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Pepperdine University School of Law Legal Summaries

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**Pepperdine University School of Law
Legal Summaries**

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SUPREME COURT OF THE UNITED STATES**Environmental Protection Agency v. EME Homer City
Generation, L.P.,
134 S. Ct. 1584 (2014)***Synopsis*

Air pollution emissions pose a difficult problem for Congress and the Environmental Protection Agency (EPA).¹ Air pollution emitted in one state may travel downwind and cause harm in another state.² Without regulations, the downwind states suffer from the inability to achieve clean air because the state has no authority to regulate air pollution.³ To address the problem, Congress added a provision to the Clean Air Act (CAA), called the Good Neighbor Provision.⁴ The provision “instructs [s]tates to prohibit in-state sources ‘from emitting any air pollutant in amounts which will . . . contribute significantly’ to downwind [s]tates’ ‘nonattainment . . . , or interfere with maintenance,’ of any EPA-promulgated national air quality standard.”⁵ Congress included the Good Neighbor Provision to establish some level of equity for downwind states by requiring upwind states that contribute to air pollution to reduce emissions.⁶ In interpreting the Good Neighbor Provision, the EPA adopted the Cross-State Air Pollution Rule (also called the Transport Rule), which requires consideration of several factors to determine how much an upwind state must reduce its emissions to improve air quality in downwind states.⁷

State and local governments, as well as industry and labor groups, filed a petition for review of the EPA’s interpretation of the Good Neighbor Provision.⁸ The D.C. Circuit Court of Appeals vacated the

¹ EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584, 1593 (2014).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 1598.

Transport Rule and held that the EPA had exceeded agency authority in developing the Transport Rule standards.⁹ The Supreme Court reversed the D.C. Circuit Court of Appeals, holding that the EPA's interpretation of the Good Neighbor Provision was reasonable.¹⁰

Background

When air pollution is generated by a state, it is carried downwind across state boundaries.¹¹ Without regulations, pollution-associated costs are borne by the state whose air quality is compromised, not necessarily by the state that produced the pollution.¹² Ideally, the producing state would be responsible for all of the costs incurred as a result of the air pollution it produces, regardless of where the negative effects are felt; however, it is difficult to regulate for several reasons.¹³ First, it is difficult to identify from which state downwind pollution originated.¹⁴ Pollution from one state may be carried to several downwind states, some states receive pollution from several upwind states, and some states both generate and receive pollution.¹⁵ Second, pollutants are chemically transformed as they travel downwind, which causes measurement issues for the EPA.¹⁶ The gasses nitrogen oxide (NO_x) and sulfur dioxide (SO₂) (collectively "upwind gasses") often transform into ozone and fine particulate matter (PM_{2.5}) (collectively "downwind gasses").¹⁷ The challenge for the EPA is how to determine what amount of upwind gasses must be reduced to meet acceptable levels of downwind gasses.¹⁸

In 1970, in an effort to address interstate air pollution issues, Congress directed the EPA to set national ambient air quality standards (NAAQS) to keep pollutant levels low to protect public

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 1593–94.

¹⁴ *Id.* at 1594.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

health.¹⁹ Once NAAQS are set, the CAA requires the EPA to determine locations where the concentration of pollutants exceeds the NAAQS (“nonattainment areas”).²⁰ States are required to submit State Implementation Plans (SIPs) to the EPA within three years of new or updated NAAQS.²¹ SIPs must include adequate provisions to “prohibi[t] . . . any source or other type of emissions activity within the [s]tate from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or therefore with maintenance by, any other [s]tate with respect to any . . . [NAAQS].”²² This CAA requirement is called the Good Neighbor Provision.²³ If a SIP is missing or inadequate, the EPA must issue a Federal Implementation Plan (FIP).²⁴

In an effort to explain the scope of the Good Neighbor Provision, the EPA issued several rules that defined what it meant to “contribute significantly” to downwind nonattainment.²⁵ The rule at issue, the Transport Rule, limited NO_x and SO₂ emissions from twenty-seven upwind states to meet downwind attainment of three NAAQS.²⁶ Under the Rule, the EPA used a two-step process to determine which states “contributed significantly” to downwind nonattainment.²⁷ Upwind states were required to eliminate emissions that “(1) produced one percent or more a NAAQS in at least one downwind state (step one) and (2) could be eliminated cost-effectively, as

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 1595 (emphasis added).

²³ *Id.* The Good Neighbor Provision was first implemented in 1970 and revised in 1977. *Id.* The current formulation of the provision was put in place in 1990. *Id.*

²⁴ *Id.* at 1594.

²⁵ *Id.* at 1595. In 1998, the EPA issued the NO_x SIP Call rule, which limited NO_x emission in twenty-three states. *Id.* The rule was upheld by the D.C. Circuit in *Michigan v. EPA*, 213 F.3d 663 (2000). In 2005, the EPA issued the Clean Air Interstate Rule (CAIR), which regulated both NO_x and SO₂ emissions. 134 S. Ct. at 1595. The rule was initially vacated by the D.C. Circuit, but was eventually upheld on rehearing in *North Carolina v. EPA*, 550 F.3d 1176, 1178 (C.A.D.C. 2008). The Transport Rule, issued in 2011, was the EPA’s response to the *North Carolina* decision. 134 S. Ct. at 1596.

²⁶ 134 S. Ct. at 1596.

²⁷ *Id.*

determined by [the] EPA (step two).”²⁸ For every state regulated by the Transport Rule, the EPA determined that the state had not submitted an adequate SIP, and issued a FIP if the determination was not challenged within sixty days.²⁹

Facts, Analysis, and Ruling

State and industry respondents petitioned for review of the Transport Rule in the D.C. Circuit Court of Appeals.³⁰ The court vacated the rule, holding that the EPA exceeded its statutory authority by issuing FIPs before states had the chance to put their own implementation plans into place, and by ignoring the Good Neighbor Provision’s limits on the EPA’s authority.³¹ The United States Supreme Court granted certiorari to determine “whether the D.C. Circuit had accurately construed the limits the CAA places on [the] EPA’s authority.”³²

The Supreme Court disagreed with the D.C. Circuit Court’s holding that states must have the chance to propose SIPs before the EPA issues a FIP. The Supreme Court found that the text of the CAA and the Good Neighbor Provision supports the EPA’s interpretation that an inadequate SIP triggers the EPA’s duty to develop a FIP “‘at any time’ within two years.”³³ The Court found nothing in the CAA to differentiate an inadequate SIP based on the Good Neighbor Provision requirements from any of the other requirements under the CAA.³⁴ There is no written statutory exception to the triggering of a FIP, and the Court noted that the reviewing court’s task is “to apply the text of the statute, not to improve upon it.”³⁵

In response to the D.C. Circuit Court’s decision that the EPA’s two-step approach to the Good Neighbor Provision exceeded its

²⁸ *Id.* at 1597.

²⁹ *Id.*

³⁰ *Id.* at 1598.

³¹ *Id.*

³² *Id.* at 1599.

³³ *Id.* at 1600.

³⁴ *Id.* at 1601.

