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Supreme Court Report

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This *Report* summarizes an opinion issued on March 3, 2020 (Part I); and cases granted review on March 2 and 9, 2020 (Part II).

I. Opinions

● *Kansas v. Garcia*, 17-834. By a 5-4 vote, the Court held that the Immigration Reform and Control Act of 1986 (IRCA) does not expressly or impliedly preempt Kansas prosecutions of respondents for identity theft for using another person's Social Security number on state and federal tax-withholding forms they submitted when obtaining employment. IRCA made in unlawful to knowingly hire an alien unauthorized to work in the United States. To enforce that bar, employers must have job applicants complete a federal work-authorization form—the I-9 form—in which an employee provides personal information including name and Social Security number. IRCA limits the use of I-9 forms, providing that "any information contained in or appended to such form may not be used for purposes other than enforcement of" the Immigration and Nationality Act and other specified provisions of federal law. 8 U.S.C. §1324a(b)(5). Respondents in the three cases before the Court are aliens who are not authorized to work in the United States, but who obtained employment by using someone else's identity on the I-9 forms, as well as on tax withholding forms (W-4 and Kansas' K-4). All three were convicted under Kansas laws against fraud, forgery, and identity theft for fraudulently using another person's Social Security number on the tax-withholding forms. Each respondent argued that IRCA preempted his prosecution. The trial courts rejected the claim, and each respondent was convicted. Three separate panels of the Kansas Court of Appeals affirmed their convictions. The Kansas Supreme Court reversed, holding that §1324a(b)(5) expressly prohibits a state from suing "any information contained within [an] I-9 as the bas[i]s for a state law identity theft prosecution of an alien who uses another's Social Security information on an I-9." In an opinion by Justice Alito, the Court reversed and remanded.

The Court first held that IRCA does not expressly preempt respondents' convictions. It noted that the Kansas Supreme Court's interpretation of §1324a(b)(5) "would mean that no information placed on an I-9—including an employee's name, residence address, date of birth, telephone number, and e-mail address—could ever be used by any entity or person for any reason." But, found the Court, that "interpretation is flatly contrary to standard English usage." Section 1324a(b)(5) limits use of "information contained in" the I-9 form, but "it is not customary to say that a person uses information that is contained in a particular source unless the person makes use of that source." For example, a person's e-mail address is contained in many places, but "no one would say that a person who uses an e-mail address has used information that is contained in all these places." The Court added that the Kansas Supreme Court's reading would produce "strange consequences." For example, if an employee states on his I-9 that his name is Jim Smith, under the Kansas court's interpretation, "no one could use Jim's name for any purpose. If he robbed a bank, prosecutors could not use his name in an indictment." The Kansas Supreme Court tried to deal with this by saying that §1324a(b)(5) preempts only prosecutions of aliens who used false identities to establish "employment eligibility." But, found the Court here, "there is no trace of these limitation in the text of §1324a(b)(5)." The Court also rejected respondents' contention that their prosecutions are preempted by §1324a(d)(2)(F), which bars use of the federal employment verification system "for law enforcement purposes other

than" those to which the I-9 can be used. Completing tax-withholding documents, found the Court, is not part of the "federal employment verification system."

The Court next held that the Kansas statutes do not fall within a field impliedly reserved exclusively for federal regulation. The Court found that the submission of tax-withholding forms does not fall within "the field of fraud on the federal employment verification system" or the "field *relating to* the federal employment verification system." It explained that "[t]he employment verification system is designed to prevent the employment of unauthorized aliens, whereas tax-withholding forms help to enforce income tax laws." Although "employees generally complete their W-4's and K-4's at roughly the same time as their I-9's, [ ] IRCA plainly does not foreclose all state regulation of information that must be supplied as a precondition of employment," such as information about age, education, criminal records, and so on. To be sure, the Court observed, *Arizona v. United States*, 567 U.S. 387 (2012), reaffirmed the holding in *Hines v. Davidowitz*, 312 U.S. 52 (1941), that the federal government occupies the field of alien registration. But in contrast to alien registration, "federal law does not create a comprehensive and unified system regarding the information that a State may require employees to provide."

