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Legal Summaries

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SUPREME COURT OF THE UNITED STATES

Henderson v. Shinseki, 131 S. Ct. 1197 (2011)

Synopsis:

Under 38 U.S.C. § 7266(a), a veteran whose claim for federal benefits is denied by the Board of Veterans' Appeals may appeal to the United States Court of Appeals for Veterans Court within 120 days after the date when the Board's final decision is properly mailed.¹ This case presents the question whether a veteran's failure to file a notice of appeal within the 120-day period should be regarded as having "jurisdictional" consequences.² The Supreme Court of the United States held that it should not.³

Facts, Analysis, and Ruling:

Petitioner David Henderson ("Henderson"), who served in the military during the Korean War, was given a one hundred percent disability by the Department Veterans Affairs ("VA") in 1992.⁴ However, in 2001, when he filed a claim with the VA for supplemental benefits based on his need for in-home care, both the Regional VA office and the Board of Veterans' Appeals denied his claim.⁵ He subsequently filed a notice of appeal with the Veterans Court but missed the 120-day deadline by fifteen days.⁶

The Veterans Court initially dismissed Henderson's appeal as untimely but then granted his motion for reconsideration and set the case for argument.⁷ While his appeal was pending, however, *Bowles v. Russell*⁸ was decided by the Supreme Court of the United States.⁹ The Court in *Bowles* held that the statutory limitation on the length of

¹ See *Henderson v. Shinseki*, 131 S. Ct. 1197, 1200 (2011).

² See *id.*

³ See *id.*

⁴ See *id.* at 1201.

⁵ See *id.*

⁶ See *id.*

⁷ See *id.*

⁸ 551 U.S. 205 (2007).

⁹ See *Henderson*, 131 S. Ct. at 1201.

an extension of the time to file a notice of appeal in an ordinary civil case¹⁰ is jurisdictional as defined by the Court.¹¹

Whenever something, including a procedural rule, is determined to be “jurisdictional,” it goes directly to the subject matter jurisdiction of the court. While federal courts are generally limited to those claims and arguments advanced by the parties in a particular case, they also have an “independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or decide not to press.”¹² In addition, an objection to subject-matter jurisdiction may be raised at *any* time.¹³ Even if a party has already lost the case, it may still raise an objection to subject-matter jurisdiction.¹⁴ And it may still raise such an objection even if the party had previously acknowledged the trial court’s jurisdiction.¹⁵ And if the court indeed lacks jurisdiction, everything else goes “out the window,” so to speak; all the prior work on the case may be wasted.¹⁶

When a procedural rule is determined to be jurisdictional, a party’s failure to comply with that rule *cannot* be excused—neither equitable factors nor an opposing party’s forfeiture or waiver of any objection for the failure to comply can excuse it.¹⁷ So when the Court in *Bowles* decided that the statutory limitation of time for filing a notice of appeal in an ordinary civil case was jurisdictional, it meant that failure to file notice of appeal within the given time period for any reason meant the end of the court’s jurisdiction in that case.¹⁸ And nothing could reinstate the court’s jurisdiction in that particular case.¹⁹

After *Bowles* came out, the Veterans Court instructed the parties in Henderson’s case to “brief that decision’s effect on prior Federal

¹⁰ Under 28 U.S.C. § 2107(c) (2006).

¹¹ See *Henderson*, 131 S. Ct. at 1201.

¹² See *id.* at 1202.

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ See *id.* at 1201-03.

¹⁸ See *id.*

¹⁹ See *id.*

Circuit precedent that allowed the equitable tolling of the 120-day deadline for filing a notice of appeal in the Veterans Court.”²⁰ The Veterans Court decided that the *Bowles* rule “compelled jurisdictional treatment of the 120-day deadline and dismissed Henderson’s untimely appeal for lack of jurisdiction,” and the Federal Circuit affirmed this decision.²¹

In order for the Court to determine if a procedural is “jurisdictional,” it must look to see whether there is any clear indication that Congress wanted the rule to be “jurisdictional.”²² In this regard, it is not necessary that Congress expressly state whether a particular rule is jurisdictional—context, including precedential history of the interpretation of similar provisions, is relevant.²³ “When ‘a long line of this Court’s decisions left undisturbed by Congress’ [internal citations omitted] has treated a similar requirement as ‘jurisdictional,’ we will presume that Congress intended to follow that course.”²⁴

Using this standard, the Court went on to determine whether the 120-day filing deadline under 38 U.S.C. § 7266(a) is jurisdictional.²⁵

²⁰ *See id.* at 1202.

