

# Journal of the National Association of Administrative Law Judiciary

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Volume 32 | Issue 1

Article 7

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3-15-2012

## Legal Summaries

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### Recommended Citation

Daniel Lamb, *Legal Summaries*, 32 J. Nat'l Ass'n Admin. L. Judiciary Iss. 1 (2012)

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**Pepperdine University School of Law  
Legal Summaries**

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**TABLE OF CASES**

**SUPREME COURT OF THE UNITED STATES**

Judulang v. Holder, 132 S. Ct. 476 (2011) .....	404
Reynolds v. United States, 132 S. Ct. 975 (2012) .....	407
Sackett v. Environmental Protection Agency, 132 S. Ct. 1367 (2012) .....	409

**UNITED STATES COURTS OF APPEAL**

EME Homer City Generation, LP v. Environmental Protection Agency, No. 11-1302 (D.C. Cir. 2011) .....	412
Discount Tobacco City & Lottery Inc., v. United States, 674 F.3d 509 (6th Cir. 2012) .....	414
Alliance for the Wild Rockies v. Salazar, 672 F.3d 1170 (9th Cir. 2012) .....	417

**UNITED STATES DISTRICT COURT**

National Association of Manufacturers v. National Labor Relations Board, 2012 WL 691535 (D.D.C. 2012) .....	420
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**SUPREME COURT OF THE UNITED STATES****Judulang v. Holder, 132 S. Ct. 476 (2011)****Synopsis:**

In Judulang, the Supreme Court unanimously overruled the Ninth Circuit's approval of the Board of Immigration Appeals' ("BIA") approach to deportation proceedings. Former Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), provides for a "waiver of excludability," permitting a non-citizen legal resident to remain in the country in spite of a criminal conviction. In 2005, the Department of Homeland Security ("DHS") sought to remove Joel Judulang from the United States on the grounds that he had committed an aggravated felony involving a crime of violence. Such a crime, the BIA held, was not comparable to any ground for exclusion determined by DHS and renders Section 212(c) inapplicable. The Court found the BIA's *comparable grounds* approach to be arbitrary and capricious under the Administrative Procedure Act.

**Facts and Analysis:**

Joel Judulang, a native of the Philippines, entered the United States in 1974 at the age of eight, and has lived continuously in the U.S. as a lawful permanent resident.<sup>1</sup> In 1988, Judulang was involved in a fight where a person was shot and killed.<sup>2</sup> Subsequent to being charged as an accessory, Judulang pled guilty to voluntary manslaughter and received a six year suspended sentence.<sup>3</sup> In 2005, Judulang pled guilty to another criminal offense involving theft.<sup>4</sup> Shortly thereafter, DHS commenced deportation proceedings.<sup>5</sup>

Judulang was charged with having committed an "aggravated felony" involving "a crime of violence," premised on the 1988 manslaughter conviction, pursuant to U.S.C. §§ 1101(a)(43)(F),

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<sup>1</sup> Judulang v. Holder, 132 S. Ct. 476, 482 (2011).

<sup>2</sup> *Id.* at 483.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

1227(a)(2)(A)(iii).<sup>6</sup> The administrative law judge ordered deportation, and the BIA affirmed on appeal.<sup>7</sup> In the latter proceeding, the BIA considered whether Judulang could make use of what is known as section 212(c) relief.<sup>8</sup> Under this provision, immigration authorities deploy the comparable *grounds approach* by which they look to the statutory ground which DHS has determined to be a basis for exclusion; and, provided the charges do not fall outside DHS's list, the alien is eligible for discretionary relief.<sup>9</sup> From there, the analyses turns on such factors as: "the seriousness of the offense, evidence of either rehabilitation or recidivism, the duration of the alien's residence, the impact of deportation on the family, the number of citizens in the family, and the character of any service in the Armed Forces."<sup>10</sup>

The BIA held that Judulang could not invoke section 212(c) relief because "crime[s] of violence" are grounds for deportation not comparable to any of DHS's exclusion grounds.<sup>11</sup> On appeal, the Ninth Circuit denied Judulang's petition for review in reliance on the circuit's precedents upholding BIA's *comparable grounds approach*.<sup>12</sup> Justice Kagan described the *comparable grounds approach* as such:

Those mathematically inclined might think of the comparable-grounds approach as employing Venn diagrams. Within one circle are all the criminal offenses composing the particular ground of deportation charged. Within other circles are the offenses composing the various exclusion grounds. When, but only when, the "deportation circle" sufficiently corresponds to one of the "exclusion circles" may an alien apply for § 212(c) relief.<sup>13</sup>

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<sup>6</sup> *Judulang*, 132 S. Ct. at 483.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 481.