³⁵ *Id.* at 1600.

powers under the CAA, the Supreme Court concluded that the EPA's method of allocation of emission reductions was "a permissible, workable, and equitable interpretation."³⁶ The statute requires upwind states "to eliminate those 'amounts' of pollution that 'contribute significantly to *nonattainment*' in downwind States."³⁷ In light of the absence of statutory direction regarding how to reduce upwind emissions in only those amounts, the Supreme Court applied *Chevron* deference³⁸ to the EPA's interpretation.³⁹ The statutory ambiguity allowed the EPA to use its discretion to find a reasonable solution.⁴⁰ The court of appeals believed that the Good Neighbor Provision included a proportionality requirement on emission restrictions.⁴¹ However, nothing in the text of the statute forces the EPA to make its determinations based on a state's proportional contribution to the problem.⁴² The Supreme Court rejected the D.C. Circuit's determination and gave deference to the EPA's authority to reasonably interpret the Good Neighbor Provision of the CAA.⁴³

Dissent

Justice Scalia, joined by Justice Thomas, dissented, arguing that the Good Neighbor Provision "specified quite precisely the responsibility of an upwind [s]tate," and that unelected agency personnel exercised inappropriate lawmaking authority by requiring pollution reductions on the basis of cost-effectiveness rather than in proportion to the amount of pollutants each state produces.⁴⁴ They recognized that regulating the problem of interstate pollution is

³⁶ *Id.* at 1610.

³⁷ *Id.* at 1603 (quoting 42 U.S.C. § 7410(a)(2)(D)(i) (2012)).

³⁸ *Chevron* deference is a two-step process used to answer questions of statutory construction in administrative law. *Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If the statute's intent is unambiguous, then the statute's construction controls. *Id.* at 842–43. If the statute's intent is ambiguous, then the agency's construction controls. *Id.*

³⁹ 134 S.Ct. at 1604.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 1610.

⁴⁴ *Id.*

“complex and difficult,” but argued that the problem may not be regulated by the EPA in a manner inconsistent with the administrative structure enacted by Congress, regardless of the seriousness of the problem.⁴⁵

Impact

In this case, the Supreme Court determined the EPA’s authority to interpret and enforce the CAA. It was a straightforward application of *Chevron* deference to allow the EPA the freedom to reasonably interpret ambiguous provisions in the CAA. While the Supreme Court disagreed with the court of appeals, the Supreme Court was not attempting to defend the practicality of the EPA’s actions. Even though the EPA may not be utilizing the best methods of enforcing the Good Neighbor Provision of the CAA, the Supreme Court noted that it is not the role of the courts to improve upon statutes.⁴⁶ It is up to the legislature to determine which statutory limits and requirements need to be placed on the EPA within the CAA standards. Here, the Supreme Court addressed the conflicting viewpoints of the legislature and judiciary and found that the EPA was acting within agency authority.

Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191 (2014)

Synopsis

The Immigration and Nationality Act⁴⁷ allows U.S. citizens and lawful permanent residents (LPRs) to petition for spouses, siblings, and minor children to obtain immigrant visas.⁴⁸ A sponsored individual is referred to as the petition’s principal beneficiary.⁴⁹ If the principal beneficiary has any unmarried children under the age of twenty-one, those children (called derivative beneficiaries) are

⁴⁵ *Id.* at 1621.

⁴⁶ *Id.* at 1600.

⁴⁷ 8 U.S.C. §§ 1101–1537 (2012).

⁴⁸ *Scialabba v. Cuellar De Osorio*, 134 S.Ct. 2191, 2196 (2014).

⁴⁹ *Id.*

allowed the same immigration status and order of consideration of the parent—meaning when a visa becomes available to a principal beneficiary, a visa also automatically becomes available to any derivative beneficiary as well.⁵⁰ However, since the immigration process can take years to complete, some beneficiaries (both principal and derivative) reach age twenty-one—and therefore “age out”—after the sponsoring petition was filed and a visa became available, but before completing the immigration process.⁵¹ In that situation, the Child Status Protection Act (CSPA)⁵² ensures that the time spent processing immigration papers does not count against the beneficiary in determining his or her status.⁵³ But sometimes a beneficiary ages out while waiting for a visa to become available.⁵⁴

In this case, the Supreme Court determined whether the CSPA provides a remedy to beneficiaries who were under age twenty-one when the sponsoring petition was filed, but aged out before a visa became available.⁵⁵ The Board of Immigration Appeals (BIA) interpreted the CSPA as providing relief to only beneficiaries who did or could have qualified as principal beneficiaries.⁵⁶ The Ninth Circuit reversed the BIA’s determination, finding that the CSPA was unambiguous and granted automatic conversion to all aged out derivative beneficiaries.⁵⁷ The Supreme Court granted certiorari and overturned the Ninth Circuit decision, deferring to the BIA’s construction of the statute.⁵⁸

Background

An immigrant visa is a “highly sought-after document” because it is required for aliens to enter and permanently reside in the United States.⁵⁹ Not everyone may obtain an immigration visa; under the

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Pub. L. No. 107-208, 116 Stat. 927 (2002).

⁵³ 134 S. Ct. at 2196.

⁵⁴ *Id.*

⁵⁵ *Id.* at 2196–97.

⁵⁶ *Id.* at 2197.

⁵⁷ *Id.* at 2202.

⁵⁸ *Id.*

⁵⁹ *Id.* at 2197.

Immigration and Nationality Act, a person must fall into one of six immigration categories to be considered. One of those categories is for immediate relatives; the remaining five categories are for “family-sponsored” immigrants, which includes more distant relatives of U.S. citizens.⁶⁰ In order to obtain an immigration visa, the sponsoring U.S. citizen must file a petition for the principal beneficiary.⁶¹ If the principal beneficiary is an immediate family member, then he or she receives the visa as soon as the sponsoring petition is approved; however, if the principal beneficiary falls into one of the family-sponsored categories, then approval of the sponsoring petition gets the beneficiary a place in line for a visa.⁶² The principal beneficiary’s status also applies to any derivative beneficiaries.⁶³

The time it takes between approval of the sponsoring petition and receipt of a visa can take many months or years.⁶⁴ There are a maximum number of visas allowed in a year for each family-sponsored category, and the demand for visas usually exceeds the supply.⁶⁵ Because of the amount of time it takes between petition approval and availability of a visa, many people who qualified for a visa when the petition was approved age out and are no longer qualified when the visa becomes available.

Congress enacted the CSPA to address the treatment of “once-but-no-longer-minor aliens.”⁶⁶ Section 1151(f)(1) allows immediate relatives to use their age as of the petition filing date to determine whether they satisfy the age requirements.⁶⁷ Section 1153(h)(1) explains how to determine the age of an alien seeking to immigrate under one of the other immigration categories.⁶⁸ Under this section, an alien cannot age out because of bureaucratic delays, but time spent simply waiting for a visa to become available is included in the age

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 2198.

⁶³ *Id.*

⁶⁴ *Id.* at 2199.

⁶⁵ *Id.* at 2198.

⁶⁶ *Id.* at 2199.

⁶⁷ *Id.*

⁶⁸ *Id.* at 2200.

determination.⁶⁹ If a beneficiary ages out before a visa becomes available, section 1153(h)(3) automatically converts the beneficiary's petition to an "appropriate category."⁷⁰ The BIA considered the meaning of section 1153(h)(3) in *Matter of Wang*.⁷¹

Wang was the principal beneficiary of a family preference visa that his U.S. citizen sister filed for him in 1992.⁷² At the time, Wang had a ten-year-old daughter who qualified as a derivative beneficiary.⁷³ Wang waited for a visa for over a decade and by the time one was available, his daughter was twenty-two, and therefore too old to qualify as a child derivative beneficiary to Wang.⁷⁴ Wang used the visa to travel to the United States and became a legal permanent resident.⁷⁵ He then filed a new petition for his daughter, with himself as the legal sponsor instead of his sister.⁷⁶ Wang argued that under the CSPA, his daughter's petition should automatically convert and she should be able to retain the original priority date.⁷⁷ The BIA rejected the argument, stating that the statute doesn't expressly state which petitions qualify for automatic conversion, and thus applied its own administrative discretion in the face of the statutory ambiguity.⁷⁸ The BIA looked to the "recognized meaning" of the words "automatic conversion" in immigration law.⁷⁹ According to the BIA, this language only applied when a petition could "move seamlessly from one family preference category to another—not when a new sponsor was needed to fit a beneficiary into a different category."⁸⁰ There was no indication that Congress intended to expand the use of the "automatic conversion" concept in immigration procedures.⁸¹ Because Wang's daughter did not have a

⁶⁹ *Id.* at 2200–01.