²¹ *Id.*

²² *See id.* at 1203. The Court, in recent cases, has tried to “bring some discipline” to the use of the term “jurisdictional” because of the “drastic” consequences that result. *Id.* In this regard, the Court “has urged that a rule should not be referred to as jurisdictional unless it governs a court’s adjudicatory capacity, that is, its subject-matter jurisdiction or personal jurisdiction.” *Id.* “Among the types of rules that should not be described as jurisdictional are . . . ‘claim-processing rules,’” which are rules that “seek to promote the orderly process of litigation by requiring that the parties take certain procedural steps at certain specified times,” rules such the filing deadline at issue in this case. *Id.* However, because Congress is free to attach the jurisdictional label or conditions to any rule, including rules the Court would define as “claim-processing,” the Court must look to Congress’s intent of whether a rule be treated as jurisdictional. *See id.*

²³ *See id.*

²⁴ *Id.*

²⁵ *See id.* The Government, respondent here, argued that *Bowles* held that all statutory deadlines for taking appeals in civil cases are jurisdictional, and therefore, because the 120-day deadline at issue here was for taking an appeal in a civil case, the deadline is jurisdictional. *See id.* The Court rejected this argument in that it mischaracterized the holding in *Bowles*—*Bowles* concerned an appeal from one court to another and “did not hold categorically that every deadline for seeking judicial review in civil litigation is jurisdictional.” *Id.* The Government also

To make this determination, the Court looked at the following three factors: (1) the terms of the provision setting the deadline, (2) the deadline's placement within the Veterans' Judicial Review Act ("VJRA"), and (3) the characteristics of the review scheme Congress created for the adjudication of veterans' benefits claims.²⁶ Regarding the first factor, the Court examined the language of Section 7266(a), which states the following:

In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.²⁷

Reviewing this language, the Court stated, "This provision 'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the [Veterans Court].'"²⁸ The Court further reasoned, "If Congress had wanted the 120-day time to be treated as jurisdictional, it could have cast that provision in language like that in [another] provision of the VJRA" that clearly signals Congress' intent for that provision to be treated as jurisdictional.²⁹ But the language for the 120-day deadline at issue is not framed in

argued that the reasoning in *Bowles* extended to judicial review of administrative decisions, citing other decisions where courts have held deadlines for filing a petition to review a final agency decision was jurisdictional. *See id.* at 1204. The Court rejected this argument as well, noting that "Congress has made it clear that the VA is not an ordinary agency." *Id.* (citing *Shinseki v. Sanders*, 129 S. Ct. 1696, 1707 (2009)). The Court also noted that the VA is like the Social Security benefits program in that both are unusually protective of claimants. *See Henderson*, 131 S. Ct. at 1204. Another similarity between the two is that both have similar review mechanisms for claimants. *See id.* And the Court has previously held that the deadline for obtaining review of a Social Security benefits decision in district court is not jurisdictional. *See id.* But despite the extraordinary nature of the VA and its similarities to the Social Security system, the Court was not controlled by precedent here and needed to perform the analysis to determine Congress' intent regarding the 120-day deadline at issue in this case. *See id.*

²⁶ *See id.* at 1204-06.

²⁷ 38 U.S.C. § 7266(a).

²⁸ *Henderson*, 131 S. Ct. at 1204 (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)).

²⁹ *Henderson*, 131 S. Ct. at 1204-05.

comparable language.³⁰ “Thus,” the Court reasoned, “the language of [Section] 7266 provides no clear indication that Congress wanted that provision to be treated as having jurisdictional attributes.”³¹

Next, the Court considered deadline’s placement within the VJRA. Congress placed Section 7266 in a subchapter entitled “Procedure” and elected not to place that section in the VJRA subchapter entitled “Organization and Jurisdiction.”³² The Court took this placement as an indication that Congress regarded the 120-day limit more as a claim-processing rule than it did a jurisdictional one.³³ The Court further noted that within the subchapter “Organization and Jurisdiction,” were subsections addressing the exclusive jurisdiction of the Veterans Court to review decisions of the Board of Veterans’ Appeals but not appeals from the VA Secretary and limiting the scope and content of that court’s review, but that nothing in this provision addresses the time for seeking Veterans Court review.³⁴ Based on these circumstances, the Court determined that Section 7266’s placement within the VJRA “provided no clear indication that Congress wanted that provision to be treated as having jurisdictional attributes.”³⁵