<sup>10</sup> *Judulang*, 132 S. Ct. at 481 (citation omitted).

<sup>11</sup> *Id.* at 483.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

The Supreme Court granted cert in order to resolve a split among the circuits as to whether the BIA's approach is proper.<sup>14</sup>

*Holding:*

The Supreme Court unanimously overruled the BIA's interpretation of the law regarding eligibility for section 212(c) relief, stating that "the BIA has failed to exercise its discretion in a reasoned manner."<sup>15</sup> Given that DHS has charged a lawful permanent resident with being removable for having been convicted of an aggravated felony, and the offense is not specifically named as a ground of inadmissibility, the Court held that the BIA's approach is arbitrary and capricious under the Administrative Procedures Act.<sup>16</sup> The case was remanded to the Ninth Circuit Court of Appeals "for further proceedings consistent with this opinion."<sup>17</sup> While the Court did not put forth a preferred approach, the judgment effectively throws out the *comparable grounds* approach.<sup>18</sup>

The Court reasoned that the *comparable grounds* approach is not premised on any considerations pertinent to whether an alien should be deported.<sup>19</sup> In effect, the BIA's current approach dictates who should be eligible for discretionary relief by utilizing a comparison that rests upon diverse statutory categories.<sup>20</sup> As a result, the BIA's analysis reflects no relation to the goals of the deportation process.<sup>21</sup> Further, such a policy will lead to aliens who are similarly situated being treated significantly different for reasons divorced from the policy behind deportation.<sup>22</sup> The Court stressed that the BIA's approach must not remain "unmoored from the purposes and concerns of the immigration laws."<sup>23</sup>

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<sup>14</sup> *Id.* at 483.

<sup>15</sup> *Judulang*, 132 S. Ct. at 484.

<sup>16</sup> *Id.* at 487.

<sup>17</sup> *Id.* at 490.

<sup>18</sup> *Id.* at 485-87.

<sup>19</sup> *Id.* at 485.

<sup>20</sup> *Judulang*, 132 S. Ct. at 485.

<sup>21</sup> *Id.* at 485-87.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 490.

**Reynolds v. United States, 132 S. Ct. 975 (2012)***Synopsis:*

Reynolds addressed a provision of the federal Sex Offender Registration and Notification Act, a provision which requires convicted sex offenders to provide state governments with current information for state and federal sex offender registries. Reynolds, whose offence pre-dated the Act, registered in Missouri in 2005 but moved to Pennsylvania in September 2007 without informing the authorities in Missouri or Pennsylvania. Upon being indicted, Reynolds moved to dismiss arguing that the Act was not applicable to pre-Act offenders during the time at issue. The District Court rejected Reynolds' motion, and the Third Circuit concluded that the registration requirements applied to pre-Act offenders. The Supreme Court reversed, finding that pre-Act offenders need not register before the Attorney General validly specifies that the Act's registration provisions apply to that particular population.

*Facts and Analysis:*

Petitioner Billy Joe Reynolds committed a sex offense that predates the federal Sex Offender Registration and Notification Act.<sup>24</sup> The present case arose when Reynolds was charged with violating the Act by failing to register between September 16 and October 16, 2007.<sup>25</sup> After serving four years in prison for his original offense, in July 2005 Reynolds registered as a Missouri sex offender.<sup>26</sup> Subsequently, Reynolds moved to Pennsylvania where he failed to update his Missouri registration information and register anew in Pennsylvania.<sup>27</sup> A federal grand jury indicted him, charging him with having “knowingly failed to register and update a registration as required by [the Act].”<sup>28</sup>

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<sup>24</sup> Reynolds v. United States, 132 S. Ct. 975, 979 (2012); 120 Stat. 590, 42 U.S.C. § 16901 et seq. (2006 ed. and Supp. III).

<sup>25</sup> Reynolds, 132 S. Ct. at 979.

<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> Id.

