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## Pepperdine University School of Law: Legal Summaries

Blair Castellanos

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**Pepperdine University School of Law  
Legal Summaries**

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**SUPREME COURT OF THE UNITED STATES**

**Mach Mining, LLC v. E.E.O.C.,**  
**135 S. Ct. 1645 (2015).**

*Synopsis*

A woman made a complaint to the Equal Employment Opportunity Commission (EEOC) that Mach Mining, LLC (Mach) had refused to hire her as a coal miner because of her sex.<sup>1</sup> The EEOC is required to make an attempt at conciliation to end the discriminatory conduct prior to filing suit.<sup>2</sup> Mach claimed that the efforts for conciliation by the EEOC were not made in good faith.<sup>3</sup> The EEOC argued that the two letters it sent show sufficient efforts, and that their efforts are not subject to judicial review.<sup>4</sup> The federal district court ruled that the court could review the EEOC's conciliation efforts.<sup>5</sup> The Seventh circuit reversed the district court's decision, saying that the conciliation efforts were unreviewable.<sup>6</sup> The Court granted cert. and reasoned that Congress had created a "mandatory duty" for the EEOC to try for conciliation prior to filing suit.<sup>7</sup> Courts regularly enforce this type of prerequisite.

*Background*

The EEOC investigated a sex discrimination claim made against Mach.<sup>8</sup> This case involved a woman who filed a complaint with the EEOC, alleging that she was not hired as a coal miner because of her sex.<sup>9</sup> The EEOC must try to amend the illegal employment practices prior to filing suit for employment discrimination under Title VII of

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<sup>1</sup> Mach Mining, LLC v. E.E.O.C., 135 S. Ct. 1645, 1650 (2015).

<sup>2</sup> *Id.* at 1649.

<sup>3</sup> *Id.* at 1647.

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

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

<sup>6</sup> Mach Mining, LLC v. E.E.O.C., 135 S. Ct. 1645, 1647 (2015).

<sup>7</sup> *Id.* at 1651.

<sup>8</sup> *Id.* at 1647.

<sup>9</sup> *Id.* at 1650.

the Civil Rights Act of 1964.<sup>10</sup> Mach was invited to “participate in informal conciliation proceedings” and notified that an EEOC representative would come to start the process.<sup>11</sup> A total of two letters were sent to Mach, but the record did not show any other attempts by the EEOC for conciliation.<sup>12</sup> A year after the first letter was sent, the EEOC brought suit against Mach in federal district court.<sup>13</sup> Mach claims that the EEOC did not approach the conciliation process in good faith before filing suit.<sup>14</sup> The EEOC claimed that its conciliation attempts were not subject to judicial review and that the two letters it sent were sufficient proof of its attempts regardless of review.<sup>15</sup> The federal district court determined that it had the ability to review whether the EEOC’s efforts were adequate.<sup>16</sup> The Seventh circuit reversed the district court’s decision.<sup>17</sup> It reasoned that the conciliation efforts were unreviewable because the provision in Title VII of the Civil Rights Act of 1964 “entrusts conciliation ‘solely to the EEOC’s expert judgment’” and does not provide a standard for any judicial review.<sup>18</sup>

### *Analysis and Ruling*

The Court reasoned that Congress does not usually prevent courts from “enforcing directives to federal agencies.”<sup>19</sup> There is a “strong presumption” in favor of such judicial review when administrative actions are in question.<sup>20</sup> The presumption of judicial review is rebuttable if it is seen that Congress intended for the agency to be self-policing, but it is difficult for the agency to prove that it was

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<sup>10</sup> *Id.* at 1647.

<sup>11</sup> Mach Mining, LLC v. E.E.O.C., 135 S. Ct. 1645, 1647 (2015).

<sup>12</sup> *Id.* at 1650.

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

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

<sup>15</sup> *Id.*

<sup>16</sup> Mach Mining, LLC v. E.E.O.C., 135 S. Ct. 1645, 1650 (2015).

<sup>17</sup> *Id.* at 1647.

<sup>18</sup> *Id.* at 1650.

<sup>19</sup> *Id.* at 1651.

<sup>20</sup> *Id.*

designed to self police its actions.<sup>21</sup> The Court then affirmed the mandatory duty of the EEOC to make a concerted effort to facilitate a conciliation agreement and to only file suit once the efforts have absolutely failed.<sup>22</sup> The enforcement of prerequisites for similar Title VII claims is commonly left to the Court.<sup>23</sup> Representatives of the EEOC made the argument that no standard criteria had been established to review the efforts of the EEOC towards conciliation. However, the Court affirmed its view that, although the EEOC has discretion as to how conciliation is attempted, Congress has not allowed the EEOC to have no review.<sup>24</sup> The statute did establish enough criteria in order to judge whether there has been satisfaction of the prerequisites.<sup>25</sup> The criteria under §2000e-5(b) includes “concrete standards,” which show that the endeavor to conciliation must include informal communication, conference, conciliation, and persuasion.<sup>26</sup>

The parties’ second dispute revolved around what scope of judicial review the Court should afford the EEOC.<sup>27</sup> The Government argued that, if there is to be some form of judicial review, that the courts only rely on the “facial examination” of provided EEOC documents.<sup>28</sup> Mach argued that there should be a very intrusive review, similar to the way judges oversee bargaining between unions and employers.<sup>29</sup> The Court decided that there should be a middle ground standard that still allows the EEOC discretion in how to carry out the conciliation process but ensures that the employer is given a chance to “discuss and rectify” any practice that is discriminatory.<sup>30</sup> If an employer provides evidence in an affidavit that the EEOC did not make a good faith effort towards

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<sup>21</sup> Mach Mining, LLC v. E.E.O.C., 135 S. Ct. 1645, 1651 (2015).

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

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

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1652.

<sup>26</sup> Mach Mining, LLC v. E.E.O.C., 135 S. Ct. 1645, 1652 (2015).

<sup>27</sup> *Id.* at 1653.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

conciliation, then the court must look at the facts of the case.<sup>31</sup> Otherwise, a sworn affidavit from the EEOC that states that it has fulfilled its obligations and conciliation efforts failed will be sufficient proof for the court that the conciliation attempt requirements are met.<sup>32</sup>

### Impact

The Court in this case refused to blindly give *Chevron* deference to the EEOC in this case. This reestablished that *Chevron* deference is given on a case-by-case basis with the intent of Congress considered for each agency. The EEOC is still given a large amount of discretion and its efforts of conciliation are granted flexibility. However, employers will now have more of a change to defend itself in a suit if it does not believe that it was given enough of a change for conciliation efforts to be completed.