⁷⁰ *Id.* at 2201 (quoting 8 U.S.C. § 1153(h)(3) (2012)).

⁷¹ 25 I. & N. Dec. 28 (2009).

⁷² 134 S. Ct. at 2201.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 2202.

qualifying relationship with the original visa sponsor, her petition could not “automatically convert,” and she had to go to the start of the visa availability line.⁸²

Facts, Analysis, and Ruling

Respondents in this case are the principal beneficiaries of family-sponsored petitions filed by U.S. citizens (a parent in one case, and a sibling in the other case).⁸³ Each respondent also had a child who was under the age of twenty-one at the time the petition was filed, and was therefore considered a derivative beneficiary.⁸⁴ But by the time visas became available, all of the respondents’ derivative beneficiaries were over twenty-one and were unable to obtain visas.⁸⁵ Respondents immigrated to the United States without their children, and then filed petitions for them, arguing that they should receive the same priority date as the original petitions.⁸⁶ The U.S. Citizenship and Immigration Services denied their requests and placed the children at the start of the priority line.⁸⁷ The parents brought a suit.⁸⁸

The District Court applied the BIA’s interpretation of section 1153(h)(3) in *Wang*, and granted summary judgment to the Government.⁸⁹ The Ninth Circuit first affirmed the judgment, but granted rehearing en banc and reversed, concluding that the statute was unambiguous and the BIA was not entitled to deference.⁹⁰ The United States Supreme Court granted certiorari to resolve a circuit split on the meaning of the statute.⁹¹ The Court overturned the Ninth Circuit, holding that the statutory ambiguity required deference to the expert interpretation of the implementing agency, the BIA.⁹²

⁸² *Id.* at 2201.

⁸³ *Id.* at 2202.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 2203.

The Court applied *Chevron* deference⁹³ to the BIA's interpretation of section 1153(h)(3).⁹⁴ The statute is ambiguous because it "addresses the issue in divergent ways," making it possible to come to alternative reasonable conclusions.⁹⁵ The first part of section 1153(h)(3) reads: "If the age of an alien is determined under paragraph (1) to be [twenty-one] years of age or older . . ."⁹⁶ This is a condition that all aged-out beneficiaries meet.⁹⁷ But the second part of the section states: "[T]he alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original position."⁹⁸ This clause instructs immigration officials to "convert" the beneficiary's petition from a category for children to an "appropriate" adult category.⁹⁹ The conversion is a change in category only, not a change in petition or sponsor.¹⁰⁰ Therefore, only beneficiaries whose petitions can be automatically converted into a different category—beneficiaries who retain qualifying relationships with their sponsor before and after turning twenty-one—are covered by the section despite the inclusive language at the beginning of the section.¹⁰¹

The respondents' children in this case did not retain qualifying beneficiary status after turning twenty-one because, although the respondents themselves were principal beneficiaries of the sponsors, their children only counted as derivative beneficiaries while they were still under twenty-one.¹⁰² Once they reached twenty-one, they

⁹³ *Chevron* deference is a two-step process used to answer questions of statutory construction in administrative law. *Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If the statute's intent is unambiguous, then the statute's construction controls. *Id.* at 842–43. If the statute's intent is ambiguous, then the agency's construction controls. *Id.*

⁹⁴ 134 S. Ct. at 2203.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 2203–04.

¹⁰⁰ *Id.* at 2204.

¹⁰¹ *Id.* at 2206.

¹⁰² *Id.* at 2206–07.

were merely grandchildren of the sponsors, which is not a relationship that warrants family preference under U.S. immigration law.¹⁰³ For the children to fit into a new category, they must find new sponsors, which does not qualify as “automatic conversion.”¹⁰⁴

The Court held that section 1153(h)(3)’s language permitted the IAB to discriminate between aged-out beneficiaries, but did not require discrimination.¹⁰⁵ Because of the section’s ambiguity, the IAB had to option to decide how to interpret it.¹⁰⁶ Because the IAB’s decision was a reasonable interpretation of the statute, the Court must defer to the interpretation.¹⁰⁷

Concurrence

Chief Justice Roberts, joined by Justice Scalia, concurred in the judgment, agreeing with most of the plurality’s opinion.¹⁰⁸ However, the Chief Justice disagreed with the plurality’s suggestion that deference was warranted because of a conflict between the two parts of section 1153(h)(3).¹⁰⁹ He explained that deference should be given to an agency’s interpretation because it is presumed that Congress intended to give responsibility to the agency to resolve ambiguity in the statute, not because the statute directly contradicts itself.¹¹⁰ “*Chevron* is not a license for an agency to repair a statute that does not make sense.”¹¹¹ But in this case, Roberts did not believe that section 1153(h)(3) had conflicting clauses; rather, the first clause stated a condition and did not actually grant relief to anyone.¹¹² The second clause was the “operative provision” that explained what an aged-out beneficiary was entitled to.¹¹³ Regardless, since the interpretation offered by the BIA was

¹⁰³ *Id.* at 2207.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 2214.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 2215.

reasonable and consistent with the ordinary meaning of the statute, Roberts concurred with the plurality's holding.¹¹⁴

Justice Alito's Dissent

Justice Alito disagreed with the plurality's opinion because he believed the statute made a clear point: "If the age of an alien is determined under [§ 1153(h)(3)] to be [twenty-one] years of age or older . . . , the alien's petition *shall* automatically be converted to the appropriate category and the alien *shall* retain the original priority date issued upon receipt of the original petition."¹¹⁵ With such a clear statutory command, Justice Alito argued, the BIA was not free to come up with a contradictory interpretation.¹¹⁶

Justice Sotomayor's Dissent

Justice Sotomayor, joined by Justice Breyer and Justice Thomas, disagreed with the plurality's opinion because section 1153(h)(3) "provides a clear answer" to the question of which aged-out children are entitled to retain priority dates: aged-out children are entitled to retain their priority dates as long as they are "determined to be [twenty-one] years of age or older for purposes of" derivative beneficiary status."¹¹⁷ Based on that language, all aged-out children that qualified under the CSPA satisfy the condition would be entitled to retain their priority dates.¹¹⁸

Notwithstanding the "unambiguous" language in the clause, Justice Sotomayor argued that the plurality allowed the BIA to interpret section 1153(h)(3) without regard to the "obvious ways in which [the section could] operate as a coherent whole and instead construe[d] the statute as a self-contradiction"¹¹⁹ Because *Chevron* deference should be applied to cases in which the statute is insufficiently specific or diametrically opposed, deference was

¹¹⁴ *Id.* at 2215–16.

¹¹⁵ *Id.* at 2216 (quoting 8 U.S.C. § 1153(h)(3) (2012)).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 2216–17 (quoting 8 U.S.C. § 1153(h)(3) (2012)).

¹¹⁸ *Id.* at 2217.