Reynolds filed a motion to dismiss on the grounds that in September and October 2007 the federal registration requirements had yet to come into effect with respect to pre-Act offenders.<sup>29</sup> The Act had become law earlier in July 2006 and the Attorney General had already promulgated an Interim Rule making the registration requirements applicable to pre-Act offenders.<sup>30</sup> Nevertheless, Reynolds' motion maintained that the Interim Rule was invalid as it violated the Constitution's "nondelegation" doctrine and the Administrative Procedure Act's "good cause" requirement for promulgating a rule without "notice and comment."<sup>31</sup>

Reynolds' legal argument was rejected by the District Court on the merits.<sup>32</sup> On appeal, the Third Circuit never addressed the merits because it found that even in the absence of any initiative by the Attorney General the Act required Reynolds and pre-Act offenders to follow the registration requirements.<sup>33</sup> Approximately half of the circuit courts disagree as they have held that the Act's registration requirements do not apply to pre-Act offenders notwithstanding direction from the Attorney General.<sup>34</sup> Recognizing the split among the circuits, the Supreme Court agreed to consider the issue.<sup>35</sup>

*Holding:*

The Supreme Court found that the federal Sex Offender Registration and Notification Act's registration requirements do not apply to pre-Act offenders until the Attorney General so specifies.<sup>36</sup> Finding that the Attorney General's Interim Rule matters as to the resolution of Reynolds's case, the Court reversed the Third Circuit's judgment and remanded the case for further proceedings consistent with the opinion.<sup>37</sup>

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<sup>29</sup> *Id.* at 979-80.

<sup>30</sup> *Reynolds*, 132 S. Ct. at 980.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Reynolds*, 132 S. Ct. at 980.

<sup>36</sup> *Id.* at 984.

<sup>37</sup> *Id.*

The Court first explained that a natural reading of the law supports the conclusion. The first part of the law states that “[a] sex offender shall register, and keep the registration current,” while it states later that “[t]he Attorney General shall have the authority to specify the applicability of the requirements . . . to sex offenders convicted before the enactment . . . .”<sup>38</sup> As such, it was reasoned that the latter provision should control the law’s application to that particular group of offenders.<sup>39</sup> Further, the Court reasoned, the holding comports with congressional concerns about the application of the registration requirement to pre-Act offenders and Congress’s intention of allowing the Attorney General to supplement what the Court referred to as “potential lacunae,” or gaps in the law.<sup>40</sup>

Justice Scalia, joined by Justice Ginsburg, dissented, finding that the Act required registration of pre-Act offenders through its own language arguing that the Attorney General was delegated only authority to exempt pre-Act offenders from the registration requirements.<sup>41</sup> Justice Scalia challenged the majority directly, stating that his was the more natural reading of the law.<sup>42</sup> Ultimately, the dissenting Justices would have counted the non-delegation principle against a power to activate because the power to exempt avoids the constitutional problem and is more consistent with the traditional discretion held by prosecutors.<sup>43</sup>

**Sackett v. Environmental Protection Agency,**  
**132 S. Ct. 1367 (2012)**

*Synopsis:*

In a unanimous decision, the Supreme Court held in Sackett v. EPA that persons subject to cease and desist orders issued by the Environmental Protection Agency (“EPA”) under the Clean Water Act may challenge the order by going directly to federal court. Upon receiving a compliance order from the EPA pursuant to the Clean

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<sup>38</sup> *Id.* at 981.

<sup>39</sup> *Id.*

<sup>40</sup> *Reynolds*, 132 S. Ct. at 982.

<sup>41</sup> *Id.* at 985-87.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*



Water Act, the Sacketts sought declarative and injunctive relief in a federal District Court invoking the Administrative Procedure Act. The District Court dismissed the action claiming a lack of subject-matter jurisdiction and the Ninth Circuit affirmed holding that the Clean Water Act precluded pre-enforcement judicial review. The Supreme Court reversed holding that the order at issue was a final agency action allowing for judicial review under the Administrative Procedure Act.

*Facts and Analysis:*

Michael and Chantell Sackett owned a residential lot in Idaho, which they filled, in part, with dirt and rock.<sup>44</sup> Upon becoming aware of the filling activity, the EPA issued an administrative compliance order pursuant to the Clean Water Act.<sup>45</sup> The EPA made a determination that the Sacketts had violated the Clean Water Act because their lot contained wetlands under the EPA's regulatory jurisdiction.<sup>46</sup> The order required the Sacketts to immediately restore the wetlands and provide the EPA access to the site and all documents pertinent to its conditions.<sup>47</sup>

Maintaining that their property was not subject to the EPA regulations, the Sacketts requested a hearing with the EPA, which was denied.<sup>48</sup> The Sacketts then filed an action in federal District Court making claims pursuant to the Administrative Procedure Act and the due process clause of the Fifth Amendment.<sup>49</sup> The lower court dismissed the case for lack of subject matter jurisdiction because there was no “final agency action” which makes judicial review permissible.<sup>50</sup> On appeal, the Ninth Circuit affirmed stating that the Clean Water Act “preclude[s] pre-enforcement judicial review of compliance orders” and adding that such preclusion of

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<sup>44</sup> Sackett v. EPA, 132 S. Ct. 1367, 1370 (2012).