Lastly, the Court held that the Kansas statutes do not stand as "an obstacle to the accomplishment and execution of the full purposes" of IRCA. Respondents rely on *Arizona*, which held that IRCA preempted a state law making it a crime for an unauthorized alien to obtain employment. *Arizona* "concluded that IRCA implicitly conferred a right to be free of criminal (as opposed to civil) penalties for working illegally." The present case is different, however: "In enacting IRCA, Congress did not decide that an unauthorized alien who uses a false identity on tax-withholding forms should not face criminal prosecution." The Court went on: "The mere fact that state laws like the Kansas provisions at issue overlap to some degree with federal criminal provisions does not even begin to make a case for conflict preemption. . . . Our federal system would be turned upside down if we were to hold that federal criminal law preempts state law whenever they overlap, and there is no basis for inferring that federal criminal statutes preempt state laws whenever they overlap." Justice Thomas filed a concurring opinion, which Justice Gorsuch joined, "to reiterate [his] view that we should explicitly abandon our 'purposes and objectives' pre-emption jurisprudence."

Justice Breyer filed an opinion concurring in part and dissenting in part, which Justices Ginsburg, Sotomayor, and Kagan joined. Justice Breyer agreed with the majority's express preemption ruling, but disagreed with its implied preemption ruling. He relied on *Arizona*'s finding that state laws that make criminal what Congress did not (there, making it a crime for an unauthorized alien to work) are preempted. In his view, "[s]tate laws that police fraud committed to demonstrate federal work authorization are similarly preempted." He read IRCA as allowing only the federal government to "prosecute people for misrepresenting their federal work-authorization status." He found it irrelevant that Kansas' statutes are laws of general applicability, whereas the law at issue in *Arizona* targeted aliens: "here, Kansas applied its criminal laws to do what IRCA reserves to the Federal Government alone—police fraud committed to demonstrate federal work authorization. That is true even though Kansas prosecuted respondents based on their tax-withholding forms, rather than their I–9s." Justice Breyer emphasized that Kansas' theory of prosecution was that respondents intended to deceive their prospective employers in order to obtain employment, which "fell squarely within the field that

. . . the federal Act preempts." The result, he said, is "a colossal loophole" under which states can prosecute false information on I-9 forms since job applicants invariably put the same false information on their tax-withholding forms.

II. Cases Granted Review

● *California v. Texas*, 19-840; *Texas v. California*, 19-1019. The Court will address the constitutionality of the Affordable Care Act. Specifically, the Court will address (1) whether reducing to zero the amount individuals who don't obtain insurance must pay the government renders the minimum-coverage requirement an unconstitutional individual mandate; (2) if so, whether the mandate is severable from some or all of the rest of the Act; and (3) as a threshold matter, whether the individual and state plaintiffs have standing to assert their challenge to the Act. As originally enacted, the ACA required individuals to purchase health insurance, *see* 26 U.S.C. §5000A(a), or make a payment to the Internal Revenue Service called a "shared responsibility payment." In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) (*NFIB*), five Justices of the Court ruled that a mandate requiring individuals to purchase health insurance would be unconstitutional; but the Court upheld §5000A as a valid exercise of Congress's power to "lay and collect Taxes." In 2017, as part of the Tax Cuts and Jobs Act, Congress amended the "shared responsibility payment" and set this amount at zero. Two private individuals and 18 states filed suit against the federal government, arguing that because Congress reduced the "shared responsibility payment" to zero, §5000A could no longer be construed as a tax and therefore was an unconstitutional mandate. The plaintiffs also argued that because the individual mandate was essential and inseverable from the ACA, the entire ACA must be struck down. The federal defendants agreed that once the "shared responsibility payment" was reduced to zero it became an unconstitutional individual mandate, but they (initially) maintained that the individual mandate was severable from the rest of the ACA. As a result of the federal defendants' decision not to fully defend the ACA, 16 states and the District of Columbia intervened as defendants ("state defendants"). The district court concluded that setting the "shared responsibility payment" to zero rendered it an unconstitutional individual mandate and that the individual mandate was inseverable from the rest of the ACA. It therefore invalidated the entire ACA and entered partial final judgment. The state defendants and the federal defendants appealed. In a 2-1 decision, the Fifth Circuit affirmed in part and reversed in part.