¹¹⁹ *Id.*

inappropriately applied in this case, according to Justice Sotomayor.¹²⁰ The Court should have applied a straightforward interpretation of the statute, without resorting to agency deference.¹²¹

Impact

“This is the kind of case *Chevron* was built for.”¹²² The Supreme Court utilized this key deference principle to clarify the roles of the administrative agency and the courts. While Congress may have meant to imply that minor derivative beneficiaries would be eligible for the CSPA remedy, they failed to legislate clearly.¹²³ Due to the potential legislative oversight, the administrative agency operated within its authority to understand and interpret the law in a reasonable manner.¹²⁴ The BIA “chose a textually reasonable construction consonant with its view of the purposes and policies underlying immigration law,” and the Court saw no reason to assume control over the agency’s expert authority.¹²⁵ However, the BIA’s determination of CSPA qualifications has far reaching consequences for the already tumultuous immigration process.¹²⁶ The correct means for addressing the issue and seeking a remedy for derivative beneficiaries who have aged out of the process is through legislation with such inclusive language.

Burwell v. Hobby Lobby Stores, Inc. **134 S. Ct. 2751 (2014)**

Synopsis

Owners of closely held corporations brought action against the Secretary of Health and Human Services (HHS) under the Religious Freedom Restoration Act (RFRA), seeking to enjoin the demand of

¹²⁰ *Id.* at 2219–20.

¹²¹ *Id.* at 2228.

¹²² *Id.* at 2213.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *See id.*, Part B, at 2199–2202.

the Patient Protections and Affordable Care Act (ACA) that the corporations provide health-insurance coverage for certain contraceptives.¹²⁷ The corporations were owned by families with sincere Christian beliefs that life begins at conception.¹²⁸ They argued that it would violate their religious beliefs to facilitate access to contraceptive methods that they believed caused abortions.¹²⁹ The RFRA “prohibits the Federal Government from taking any action that *substantially burdens* the exercise of religion unless that action constitutes the *least restrictive means* of serving a *compelling government interest*.”¹³⁰ In this case, the question for the Supreme Court was whether the HHS was allowed to force the corporations to provide insurance coverage for contraceptive methods under the RFRA.¹³¹

First, the Court determined that corporations constitute “persons” under the RFRA, and therefore the RFRA applied to the case.¹³² Then, applying the RFRA to the ACA mandate, the Court held that, although the HHS’s mandate served a compelling government interest, the contraceptive regulations substantially burdened the exercise of religion and did not constitute the least restrictive means of serving the government’s compelling interest in ensuring access to healthcare.¹³³

Background

Religious Freedom Restoration Act of 1993

The RFRA was enacted in 1993 to “provide very broad protection for religious liberty.”¹³⁴ In *Employment Division, Department of Human Resources of Oregon v. Smith*,¹³⁵ the Supreme Court rejected

¹²⁷ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2764–66 (2014).

¹²⁸ *Id.*

¹²⁹ *Id.* at 2759.

¹³⁰ *Id.* (emphasis added).

¹³¹ *Id.*

¹³² *Id.* at 2768.

¹³³ *Id.* at 2759.

¹³⁴ *Id.* at 2760.

¹³⁵ 494 U.S. 872 (1990).

the test that had formerly been used to determine whether government actions violated the Free Exercise Clause of the First Amendment.¹³⁶ Congress enacted the RFRA¹³⁷ in response to *Smith* to ensure that the government could not “substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.”¹³⁸ Under the RFRA, the government may not substantially burden a person’s exercise of religion unless the government can demonstrate that the burden: (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that interest.¹³⁹

The Patient Protection and Affordable Care Act of 2010

In general, the ACA “requires employers with [fifty] or more full-time employees to offer ‘a group health plan or group health insurance coverage’ that provides ‘minimum essential coverage.’”¹⁴⁰ “Minimum essential coverage” includes coverage for preventive care and screenings for women, which includes “approved contraceptive methods, sterilization procedures, and patient education and counseling.”¹⁴¹ Covered employers who do not provide the required coverage are charged a significant fee.¹⁴² Certain religious

¹³⁶ 134 S. Ct. at 2760. The Court in *Smith* rejected a balancing test that considered “whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling interest.” *Id.* In *Smith*, two Native American Church members were denied unemployment benefits after they were fired for consuming peyote. *Id.* Although their peyote consumption was for religious purposes, the state denied unemployment benefits because peyote consumption was a crime. *Id.* The Court upheld the state’s decision, reasoning that “neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling government interest.” *Id.* at 2760–61.

¹³⁷ 42 U.S.C. § 2000bb to -4 (2012).

¹³⁸ 134 S. Ct. at 2761.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 2762 (quoting 26 U.S.C. §§ 5000A(f)(2), 4980H(a), (c)(2) (2012)).

¹⁴¹ *Id.* (quoting 77 Fed. Reg. 8725). Congress did not specify what “preventive care” included, but instead authorized the Health Resources and Services Administration (HRSA) to make that determination. *Id.* The HRSA produced the Women’s Preventive Services Guidelines in 2011. *Id.*

¹⁴² *Id.* Covered employers who provide inadequate coverage may be charged up to \$100 per day per inadequately-covered individual. *Id.* Covered employers

employers and religious nonprofit organizations are exempted from the contraceptive coverage requirement.¹⁴³

Although most contraceptive methods prevent egg fertilization, the methods of contraception at issue in these cases prevent pregnancy by inhibiting a fertilized egg from attaching to the uterus.¹⁴⁴ This method of contraception is akin to abortion by some religious groups.¹⁴⁵

Facts, Analysis, and Ruling

Facts

In the first case, the Hahn family, devout Mennonites, owned and operated a closely held for-profit corporation called Conestoga Wood Specialties.¹⁴⁶ The Hahns were the sole owners of the corporation; they controlled the board of directors and held all of the company's voting shares.¹⁴⁷ They sought to operate their business in a way that reflected their Christian beliefs, which included the belief that human life begins at conception.¹⁴⁸ Therefore, they refused to provide health insurance coverage for the types of contraceptive methods they considered abortifacients.¹⁴⁹ They sued the HHS under the RFRA in an effort to enjoin the application of the ACA's contraceptive coverage requirement insofar as it required Conestoga to provide coverage for the types of contraception that violated the Hahns's religious beliefs.¹⁵⁰ The district court denied a preliminary injunction, and the Third Circuit Court of Appeals affirmed.¹⁵¹

In the second case, the Green family was a Christian family that owned two for-profit businesses: a Christian bookstore called

who do not provide health coverage at all may be required to pay up to \$2,000 per year for each full-time employee. *Id.*

¹⁴³ *Id.* at 2763.

¹⁴⁴ *Id.* at 2762.

¹⁴⁵ *Id.* at 2759.

¹⁴⁶ *Id.* at 2764.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 2764–65.

¹⁵⁰ *Id.* at 2765.