### **Mellouli v. Lynch,** **135 S. Ct. 1980 (2015)**

### Synopsis

This case concerns the Petitioner, Moones Mellouli, who was convicted of possession of drug paraphernalia used to conceal a controlled substance under Kansas's law.<sup>33</sup> After finishing his probationary period, Immigration and Customs Enforcement decided that the conviction was cause for removal of Mellouli from the U.S. He appealed to the Board of Immigration Appeals (BIA) who confirmed the deportation. The Eighth Circuit denied Mellouli's petition of review and he was deported in 2012.<sup>34</sup> The BIA's argument for deportation was that §1227(a)(2)(B)(i) allowed deportation for drug offenses under state laws that related to federal drug and drug paraphernalia laws, even if the actual conduct did not

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<sup>31</sup> *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645, 1655 (2015).

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

<sup>33</sup> *Mellouli v. Lynch*, 135 S. Ct. 1980, 1981 (2015); Kan. Stat. Ann. § 21-5709(b)(2).

<sup>34</sup> *Id.* at 1982, 1984.

fall under the definitions of controlled substances and drug paraphernalia under §802, so long as the state laws overlapped with the federal law.<sup>35</sup> The Court found that a narrower interpretation of the term “relating to” should be used.<sup>36</sup> Without a narrower view, even minor drug offenses that are not criminalized by federal law and defined by federal law as qualifying for deportation could cause an alien to be treated harshly under the law and removed.<sup>37</sup> The Court, therefore, reversed the prior ruling and determined that Mellouli’s deportation was incorrect.<sup>38</sup>

### *Background*

Mellouli emigrated from Tunisia on a student visa in 2004 and was educated in the U.S., later becoming a teacher at the University of Missouri–Columbia.<sup>39</sup> He became a conditional permanent resident in 2009 and was made a lawful resident in 2011.<sup>40</sup> However, in 2010, Mellouli was arrested for the offenses of driving with a suspended license and under the influence.<sup>41</sup> Officers found four orange pills in his sock during the search incident to his arrest.<sup>42</sup> Mellouli later identified the pills as Adderall, which is a controlled substance under Kansas state law and federal law.<sup>43</sup> He was charged with possession of drug paraphernalia and pled guilty to driving under the influence. It was alleged in the complaint that he had “use[d] or possess[ed] with intent to use drug paraphernalia . . . [and] introduce[d] into the human body a controlled substance.”<sup>44</sup> Two years later, in February 2012, Mellouli had finished his probation.<sup>45</sup> The Immigration and Customs Enforcement officers then arrested

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<sup>35</sup> *Id.* at 1982.

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

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

<sup>38</sup> Mellouli v. Lynch, 135 S. Ct. 1980, 1983 (2015).

<sup>39</sup> *Id.* at 1984-85.

<sup>40</sup> *Id.* at 1985.

<sup>41</sup> *Id.*

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

<sup>43</sup> Mellouli v. Lynch, 135 S. Ct. 1980, 1985 (2015)

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

Mellouli and determined that he qualified for deportation because of his conviction under §1227(a)(2)(B)(i).<sup>46</sup> The deportation was ordered by an immigration judge, the BIA affirmed the ruling, and Mellouli was deported in 2012.<sup>47</sup> The Eighth Circuit court denied the petition for review and the Supreme Court granted certiorari.<sup>48</sup>

### *Analysis and Ruling*

The Court ruled that Mellouli's conviction in Kansas under Kan. Stat. Ann. §21-5709(b)(2) did not trigger the deportation.<sup>49</sup> Under 8 U.S.C. §1227(a)(2)(B)(i), an alien may be removed if they are "convicted of a violation of . . . any law or regulation of a State, the United states, or a foreign country relating to a controlled substance."<sup>50</sup> The substances that qualify are defined in §802 of Title 21.<sup>51</sup> Although the Kansas offense was related to possession of a controlled substance, that law did not require the substance to be defined in 21 U.S.C §802. However, Mellouli concealing the controlled substance in his sock would not be considered a drug paraphernalia offense under federal law because federal law considers the sale or commerce of drugs and drug paraphernalia to be criminal not only possession of the contraband.<sup>52</sup>

The Court first addressed the reasoning used by the BIA and Eighth Circuit to differentiate a possession and distribution offense from a drug paraphernalia offense.<sup>53</sup> A conviction under state law can only trigger removal of the alien if the crime is considered a removable offense under federal law.<sup>54</sup> The facts of the crime that

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

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

<sup>48</sup> Mellouli v. Lynch, 135 S. Ct. 1980, 1985 (2015).

<sup>49</sup> *Id.* at 1984.

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

<sup>51</sup> *Id.* at 1985

<sup>52</sup> *Id.* (The court continued to explain that drug paraphernalia under federal law does not include "common household or ready to wear items like socks" and instead looks for items chiefly intended for use in drug related activities. *Id.* at 1985.)

<sup>53</sup> Mellouli v. Lynch, 135 S. Ct. 1980, 1985 (2015).

<sup>54</sup> *Id.* at 1986.

lead to the conviction are not meant to be reviewed by the immigration courts, who instead use a categorical approach to focus on the legal question of what was established by the conviction.<sup>55</sup> Under *Paulus*, Mellouli would not be a candidate for deportation because, in spite of the category of his conviction, the act was not criminalized under federal law.<sup>56</sup> The BIA used the rationale that any drug paraphernalia conviction, regardless of whether it is defined by § 802, should be considered a removable offense, even if mere possession of the substance is not.<sup>57</sup> The Court clarified that the BIA used a conflicting interpretation of §1227(a)(2)(B)(i) than what Congress must have intended, causing even minor drug offenses to be treated as harshly as drug distributing or trade offenses.<sup>58</sup> The BIA's interpretation that "an alien is not removable for possessing a substance controlled only under Kansas law, but he is removable for using a sock to contain that substance" made no sense to the Court. The Court, therefore, denied deference to the BIA under the *Chevron* doctrine.<sup>59</sup>

The Eighth Circuit affirmed the BIA's conclusion and added the reasoning that a conviction for paraphernalia possession under a state's law "categorically relates to a federally controlled substance" as long as there is "'nearly a complete overlap' between the drugs controlled under state and federal law."<sup>60</sup> There was a heavy reliance on the statute's use of the term "relating to" when determining if a drug offence in a state could be used for removal under federal law.<sup>61</sup> Because this term is understandably vague, the Court felt that it was necessary to narrow the interpretation of the phrase.<sup>62</sup> The Court held that §1227(a)(2)(B)(i)'s meaning should be limited for removal purposes to substances defined in §802 and rejected the notion that

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<sup>55</sup> *Id.* (The lack of review is due to the risk of burdening the system and establishing fairness and predictability in the immigration courts.)