The Fifth Circuit determined that both the individual plaintiffs and the state plaintiffs had standing to file the lawsuit. With respect to the individual plaintiffs, the majority concluded that the individual mandate required that they purchase insurance and that this mandatory purchase represented an economic injury. The court also determined that the state plaintiffs had suffered "fiscal injuries as employers," such as the "increased . . . cost of printing and processing these forms and of updating the state employers' in-house management systems." On the merits, the court held that because the "shared responsibility payment" was amended to zero, the individual mandate is no longer a valid constitutional exercise of congressional power. The court reasoned that the characteristics relied upon in *NFIB* to read the individual mandate as a proper exercise of Congress's taxing power no longer applied: (1) the "shared responsibility payment" no longer yielded revenue for the government, (2) the "shared responsibility payment" was no longer "paid into the Treasury by taxpayers when they file their tax returns," (3) the amount owed was not calculated "by such familiar factors

as taxable income, number of dependents, and joint filing status," and (4) a payment was no longer required, enforced, or collected by the IRS. Having concluded that the shared responsibility payment was now an unconstitutional individual mandate, the court next determined that the district court's severability analysis was incomplete in two ways. First, the district court paid relatively little attention to the intent of the 2017 Congress. Second, the district court did not "do the necessary legwork of parsing through the over 900 pages of the post-2017 ACA, explaining how particular segments are inextricably linked to the individual mandate." On remand, the court directed the district court to address these severability issues, as well as to consider "the federal defendants' newly-suggested relief of enjoining the enforcement only of those provisions that injure the plaintiffs or declaring the [ACA] unconstitutional only as to the plaintiff states and the two individual plaintiffs."

The intervening state defendants contend that the Fifth Circuit's decision is wrong as to "standing, the merits, and severability." They argue that since Congress has reduced the "shared-responsibility payment" to zero, "the individual plaintiffs do not need to do anything to comply with the law." Therefore, the ACA "does not impose any legally cognizable harm" and any injury is "entirely self-inflicted." The state defendants also argue that the state plaintiffs failed to produce concrete evidence supporting any injury. On the merits, the state defendants contend that the minimum coverage provision "encourage[s] Americans to buy health insurance, but it imposes no legal obligation to do so." As such, "[t]here is no basis for concluding that 'Congress exceeds its enumerated powers when it passes a law that does nothing.'" Lastly, they maintain that severability is a question of law and therefore, remand is "unnecessary." They also submit that Congress's severability intent is clear because when it reduced the "shared-responsibility payment" to zero in 2017, it left "every other provision of the ACA in place."

The state plaintiffs filed a conditional cross-petition for certiorari arguing that certiorari should not be granted because the case was in an "interlocutory posture in which the lower courts have not yet determined the scope of relief to which conditional cross petitioners are entitled." If the Court were to grant certiorari, however, they argued that the district court's order should be affirmed in its entirely. Specifically, the state plaintiffs argue that Congress's severability intent was clear when it enacted the ACA and declared that "[t]he requirement [to buy health insurance] is essential to creating effective health[-]insurance markets in which improved health[-]insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." 42 U.S.C. §18091(2)(I). Since the 2017 Congress left this provision intact, the state plaintiffs submit there "can be no clearer statement of Congress's view that the mandate is not severable from the rest of the ACA." They thus ask that the entire ACA be declared unconstitutional.