The Court then examined the third factor and determined that what was most telling of Congress’ intent for this provision was “the singular characteristics of the review scheme that Congress created for the adjudication of veterans’ benefits claims.”³⁶ The attentiveness and consideration of Congress for veterans is long standing and well-established and is clearly reflected in the VJRA and other, subsequent laws addressing the administrative and judicial review of VA decisions—these statutes and laws weigh heavily in favor of veterans.³⁷ And according to the Court, the gap of differences between the system of ordinary civil litigation that was the context

³⁰ *Id.* at 1205. The Court noted that the language of Section 7266 is mandatory, but it further noted that it has “rejected the notion that ‘all mandatory prescriptions [are jurisdictional].’” *Id.*

³¹ *Id.*

³² *See id.*

³³ *See id.*

³⁴ *See id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *See id.*

for the *Bowles* decision and the system that Congress created for the adjudication of veterans' benefits claims is vast and could hardly be wider.³⁸ In ordinary civil litigation, plaintiffs must generally commence their suits within the time specified by a statute of limitations; the litigation is adversarial; plaintiffs must gather the evidence and support for their claims and generally bear the burden of production and persuasion; both parties may appeal an adverse decision; and a final judgment may only be reopened in narrow circumstances.³⁹ In the system established by Congress for review of veterans' benefits claims, a veteran may commence his or her claim at any time after the alleged onset of disability or separation from service; the proceedings are informal and nonadversarial; the VA must assist veterans in gathering evidence to support their claims and must give veterans the benefit of the doubt; only the veteran or his or her representative can appeal an adverse decision; and a denied claim may be reopened simply if the veteran presents new and material evidence.⁴⁰ According to the Court, "Rigid jurisdictional treatment of the 120-day period for filing a notice of appeal in the Veterans Court would *clash sharply* with [the scheme developed by Congress for the adjudication of veterans' benefits claims]."⁴¹ Based on the evaluation and analysis of the above factors, the Court found no clear indication that Congress intended the 120-day limit to be jurisdictional, and thus held that "the deadline for filing a notice of appeal with the Veterans Court does not have jurisdictional attributes."⁴² The Court remanded the case for further proceedings.

Impact:

The impact of this case is clear: (1) the discretion and leniency afforded veterans in the adjudication of their benefits claims is wide and steadfast; (2) the assignment of the "jurisdictional" label to a particular requirement is narrowly constructed because it is such a harsh and unforgiving label. Because veterans are afforded such great leniency and viewed in a benevolent manner, and because the

³⁸ See *id.* at 1205-06.

³⁹ See *id.* at 1206.

⁴⁰ See *id.*

⁴¹ *Id.* (emphasis added).

⁴² *Id.* at 1206.

jurisdictional label is so harsh, there must be clear indication that Congress intended a particular rule or requirement to be jurisdictional. Deriving Congress's intention may include examining a statutory provision's particular language, context, and the subject matter that it addresses. The results of this case may give those who represent veterans in administrative claims significant leeway in arguing for the benefit of those veterans, but this case may also raise questions as to how wide the leniency given to veterans actually is. Here, the deadline was missed by fifteen days; what if it had been thirty days? Or sixty? Or ninety? At what point would a 120-day deadline actually become a deadline? While the deadline is not jurisdictional *per se*, and veterans should be afforded significant leniency, one potential impact is that the efficacy of the deadline has been eroded, and the deadline may become pointless should courts choose to ignore delays in filings by parties.

Kucana v. Holder, 130 S. Ct. 827 (2010)

Synopsis:

Petitioner Argon Kucana moved to reopen his removal proceedings based on new evidence in support of his plea for asylum.⁴³ An Immigration Judge ("IJ") denied Kucana's motion, and the Board of Immigration Appeals ("BIA" or "Board") sustained that ruling; when Kucana appealed to the United States Court of Appeal for the Seventh Circuit, that court concluded it lacked jurisdiction based on a provision added to the Immigration and Nationality Act⁴⁴ ("INA" or "Act") by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996⁴⁵ that "states that no court shall have jurisdiction to review any action of the Attorney General 'the authority for which is specified under this chapter to be in the discretion of the Attorney General.'"⁴⁶ The Supreme Court of the United States "granted certiorari to decide whether the proscription of judicial review stated in [Section] 1252(a)(2)(B) applies not only to Attorney General determinations made discretionary by statute,

⁴³ See *Kucana v. Holder*, 130 S. Ct. 827, 831 (2010).