<sup>56</sup> *Id.* at 1987-88 (citing *Matter of Paulus*, 11 I. & N. Dec. 274 (1965)).

<sup>57</sup> *Id.* at 1988; The BIA relied on the reasoning in *Matter of Martinez Espinoza*, 25 I. & N. Dec. 118 (2009).

<sup>58</sup> *Mellouli v. Lynch*, 135 S. Ct. 1980, 1989 (2015).

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

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

<sup>61</sup> *Id.* at 1990.

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

any offense related to drugs or drug paraphernalia could lead to deportation of an alien.<sup>63</sup>

*Justice Thomas's Dissent*

Justice Alito joined in the dissent. The dissent argued that the court rejected the interpretations of §1227(a)(2)(B)(i) given by the BIA and the Eighth Circuit but it did not offer its own new interpretation.<sup>64</sup> Justices Thomas and Alito argued that the statute's language supports the argument "that the overlap between state and federal drug schedules supports the removal of aliens convicted of any drug crime, not just paraphernalia offenses."<sup>65</sup> This would mean that the term "referring to" would modify the meaning of what laws and regulations are considered instead of modifying the violations that would qualify for deportation.<sup>66</sup> The Government in the case argued that overlap between state and federal law allows enough connection to qualify an alien for deportation for any crime under state law that relates to the federal law even if not defined by federal law.<sup>67</sup>

The dissent criticizes the court for not answering the question of what "relates" to federal law under the statute.<sup>68</sup> A complete overlap between the laws may not be needed between what substances are controlled under state and federal law, but the dissent argues that enough of an overlap should mean that violation of the state law makes an alien removable even if their actual offense is not defined under the federal statute.<sup>69</sup> Therefore, the dissent concludes that the broader interpretation of the federal statute is necessary and that Mellouli was appropriately deported.<sup>70</sup>

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<sup>63</sup> Mellouli v. Lynch, 135 S. Ct. 1980, 1991 (2015).

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

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

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

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

<sup>68</sup> Mellouli v. Lynch, 135 S. Ct. 1980, 1992 (2015).

<sup>69</sup> *Id.* at 1993.

<sup>70</sup> *Id.* at 1995.

*Impact*

This case has a narrowing affect on the meaning of §1227(a)(2)(B)(i). This has caused the termination or reversal of cases being judged on similar facts and reasoning in immigration courts.<sup>71</sup> Future cases involving aliens convicted of state drug paraphernalia offenses will be less likely to lead to deportation of the aliens. Attorneys with non-U.S. citizen clients facing state drug charges will have to consider whether the state definition of a controlled substance includes drugs or paraphernalia not included in the federal law in order to give effective representation.<sup>72</sup>

**Michigan v. E.P.A.,**  
**135 S. Ct. 2699, 192 L. Ed. 2d 674 (2015)**

*Synopsis*

The Clean Air Act created regulatory programs to control the pollution sent into the air by factories and refineries.<sup>73</sup> It was amended in 1990 to establish the National Emissions Standards for Hazardous Air Pollutants Program in order to address power plants and the air pollution they cause.<sup>74</sup> The Environmental Protection Agency (EPA) interpreted the Clean Air Act to require it to consider regulation of power plants where it is “appropriate and necessary,” but disregarded consideration of the cost of the regulation because the Act did not specifically require the EPA to consider cost.<sup>75</sup> Twenty-three states sought the EPA’s regulations to be reviewed by the Court of Appeals for the DC Circuit Court, challenging the EPA’s refusal to consider the large cost estimated under the program. The District and Appellate courts found in favor of the EPA, and allowed

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<sup>71</sup> Michael Z. Goldman, *The Real World Consequences of Mellouli v. Lynch*, CRIMMIGRATION: THE INTERSECTION OF CRIMINAL AND IMMIGRATION LAW (Jan. 10, 2016, 1:40 PM), <http://crimmigration.com/2015/06/02/the-real-world-consequences-of-mellouli-v-lynch/>

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

<sup>73</sup> *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2704 (2015) (citing 42 U.S.C. §§ 7401-7671q).

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

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

it to not consider costs when passing regulations for power plant air pollution. The Supreme Court reversed and remanded the case in favor of the States because the EPA had been unreasonable in not considering the cost of its regulations; therefore it was not granted deference under *Chevron*.<sup>76</sup>

### Background

In order to reduce the air pollution caused by factories and refineries in the United States, the government passed the Clean Air Act.<sup>77</sup> This Act established regulatory programs in order to control the air pollution caused by such stationary sources and moving sources like cars and airplanes.<sup>78</sup> The National Emissions Standards for Hazardous Air Pollutants Program was one of the programs in the Act, established in its current form in the 1990 amendments, and is focused on regulating the stationary sources of emissions of more than 180 specific pollutants.<sup>79</sup> The way the program applies to a source depends on how much pollution the stationary source emits.<sup>80</sup> Congress then established a unique process in order to determine whether and how to apply these programs to power plants.<sup>81</sup> The EPA was instructed to perform a study to determine the likely hazards to public health after applying the guidelines of the Act, then, if the agency determines that regulation is “appropriate and necessary,” the EPA may regulate power plants according to the Act.<sup>82</sup> The EPA concluded in 2000 that it was appropriate and necessary to regulate power plants based on their emissions and

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<sup>76</sup> *Id.* at 2712 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

<sup>77</sup> *Id.* at 2704.

<sup>78</sup> *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2704 (2015)..

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* If a source emits more than ten tons of a specific pollutant or twenty-five tons of a mix of pollutants in a year, it is considered a major source of pollutants and must be regulated by the EPA. However, stationary sources that emit less pollutants but have the risk of causing damage to human health or the environment are called area sources and must also be regulated by the EPA. *Id.* at 2705.

<sup>81</sup> *Id.* at 2705.

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

inadequacies in the Act. This conclusion was later confirmed in 2012.<sup>83</sup> However, the EPA indicated that the cost of regulation “should not be considered” in deciding whether power plants should be regulated.<sup>84</sup> The Agency estimated that the benefits of reducing the air pollutants of power plants would be worth around four to six million dollars a year, but the costs of the programs under their proposed regulations would be \$9.6 billion for the power plants.<sup>85</sup> The District and Appellate courts found in favor of the EPA, allowing it to not consider costs when passing regulations for power plant air pollution.<sup>86</sup>

### *Analysis and Ruling*

Congress laid out specific criteria for the EPA to use to determine if other sources of pollutants would be included in the program, but the power plants were treated differently.<sup>87</sup> Congress asked the EPA to regulate power plants only if it found that regulation was “appropriate and necessary” with no specific guidance as to what factors to consider.<sup>88</sup> The phrase “appropriate and necessary” may be broad and up to interpretation, but the Court indicated that a federal agency may not fail to consider such an important aspect as cost.<sup>89</sup> The Court conceded that there are situations in which cost is not a necessary consideration, but that it is not rational, much less appropriate, to enact regulations that cost billions of dollars for such a small amount of estimated benefit.<sup>90</sup> It is common practice for Agencies to consider cost; therefore, not considering cost would be unusual when deciding whether to impose regulations.<sup>91</sup> Under *Chevron* deference, agencies are able to choose a reasonable

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<sup>83</sup> *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2705 (2015).