● *Jones v. Mississippi*, 18-1259. The Court will resolve whether the Eighth Amendment prohibits a sentence of life without parole (LWOP) for juvenile homicide offenders absent a finding of permanent incorrigibility. Brett Jones, then 15 years old, stabbed his grandfather to death and received a mandatory sentence of life without parole. Later, in *Miller v. Alabama*, 567 U.S. 460 (2012), the Supreme Court held that mandatory LWOP sentences for juveniles are unconstitutional. Jones therefore obtained a new sentencing hearing to determine his parole-eligibility. The trial judge appointed counsel, authorized an investigator, and held a hearing at which Jones testified and presented five other witnesses (his mother, younger brother, grandmother, aunt, and a corrections officer). Jones

provided evidence that his stepfather was physically and verbally abusive, and his mother had mental health issues and abused alcohol. When Jones was 14 years old, a physical altercation with his stepfather resulted in Jones' arrest for domestic violence, which prompted him to move back to Mississippi to live with his grandparents. Two months later, after turning 15, he killed his grandfather. According to Jones, he took medication for certain mental health issues and self-harmed by cutting, had only one significant disciplinary action for a fight, and regretted killing his grandfather. The trial judge imposed an LWOP sentence. He prefaced his opinion by saying he had "considered each and every factor that is identifiable in the *Miller* case and its progeny." He was "cognizant of the fact that children are generally different; [and] that consideration of the *Miller* factors . . . might well counsel against irrevocably sentencing a minor to life in prison." He explained that his decision was based in part on the jury's decision to find Jones guilty of "deliberate-design murder" instead of manslaughter or acquitting based on self-defense; the murder was "particularly brutal"; Jones "resort[ed] to" using a second knife after the first one broke; and he attempted to conceal the murder. The judge also found that Jones was not under third-party pressure to commit the murder, and despite growing up in "troubled circumstances," they were neither "brutal" nor "inescapable." Jones appealed, claiming that *Miller* and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), required the judge to find he was permanently incorrigible before imposing LWOP. The Mississippi Court of Appeals affirmed.

The Mississippi Court of Appeals rejected Jones' argument that *Miller* creates a "presumption against" a juvenile LWOP sentence and requires a finding of permanent incorrigibility, irretrievable depravity, or irreparable corruption. As the court explained in its prior opinion in *Cook v. State*, 242 So. 3d 865 (Miss. Ct. App. 2017), *Miller* "'requires the sentencing authority to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison'" by applying the *Miller* factors in "non-arbitrary fashion." But, under *Miller*, "the sentencing judge is not required to make any specific 'finding of fact.'" The court also recognized *Miller*'s prediction that juvenile LWOP sentences would be "'uncommon'" and its observation in *Montgomery* that LWOP would be "disproportionate for all but the rarest of children whose crimes reflect 'irreparable corruption.'" After analyzing the *Miller* factors, the appellate court ruled the trial judge properly applied them. Although the trial judge "did not specifically discuss on the record each and every factor mentioned in the *Miller* opinion," the court noted, he "expressly stated" he had done so. "Neither the Supreme Court nor the Mississippi Supreme Court has held that reversal is required just because the sentencing judge omits some factors from his on-the-record discussion of the reasons for his sentence." In sum, the court concluded that the trial judge's findings were supported by the record, and that he sufficiently explained "the reasons for the sentence," applied the correct legal standard (*Miller*), and did not impose LWOP arbitrarily. The Mississippi Supreme Court initially agreed to review that decision, but after oral argument five justices voted to dismiss the petition over the dissent of four justices.