⁴⁴ 8 U.S.C. § 1101 *et seq.* (2010).

⁴⁵ 110 Stat. 3009-546.

⁴⁶ *Kucana*, 130 S. Ct. at 831 (citing 8 U.S.C. § 1252(a)(2)(B)).

but also to determinations declared discretionary by the Attorney General himself through regulation” and held that “the key words ‘specified under this subchapter’ refer to statutory, but not to regulatory, specifications.”⁴⁷ Based on this holding, the Court reversed the Seventh Circuit’s ruling and remanded the case.⁴⁸

Facts, Analysis, and Ruling:

Kucana is a citizen of Albania who entered the United States in 1995 on a business visa and remained after the visa expired.⁴⁹ He applied for political asylum and withholding of removal in 1996.⁵⁰ The IJ reviewing Kucana’s case determined that Kucana was removable and scheduled a hearing on Kucana’s application for asylum.⁵¹ However, Kucana missed this hearing,⁵² and the IJ ordered Kucana’s removal.⁵³ Kucana filed a motion to reopen, but the IJ denied his motion, and the BIA affirmed this decision in 2002.⁵⁴ Despite this, Kucana “did not seek judicial review, nor did he leave the United States.”⁵⁵

Four years later, Kucana filed his second motion to reopen, alleging that he could not go back to Albania because conditions had worsened there since the time of his initial filing.⁵⁶ But the BIA denied this motion, finding that “conditions in Albania had actually improved since 1997.”⁵⁷ Kucana then filed a petition for review in

⁴⁷ *Kucana*, 130 S. Ct. at 831.

⁴⁸ *Id.* at 831, 839.

⁴⁹ *See id.* at 832.

⁵⁰ *See id.* Kucana “alleg[ed] that he would be persecuted based on his political beliefs if [he was] returned to Albania.” *Id.*

⁵¹ *See id.*

⁵² According to Kucana, he missed his hearing because he overslept. *See id.*

⁵³ *See id.*

⁵⁴ *See id.*

⁵⁵ *Id.*

⁵⁶ *See id.* Each alien is given the right to file *one* motion to reopen proceedings; further motions to reopen in proceedings seeking asylum or withholding of removal are permitted when conditions within the country of nationality or removal have changed. *See id.* at 833 n.5.

⁵⁷ *Id.* at 832-33.

the Seventh Circuit, arguing that the BIA had abused its discretion in denying his motion.⁵⁸

However, the Seventh Circuit, in a split opinion, dismissed Kucana's petition for review for lack of jurisdiction.⁵⁹ The Seventh Circuit made this holding under the belief that Congress removed the authority to review denials of an alien's motion to reopen—an authority long held and exercised by federal courts⁶⁰—when it created Section 1252(a)(2)(B)(ii), which, according to the Seventh Circuit, “bars judicial review not only of administrative decisions made discretionary by statute, but also ‘when the agency’s discretion is specified by a regulation rather than a statute.’”⁶¹ This decision created a rift in the Circuits because other Courts of Appeal had held that denials of reopening motions *are* reviewable in court.⁶² The Supreme Court of the United States “granted certiorari [citations omitted] to resolve the Circuit conflict.”⁶³

The provision at issue is contained within 8 U.S.C. § 1252(a)(2)(B), under a heading entitled “Denials of discretionary relief,” and reads in pertinent part as follows:

“Notwithstanding any other provision of law (statutory or non statutory), . . . except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review-

i.any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

⁵⁸ See *id.* at 833.

⁵⁹ See *Kucana v. Mukasey*, 533 F.3d 534, 539 (7th Cir. 2008).

⁶⁰ “The motion to open is an ‘important safeguard’ intended ‘to ensure a proper and lawful disposition’ of immigration proceedings.” *Kucana*, 130 S. Ct. at 834 (quoting *Dada v. Mukasey*, 128 S. Ct. 2307, 2317-19 (2008)). “Federal court review of administrative decisions denying motions to reopen removal proceedings dates back to at least 1916.” *Kucana*, 130 S. Ct. at 834.

⁶¹ *Kucana*, 130 S. Ct. at 833 (quoting *Kucana*, 533 F.3d at 536); see also *Kucana*, 130 S. Ct. at 834.

⁶² See *Kucana*, 130 S. Ct. at 833.