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

<sup>85</sup> *Id.* at 2706. The regulatory impact analysis took other pollutants not on the EPA’s list and considered the lowering of these emissions when it gave its estimated benefit value of \$37-90 billion. *Id.*

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

<sup>87</sup> *Id.* at 2707.

<sup>88</sup> *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2707 (2015).

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

<sup>90</sup> *Id.*

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

interpretation of ambiguous or vague statutes and courts respect that reasonable interpretation when considering the agency's liability or actions.<sup>92</sup> However, the Court felt that, since other parts of the Clean Air Act discuss cost, that the purposeful disregard of that factor in consideration was not reasonable.<sup>93</sup>

*Justice Thomas Concurring*

Judge Thomas concurred specifically with the Court's interpretation and implementation of the *Chevron* deference precedent.<sup>94</sup> He agreed that the interpretation of Congress's request that the EPA determine if power plant regulation was "appropriate and necessary" meant that the EPA was not meant to consider whether the cost of the regulation was unreasonable.<sup>95</sup> The limitation of the *Chevron* deference test was, to Justice Thomas, an extremely positive outcome of the ruling.<sup>96</sup> He noted that the *Chevron* deference should not allow federal agencies to act in an irresponsible manner when interpreting vague statutes.<sup>97</sup>

*Justice Kagen Dissent*

Justice Ginsburg, Justice Breyer, and Justice Sotomayor joined in the dissent. The dissent argued that the EPA took many factors into consideration.<sup>98</sup> The EPA estimated that the benefit, according to the list of pollutants it usually used, was worth \$4 to \$6 million but those amounts were shifted to a benefit worth \$80 billion including the ability to prevent approximately 11,000 fewer premature deaths.<sup>99</sup> The basic argument is that the EPA only must take the emissions in consideration to determine the appropriateness or necessity of the regulation and only after that analysis does the EPA consider the cost

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<sup>92</sup> *Id.* at 2708.

<sup>93</sup> *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2708 (2015).

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

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2715 (2015).

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

benefit analysis.<sup>100</sup> The dissent notes that cost was considered after the need for regulation as determined and that the EPA would have taken cost into account when drafting said regulation.<sup>101</sup>

### Impact

This case limited the scope of the *Chevron* deference given to federal agencies when interpreting ambiguous statutes. The cost and burden of regulations should be considered as a factor in a majority of situations as is customary in determining whether regulations are necessary. In this way, the reasonableness factor in the deference test has been affirmed and elevated in its consideration by the court.

## UNITED STATES COURT OF APPEALS

### F.T.C. v. Wyndham Worldwide Corp., 799 F.3d 236 (3d Cir. 2015)

### Synopsis

In 2005, the FTC began pursuing liability of companies with either inadequate cyber security to protect consumer's data against hackers or companies that made false statements about their level of security.<sup>102</sup> Wyndham Worldwide Corp. was the target of hackers three times in 2008 and 2009.<sup>103</sup> The hackers successfully accessed personal information of approximately 619,000 consumers and managed to cause \$10.6 million in fraud loss.<sup>104</sup> The district court denied Wyndham's motion to dismiss, and the appeal was heard on two issues to show a failure to state a claim.<sup>105</sup> The issues raised

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> F.T.C. v. Wyndham Worldwide Corp., 799 F.3d 240 (3d Cir. 2015).

<sup>103</sup> *Id.* Wyndham Hotel Group, LLC, Wyndham Hotels and Resorts, LLC, Wyndham Hotel Management, Inc., and Wyndham Worldwide Corp were all defendants in the case and are all referred to under the name "Wyndham" in the case.

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

<sup>105</sup> *Id.*

were the FTC's authority to regulate cyber security under 15 U.S.C.S. §45(a) or (n)'s unfairness prong, and, regardless of the authority, whether Wyndham had had fair notice that its security precautions were inadequate under FTC guidelines.<sup>106</sup> The appellate court affirmed the district court's ruling against the motion to dismiss.<sup>107</sup>

### Background

The Federal Trade Commission Act was established in 1914, codified as 15 U.S.C. §45(a), prohibiting unfair business practices or "methods of competition in commerce."<sup>108</sup> The 1994 amendments codified §45(n), a three-step policy that had developed over the decades of how to judge whether a practice was indeed unfair.<sup>109</sup> The development of cyber crime and reasonable industry standards for cyber security in business practices lead the FTC to begin filing cases against companies for not protecting consumers and for falsely misleading consumers regarding the company's level of security in 2005.<sup>110</sup> In 2008 and 2009, the computer systems of Wyndham Worldwide Corporation were hacked on three separate occasions.<sup>111</sup> The personal information of approximately 619,000 consumers was accessed and compromised.<sup>112</sup> The cyber thieves successfully caused \$10.6 million in fraud loss.<sup>113</sup> The FTC filed suit against Wyndham for violations of §45(a) in the U.S. District Court for the District of Arizona in June of 2012.<sup>114</sup> The case was then transferred to the U.S. District Court for the District of New Jersey where

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

<sup>107</sup> *F.T.C. v. Wyndham Worldwide Corp.*, 799 F.3d 240, 236 (3d Cir. 2015).

<sup>108</sup> *Id.* at 243.

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

<sup>110</sup> *Id.* at 240.

<sup>111</sup> *Id.* Wyndham Hotel Group, LLC, Wyndham Hotels and Resorts, LLC, Wyndham Hotel Management, Inc, and Wyndham Worldwide Corp were all defendants in the case and are all referred to under the name "Wyndham" in the case.

<sup>112</sup> *F.T.C. v. Wyndham Worldwide Corp.*, 799 F.3d 240 (3d Cir. 2015).

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

<sup>114</sup> *Id.* at 242.