¹⁵¹ *Id.*

Mardel, and a nationwide chain arts-and-crafts store called Hobby Lobby.¹⁵² The Green family retained sole control over both corporations.¹⁵³ Like the Hahns, the Greens ran their companies in accordance with their religious beliefs.¹⁵⁴ All Mardel and Hobby Lobby stores closed on Sunday, and they did not sell products that facilitated or promoted alcohol consumption.¹⁵⁵ They also contributed company profits to Christian missionaries and ministries.¹⁵⁶ Since they believed that some of the contraceptive methods required under the ACA operated in violation of their religious beliefs, they too sued the HHS under the RFRA in an effort to enjoin the application of the ACA's contraceptive coverage requirement insofar as it required Mardel and Hobby Lobby to provide coverage for the types of contraception that violated their religious beliefs.¹⁵⁷ The district court denied a preliminary injunction.¹⁵⁸ Contrary to the Third Circuit's decision, the Tenth Circuit Court of Appeals reversed the district court, holding that the contraceptive coverage requirement was a substantial burden on the exercise of religion, and that the HHS had failed to show a compelling interest.¹⁵⁹ The Supreme Court granted certiorari to address the circuit split.¹⁶⁰

Corporate Personhood

The RFRA prohibits the federal government from substantially burdening a person's exercise of religion unless it is in furtherance of a compelling government interest and is the least restrictive means of furthering that interest.¹⁶¹ The first issue was to determine whether the three for-profit corporations constituted "persons" under the

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 2766.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

RFRA.¹⁶² Since the RFRA does not define the term “person,” the Court applied the Dictionary Act¹⁶³ definition: a “person” includes “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”¹⁶⁴ The Court found that there was no intent in the passing of the RFRA to depart from the Dictionary Act definition of person, which includes corporations.¹⁶⁵ The Court also considered RFRA claims brought by nonprofit corporations in several cases,¹⁶⁶ thus demonstrating that a nonprofit corporation may be considered a person under the RFRA.¹⁶⁷ The HHS conceded that a nonprofit corporation may be a “person” within the meaning of the RFRA, and the Court did not find any clear distinction between for-profit and nonprofit corporations that would allow one to retain “personhood” rights under the RFRA while denying the other.¹⁶⁸

The HHS argued that for-profit corporations were not covered by the RFRA because they could not exercise religion.¹⁶⁹ They first argued that the RFRA was essentially a codification of the pre-*Smith* Free Exercise balancing test, and because none of the pre-*Smith* cases held that a for-profit corporation had free-exercise rights, free-exercise protection does not extend to RFRA cases.¹⁷⁰ The Court rejected this argument, mainly because nothing in the RFRA suggests that it was meant to codify the pre-*Smith* rule.¹⁷¹

The HHS also argued that for-profit corporations were not covered by the RFRA because determining the sincere religious

¹⁶² *Id.* at 2768–69.

¹⁶³ “[The Court must] look to the Dictionary Act . . . ‘[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise.’” *Id.* at 2768 (quoting 1 U.S.C. § 1 (2012)).

¹⁶⁴ *Id.* at 2768; 1 U.S.C. § 1 (2012).

¹⁶⁵ 134 S. Ct. at 2768.

¹⁶⁶ *See, i.e., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012); *Gonzalez v. O Centro Espirita Beneficenta Uniao de Vegetal*, 546 U.S. 418 (2006); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

¹⁶⁷ 134 S. Ct. at 2769.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 2772.

¹⁷¹ *Id.*

beliefs of large, publicly traded for-profit corporations would be so difficult as a practical matter that Congress could not have intended the RFRA to apply to for-profit corporations.¹⁷² The Court found, however, that because the corporations at issue in this case were closely held and entirely owned by members of individual families, the sincerity of their religious views was easily discernable.¹⁷³ Therefore, the Court held that “a federal regulation’s restriction on the activities of a for-profit closely held corporation must comply with [the] RFRA.”¹⁷⁴

Substantial Burden on Religious Exercise

Because it determined that the RFRA applied in this case, the Court next addressed whether the contraceptive coverage requirement placed a substantial burden on the exercise of religion.¹⁷⁵ The Court entertained two arguments from the HHS.¹⁷⁶ First, the HHS argued that the ACA mandate requiring employers to either provide healthcare coverage or face a financial penalty did not constitute a substantial burden because the penalty was less than the cost of providing health insurance to employees.¹⁷⁷ The Court rejected this argument finding that the HHS’s claim was unsupported and the burden would be a competitive disadvantage to the corporation.¹⁷⁸

The HHS’s second argument was that the connection between providing healthcare coverage for contraception and the morally objectionable action (destruction after conception) was too attenuated.¹⁷⁹ The Court held that this argument wrongly addressed the issue of whether the religious belief asserted was reasonable rather than addressing whether the HHS demand placed a substantial

¹⁷² *Id.* at 2774.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 2775.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 2775–79.

¹⁷⁷ *Id.* at 2776.

¹⁷⁸ *Id.* at 2777.

¹⁷⁹ *Id.*

burden on religious exercise.¹⁸⁰ Traditionally, the Court has held that a sincere religious belief that sets a moral standard must only be found to reflect an “honest conviction” to qualify as religious exercise.¹⁸¹ The Court found that there was a substantial burden on the corporations to either provide health insurance or face a heavy financial penalty that violated a sincerely held religious conviction.¹⁸²

Compelling Government Interest and Least Restrictive Means

Once the Court found that the HHS imposed a substantial burden on the religious exercise of the corporations, the Court next evaluated whether the HHS showed that their demand “(1) [was] in furtherance of a compelling governmental interest; and (2) [was] the least restrictive means of furthering that compelling governmental interest.”¹⁸³ The Court found it unnecessary to adjudicate the first part of the issue, and assumed that the interest in providing cost-free access to contraception for employees under employer-provided group health plans constituted a compelling government interest.¹⁸⁴ The Court chose instead to consider the second half of the test, whether the contraceptive mandate was the least restrictive means of furthering that compelling government interest.¹⁸⁵ Noting the “exceptionally demanding” nature of the least-restrictive means standard, the Court argued that the least restrictive way of providing contraception coverage would be for the government to pay for it.¹⁸⁶ It is likely that the cost to allow closely held corporations to defer the cost of certain contraceptives to the government would be minor, as the government has already taken on a heavy financial burden through the passage of the ACA.¹⁸⁷ This would alleviate the burden on the individual corporations while still ensuring contraceptive

¹⁸⁰ *Id.* at 2778.

¹⁸¹ *Id.* at 2779.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 2780.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 2781.

coverage.¹⁸⁸ While the Court cannot make decisions to create new programs, the Court still used that analysis to determine that the HHS did not employ the least restrictive means in furthering its governmental interest.¹⁸⁹ Thus, the Court's final determination was that "the contraceptive mandate, as applied to closely held corporations, violate[d the] RFRA."¹⁹⁰

Dissent

Justice Ginsburg, joined by Justices Sotomayor, Breyer, and Kagan, disagreed with the majority's opinion.¹⁹¹ Ginsburg first argued that the corporations did not have Free Exercise Clause claims because, under *Smith*, "the ACA's contraceptive coverage requirement applies generally, it is 'otherwise valid,' it trains on women's well[-]being, not on the exercise of religion, and any effect it has on such exercise is incidental."¹⁹² But even if *Smith* did not control, Ginsburg said, an exemption would not be granted to the corporations because it would "significantly impinge on the interests of third parties" by overriding the interests of employees and their covered dependents, who would not necessarily hold the same religious convictions.¹⁹³

Ginsburg then argues that the corporations' RFRA claims must fail because the RFRA was simply a codification of pre-*Smith* law and therefore did not create any new rights.¹⁹⁴ If one referred to the pre-*Smith* body of law, Ginsburg argued, then each step of the analysis would have been determined differently, and the Court would have found that there was no satisfactory alternative that would have served the government's compelling interests.¹⁹⁵

¹⁸⁸ *Id.* at 2780.

¹⁸⁹ *Id.* at 2781–82.

¹⁹⁰ *Id.* at 2785.

¹⁹¹ *Id.* at 2787.

¹⁹² *Id.* at 2790 (quoting Emp't Div., Dep't. of Human Res. of Or. v. Smith, 494 U.S. 872, 878–79 (1990)).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 2791.

¹⁹⁵ *Id.* at 2793–2803.