⁶³ *Id.*

ii.any other decision or action of the Attorney General . . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General . . . , other than the granting of relief under section 1158(a) of this title.”⁶⁴

The Supreme Court noted that a regulation propounded by the Attorney General states that “[t]he decision to grant or deny a motion to reopen . . . is within the discretion of the Board.”⁶⁵ In addition, “As adjudicator in immigration cases, the Board exercises authority delegated by the Attorney General.”⁶⁶

The parties, particularly *amicus*, read the word *under* in Section 1252(a)(2)(B)(ii) as being key.⁶⁷ *Amicus* argued that *under* means “pursuant to,” “subordinate to,” “below or lower than,” “inferior in rank or importance,” and “by reason of the authority of.”⁶⁸ Under this interpretation, administrative regulations fall within Section 1252(a)(2)(B) because “they are issued ‘pursuant to,’ and are measures ‘subordinate to,’ the legislation they serve to implement.”⁶⁹ The parties, however, read the phrase “specified under this subchapter” to mean “specified in,” or “specified by,” the subchapter.⁷⁰ The Court reasoned that, “[o]n the reading *amicus* advances, [Section] 1252(a)(2)(B)(ii) would bar judicial review of any decision that an executive regulation places within the BIA’s discretion,” whereas on the parties’ reading, that section would “preclude[] judicial review only when the statute itself specifies the discretionary character of the Attorney General’s authority.”⁷¹ Despite these various interpretations of the word *under* in Section 1252(a)(2)(B)(ii), the Court could not resolve the case from these

⁶⁴ 8 U.S.C 1252(a)(2)(B)(i)-(ii) (2005).

⁶⁵ See *Kucana*, 130 S. Ct. at 832, 835 (quoting 8 C.F.R. 1003.2(a) (2009)).

⁶⁶ *Kucana*, 130 S. Ct. at 832.

⁶⁷ See *id.* at 835.

⁶⁸ See *id.*

⁶⁹ *Id.*

⁷⁰ See *id.*

⁷¹ *Id.*

interpretations alone.⁷² To make its determination, the Court also looked to the context of the statute,⁷³ the history of the relevant statutory provisions,⁷⁴ and the principle of statutory construction that favors judicial review of administrative action.⁷⁵

Regarding the context of Section 1252(a)(2)(B)(ii), the Court first looked to the placement of that section and to the nature of the subsections immediately preceding and succeeding Section 1252(a)(2)(B), subsections (a)(2)(A) and (a)(2)(C), respectively.⁷⁶ “[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”⁷⁷ Looking at the sections between which Section 1252(a)(2)(B) is sandwiched, the Court noted that both Section 1252(a)(2)(A) and Section 1252(a)(2)(C) “depend on statutory provisions, not on any regulation, to define their scope.”⁷⁸ Because of the placement of Section 1252(a)(2)(B) “between subsections (a)(2)(A) and (a)(2)(C), one would expect that it, too, would cover statutory provisions alone.”⁷⁹ Next, the Court looked to the context within Section 1252(a)(2)(B) itself. Looking at Section 1252(a)(2)(B)(i), the Court noted that clause (i) refers to enumerated statutory provisions but not to any regulatory provision. Keeping this in mind, the Court noted, “The proximity of clauses (i) and (ii), and the words linking them—‘any other decision’—suggests that Congress had in mind decisions of the same genre, *i.e.*, those made discretionary by legislation.”⁸⁰ The Court reasoned that the clause (i) enumeration of specific statutes is “instructive in determining the meaning of the clause (ii) catchall [at issue].”⁸¹ Thus, “Read harmoniously, both clauses convey that Congress barred court review of discretionary decisions only when Congress itself set out the Attorney General’s discretionary authority

⁷² See *id.*

⁷³ See *id.*

⁷⁴ See *id.* at 838.

⁷⁵ See *id.* at 839.

⁷⁶ See *id.* at 836.

⁷⁷ *Id.* (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)).

⁷⁸ See *Kucana*, 130 S. Ct. at 836.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

in the statute.”⁸² The Court found further contextual significance in the character of the decisions Congress enumerated in clause (i); the decisions listed in clause (i) involve substantive determinations made by the executive as a matter of grace, including waivers of inadmissibility based on certain criminal offenses and cancellation of removal. Thus, other decisions specified by statute to be within the discretion of the Attorney General and insulated from judicial review are of a like kind: substantive determinations made by the Executive as a matter of grace. The Court reasoned that a motion to reopen is a procedural device, not a substantive one, that “touches and concerns only the question whether the alien’s claims have been accorded a reasonable hearing.”⁸³ The Court then further noted that had Congress intended the jurisdictional bar of Section 1252(a)(2)(B)(ii) to encompass decisions specified as discretionary by regulation in addition to those made so by statute, it easily could have said so, as it had in other provisions enacted at the same time Section 1252(a)(2)(B)(ii) was enacted.⁸⁴ “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”⁸⁵ Having examined the context of Section 1252(a)(2)(B)(ii), the Court then turned to its history.