Wyndham filed its Rule 12(b)(6) motion to dismiss.<sup>115</sup> The motion to dismiss was denied, but the court certified the decision on the claim of unfairness for interlocutory appeal.<sup>116</sup>

### Analysis and Ruling

#### FTC's Regulatory Authority Under §45(a) or (n)

The FTC has the ability to pursue cases against companies for unfair business practices under §45(a).<sup>117</sup> The unfairness test in §45(n) has three factors: (1) substantial injury to consumers, (2) which could not be avoided by consumers and (3) is not outweighed by benefits.<sup>118</sup> The statute further instructs the FTC to consider established public policies.<sup>119</sup> Wyndham claims that all three factors are necessary but not adequate by themselves, and that other requirements were necessary to be met in order for Wyndham to be liable.<sup>120</sup> The Court agreed that the three-factor test may be necessary but not independently sufficient; however, the Court was not persuaded by the alternatives Wyndham proposed. It determined that the FTC had authority to regulate unfair practices of the nature in the case.<sup>121</sup>

#### Fair Notice

Wyndham next made the claim that it lacked fair notice of the law.<sup>122</sup> It claimed that it acted with the understanding that it needed ascertainable certainty of the FTC's security standards.<sup>123</sup> Wyndham had the requisite notice in order to put security measures in place,

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *F.T.C. v. Wyndham Worldwide Corp.*, 799 F.3d 240, 243 (3d Cir. 2015).

<sup>118</sup> *Id.* at 244.

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

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

<sup>121</sup> *Id.*

<sup>122</sup> *F.T.C. v. Wyndham Worldwide Corp.*, 799 F.3d 240, 249 (3d Cir. 2015).

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

especially after the first instance of security breach.<sup>124</sup> Even though the standard of notice does not need to be as high in civil cases, as in criminal cases. The Court determined that Wyndham could not claim that it lacked fair notice.<sup>125</sup>

### *Impact*

This case affirmed the FTC's authority to pursue cases against companies; however, the three-factor test for unfair practices may be expanded in the future. The issue of fair notice was still muddled by the case because Wyndham did not sufficiently argue the claim for fair notice. Wyndham claimed that there is no FTC interpretation of §45(a) or (n) that the court must defer to, and that the Court must interpret the statute itself and apply it to Wyndham's conduct in the first instance.<sup>126</sup> Wyndham was not able to argue that it needed to know the standards with ascertainable certainty—it could only claim that it did not have fair notice of the meaning of the statute, which it did not do sufficiently.<sup>127</sup>

### **In re JPMorgan Chase Bank, N.A., 799 F.3d 36 (1st Cir. 2015).**

### *Synopsis*

A class action lawsuit was brought against JP Morgan Chase Bank for failing to detect a Ponzi scheme.<sup>128</sup> Chase claimed that a portion of the documents the plaintiffs requested was shielded from discovery.<sup>129</sup> A magistrate judge reviewed the disputed documents and concluded that a “vast majority” was not shielded from discovery under and statute or regulation.<sup>130</sup> Chase's request for an interlocutory appeal was denied by the district court, so Chase

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<sup>124</sup> *Id.* at 250.

<sup>125</sup> *Id.* at 258.

<sup>126</sup> *Id.* at 259.

<sup>127</sup> *F.T.C. v. Wyndham Worldwide Corp.*, 799 F.3d 240, 259 (3d Cir. 2015).

<sup>128</sup> *In re JPMorgan Chase Bank, N.A.*, 799 F.3d 36, 37 (1st Cir. 2015).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 38.

initiated a mandamus proceeding to force the district court to declare fifty-five pages of the discovery documents shielded under the Bank Secrecy Act.<sup>131</sup> The appellate court did a de novo review of the documents in camera.<sup>132</sup> The court determined that the writ of mandamus was denied due to Chase's failure to show clear entitlement to the relief sought.<sup>133</sup>

### Background

The plaintiffs in the case alleged that a Chase customer had used his accounts with the bank and a bank acquired by Chase in order to run a Ponzi scheme.<sup>134</sup> A putative class action was brought against the bank for failure to detect and stop the Ponzi scheme.<sup>135</sup> The plaintiffs managed to acquire a large collection of records from Chase in preparation for litigation.<sup>136</sup> There was a dispute between Chase and the plaintiffs regarding whether the Bank Secrecy Act and similar regulations protected some of the documents from discovery.<sup>137</sup> Notification of the dispute was sent to the Director of the Litigation Division for the Office of the Comptroller of the Currency (OCC) and the Financial Crimes Enforcement Network (FinCEN) but only the OCC filed an amicus brief in the district court with a review of the legal principles.<sup>138</sup> However, the OCC refused to review the documents so a magistrate judge reviewed the documents in camera.<sup>139</sup> The district court ruled in favor of the plaintiffs and Chase filed a motion for mandamus proceeding hoping the appellate court would declare that the fifty-five pages of documents from discovery were shielded from discovery through the Bank Secrecy Act and other regulations.<sup>140</sup>

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<sup>131</sup> *Id.* at 38. The Bank Secrecy Act is codified as 31 USC § 5318(g). *Id.* at 37.

<sup>132</sup> *Id.*

<sup>133</sup> *In re JPMorgan Chase Bank, N.A.*, 799 F.3d 36, 37 (1st Cir. 2015).

<sup>134</sup> *Id.* at 38

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

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

<sup>138</sup> *In re JPMorgan Chase Bank, N.A.*, 799 F.3d 36, 38 (1st Cir. 2015).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

### Analysis and Ruling

In order to qualify for mandamus, the petitioner must prove that “there is a clear entitlement to the relief requested and that irreparable harm will likely occur if the writ is withheld.”<sup>141</sup> There are high standards for a writ of mandamus to be granted as it may not be a substitute for appeal and the threat of injury must be blatant.<sup>142</sup> The “clear entitlement prong of the mandamus standard” calls for the court’s prudent analysis of the Bank Secrecy Act and related regulations, which pertain to the confidentiality of suspicious activity reports (SARs). Although there is clear provision for confidentiality of certain documents and information, one of the regulations under the Act specifies that “the regulation should not be construed as prohibiting . . . [t]he disclosure . . . of . . . [t]he underlying facts, transactions, and documents upon which a SAR is based.”<sup>143</sup> The court also notes that case law has affirmed the rights of evidentiary privilege and unqualified discovery.<sup>144</sup> In the end, the documents Chase wanted shielded did not meet the standards necessary for a writ of mandamus under the Act or any of the regulations. Chase still had less severe options in order to continue to seek protection for the documents, but the writ was denied. Chase’s additional motion for sanction against the plaintiff’s council was also denied and the parties’ motion to file a joint supplemental appendix was granted.<sup>145</sup>

### Impact

The protection of the right of discovery is fundamental to the U.S. judicial system. Although the protection of privileged and confidential information is extremely valuable, courts cannot be overbroad in its protections at the detriment of those who have been wronged or those wrongfully accused. The court could not set the

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 39.