<sup>45</sup> *Id.* at 1370-71.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1371.

<sup>48</sup> *Id.*

<sup>49</sup> Sackett, 132 S. Ct. at 1371.

<sup>50</sup> *Id.*

judicial review does not violate the Sacketts' due process rights under the Fifth Amendment.<sup>51</sup>

*Holding:*

The Supreme Court unanimously ruled that the Sacketts could challenge the EPA's administrative compliance order in a U.S. District Court.<sup>52</sup> However, the Court did not decide on the merits as to whether the property in question contains wetland regulated under the Clean Water Act nor as to the Sacketts' due process rights.<sup>53</sup> Holding on more narrow grounds, the Court found that the EPA's administrative order was immediately subject to judicial review under the Administrative Procedures Act.<sup>54</sup>

The Court held that an administrative compliance order represents a "final agency action," a prerequisite for judicial review.<sup>55</sup> Well established precedent provides that an agency action is final if it: 1) determines rights or obligations, or is an action from which legal consequences flow, and 2) marks the consummation of the agency's decision-making process.<sup>56</sup> As such, the Court held that the EPA's order to the Sacketts determined their rights or obligations as it created a legal obligation to restore the property and would have given the EPA access to the site and to the Sacketts' documents.<sup>57</sup> Correspondingly, the EPA's action created legal consequences by exposing the Sacketts to daily penalties in addition to other negative impacts.<sup>58</sup> Further, the Court reasoned that the order was a consummation of the agency's decision-making process because the Sacketts had no recourse to further agency review.<sup>59</sup> The Court also held that the Clean Water Act does not preclude judicial review

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1374.

<sup>53</sup> *Id.*

<sup>54</sup> *Sackett*, 132 S. Ct. at 1374.

<sup>55</sup> *Id.* at 1373.

<sup>56</sup> *See, e.g.,* *Bennett v. Spear*, 520 U.S. 154, 178 (1997); *Port of Boston Marine Terminal Ass'n. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970).

<sup>57</sup> *Sackett*, 132 S. Ct. at 1372.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

because the Administrative Procedures Act creates a presumption of judicial review with respect to administrative agency actions.<sup>60</sup>

**UNITED STATES COURTS OF APPEAL**

**EME Homer City Generation, LP v. Environmental Protection Agency, No. 11-1302 (D.C. Cir. 2011)**

*Synopsis:*

In EME Homer City Generation, the Court of Appeals for the District of Columbia Circuit granted a stay on the implementation of the Environmental Protection Agency's ("EPA") latest, and controversial, air pollution rule. A group of power companies challenged the rule arguing it placed an undue financial burden on power producers. The per curiam order was handed down forty-eight hours before the rule was to come into effect and stated only that the petitioners had met the requirements for a stay. The court emphasized that the order was not a decision on the merits, but only a delay pending the court's completion of its review.

*Facts and Analysis:*

Several private companies, in addition to the states of Alabama, Florida, Kansas, Nebraska, Oklahoma, South Carolina, Texas and Virginia, sued the EPA in federal District Court challenging the implementation of the EPA's Cross-State Air Pollution Rule ("the Rule").<sup>61</sup> The parties originally filed seven separate cases, which had been consolidated into a single case.<sup>62</sup>

The Rule was promulgated by the EPA in 2011 pursuant to the authority given to it under the Clean Air Act, and requires certain states to reduce sulfur dioxide and nitrogen oxide emissions in order to reduce the impact of air quality down-wind in other states.<sup>63</sup>

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<sup>60</sup> *Id.* at 1373.

<sup>61</sup> EME Homer City Generation, LP v. Environmental Protection Agency, No. 11-1302, (D.C. Cir. 2011) (per curiam) [*EME I*].

<sup>62</sup> *Id.*

<sup>63</sup> United States v. EME Homer City Generation, LP, 823 F. Supp. 2d 274, 277-78 (W.D. Pa. 2011) [*EME II*].