Impact

Considered “the most controversial Supreme Court decision” in 2014, this case was heavily politicized and drew attention to the political divisiveness of the decision.¹⁹⁶ This decision is an important clarification of the recently implemented ACA and could lead to further suits brought by other closely held corporations seeking exemption from providing insurance coverage of certain healthcare procedures. One practical implication of this decision is the fact that Hobby Lobby, Mardel, and Conestoga Wood Specialties may now refuse to cover certain types of contraceptives under their employer group health insurance, which sets a precedent for more closely held corporation exceptions to the ACA. More litigation will likely arise now that the Supreme Court has ruled on one aspect of the relationship between the ACA and the RFRA in employer provided group insurance plans.

UNITED STATES COURTS OF APPEALS**Atrium Medical Center v. United States Department of Health and Human Services,
766 F.3d 560 (6th Cir. 2014)***Synopsis*

Two groups of hospitals challenged calculations the Secretary of the Department of Health and Human Services (HHS) used to determine how much each hospital was paid for inpatient services under Medicare Part A.¹⁹⁷ Two types of programs were at issue: a short-term disability program and a part-time weekend work program (Baylor Plan).¹⁹⁸ The hospitals opposed the Secretary’s decision to include the hours associated with each program in the calculations for

¹⁹⁶ Richard A. Epstein, *The Defeat of the Contraceptive Mandate in Hobby Lobby: Right Results, Wrong Reasons*, 2014 CATO SUP. CT. REV. 35, 35 (2013–2014).

¹⁹⁷ *Atrium Med. Ctr. v. United States Dep’t of Health & Human Servs.*, 766 F.3d 560, 564 (6th Cir. 2014).

¹⁹⁸ *Id.*

inpatient services reimbursements.¹⁹⁹ The Sixth Circuit Court of Appeals affirmed the district court's decision to support the Secretary's determination to include the programs' hours.²⁰⁰

Facts, Analysis, and Ruling

Background

Under Medicare Part A, a fixed, predetermined formula called the prospective payment system is used to determine how much hospitals are reimbursed for inpatient medical services.²⁰¹ Section 1395ww(d)(3)(E)(i) of the Medicare Act requires the Secretary to adjust reimbursements to account for differences in the cost of labor in a given area.²⁰² The Center for Medicare and Medicaid Services (CMS) evaluates reports submitted by each hospital to determine the hospital's labor costs.²⁰³ The data is used to calculate the average cost of labor in a given area—called the wage index—and that amount is used to establish the nationwide federal rate and make regional adjustments.²⁰⁴ “Wages,”²⁰⁵ “wage-related costs,”²⁰⁶ and “paid hours”²⁰⁷ make up the components of the wage index.²⁰⁸ Hospitals prefer to report fewer paid hours because paid hours lower the region's index and result in decreased reimbursement for inpatient services.²⁰⁹ Since wage costs are tied to paid hours, a

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*; see 42 U.S.C. § 1395ww(d)(3)(E)(i) (2012).

²⁰³ *Atrium*, 766 F.3d at 564.

²⁰⁴ *Id.* at 564–65.

²⁰⁵ “‘Wages’ are . . . the dollar value of every hour the hospital paid its employees.” *Id.* at 565.

²⁰⁶ “‘Wage-related costs’ are essentially fringe benefits, like health insurance and retirement plans, and are not linked to paid hours.” *Id.*

²⁰⁷ “‘Paid hours’ are the actual hours associated with an employee's wages rather than simply the amount of time an employee spent working at the hospital; for example, paid hours includes ‘paid lunch hours’ and ‘paid holiday, vacation, and sick leave hours.’” *Id.*

²⁰⁸ *Id.* at 564. Here is a simplified version of the formula used to calculate the wage index: (wages + wage-related costs) / (paid hours). *Id.* at 565.

²⁰⁹ *Id.*

hospital would not want to report a cost as a wage that other hospitals in the same region reported as a wage-related cost because it would lower the hospital's wage index in comparison to the other hospitals in the region.²¹⁰

Standards of Review

The Secretary's decision to count short-term disability payments and Baylor Plan payments in her determination of reimbursement adjustments for that region was reviewed de novo.²¹¹ First, the court determined that the treatment of program payments was entitled to *Chevron* deference,²¹² following Congress's intention to grant exceptionally broad discretion to the Secretary in defining "wages," "wage-related," and "paid hours."²¹³ Then, the court determined that the Secretary's decision also merited *Auer* deference²¹⁴ to determine whether the decision was arbitrary or capricious. Thus, the Secretary had discretion to formulate the wage index as long as she did not arbitrarily treat the same input differently for different hospitals.²¹⁵ The Sixth Circuit concluded that the Secretary's construction of the Medicare Act was neither contrary to the statute nor arbitrary or capricious.²¹⁶

²¹⁰ *Id.*

²¹¹ *Id.* at 566.

²¹² *Chevron* deference is a two-step process used to answer questions of statutory construction in administrative law. *Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If the statute's intent is unambiguous, then the statute's construction controls. *Id.* at 842–43. If the statute's intent is ambiguous, then the agency's construction controls. *Id.*

²¹³ 766 F.3d at 566.

²¹⁴ Even if an agency's interpretation of a statute controls under *Chevron*, the interpretation may nevertheless be rejected if it is arbitrary or capricious. *Id.* at 567. Under *Auer*, the agency's interpretation is controlling unless it is "plainly erroneous or inconsistent with the regulation." *Id.* (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

²¹⁵ *Id.* at 569.

²¹⁶ *Id.* at 575.

The Secretary's Decision: Short-Term Disability Payments

Most hospitals have insurance to cover short-term disability payments, and those insurance premiums are considered “wage-related” costs.²¹⁷ However, some hospitals, including plaintiffs in this case, choose instead to make short-term disability payments out of general funds through the payroll process.²¹⁸ This process requires accounting for more paid hours, which lowers the wage index determination for that hospital group and ultimately produces lower reimbursements.²¹⁹ The plaintiffs alleged that treating typical insurance premiums as “wage-related” and short-term disability payments made through general funds as “wages” was an inconsistent treatment of costs, violating the Medicare Act’s mandate that the wage index be uniform and consistent.²²⁰

The Sixth Circuit relied on the decision in *Barnhart*, in which the Supreme Court granted *Chevron* deference to the Social Security Administration to interpret details of the Social Security Act’s administration because the Act was complex, broadly applicable, and required agency expertise.²²¹ The Sixth Circuit applied the same analysis in this case, and held that the Secretary’s interpretation of the Medicare Act as it applied to classifying non-insurance short-term disability payments did not obviously conflict with the statute.²²² Even though insurance programs were treated differently from non-insurance programs, because hospitals using the non-insurance short-term disability payment process were not treated differently than similarly situated hospitals that used insurance to make short-term disability payments, there was no violation of the Medicare Act’s uniformity requirement.²²³ The Sixth Circuit affirmed the district court’s holding that the Secretary’s

²¹⁷ *Id.* at 570.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 573 (citing *Barnhart v. Walton*, 535 U.S. 212, 225 (2002)).