Jones argues that the Mississippi appellate court misapplied *Miller*. He maintains that "[w]ithout a requirement to *find* permanent incorrigibility before imposing life without parole, the command of *Miller* and *Montgomery* to restrict the sentence to rare, permanently incorrigible juveniles loses its force as a rule of law." And "[i]n practical terms, sentencing authorities unconstrained by a finding requirement would be 'free to sentence a child whose crime reflects transient immaturity to life without parole,' despite [the] Court's clear holding that this is impermissible." In Jones' view, a finding of

permanent incorrigibility is necessary to comply with the constitutional restriction identified *Miller* and *Montgomery*—that LWOP sentences will be disproportionate "for all but the rarest of juvenile offenders, whose crimes reflect permanent incorrigibility." Jones notes that even the dissent in *Montgomery* recognized that courts would now be required to "'resolve' the question of incorrigibility'"—and "[t]rial courts resolve questions by making findings." Yet here, he argues, the trial judge did not find Jones permanently incorrigible and did not even "acknowledge that only permanently incorrigible juvenile homicide offenders may be sentenced to life without parole. . . . In fact, it did not address [Jones'] capacity for rehabilitation at all." Rather, the court "viewed its task merely as assessing aggravating and mitigating circumstances." Jones adds that the question of incorrigibility is "*the* central question in juvenile life-without-parole cases, and the sentencing authority must answer it for appellate review to be meaningful." When a trial court fails to answer it, the case should be remanded for an "'actual determination'" whether the juvenile is "potentially corrigible or permanently depraved."

Mississippi counters that neither *Miller* nor *Montgomery* requires the trial court to make a permanently-incorrigible finding before sentencing a juvenile to LWOP. Here, the trial court complied with *Miller*, it argues, by giving Jones a hearing and considering the *Miller* factors. In the state's view, *Montgomery* reinforced *Miller*'s acknowledgement that fact-finding is not required. And if the Court meant to require a finding of permanent incorrigibility in either *Miller* or *Montgomery*, it would have specifically said so. Instead, the state continues, the Court cited *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986), for the proposition that the Court leaves the enforcement of constitutional restrictions on sentencing to the states. The state also notes that determining permanent incorrigibility and the possibility of rehabilitation may not be feasible when an offender, like Jones, has been sentenced relatively recently. Finally, the state acknowledges that "determining 'irreparable corruption' is possibly one way of" ensuring a proportionate sentence, but maintains that "trial courts can determine the appropriate sentence consistently with the constitution by conducting a hearing, considering the factors found in *Miller*, and considering whether the defendant's crime does not reflect transient immaturity."

● *Borden v. United States*, 19-5410. The Court will resolve whether a violent felony under the "use of force" clause in the Armed Career Criminal Act (ACCA), 18 U.S.C. §924, includes offenses based on recklessness. Charles Borden pleaded guilty in federal court to possessing a firearm as a felon. The ACCA provides a 15-year mandatory minimum sentence for a defendant so convicted with three or more "violent felony" convictions. §924(e)(1). A "violent felony" is one that has "as an element the use, attempted use or threatened use of physical force against the person of another." §924(e)(2)(B)(i). Borden has three prior Tennessee aggravated assault convictions, one which required only recklessness—meaning it was committed in conscious disregard of a substantial risk of causing injury rather than knowingly or intentionally committed to cause injury. At sentencing, the government argued that all three aggravated assault convictions counted as violent felonies. Borden argued that the reckless assault conviction did not count because it did not involve the intentional use of force. But he acknowledged that before sentencing, the Sixth Circuit had held the opposite in *United States v. Verwiebe*, 874 F.3d 258 (6th Cir. 2017)—that reckless aggravated assault is a violent felony. The district court applied the 15-year mandatory minimum in calculating Borden's sentence. On appeal, Borden argued that *Verwiebe* was wrongly decided. The Sixth Circuit affirmed. 769 Fed. Appx. 266.