<sup>143</sup> *In re JPMorgan Chase Bank, N.A.*, 799 F.3d 36, 39 (1st Cir. 2015). (citing 12 C.F.R. §21.11(k)(1)(ii)(A)(2)).

<sup>144</sup> *Id.* at 44.

<sup>145</sup> *Id.* at 45.

precedent that a writ of mandamus could be used as a substitute for an appeal when an appeal and other methods of protection are available.<sup>146</sup>

**Varsity Brands, Inc. v. Star Athletica, LLC,**  
**799 F.3d 468 (6th Cir. 2015)**

*Synopsis*

The designers at Varsity Brands Inc. (Varsity) created designs for cheerleading uniforms, which it submitted to the Copyright Office.<sup>147</sup> Varsity had five registered copyrights that it claimed Star Athletica, LLC (Star) was violating by marketing similar designs.<sup>148</sup> Varsity brought suit against Star for violation of the Copyright Act and Tennessee state-law pertaining to copyright and competition.<sup>149</sup> The district court ruled in favor of Star granting summary judgment on all federal matters regarding the Copyright Act and then dismissing the state-law claims without prejudice.<sup>150</sup> The Court analyzed the separability of the designs from their utilitarian function and determined that the designed were copyrightable.<sup>151</sup> The Court remanded the case, allowed the state law claim to be reassessed, and allowed Varsity to adjust its claim to address the diversity jurisdiction that allowed the federal court jurisdiction.<sup>152</sup>

*Background*

The design team at Varsity created designs for their cheerleading sportswear claimed that it held five copyrights filed with the Copyright Office in accordance to the Copyright Act.<sup>153</sup> The designs were made without looking at the functionality of the product, but

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<sup>146</sup> *Id.*

<sup>147</sup> Varsity Brands, Inc. v. Star Athletica, LLC, 799 F.3d 468, 474 (6th Cir. 2015).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 471.

<sup>151</sup> *Id.* at 475.

<sup>152</sup> Varsity Brands, Inc. v. Star Athletica, LLC, 799 F.3d 468, 484 (6th Cir. 2015).

<sup>153</sup> *Id.* 474-75 (6th Cir. 2015); 17 U.S.C. § 101 *et seq.*

consisted of the arrangements and positions of shapes and colors.<sup>154</sup> Star also produced uniforms for cheerleading. Varsity claims that Star has violated its five copyrights by marketing outfits of similar design and brought suit under the Copyright Act and Tennessee's laws against "unfair competition, inducement of breach of contract, inducement of breach of fiduciary duty, and civil conspiracy."<sup>155</sup> Star denied the charges and brought counterclaims against Varsity misleading representations to the Copyright Office.<sup>156</sup> Both parties moved for summary judgment.<sup>157</sup> Star claimed that Varsity's copyrights were invalid because (1) the designs are for useful items and are therefore not copyrightable and (2) the graphic, pictorial and/or sculptural were not separable from the uniform thus are also not copyrightable.<sup>158</sup> Varsity claimed that its copyrights were valid because (1) the designs were "separable and nonfunctional" and (2) Star's actions infringed its copyrights.<sup>159</sup> The district court ruled in favor of Star and granted summary judgment, dismissing the state law claims without prejudice.<sup>160</sup>

### *Analysis and Ruling*

In order to prevail on its Copyright infringement claim, Varsity must show that it owned a valid copyright in the designs and that Star copied the protectable parts of the work.<sup>161</sup> The first prong of the test, to establish the validity of a copyright, has five elements:

(1) originality in the author; (2) copyrightability of the subject matter; (3) a national point of attachment of the work, such as to permit a claim of copyright; (4) compliance with applicable statutory formalities; and (5) (if the plaintiff is not the author) a transfer of

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<sup>154</sup> *Id.* at 471.

<sup>155</sup> *Id.* at 475.

<sup>156</sup> *Id.*

<sup>157</sup> *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 475 (6th Cir. 2015).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 476.

<sup>161</sup> *Id.*

rights or other relationship between the author and the plaintiff so as to constitute the plaintiff as the valid copyright claimant.<sup>162</sup>

The second prong of the test determines whether an infringement of the copyright occurred, and whether the copied portions of the material should have been protected under copyright law.<sup>163</sup> Varsity claims that the district court did not give deference to the Copyright Office's decision that the material was protectable under copyright law, and that the district court used the wrong approach to decide whether the design was separable from the utilitarian aspects of the item.<sup>164</sup>

Copyright registration occurs at the discretion of the Copyright Office. The court must give a presumption of validity in a judicial proceeding if the Copyright Office has granted a copyright registration.<sup>165</sup> Once the plaintiff shows that the work was registered before publication or within five years after publication of the work, the burden shifts to the defendant who may rebut the presumption by showing that the copyrights are invalid.<sup>166</sup> The *Chevron* doctrine grants deference to executive agencies that Congress delegated the authority to implement provisions.<sup>167</sup> The Copyright Office was delegated such responsibilities, but the Court determined that it should be granted deference under the *Skidmore* deference more than the *Chevron* deference because the delegated power is not to make law.<sup>168</sup>

The court must determine whether or not the article is useful and whether the aesthetic designs are separable from the utilitarian aspects of an item.<sup>169</sup> Separability from the utilitarian aspects of an item is determined in two ways, by looking at its physical separability and its conceptual separability.<sup>170</sup> The physical

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<sup>162</sup> Varsity Brands, Inc. v. Star Athletica, LLC, 799 F.3d 468, 476 (6th Cir. 2015).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 477.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> Varsity Brands, Inc. v. Star Athletica, LLC, 799 F.3d 468, 478 (6th Cir. 2015); *Chevron U.S.A. Inc. v National Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

<sup>168</sup> *Id.* at 479; *Skidmore v Swift & Co.*, 323 U.S. 134 (1944).

<sup>169</sup> *Id.* at 481.