Impacting a total of twenty-seven states, the Rule was scheduled to come into effect on January 1, 2012.<sup>64</sup> The Rule significantly expands the EPA's authority because, where the EPA is now limited to only setting air quality standards, the Rule includes enforcement provisions, a prerogative long maintained by individual state governments.<sup>65</sup>

Plaintiffs moved to stay the Rule in an effort to prevent it from coming into effect as scheduled.<sup>66</sup> The challengers put forth similar arguments demonstrating the four factors necessary for a stay on administrative action.<sup>67</sup> First, it was argued that plaintiffs are likely to prevail on the merits because the promulgation is improper without providing states the chance to create their own implementation plans; and, the EPA's actions were arbitrary and capricious under the Administrative Procedures Act.<sup>68</sup> Second, it is argued that the parties will suffer irreparable harm if a stay is not granted because the Rule will have a detrimental effect on state economies and threatens their citizens' access to affordable energy.<sup>69</sup> Third, that there is no possibility of substantial harm to other parties if a stay is granted as the rules already in place will remain until the EPA can promulgate valid new rules.<sup>70</sup> As for the final factor, plaintiffs maintain that the public interest favors granting the motion to stay because it will protect consumers from increases in power rates.<sup>71</sup>

*Holding:*

On December 30, 2011, forty-eight hours before the Rule was to come into effect, the Court of Appeals for the District of Columbia Circuit stayed implementation of the EPA's new rule.<sup>72</sup> The Court's decision stays the Rule in its entirety pending completion of judicial

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 290.

<sup>68</sup> *EME II*, 823 F. Supp. 2d at 290.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

review.<sup>73</sup> The order left much to the imagination as it provided little explanation, stating only that the requirements for a stay had been met.<sup>74</sup> While preserving the status quo for the time being, the per curium order is not a ruling on the merits.<sup>75</sup> In light of the stay, the court ordered the EPA to continue enforcing the regulation that was set to be replaced by the Rule.<sup>76</sup>

**Discount Tobacco City & Lottery Inc., v. United States,**  
**674 F.3d 509 (6th Cir. 2012)**

*Synopsis:*

In a challenge to provisions of the Family Smoking Prevention and Tobacco Control Act, the Sixth Circuit in Discount Tobacco largely upheld the constitutionality of the new warning label requirements on tobacco products. The plaintiffs argued that the burden placed upon them by the law outweighs any legitimate government interest in conveying factual information to consumers, and moreover, effectively overshadows and dominates plaintiffs' speech. In a 2-1 decision, the court held that the warning requirements are mostly valid as they materially advance the government's stated interest. However, the provision banning the use of color and graphics in tobacco advertising was struck down as "vastly overbroad."

*Facts and Analysis:*

In 2009, Congress enacted, and the President signed into law, the Family Smoking Prevention and Tobacco Control Act.<sup>77</sup> The law grants the power to the Food and Drug Administration ("FDA") to regulate tobacco products for the stated purpose of addressing "issues of particular concern to public health officials, including the use of tobacco by young people and dependence on tobacco."<sup>78</sup> Moreover,

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<sup>73</sup> *EME II*, 823 F. Supp. 2d at 290.

<sup>74</sup> *Id.*

<sup>75</sup> *See Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Pub.L. No. 111-31, 123 Stat. 1776 (2009).

<sup>78</sup> *Id.* at § 3(2).

the Act seeks “to promote cessation” of tobacco use in order “to reduce disease risk and the social costs associated with tobacco-related diseases.”<sup>79</sup> The policy’s origin can be traced, in part, to a study by the FDA, where several significant findings were reported with respect to tobacco use among juveniles.<sup>80</sup>

In August 2009, a group of tobacco manufacturers and sellers brought suit against the United States in federal District Court claiming that provisions of the law: 1) violate free speech rights under the First Amendment, 2) constitute an unlawful taking pursuant to the Fifth Amendment, and 3) infringe on Fifth Amendment due process rights.<sup>81</sup> The challenged portion of the law requires the following:

(1) that tobacco manufacturers reserve a significant portion of tobacco packaging for the display of health warnings, including graphic images intended to illustrate the hazards of smoking; (2) restrictions on the commercial marketing of so-called “modified risk tobacco products;” (3) ban of statements that implicitly or explicitly convey the impression that tobacco products are approved by, or safer by virtue of being regulated by, the FDA; (4) restriction on the advertising of tobacco products to black text on a white background in most media; and (5) bar on the distribution of free samples of tobacco products in most locations, brand-name tobacco sponsorship of any athletic or social event, branded merchandising of any non-tobacco product, and distribution of free items in consideration of a tobacco purchase (i.e., “continuity programs”).<sup>82</sup>

The lower court granted summary judgment for the plaintiffs as to the claims that the prohibition on color and graphics in advertising and the ban on statements implying that tobacco products

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<sup>79</sup> *Id.* at § 3(9).