The Sixth Circuit adhered to *Verwiebe*, which applied the Supreme Court's textual analysis of a similarly worded provision in *Voisine v. United States*, 136 S. Ct. 2272 (2016). *Voisine* considered whether the statutory firearms ban applies to a defendant convicted of a misdemeanor crime of domestic violence that "has, as an element, the use or attempted use of physical force." The Court held that it does, even when the conviction is predicated on reckless conduct. The Court explained that "[n]othing in the word 'use' . . . indicates that [the provision] applies exclusively to knowing or intentional domestic assaults." While the word "use" requires "volitional" as opposed to accidental conduct, it does not "demand that the person applying the force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so." In other words, said the Court, "use" is "indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct." The Court rejected a narrower reading that would have rendered the provision inoperative in 35 jurisdictions and "risk[ed] allowing domestic abusers of all mental states to evade [the] firearms ban." The Sixth Circuit in *Verwiebe* found this analysis equally applicable in the ACCA context and concluded that "[a] defendant uses physical force whenever his volitional act sets into motion a series of events that results in the application of a 'force capable of causing physical pain or injury to another person.'" Applying *Verwiebe* in Borden's case, the Sixth Circuit upheld the district court's decision to treat Borden's reckless aggravated assault conviction as a violent felony.

The Court granted certiorari to resolve a deepening circuit split on the question whether a violent felony includes reckless crimes. Borden maintains it does not. He argues that the ACCA provision is different from the one in *Voisine* because the latter does not include the phrase "against the person of another." And he asserts that its inclusion in ACCA is "limiting" language that requires force to be used intentionally. "Given the much harsher consequences of the [ACCA] statute," he reasons, "it makes sense that the violent felony definition in the ACCA would be limited to more serious conduct than the definition of 'misdemeanor crime of domestic violence'" for purposes of the firearms ban. Borden also asserts that "[r]ecklessness means [the offender] is indifferent as to whether his actions cause harm," and "[t]his indifference means that he has not *used* physical force *against the person of another*," as required by ACCA. Finally, Borden maintains that "excluding reckless crimes . . . will not wholly deprive the statute of practical effect" but "will merely ensure that a fifteen-year-mandatory-minimum is applied only to individuals who have prior convictions for serious, intentional, acts of violence."

● *U.S. Fish and Wildlife Service v. Sierra Club, Inc.,* 19-547. The Court will resolve whether draft documents created during formal interagency consultation under Section 7 of the Endangered Species Act (ESA) must be disclosed under the Freedom of Information Act (FOIA) or instead are protected by the "deliberative process privilege." The Environmental Protection Agency proposed new regulations for "cooling water intake structures" used by power plants and manufacturing facilities to dissipate heat from industrial processes. As part of the rulemaking process, the EPA consulted with the U.S. Fish and Wildlife Service and National Marine Fisheries Service (the Services) about the impact of those regulations. During this formal consultation, the Services created draft biological opinions and accompanying documents, and drafted a proposed intake-structures rule. That version of the rule was not adopted. Instead, the EPA and Services engaged in additional extensive consultation

and the EPA proposed a new Intake-Structures Rule. The Services ultimately issued a "no jeopardy" biological opinion as to that rule, finding it would not jeopardize a species protected by the ESA. The EPA then issued the rule. The Sierra Club made a FOIA request to the Services for records relating to the consultation process for the Intake-Structures Rule. The Services responded by releasing numerous documents, but withheld draft opinions and accompanying documents under Exemption 5 of FOIA, which allows agencies to withhold "interagency 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." The Sierra Club sued the agencies under FOIA in district court, which ruled that some of the withheld documents had to be produced while others were protected. Relatedly, the Sierra Club filed petitions for review in the Second Circuit challenging the final rule and, in that litigation, moved to compel the agencies to supplement the public administrative record with the draft biological opinions and various accompanying documents at issue here. The Second Circuit upheld the final rule and permitted the agencies' invocation of the deliberate process privilege. On appeal to the Ninth Circuit in the FOIA case, the remaining documents in dispute were two 2013 jeopardy opinions, reasonable and prudent alternatives (RPA's), and a 2014 jeopardy opinion. A divided panel of the Ninth Circuit affirmed in part and reversed in part. 925 F.3d 1000.