²²² *Id.*

²²³ *Id.*

determination of the Medicare Act was not manifestly contrary and that her reasoning was neither arbitrary nor capricious.²²⁴

The Secretary's Decision: Baylor Plan Hours

In order to encourage weekend work, many hospitals offer an arrangement referred to as the "Baylor Plan," which grants a full-time salary and accompanying benefits to an individual who works two weekend shifts.²²⁵ An employee who works two twelve-hour weekend shifts is to be paid as a full-time employee; therefore, the payroll records forty paid hours per week for that individual.²²⁶

The plaintiffs in this case challenged the determination that the unworked hours in the Baylor Plan were to be counted as "paid hours" and included in the wage index calculation.²²⁷ Unlike Baylor Plan hours, bonuses and overtime hours are not considered "paid hours," and thus are not included in the wage index.²²⁸ Plaintiffs argued that unworked Baylor Plan hours were merely an accounting mechanism to calculate the premium per hour incentive for employees who worked these undesirable shifts.²²⁹ The Secretary defended the categorization of Baylor Plan hours as paid hours, stating that paid hours are a more appropriate reflection of an employee's salary, and recording the non-worked hours as paid hours allowed employees to receive full-time benefits.²³⁰

Because there was no question of statutory construction, the court applied *Auer*, rather than *Chevron*, deference to the Secretary's decision.²³¹ The court found that defining Baylor Plan hours as "paid hours" rather than some version of bonuses was neither arbitrary nor capricious because it was an accurate representation of the reality of the Baylor Plan and how the hospitals themselves treated Baylor Plan

²²⁴ *Id.*

²²⁵ *Id.* at 574.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 574–75.

²²⁹ *Id.* at 575.

²³⁰ *Id.*

²³¹ *Id.*; see also *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

employees as full-time employees.²³² The Sixth Circuit affirmed the district court's holding.²³³

Impact

Classification of expenses is crucial to hospitals that serve a significant portion of patients relying on Medicare coverage. The more paid hours a hospital has to report, the lower its region's wage index; a lower index equates to lower reimbursement for inpatient services.²³⁴ A hospital would therefore prefer to report as few paid hours as possible, or at least refrain from reporting something as "wage" that other hospitals are reporting as "wage-related."²³⁵ With such a large proportion of the federal budget allocated for Medicare coverage, and approximately 54 million people benefiting from that coverage²³⁶, the reimbursement of Medicare funds is a far-reaching complexity requiring the Sixth Circuit to "grapple with some of 'the most completely impenetrable texts within human experiences,' statutes and regulations that 'one approaches at the level of specificity herein demanded with dread.'"²³⁷ It is likely that further examinations of these "impenetrable texts" will continue to reach the courts due to the need for greater clarification.

Avila v. Los Angeles Police Department, 758 F.3d 1096 (9th Cir. 2014)

Synopsis

The Ninth Circuit Court of Appeals affirmed a district court decision in favor of Leonard Avila, a former Los Angeles Police Officer.²³⁸ Avila claimed that he was fired from the Los Angeles

²³² *Atrium*, 766 F.3d at 575.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Medicare at a Glance*, THE HENRY J. KAISER FAMILY FOUNDATION (Sept. 2, 2014), <http://kff.org/medicare/fact-sheet/medicare-at-a-glance-fact-sheet/>.

²³⁷ *Atrium*, 766 F.3d at 564 (quoting *Rehab Ass'n of Va. v. Kozlowski*, 42 F.3d 1444, 1450 (4th Cir. 1994)).

²³⁸ *Avila v. L.A. Police Dep't*, 758 F.3d 1096, 1099 (9th Cir. 2014).

Police Department (LAPD) due to his testimony in a Fair Labor Standards Act (FLSA) lawsuit brought by a fellow officer.²³⁹ Avila brought an action against the LAPD and the City of Los Angeles (collectively, the City) for violations of the FLSA anti-retaliation provision.²⁴⁰ The jury found in favor of Avila and awarded attorney's fees and liquidated damages.²⁴¹ The City appealed the decision, claiming that Avila had been terminated for insubordination because he failed to claim overtime.²⁴² The LAPD's disciplinary body, the Board of Rights (BOR), had previously found Avila guilty of insubordination and recommended termination.²⁴³ The City argued that the BOR determination precluded Avila's retaliation claim.²⁴⁴ The district court found that it did not, and the Ninth Circuit affirmed.²⁴⁵ The City also argued on appeal that the jury was not properly instructed; however, the Ninth Circuit found no reversible error and upheld the district court decision.²⁴⁶

Facts, Analysis, and Ruling

Leonard Avila testified under subpoena in a FLSA suit brought by Edward Maciel against the City of Los Angeles.²⁴⁷ Maciel sought overtime pay for working through his lunch hour.²⁴⁸ Avila testified that it was common practice to work through lunch and not claim overtime.²⁴⁹ Avila stated that he, along with his supervisors, operated under an "unwritten policy of not claiming overtime for working through lunch."²⁵⁰ After testifying in the FLSA suit, the LAPD brought an investigation against Avila and the other officer

²³⁹ *Id.* at 1098.

²⁴⁰ *Id.* at 1099; *see also* 29 U.S.C. § 215(a)(3) (2012).

²⁴¹ *Avila*, 758 F.3d at 1105.

²⁴² *Id.* at 1099.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 1100.

²⁴⁶ *Id.* at 1099.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

who testified, Richard Romney.²⁵¹ Avila and Romney were ordered to appear at a BOR disciplinary hearing.²⁵² On the day of the hearing, Avila resigned to accept a job offer with another law enforcement agency.²⁵³ The BOR continued the hearing against Avila without him present.²⁵⁴ The BOR ultimately determined that Avila was guilty of insubordination and recommended his termination.²⁵⁵ Avila then brought an anti-retaliation charge against the City.²⁵⁶ The City moved for summary judgment, arguing the Avila's FLSA claim was precluded because he never sought judicial review of the BOR decision.²⁵⁷ The jury found in favor of Avila and awarded him \$50,000 in liquidated damages and \$579,400 in attorneys' fees.²⁵⁸ The City appealed.²⁵⁹

State agency determinations are "entitled to preclusive effect if three requirements are satisfied: '(1) that the administrative agency act in a judicial capacity, (2) that the agency resolve disputed issues of fact properly before it, and (3) that the parties have an adequate opportunity to litigate.'"²⁶⁰ The City argued that Avila never properly appealed the BOR decision and that the agency determination should preclude his FLSA retaliation claim.²⁶¹ The BOR constitutes a state administrative agency acting in a judicial capacity; however, the court of appeals found that because the BOR never addressed the issue of retaliation, there was no preclusion.²⁶² There was no resolution of the disputed issue: Avila's claim that his termination was in retaliation for testifying in the Maciel trial.²⁶³

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* The BOR also fired Officer Romney. *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 1100.

²⁶¹ *Id.* at 1099.

²⁶² *Id.* at 1100.

²⁶³ *Id.*

On appeal, the City argued that the jury was not given proper instructions.²⁶⁴ The district court followed Ninth Circuit law by giving instructions to the jury that included the requirement for Avila to prove that his testifying at the Maciel trial was a motivating factor in his termination.²⁶⁵ The City attempted to include the “same decision” affirmative defense on appeal; however, because the briefs on appeal did not assert an error in the district court’s failure to include the “same decision” instruction, the Ninth Circuit found that the argument was waived.²⁶⁶ The City requested special instructions in the jury trial to support its argument that Avila was fired because he failed to request overtime and not because he testified.²⁶⁷ The district court refused the special instructions and the Ninth Circuit held that this refusal was not an abuse of discretion.²⁶⁸

Because the only evidence that Avila was failing to seek overtime pay was his testimony in the FLSA suit, the City could not avoid the retaliation claim.²⁶⁹ The Ninth Circuit affirmed the district court’s finding that Avila was wrongfully terminated in retaliation for testifying in Maciel’s FLSA suit.²⁷⁰ The Ninth Circuit also found no abuse of discretion in the award of attorneys’ fees or liquidated damages.²⁷¹

Impact

Under most circumstances, claims against state agencies must follow the administrative procedure for appeals, and those administrative decisions would preclude an individual from bringing a further civil claim.²⁷² However, the requirements for preclusion exist for a case such as this one. While Avila may not have followed the proper procedure for appealing the BOR decision, the BOR

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 1101.