In 1996, Congress enacted IIRIRA and codified the motion to reopen as a form of relief available to aliens, which motion had previously been a regulatory procedure.⁸⁶ Congress also simultaneously enacted legislation that expedited the removal of aliens lacking legal basis to remain and established several proscriptions of judicial review, including the one at issue, Section 1252(a)(2)(B)(ii).⁸⁷ However, Congress “did not codify the regulation delegating to the BIA discretion to grant or deny motions

⁸² *Id.* at 836-37. The principle allowing such a conclusion can be found in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), which states, “When a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows.”

⁸³ *See Kucana*, 130 S. Ct. at 837.

⁸⁴ *See id.*

⁸⁵ *Id.* at 838 (quoting *Nken v. Holder*, 129 S. Ct. 1749, 1759 (2009)).

⁸⁶ *See Kucana*, 130 S. Ct. at 838.

⁸⁷ *See id.*

to reopen.”⁸⁸ Because Congress was silent on the discretion of the Attorney General over reopening motions, the Court inferred that Congress had left the law where it was before Congress enacted IIRIRA, and the state of the law before IIRIRA was that the BIA had wide discretion to grant or deny motions to reopen, but courts had the jurisdiction to review those decisions.⁸⁹ By the time Congress amended the INA, at least two Courts of Appeals had ruled that Section 1252(a)(2)(B)(ii) did not bar them from reviewing denials of motions to reopen, yet Congress “did not disturb the unbroken line of decisions upholding court review of administrative denials of motions to reopen” when it amended the INA.⁹⁰ Again, the Court seemed to interpret Congress’s silence on this issue as indicative of complacency with the state of the law.⁹¹

The final area of consideration for the Court here was the general principle of statutory construction that is a “presumption favoring judicial review of administrative action.”⁹² Because this presumption is well-settled, “the Court assumes that ‘Congress legislates with knowledge of’ this presumption,” and it “takes ‘clear and convincing evidence’ to dislodge the presumption.”⁹³ Because there was no such evidence here, the presumption held firm.⁹⁴ The Court went on to mention that, as a policy matter, should the Seventh Circuit’s interpretation of Section 1252(a)(2)(B)(ii) prevail, “the Executive would have a free hand to shelter its own decisions from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions ‘discretionary,’” which goes far beyond the authority Congress delegated here.⁹⁵

“A statute affecting federal jurisdiction ‘must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes.’”⁹⁶ Based on the words of the statutory

⁸⁸ *Id.*

⁸⁹ *See id.*

⁹⁰ *See id.* at 839.

⁹¹ *See id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *See id.*

⁹⁵ *Id.* at 840.

⁹⁶ *Id.*

provision, its context and history, and general principles of statutory construction, Congress did not delegate to the Executive authority to pare back judicial review of administrative decisions, and thus, “[a]ction on motions to reopen, made discretionary by the Attorney General only, . . . remain subject to judicial review.”⁹⁷

Impact:

One broader aspect of this case that is particularly useful is that it provides a framework of rules for statutory interpretation or construction that may be used broadly when analyzing a particular provision within a given statute, particularly those involving administrative actions. When analyzing a provision’s meaning and scope, one may look to the provision’s terms, context, placement, history, and general principles of statutory construction to arrive at a particular conclusion or at the knowledge of the legislature’s meaning. Based on the Court’s analysis and conclusion in this case, it seems that a general rule to follow when attempting to analyze a statutory provision and determine a legislature’s intention is to interpret that provision as narrowly as possible unless there is strong evidence in support otherwise.

A more immediate and narrow impact of this case is that aliens are afforded significant protection in the reviewability of motions to reopen. If, as here, an alien files a motion to reopen because the country to which they will be returned has worsened conditions, the denial of that motion by the BIA is reviewable by higher courts.

Regarding Section 1252(a)(2)(B)(ii) itself, the ruling here supports the proposition that only decisions made discretionary by statute may be jurisdictionally barred from court review—decisions made discretionary by other means, such as through regulation, do not fit the bill and remain subject to review.