<sup>80</sup> *Discount Tobacco City & Lottery Inc., v. United States*, 674 F.3d 509, 519 (6th Cir. 2012).

<sup>81</sup> *Id.* at 521.

<sup>82</sup> *Id.* at 520.

are safer due to FDA regulation violated the First Amendment.<sup>83</sup> Summary judgment was granted for the government with respect to plaintiff's remaining claims.<sup>84</sup>

*Holding:*

In a 2-1 decision, the Sixth Circuit affirmed the lower court findings as to the validity of the Family Smoking Prevention and Tobacco Control Act's restrictions on the marketing of modified-risk tobacco products; prohibition on event sponsorship, branding non-tobacco merchandise, and free sampling, and the requirement that tobacco manufacturers reserve packaging space for textual health warnings.<sup>85</sup> The District Court judgment was also affirmed as to the unconstitutionality of the law's limitation on tobacco advertising to black and white text.<sup>86</sup> Lastly, the court of appeal affirmed as to the non-graphic warning label requirement.<sup>87</sup> On the other hand, the lower court was reversed with respect to the following: that the restriction on statements regarding the relative safety of tobacco products based on FDA regulation is unconstitutional and its finding that the law's ban on tobacco continuity programs is permissible under the First Amendment.<sup>88</sup>

The opinion began by highlighting the problem of juvenile tobacco use, citing the "thousands of pages of medical studies and governmental reports supporting the conclusion that the use of tobacco, especially by juveniles, poses an enormous threat to the nation's health, and imposes grave costs on the government."<sup>89</sup> As such, the court stated that "[t]here can be no doubt that the government has a significant interest in preventing juvenile smoking and in warning the general public about the harms associated with the use of tobacco products."<sup>90</sup> Nevertheless, the court pointed out that the sale and use of tobacco by adults is a legal activity and that the

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<sup>83</sup> *Id.* at 521.

<sup>84</sup> *Id.*

<sup>85</sup> *Discount Tobacco*, 674 F.3d at 518.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 519.

<sup>90</sup> *Discount Tobacco*, 674 F.3d at 519.

tobacco industry and its consumers have an important interest in truthful information related to the use of tobacco.<sup>91</sup>

The court found significant the lack of consumer awareness regarding the serious health risks resulting from “the decades-long deception by Tobacco Companies.”<sup>92</sup> The majority then went even further stating that it “bears emphasizing that the risks here include the undisputed fact that Plaintiffs' products literally kill users and, often, members of the families of users . . .”<sup>93</sup> These sentiments led to the conclusions that the warning requirements are “reasonably related to the government's interest in preventing consumer deception and are therefore constitutional.”<sup>94</sup>

**Alliance for the Wild Rockies v. Salazaar,**  
**672 F.3d 1170 (9th Cir. 2012)**

Synopsis:

In Alliance for the Wild Rockies, the Ninth Circuit upheld a provision of the 2011 Appropriations Act which ordered the Secretary of the Interior to remove a specified population of grey wolves from Endangered Species Act's (“ESA”) protection. The law effectively overruled an earlier court decision that found that such a partial delisting of a species would violate the ESA. Environmental advocacy groups challenged that law citing separation of powers, arguing that Congress was forcing the courts to rule as it willed. The lower court rejected this theory holding that Congress had acted within its constitutional authority to alter the laws even when a particular law is subject to contemporaneous litigation. The Ninth Circuit agreed, finding that Congress had simply amended the law.

Facts and Analysis:

The United States Fish and Wildlife Service (“FWS”) has, on numerous occasions, attempted to exclude a distinct population of grey wolves found in the northern Rocky Mountains from federal

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<sup>91</sup> *Id.* at 520.

<sup>92</sup> *Id.* at 562.

<sup>93</sup> *Id.* at 596.

