congress loudly proclaimed its interests in environmental protection and transparency through a slate of legislation.

Since then, numerous EPA administrators have followed suit in publishing a “fishbowl memo” in some form or another, tipping their hat to the importance of public access to environmental information.<sup>233</sup> Such data has been

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227. *See generally* Cause of Action Inst. v. U.S. Dep’t of Veterans Affs., No. 20-997, 2021 WL 1549668 (D.D.C. Apr. 20, 2021).

228. *Id.* at \*18.

229. *See id.* at \*10–11 (“The place of the pilot market assessments and briefing documents within this larger statutory process for development of the National Realignment Strategy makes clear that they are not final, as *Sierra Club* understands that term. *Sierra Club*, 141 S. Ct. at 786. . . . Plaintiff next cautions that finding these records to be predecisional ‘because what matters is the “VA’s final decision” in the realignment process . . . is a serious misreading of *Sierra Club*’ and ‘would require treating everything even remotely related to VA reform efforts as privileged.’ The *Sierra Club* Court rejected a similar argument . . . .” (alteration in original) (footnote omitted) (citation omitted)).

230. *See generally* Hall & Assocs. v. EPA, No. 18-1749, 2021 WL 1226668 (D.D.C. Mar. 31, 2021).

231. Press Release, EPA, Ruckelshaus Takes Steps to Improve Flow of Agency Information [Fishbowl Policy] (May 19, 1983), <https://perma.cc/7YMN-5MB9>.

232. *See* HART & D’ARCY, *supra* note 86, at 6.

233. *See id.* at 7.

continuously sought after by wide-ranging segments of the public and for various reasons. In presidential administrations that have generally been both more and less transparent in their approach to environmental information, the federal courts have carried out their important role of reviewing agency withholding decisions through the FOIA process.

In the *Argus Leader* and *Sierra Club* cases during the past two years, the Supreme Court has twice raised the barriers for the public to access environmental information. Most recently, in March 2021, the *Sierra Club* opinion quoted another EPA FOIA case, *Mink*, to describe the deliberative process privilege.<sup>234</sup> In construing a FOIA exemption to deny environmental information to one of the nation's oldest nonprofit environmental groups,<sup>235</sup> the Court's majority explained one of its interests: "protect[ing] agencies from being 'forced to operate in a fishbowl.'"<sup>236</sup>

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234. U.S. Fish & Wildlife Serv. v. Sierra Club, Inc., 141 S. Ct. 777, 785 (2021) (quoting EPA v. Mink, 410 U.S. 73, 87 (1973)).

235. See *About Us*, SIERRA CLUB CAL., <https://perma.cc/QKV4-8WVT>.

236. *Sierra Club*, 141 S. Ct. at 785 (quoting *Mink*, 410 U.S. at 87).