The court explained that agencies may withhold documents that fall within Exemption 5, which is coextensive with the "deliberative process privilege." The purpose of the exemption is "'to prevent injury to the quality of agency decisions by ensuring that the frank discussion of legal or policy matters in writing, within the agency, is not inhibited by public disclosure.'" But it applies only to documents that are both predecisional and deliberative. The majority held that the 2013 draft biological opinions and accompanying documents, as well as one RPA, were not protected by the deliberative process privilege. In the majority's view, the 2013 jeopardy opinions were not predecisional because, although labeled drafts and not publicly issued, they "nonetheless represent the [agencies'] final views and recommendations regarding the EPA's then-proposed regulation." The court also concluded that the documents were not deliberative. Applying a "functional approach" to decide whether the documents "'reveal the mental processes of the decisionmakers'" and "discourage candid discussion within the agency and thereby undermine [their] ability to perform [their] function,'" the court viewed the documents as "final products that reflect the agencies' finding on the jeopardy posed by the [unadopted version of the] rule, and their recommendations for mitigating the harmful impacts of that rule." They did "not contain line edits, marginal comments, or other written material that expose any internal agency discussion about the jeopardy finding" and did not "contain any insertions or writings reflecting input from lower level employees." Rather, they "were prepared on behalf of the entire agency," "represent that agency's opinion," and were ready for the decisionmaker's "autopen signature." The court rejected the idea that the unadopted version of the intake rule was a prior "draft" of the ultimately adopted rule, concluding instead that the 2013 opinions pertained to a "different" rule. Finally, the court reasoned, the documents did not reveal the "internal deliberative process" of either the EPA or the Services, and releasing the documents would not "allow a reader to reconstruct the 'mental processes' that lead to the production" of the ultimate "no jeopardy opinion." As to the unprotected RPA, the majority concluded it was not deliberative because it offered "no insights into the agency's internal deliberations" and there were no "subsequent versions."

The Services argue that the Ninth Circuit applied a novel rule requiring federal agencies to disclose *draft* decision documents that were never signed by a decisionmaker, finalized, or given legal effect. Instead, they were "superseded when the proposed agency action was modified in response to feedback in the ongoing consultation process." The Services note that they sent "portions of their draft biological opinions" to EPA, but "before the draft opinions and documents were signed or otherwise finalized for transmittal . . . [t]he Services and EPA all 'agreed that more work needed to be done.'" In other words, "the Services prepared draft biological opinions and related documents during their deliberations, but those drafts were never finalized or even transmitted in full draft form to EPA for its review and comment. Instead, those drafts were abandoned and superseded when the Services issued their joint final opinion." The Services maintain the "drafts and related discussions helped shape the final version of EPA's rule" and "[t]hat is exactly how the ESA consultation process is supposed to work." Thus, the Services reason, the "draft documents that the Services prepared prior to issuing their joint final biological opinion" are protected by the deliberative process privilege. The Ninth Circuit erred, the Services argue, in refusing to "take appropriate account" of the interagency consultation process. The Services assert that the Ninth Circuit also erred in "artificially bifurcat[ing]" the consultation process rather than treating the documents as "part of a single consultation process on development of an Intake-Structures Rule." The Services also note the conflict between the Ninth Circuit's decision and the Second Circuit's ruling "that the very same draft documents at issue here are protected by the deliberative process privilege." Finally, they assert, "diminishing the clarity" of the privilege will make it too uncertain for agencies to know when their drafts will be subject to disclosure. and this "inherent unpredictability" in knowing when a draft is "'close enough' to finality" will "chill the deliberative process" for many federal agency actions.

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