<sup>170</sup> *Id.*

separability test is considered along with whether the “pictorial, graphic, or sculptural features of an article are conceptually separable” because the physical test is limited.<sup>171</sup> Of the multiple approaches used by courts, the Court decided upon a hybrid approach used by the Second and Fourth Circuits, which determined that the decorative elements of clothing are separable from the function of a garment.<sup>172</sup> The Sixth Circuit’s approach to identify pictorial, graphic, and sculptural works was determined to be the best approach.<sup>173</sup> This approach is made up of asking multiple questions that are derived from the Copyright Act.<sup>174</sup> These include what the utilitarian aspect of the item is, whether an individual viewing the design can identify the “‘pictorial, graphic or sculptural features’ ‘separately from the utilitarian aspect of the useful article,’” and whether those features of the design can exist independently of the utilitarian aspects of the item.<sup>175</sup> The court determined that, because Varsity’s designs were more similar to fabric designs than dress designs, they are protectable subject matter under the Copyright Act.<sup>176</sup> Therefore, summary judgment was entered in Varsity’s favor on the issue of copyright protectability.<sup>177</sup>

The Court answered five questions to determine whether Varsity’s designs were protectable. First, the Court determined that Varsity’s designs are “pictorial, graphic, or sculptural” because they are two-dimensional works of art.<sup>178</sup> Second, the designs are for useful articles because they are designs for cheerleading uniforms. Third, The Court rejected Star’s arguments for the purported utilitarian aspect of a cheerleading uniform and found it to be an impermissible factor.<sup>179</sup> The Court also denied that the decorative aspects of a cheerleading outfit are a part of the utilitarian aspect of the garment because it is well established that fabric designs are

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<sup>171</sup> *Id.* at 482.

<sup>172</sup> *Id.* at 487.

<sup>173</sup> *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 487 (6th Cir. 2015).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 488.

<sup>176</sup> *Id.* at 493.

<sup>177</sup> *Id.*

<sup>178</sup> *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 490 (6th Cir. 2015).

<sup>179</sup> *Id.*

copyrightable.<sup>180</sup> The fourth question was whether the pictorial, graphic, or sculptural aspects of the garments could be identified separately from the utilitarian aspects of covering the body, wicking away moisture, and permitting free body movement.<sup>181</sup> The Court determined that the designs could be separately identified because a plain white cheerleading outfit could complete the same functions separate from the graphic designs.<sup>182</sup> Question five was whether the “arrangement of stripes, chevrons, color blocks, and zigzags” could exist independently of the useful aspects of the uniform. The court reasoned that they were separable and copyrightable because the designs could be transferred to other items of clothing and were not solely tied to the cheerleading uniform.

The district court’s dismissal of the state law claims was based on the principle that a district court may refuse to exercise supplemental jurisdiction on state-law claims if the federal questions over which it has jurisdiction have been dismissed.<sup>183</sup> The court vacated the district court’s dismissal of the state-law claims for two reasons: (1) there was still a federal claim because the court held that Varsity’s designs are copyrightable graphic work, and (2) Varsity should have the opportunity to amend its complaint to satisfy the diversity jurisdiction requirements.<sup>184</sup> Therefore, Varsity was granted the ability to bring the state claims again when the case was remanded.

### Impact

The court used this case to identify what it considered the best approach to determine the validity of a copyrightable design for garments with a utilitarian aspect. This ruling will create the ability to copyright uniforms, costumes, and other useful garments, thus precluding them from being widely copied. This protects designers and encourages ingenuity and competition.

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<sup>180</sup> *Id.* at 490.

<sup>181</sup> *Id.* at 491.

<sup>182</sup> *Id.*

<sup>183</sup> *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 493 (6th Cir. 2015).

<sup>184</sup> *Id.* (The second reason is due to Star’s assertion that Varsity did not meet diversity jurisdiction because they did not state an amount in controversy or that the parties were diverse in its complaint.)

**De Niz Robles v. Lynch,  
803 F.3d 1165 (10th Cir. 2015)**

Synopsis

The court made a ruling in *Padilla–Caldera v. Gonzales (Padilla–Caldera I)*, 426 F.3d 1294, 1300–01 (10th Cir. 2005) which was overruled by the Board of Immigration Appeals (BIA) issued *In re Briones*, 24 I. & N. Dec. 355 (BIA 2007).<sup>185</sup> The ruling of Briones was applied retroactively to a petition by Mr. De Niz Robles for an adjustment of his citizenship status even though his application was submitted relying on the ruling in *Padilla-Caldera I*.<sup>186</sup> The question before the court was whether an executive agency, with delegated legislative policy making authority, can overrule a rule that a judicial proceeding established.<sup>187</sup> Under *Chevron*, step two and *Brand X*, if a “statutory scheme administered by an executive agency” is ambiguous then the court must assume that Congress has delegated decision making to the agency and defer to the agencies policy choices even if they overrule precedent.<sup>188</sup> These rules applied to the law when Mr. De Niz Robles’s application was denied because he was found inapplicable for adjustment of his status under §§1255(i)(2)(A) and 1182(a)(9)(C)(i)(I).<sup>189</sup> After analysis of the Constitution, views on retroactivity and the Bowen case, the Court focused on the *Stewart Capital* factors. The same conclusion was reached with every test, that retroactivity does not apply, so the petition for review was granted and the case was remanded back to the BIA for proceedings consistent with the decision.

Background

The first statute passed that affected the case was the §1255(i), which gives the Attorney General the ability to change the status of illegal immigrants and grant them lawful residency.<sup>190</sup> The second

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<sup>185</sup> De Niz Robles v. Lynch, 803 F.3d 1165, 1167 (10th Cir. 2015).

<sup>186</sup> *Id.* at 1168.

<sup>187</sup> *Id.* at 1167.

<sup>188</sup> *Id.* at 1167.

<sup>189</sup> These statutes will be further explained in the description of the analysis.

<sup>190</sup> De Niz Robles v. Lynch, 803 F.3d 1165, 1167 (10th Cir. 2015).

statute, § 1182(a)(9)(c)(i)(I), limits this discretion by clarifying that those who have entered the US illegally more than once are unable to receive lawful residency unless they first have a ten-year waiting period outside of the U.S.<sup>191</sup> In 2005, the court ruled in *Padilla-Caldera v. Gonzales (Padilla-Caldera I)* that §1255 trumped §1182(a)(9)(c)(i)(I).<sup>192</sup> So, the Attorney General would still be able to have the discretion to adjust the citizenship status of those who applied. Relying on this ruling, Mr. De Niz Robles decided to remain in the US and applied for an adjustment in his status. His application sat in the process of being reviewed for years when the BIA passed *In re Briones*, 24 I. & N. Dec. 355 (BIA 2007) in which the BIA ruled that §1182(a)(9)(c)(i)(I) was the statute that ruled and that the Attorney General had no ability to adjust a status and that this ruling applied retroactively. Therefore, this ruling would be applied to the applications waiting for status adjustment or “retroactively.”

