

## The Supreme Court - March 4, 2021

---

Today, the Supreme Court of the United States issued the following two decisions:

**United States Fish and Wildlife Serv. v. Sierra Club, Inc.**, No. 19-547: The Sierra Club submitted Freedom of Information Act (“FOIA”) requests for records related to the U.S. Fish and Wildlife Service and National Marine Fisheries Service’s (collectively, “Services”) consultations with the Environmental Protection Agency (“EPA”) regarding the impact that the EPA’s proposed rules regarding cooling water intake structures used to cool industrial equipment would have on endangered aquatic species. The Services invoked the deliberative process privilege under FOIA Exemption 5, in 5 U.S.C. § 552(b), for their draft biological opinions analyzing the EPA’s 2013 proposed rule. Those drafts were never approved by the Services’ decision-makers or sent to the EPA. Instead, discussions between the Services and EPA continued and, in 2014, the EPA sent the Services a significantly different rule. The District Court and Ninth Circuit held the draft biological opinions were not privileged because they represented the Services’ final opinion that the EPA’s 2013 proposed rule was likely to have an adverse effect on certain endangered species. Today, the Court reversed, holding that the deliberative process privilege protects in-house drafts that proved to be the agencies’ last word about a proposal’s potential threat to the environment, because the drafts were both predecisional and deliberative. The Court reasoned that although the drafts were the Services’ “last word,” they were predecisional and deliberative because they were not final; instead, the reason the drafts were the “last word” was because the recommendations “died on the vine.” The Court’s opinion was issued by Justice Barrett. Justice Breyer dissented, joined by Justice Sotomayor.

The Court’s decision is available [here](#).

**Pereida v. Wilkinson**, No. 19-438: The Immigration and Nationality Act provides that the Federal Government may initiate removal proceedings against an individual for, *inter alia*, entering the country or committing a serious crime in the United States. Such an individual, however, is eligible to ask the Attorney General to “cancel” that order if that

### Related Capabilities

- Appellate
- Construction & Design
- Environmental
- Immigration

person proves four required elements, one of which is that he has not been convicted of certain criminal offenses, including crimes “involving moral turpitude.” Petitioner Clemente Avelino Pereida’s contention that he is eligible for discretionary relief from his order of removal required that he show that his conviction under Nebraska law for attempted criminal impersonation was not a crime of moral turpitude. It was undisputed that a crime involving fraud was one involving moral turpitude, and thus left only one of the Nebraska law’s four subsections (for carrying on a business without a required license) as one that would not be a crime of moral turpitude. The immigration judge saw little reason to believe that was the subsection on which Pereida was convicted – a finding supported by the government’s production of the criminal complaint, and not disproven by Pereida, who declined to offer any competing evidence of his own. Both the Bureau of Immigration Appeals and the Eighth Circuit agreed that, although nothing in the record definitively indicated which statutory subsection Pereida was convicted of violating, Pereida bore the burden of proving his eligibility for relief, including that his crime of conviction did not involve moral turpitude, and he had failed to do so. The Court today affirmed, holding that a nonpermanent resident seeking to cancel a lawful removal order fails to carry his burden of showing that he has not been convicted of a disqualifying offense when the statutory conviction on his record is ambiguous regarding whether a disqualifying offense formed the basis of his conviction. Justice Gorsuch issued the Court’s opinion. Justice Breyer dissented, joined by Justices Sotomayor and Kagan. Justice Barrett took no part in the case.

The Court's decision is available [here](#).