Milner v. Dep’t of the Navy, 131 S. Ct. 1259 (2011)

Synopsis:

The Freedom of Information Act⁹⁸ (“FOIA”) “requires federal agencies to make Government records available to public, subject to

⁹⁷ *Id.*

⁹⁸ 5 U.S.C. § 552 (2009).

nine exemptions.”⁹⁹ Petitioner Glen Milner (“Petitioner” or “Milner”) submitted requests under the FOIA to Respondent Department of the Navy (“Navy” or “Government”) for explosives data and maps used by the Navy in storing munitions at a naval base in his hometown, Puget Sound, Washington.¹⁰⁰ The Navy denied his request, stating that the disclosure would jeopardize the safety of the base and its surrounding community and invoking “Exemption 2” of the nine exemptions provided in the FOIA.¹⁰¹ Exemption 2 “protects from disclosure material ‘related solely to the internal personnel rules and practices of an agency.’”¹⁰² The Court held that “[b]ecause Exemption 2 encompasses only records relating to employee relations and human resources issues, the explosives maps and data requested here do not qualify for withholding under that exemption.”¹⁰³

Facts, Analysis, and Ruling:

“Congress enacted the FOIA to overhaul the public disclosure section of the Administrative Procedure Act [“APA”],” which was “plagued with vague phrases” and had become “more ‘a withholding statute than a disclosure statute.’”¹⁰⁴ The purpose of the FOIA was to “permit access to official information long shielded unnecessarily from public view,” and, pursuant to this purpose, the FOIA requires that “an agency disclose records on request, unless they fall within one of nine exemptions.”¹⁰⁵ One of these exemptions, Exemption 2, the exemption at issue here, “shields from compelled disclosure documents ‘related solely to the internal personnel rules and practices of an agency.’”¹⁰⁶ Previously, the APA had exempted “any matter relating solely to the internal management of an agency,” but Congress, in its revision of the APA with the FOIA, drafted Exemption 2 to have a narrower reach than its predecessor under the

⁹⁹ *Milner v. Dep’t of the Navy*, 131 S. Ct. 1259, 1260 (2011).

¹⁰⁰ *See id.* at 1260, 1263-64.

¹⁰¹ *See id.* at 1260.

¹⁰² *See id.* (quoting 5 U.S.C. § 552(b)(2)).

¹⁰³ *See id.* at 1260.

¹⁰⁴ *See id.* at 1262 (quoting *EPA v. Mink*, 410 U.S. 73, 79 (1973)).

¹⁰⁵ *See Milner*, 131 S. Ct. at 1262.

¹⁰⁶ *See id.* (quoting 5 U.S.C. § 552(b)(2)).

belief that “the ‘sweep’ of the phrase ‘internal management’ had led to excessive withholding.”¹⁰⁷

In *Department of the Air Force v. Rose*,¹⁰⁸ the Supreme Court of the United States considered the scope of Exemption 2 and held that it applies primarily to material concerning employee relations or human resources, such as the use of parking facilities, regulations of lunch hours, and statements of policy as to sick leave.¹⁰⁹ Viewing a request for case summaries of honor and ethics hearings at the United States Air Force Academy through this interpretation of Exemption 2, the Court in *Rose* held that the case summaries were not exempted because they “d[id] not concern only routine matters” of “merely internal significance.”¹¹⁰

In its ruling in *Rose*, the Court also stated a possible caveat that its interpretation of Exemption 2 governed “where the situation is not one where disclosure may risk circumvention of agency regulation.”¹¹¹ The District of Columbia Circuit Court of Appeals later took this caveat and converted it into a rule in *Crooker v. Bureau of Alcohol, Tobacco & Firearms*.¹¹² This new rule established in *Crooker* covered any predominantly internal materials the disclosure of which would “significantly ris[k] circumvention of agency regulations or statutes.”¹¹³ Courts using the *Crooker* approach “refer to the ‘Low 2’ exemption when discussing materials concerning human resources and employee relations, and to the ‘High 2’ exemption when assessing records whose disclosure would risk circumvention of the law.”¹¹⁴

¹⁰⁷ See *Milner*, 131 S. Ct. at 1262.

¹⁰⁸ 425 U.S. 352 (1976).

¹⁰⁹ See *id.* at 363.

¹¹⁰ *Id.* at 370.

¹¹¹ *Id.* at 369.

¹¹² 670 F.2d 1051 (D.C. Cir. 1981).