The court was bound by the ruling of the executive agency under an exception define by the “step two” of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and the *National Cable & Telecommunications Ass'n v. Brand X Internet Services (Brand X)*, 545 U.S. 967 (2005) case. Together, these cases have created the rule that, “if a statutory scheme administered by an executive agency is ‘ambiguous’” the court must assume that Congress has delegated the ability to make policy decisions to the agency and requires the court to “defer to the agency's policy choice,” even if it overrules “preexisting and governing statutory interpretation” by the court.<sup>193</sup> The BIA finally ruled on Mr. De Niz Robles’s application in 2013, denying his application based on the *In re Briones* ruling.<sup>194</sup> Mr. De Niz Robles appealed the denial leading to the case at hand.<sup>195</sup>

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<sup>191</sup> *Id.*

<sup>192</sup> *Padilla-Caldera v. Gonzales*, 426 F.3d 1294, 1300 (10th Cir.) *amended and superseded on reh'g*, 453 F.3d 1237 (10th Cir. 2005) disapproved in later appeal sub nom. *Padilla-Caldera v. Holder*, 637 F.3d 1140 (10th Cir. 2011), as corrected (Mar. 22, 2011).

<sup>193</sup> *De Niz Robles v. Lynch*, 803 F.3d 1165, 1167 (10th Cir. 2015).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

*Analysis and Ruling*

The question before the court was whether a ruling made by an executive agency could be applied retroactively.<sup>196</sup> The BIA denied that there is any retroactivity because the ruling on Mr. De Niz Robles's application was far after its decision in *In re Briones*.<sup>197</sup> Robles claimed that he had filed the petition in 2005 in reliance on the law at the time and he could have been out of the country for the necessary ten years if he had known to rely on §1255; therefore, the new law was applied to actions taken before its creation.<sup>198</sup>

The Constitution is clear that the laws passed by Congress are prospective and cannot be retroactive under the principles of due process and equal protection unless they are expressly prescribed as being retroactive.<sup>199</sup> Judicial decisions, however, are presumptively allowed to be retroactive under the Constitution because they are rulings on past events.<sup>200</sup> Yet, the retroactivity of rulings by executive agencies was unclear.<sup>201</sup> The court concludes that the delegation of powers to the agency came from a legislative source and therefore must be treated as prospective.<sup>202</sup> The Court in *Bowen*<sup>203</sup> held that an executive agency's rulings should only be prospective unless allowed retroactivity by Congress.<sup>204</sup> The case analyzed how rule two in *Chevron* and *Brand X* can be reconciled with the decision against retroactivity.<sup>205</sup> The agency holds a judicial proceeding complete with briefs and arguments, which seems to indicate that a ruling would be treated like a judicial ruling complete with retroactivity because the agency is not changing a law as much as clarifying and interpreting a law's meaning.<sup>206</sup> However, the

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<sup>196</sup> *Id.* at 1168.

<sup>197</sup> *Id.*

<sup>198</sup> *De Niz Robles v. Lynch*, 803 F.3d 1165, 1168 (10th Cir. 2015).

<sup>199</sup> *Id.* at 1169.

<sup>200</sup> *Id.* at 1170.

<sup>201</sup> *Id.* at 1171.

<sup>202</sup> *Id.* at 1172.

<sup>203</sup> *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988).

<sup>204</sup> *De Niz Robles v. Lynch*, 803 F.3d 1165, 1172 (10th Cir. 2015).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

Court clarifies that step two in *Chevron* applies when an executive agency uses the ambiguity of a law to write new laws under its delegated powers.<sup>207</sup> Therefore, *Bowen* supports the Court's conclusion that there is no retroactivity because the acts of the BIA are a part of legislative rather than judicial proceedings, thus are prospective in effect.<sup>208</sup> However, the Court did allow for the retroactivity of an executive agency's decisions to be judged on a case-by-case basis to allow for some flexibility.

A five-factor balancing test was established in the case *Stewart Capital Corp. v. Andrus*, 701 F.2d 846 (10th Cir.1983).<sup>209</sup> The *Stewart Capital* factors are for application on a case-by-case basis.<sup>210</sup> The first factor is whether the case was one of first impression, which is irrelevant in this case.<sup>211</sup> The second factor asks whether the action or ruling of the executive agency is a sudden divergence from "well established practice" or if it is only trying to "fill a void in an unsettled area of the law."<sup>212</sup> The third factor requires the court to ask whether and to what extent the party affected by the new ruling relied on a former law or ruling.<sup>213</sup> The fourth asks how much of a burden retroactive application of the agency's decision would create for the petitioner. Lastly, the fifth factor asks whether the agency's interest in retroactivity is more valuable.<sup>214</sup>

The Court concluded that the BIA's application of *Briones* to Mr. De Niz Robles's application was retroactive.<sup>215</sup> This meant that those who had relied on the law as it was when they applied for change in their citizenship status, like Mr. De Niz Robles, were disadvantaged because they had already given up years towards their other option.<sup>216</sup> The Court valued the ability for the people to be able to rely on laws and for there to be constancy and dependence on the

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<sup>207</sup> *Id.* at 1173.

<sup>208</sup> *Id.*

<sup>209</sup> *De Niz Robles*, 803 F.3d 1165, at. 1177.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 1178; *Stewart Capital Corp. v. Andrus*, 701 F.2d 846 (10th Cir.1983).

<sup>212</sup> *De Niz Robles v. Lynch*, 803 F.3d 1165, 1178 (10th Cir. 2015).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 1180

<sup>216</sup> *Id.*

way the law would be applied.<sup>217</sup> It therefore found that the “principles underlying the law of retroactivity” were not in support of this action.<sup>218</sup> The petition for review of Mr. De Niz Roble’s application was granted and the case was remanded to the BIA for further proceedings consistent with that decision.<sup>219</sup>

### *Impact*

This case excited immigration attorneys because it officially indicated that what the BIA had done was, in fact, retroactive application of its ruling. It further confirmed that the policies against retroactivity and in favor of reliability in the law would be enforced even against government agencies.<sup>220</sup> This meant that rulings of the BIA could be rejected or appealed based on retroactivity in application of law.<sup>221</sup> Therefore, the immigrants who were caught between the two conflicting laws and relying on the one that allowed them ability to petition for status adjustment were allowed to continue to be applicable for status adjustment so long as their application was within a certain time around the newest ruling.<sup>222</sup> This will likely cause a small influx of cases to be brought by those who were denied status adjustment through the retroactive application of the BIA’s ruling.

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<sup>217</sup> De Niz Robles v. Lynch, 803 F.3d 1165, 1180 (10th Cir. 2015).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> David A. Isaacson, *Non-Retroactivity Of Bia Precedent Decisions: De Niz Robles V. Lynch And Other Recent Court Of Appeals Rulings*, The Insightful Immigration Blog – Commentaries on Immigration Policy, Cases, and Trends, October 26, 2015 (Jan. 4th, 2016 at 3:03PM.), <http://blog.cyrusmehta.com/2015/10/non-retroactivity-of-bia-precedent.html>.

<sup>222</sup> *Id.*