<sup>94</sup> *Id.*



protections under the ESA pursuant to its rule making authority.<sup>95</sup> In its latest effort, a District Court struck down the rule because the ESA did not permit partial delisting of a distinct population of a protected species.<sup>96</sup> While that case was pending before an appeals court, proponents of the delisting turned to Congress which altered the ESA in section 1713 of an appropriations bill signed into law on April 15, 2011.<sup>97</sup> Section 1713 requires the Secretary of the Interior to reissue the delisting rule “without regard to any other provision of statute or regulation that applies to issuance of such rule.”<sup>98</sup> Further, the Secretary “shall not be subject to judicial review . . . .”<sup>99</sup>

In May 2011, the FWS complied with Section 1713 and reissued the rule delisting the specified population of grey wolves.<sup>100</sup> A group of environmental activists filed the present action in a federal District Court claiming that Section 1713 was unconstitutional under the separation of powers doctrine.<sup>101</sup> The plaintiffs relied heavily United States v. Klein, which held that Congress unconstitutionally violated the separation of powers doctrine by directing the Court to make a factual finding regarding the probative weight of a presidential pardon.<sup>102</sup> The District Court Judge was notably sympathetic to the claim stating that, “Section 1713 sacrifices the spirit of the ESA to appease a vocal political faction.”<sup>103</sup> Notwithstanding, the lower court conceded that “the wisdom of that choice is not now before this Court,” and begrudgingly granted summary judgment against the plaintiffs.<sup>104</sup>

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<sup>95</sup> *Alliance for the Wild Rockies v. Salazar*, 672 F.3d 1170 (9th Cir. 2012) [*Alliance II*].

<sup>96</sup> *See, e.g., Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010).

<sup>97</sup> *See* Pub. L. 112–10, 125 Stat. 38 (2011).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> C.F.R. Part 17, 76 Fed. Reg. 25, 590 (2011).

<sup>101</sup> *Alliance for the Wild Rockies v. Salazar*, 800 F. Supp. 2d 1123 (D. Mont. 2011) [*Alliance I*].

<sup>102</sup> 80 U.S. 128 (1871).

<sup>103</sup> *Alliance I*, 800 F. Supp. 2d at 1126.

<sup>104</sup> *Id.*

*Holding:*

The Ninth Circuit affirmed the lower court, finding that Section 1713 did not violate the separation of powers doctrine.<sup>105</sup> The court was under no illusions and noted that Congress had changed the law applicable to a particular case before the courts.<sup>106</sup> However, the court reasoned that the judiciary was not being directed by Congress to reach a particular outcome, but rather was free to apply the new applicable law to the facts of the case.<sup>107</sup> As such, it was held that Section 1713 merely constituted an amendment of the law which courts are bound to follow.<sup>108</sup>

Under Ninth Circuit precedent, a violation of the separation of power doctrine occurs where, (1) Congress has impermissibly directed certain findings in pending litigation, without changing any underlying law, or (2) a challenged statute is independently unconstitutional on other grounds.<sup>109</sup> This precedent is premised on the Supreme Court's opinion in Robertson v. Seattle Audubon Society, 503 U.S. 429, (1992), which held that "amended" or changed environmental laws applicable to a specific case did not violate the constitutional prerogatives of the courts.<sup>110</sup>

Likening the present case to Robertson, the Ninth Circuit found "that Congress has directed an agency to take particular action challenged in pending litigation by changing the law applicable to that case."<sup>111</sup> Nevertheless, the court found that Congress did not repeal any part of the ESA.<sup>112</sup> Rather, the court reasoned, Congress ordered that no statute, including the ESA, would apply to the FWS's delisting rule once reissued.<sup>113</sup> Congress thus amended the law which governs that agency's action.<sup>114</sup> Noting that the Supreme Court has made it clear that such amendments, as opposed to repeals, do not

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<sup>105</sup> *Alliance II*, 672 F.3d at 1171.

<sup>106</sup> *Id.* at 1175.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Alliance II*, 672 F.3d at 1174.

<sup>111</sup> *Id.* at 1175.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

constitute a violation of the separation of powers doctrine, Section 1713 was found to be valid.<sup>115</sup>

**UNITED STATES DISTRICT COURT**

**National Association of Manufacturers v. National Labor  
Relations Board, 2012 WL 691535 (D.D.C. 2012)**

*Synopsis:*

In National Association of Manufacturers, the U.S. District Court for the District of Columbia held that the National Labor Relations Board (“NLRB”) exceeded its authority. The NLRB issued a rule on August 25, 2011 that requires employers subject to the National Labor Relations Act (“NLRA”) to clearly post a notice in specified locations. While the court upheld the NLRB’s authority to make rules requiring such posting, its authority was exceeded when it deemed a failure to comply with the posting rule an unfair labor practice.