²⁶⁶ *Id.* at 1100.

²⁶⁷ *Id.* at 1101.

²⁶⁸ *Id.* at 1105.

²⁶⁹ *Id.* at 1100.

²⁷⁰ *Id.* at 1105.

²⁷¹ *Id.*

²⁷² *Id.* at 1100.

determination was made on improper grounds. Anti-retaliation laws within the FLSA exist to protect employees from being punished for speaking up about labor law violations and to encourage employees to participate in FLSA lawsuits.²⁷³ The LAPD singled out the two individuals who testified at Maciel's trial for a BOR investigation and wrongfully terminated their employment.²⁷⁴ The dissenting judge in this case did not find the "same decision" defense to be waived and found ample evidence to support that defense; however, the panel affirmed the district court's decision and clarified the circumstances in which state administrative agencies do not preclude individuals' FLSA claims.²⁷⁵

Young v. United States,
769 F.3d 1047 (9th Cir. 2014)

Synopsis

While visiting Mount Rainier National Park, Plaintiff Donna Young fell into a twelve-foot hole near the Park's main visitor center and suffered serious injuries.²⁷⁶ The Young family brought suit against the United States under the Federal Tort Claims Act (FTCA), alleging that the National Park Service (NPS) was negligent in failing to warn of a hazard that it both knew of and created.²⁷⁷ The district court dismissed the Youngs' claim, finding that the action was barred by the discretionary function exception to the FTCA because the decision to warn visitors of hazards of a general nature in the park was policy-driven and therefore protected.²⁷⁸ The Youngs appealed.²⁷⁹ The Ninth Circuit Court of Appeals found that the decision not to warn of a known safety hazard was not a policy consideration that the discretionary exception was designed to

²⁷³ *Id.*

²⁷⁴ *Id.* at 1101.

²⁷⁵ *Id.* at 1105.

²⁷⁶ *Young v. United States*, 769 F.3d 1047, 1050 (9th Cir. 2014).

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

protect.²⁸⁰ The court held that the Youngs' claim was not barred and remanded the case to the district court for further proceedings.²⁸¹

Facts, Analysis, and Ruling

In June 2010, Donna and her family visited Mt. Rainier National Park while on vacation in Washington.²⁸² They arrived at the park in the early evening and decided to walk around near the visitor center before the park closed.²⁸³ Across the road from the visitor center was an empty field that was typically covered by snow for most of the year.²⁸⁴ There was a transformer that sat in the field and was used to power the visitor center building.²⁸⁵ The snowfall regularly covered the transformer, which released heat as it transferred electricity from nearby power lines to the visitor center.²⁸⁶ There was no sign or warning of the transformer's presence, so when Donna Young walked over to the field, she fell twelve feet into a hole created by the melting snow around the transformer.²⁸⁷ She sustained severe injuries as a result of the fall.²⁸⁸

The Youngs sued the United States under the FTCA.²⁸⁹ The FTCA allows individuals to recover money damages for injuries caused by negligent acts of government employees.²⁹⁰ The Youngs alleged that the NPS knew about the hazard, but negligently failed to warn visitors.²⁹¹ The Government moved to dismiss the Youngs' claim, arguing that the claim was barred by the discretionary function exception to the FTCA.²⁹² Under the discretionary function exception, "[a]ny claim based upon . . . the exercise or performance

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.* at 1051.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.* at 1053.

or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused,” does not receive waiver of immunity.²⁹³

In order to determine whether the discretionary function exception applied to the NPS’s actions, the district court applied *Berkovitz*’s two-step inquiry.²⁹⁴

Step One of the *Berkovitz* Test: Discretion

In *Berkovitz*,²⁹⁵ the Court held that an act is discretionary if it is “a matter of choice for the acting employee,” and “involves an element of judgment or choice.”²⁹⁶ Therefore, the first step in the *Berkovitz* analysis is to determine “whether the decision at issue ‘involve[d] an element of judgment or choice.’”²⁹⁷

Here, the parties agreed that the decision not to place warning signs was discretionary because there was no established statute, regulation, or policy requiring or prohibiting warning signs.²⁹⁸ The decision not to place a sign was a matter of judgment for the Park Service staff.²⁹⁹

Step Two of the *Berkovitz* Test: Policy

The second step in the *Berkovitz* analysis requires determining whether the discretionary conduct was “of the kind that the discretionary function exception was designed to shield.”³⁰⁰ In order to meet this standard, the decision must be “grounded in social, economic, and political policy.”³⁰¹

²⁹³ *Id.* (quoting 28 U.S.C. § 1680(a) (2012)).

²⁹⁴ *Id.*

²⁹⁵ *Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988).

²⁹⁶ 769 F.3d at 1053 (quoting *Berkovitz*, 486 U.S. at 536).

²⁹⁷ *Id.* (quoting *Berkovitz*, 486 U.S. at 536).

²⁹⁸ *Id.* at 1055.

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 1053 (quoting *Berkovitz*, 486 U.S. at 536).

³⁰¹ *Id.* (quoting *Berkovitz*, 486 U.S. at 536).

Here, the parties' dispute lies in the determination of whether the decision not to place warning signs at the site of the transformer was policy-driven.³⁰² The purpose of this requirement is to protect administrative and legislative decisions from being second-guessed by the judiciary.³⁰³ The NPS was created under a statute that established "broad policy considerations that govern [the] NPS's management of national parks."³⁰⁴ The NPS's management policies also require it to balance visitor safety against conservation and access.³⁰⁵ However, the policies do not protect all decision the NPS makes.³⁰⁶ Therefore, there must be some support that a particular NPS decision was "actually susceptible to analysis under the policies the government identified" for the discretionary function exception to apply.³⁰⁷

While the decision not to provide warning signs on unmaintained trails or other natural hazards in national parks would likely fall within the policy requirement of the discretionary exception, the decision not to warn visitors of a latent safety hazard created by the park itself does not.³⁰⁸ Here, the transformer, and the snowmelt danger that it created, was created by the NPS, not by nature.³⁰⁹ Therefore, the decision not to warn visitors of the transformer's presence was not a policy decision requirement and thus failed the discretionary function exception.³¹⁰ Under the FTCA, Plaintiffs' claim was not barred, and the Ninth Circuit reversed the district court's judgment.³¹¹

Impact

This case allowed the Ninth Circuit to establish a clear distinction between discretionary actions that should be covered by the

³⁰² *Id.* at 1055.

³⁰³ *Id.*

³⁰⁴ *Id.* (quoting *Terbush v. United States*, 516 F.3d 1125, 1130 (9th Cir. 2008)).

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 1057.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 1057–58.

³⁰⁹ *Id.* at 1058.

³¹⁰ *Id.* at 1059.

³¹¹ *Id.*

discretionary function exception and those that should not. The exception to the FTCA is important in order to protect government agencies from being subject to heavy judicial oversight of their management decisions.³¹² The NPS would likely be better suited to make decisions regarding trail maintenance and snow removal than the courts, however, the importance of individual safety at any government-run building, landmark, or park must be protected as well.³¹³ This case established important precedent for applying the discretionary function exception by holding that the government is accountable for dangers created by government agencies.³¹⁴ Individuals can expect natural hazards in national parks, given that they are areas of preserved wilderness; however, if an injury is incurred due to an unexpected hazard created by the NPS, the government agency should be held accountable.³¹⁵

³¹² *Id.* at 1055.

³¹³ *Id.* at 1059.

³¹⁴ *Id.*

³¹⁵ *See id.*