*Facts and Analysis:*

Congress has granted the NLRB the “authority from time to time to make, amend, and rescind, in the manner prescribed by National Labor Relations Act such rules and regulations as may be necessary to carry out the provisions of this National Labor Relations Act.”<sup>116</sup> Pursuant to this authority, the NLRB issued a rule on August 25, 2011 that requires employers under its authority to post notice of the rights of employees to organize into unions, bargain collectively, discuss wages, benefits and working conditions, jointly complain, and strike and picket, along with contact information for the NLRB and information regarding enforcement procedures.<sup>117</sup> The posting must be: in a conspicuous place, where other notices to employees

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<sup>115</sup> *Alliance II*, 672 F.3d at 1175.

<sup>116</sup> *National Ass’n of Mfrs. v. NLRB*, --- F. Supp. 2d ---, 2012 WL 691535, \*2 (D.D.C. 2012) [*NLRB*].

<sup>117</sup> *Id.*

are customarily posted, and on electronic sites if the employer customarily communicates through such means.<sup>118</sup>

Moreover, if twenty percent or more of the workforce is not proficient in English and speaks a language other than English, the notice must be written in the language employees speak.<sup>119</sup> Failure to comply with these rules was to be deemed unfair labor practices.<sup>120</sup>

The National Association of Manufacturers challenged the new rule in a federal District Court on four grounds.<sup>121</sup> First, they argued that the NLRA does not grant the NLRB the authority to require employers to post a notification of employee rights. Second, that the NLRB's powers are triggered when some complaint or petition is filed and not before.<sup>122</sup> Third, that the NLRB is not permitted to establish a new unfair labor practice absent statutory authority.<sup>123</sup> And finally, that the new regulation allows employee to file unfair labor practice charges after the statute of limitations has expired.<sup>124</sup>

*Holding:*

The U.S. District Court for the District of Columbia held that the NLRB had exceeded its authority and correspondingly struck down part of the rule.<sup>125</sup> The court first noted that Congress “expressly [granted] the Board the broad rulemaking authority to make rules necessary to carry out any of the provisions of the National Labor Relations Act.” Further, the court found the posting requirement to be appropriate and reasonable under the authority granted to it.<sup>126</sup> However, it was held that the NLRB exceeded its authority by deeming the failure to comply with post requirement an

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *NLRB*, --- F. Supp. 2d at \*1.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *NLRB*, --- F. Supp. 2d at \*6.

unfair labor practice.<sup>127</sup> The court also agreed with the plaintiff as to the statute of limitation issue.<sup>128</sup>

With respect to the NLRB's ability to make rules requiring employers to post notices, the court found that Congress did not unambiguously intend to preclude the agency from promulgating such rules, which inform employees of their rights under the NLRA.<sup>129</sup> The text of the statute, the court reasoned, could not justify such a narrow interpretation of the NLRB's authority.<sup>130</sup>

On the other hand, the court found that the NLRB did exceed its authority it classifying a violation of the posting requirement as an unfair labor practice.<sup>131</sup> The court reasoned that the new rule makes the failure to post a per se violation.<sup>132</sup> The court explained that violations must be addressed on a case-by-case basis and instructed the NLRB to "make a specific finding based on the facts and circumstances in the individual case before it that the failure to post interfered with the employee's exercise of his or her rights."<sup>133</sup> In addition, the NLRB exceeded its authority because the new rules tolling provisions "substantially amends the statute of limitations that Congress expressly set out in the statute."<sup>134</sup>

As some provisions of the rule were found to be valid and others invalid, the court turned to the issue of severability.<sup>135</sup> Although the rule lacked a severability clause, the court found the provisions were capable of standing alone and were not intertwined.<sup>136</sup> Thus, the court held that the agency would have adopted the severed portion on its own and only struck down the portions of the rule where the NLRB exceeded its authority.<sup>137</sup>

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<sup>127</sup> *Id.* at \*1.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at \*6.

<sup>130</sup> *Id.*

<sup>131</sup> *NLRB*, --- F. Supp. 2d at \*12.

<sup>132</sup> *Id.* at \*14.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at \*17.

<sup>135</sup> *Id.* at \*20.

<sup>136</sup> *NLRB*, --- F. Supp. 2d at \*21.

<sup>137</sup> *Id.*