¹¹³ *Id.* at 1056-57, 1074. Three Courts of Appeals have adopted the D.C. Circuit’s interpretation of Exemption 2. See *Milner*, 131 S. Ct. at 1263. Congress also took notice of the *Crooker* decision, using language from it when amending the FOIA; Exemption 7(E) was amended to shield from disclosure “records or information compiled for law enforcement purposes if their disclosure “could reasonably be expected to risk circumvention of the law.” See *id.* (quoting 5 U.S.C. 552(b)(7)(E)).

¹¹⁴ See *Milner*, 131 S. Ct. at 1263.

Here, Milner, a resident of Puget Sound, Washington, submitted to the Navy FOIA requests for all Explosive Safety Quantity Distance (“ESQD”) information relating to the Navy’s operations at Naval Magazine Indian Island, a naval base in Puget Sound.¹¹⁵ The Navy keeps various munitions, including weapons, ammunition, and explosives, at this base, and the Navy uses ESQD data to aid in the storage and transportation of these munitions.¹¹⁶ The Navy refused Milner’s request, stating that the release of such information to the public would threaten the security of the base and the surrounding community, and the Navy invoked Exemption 2 to support its position of denying disclosure of the requested information.¹¹⁷ The District Court granted summary judgment in the Navy’s favor, and the Court of Appeals affirmed, relying on the *Crooker* decision and a “High 2” analysis, stating that the ESQD information “is predominantly used for the internal purpose of instructing agency personnel on how to do their jobs” and that disclosure of the information would “risk circumvention of the law” by “point[ing] out the best targets for those bent on wreaking havoc,” such as terrorists.¹¹⁸ The Supreme Court granted certiorari “in light of the Circuit split respecting Exemption 2’s meaning.”¹¹⁹

In its consideration of Exemption 2’s scope, the Court first looked to the statutory text in which the exemption is found, which simply reads “related solely to the internal personnel rules and practices of an agency.”¹²⁰ According to the Court, the key word in this text is “personnel,” which modifies “rules and practices” and refers to human resources matters.¹²¹ Generally, the term

¹¹⁵ See *id.* at 1263-64.

¹¹⁶ See *id.* “ESQD information prescribes ‘minimum separation distances’ for explosives and helps the Navy design and construct storage facilities to prevent chain reactions in case of detonation.” *Id.* at 1263. ESQD information is “often incorporated into specialized maps depicting the effects of hypothetical explosions.” *Id.*

¹¹⁷ See *id.* at 1264.

¹¹⁸ See *id.*

¹¹⁹ *Id.*

¹²⁰ See *id.* “Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Id.* (quoting *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)).

¹²¹ See *Milner*, 131 S. Ct. at 1264.

“personnel” means “the selection, placement, and training of employees and . . . the formulation of policies, procedures, and relations with [or involving] employees or their representatives.”¹²²

The Court also looked to other Exemptions within the FOIA and noted that Exemption 6 uses the term “personnel” as a modifier meaning “human resources,” and “Exemption 2 uses ‘personnel’ in the exact same way.”¹²³ “An agency’s ‘personnel rules and practices’ are its rules and practices dealing with employee relations or human resources.”¹²⁴ In other words, “[t]hey concern the conditions of employment in federal agencies—such matters as hiring and firing, work rules and discipline, compensation and benefits.”¹²⁵ Given this construction of the statutory language in which Exemption 2 is found, the Court held it is clear that “Low 2”—materials concerning human resources and employee relations—is *all* of Exemption 2.¹²⁶

The Court further looked to the statute’s purpose to shed additional light on the meaning of Exemption 2.¹²⁷ “We have often noted ‘the Act’s goal of broad disclosure’ and insisted that the exemptions be ‘given a narrow compass.’”¹²⁸ According to the Court, the reason Congress worded Exemption 2 the way it did when it revised the APA was to reign in the prior APA exemption that “agencies had used to prevent access to masses of documents.”¹²⁹ As the Court stated, “We would ill-serve Congress’s purpose by construing Exemption 2 to reauthorize the expansive withholding that Congress wanted to halt.”¹³⁰ “Our reading instead gives the exemption the ‘narrower reach’ Congress intended . . . through the simple device of confining the provision’s meaning to its words.”¹³¹

Under the Court’s reading and construction of Exemption 2, Exemption 2 “encompasses only records relating to issues of

¹²² *Id.*

¹²³ *See id.* at 1265.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *See id.*

¹²⁷ *See id.*

¹²⁸ *Id.*

¹²⁹ *See id.* at 1266.

¹³⁰ *Id.*

¹³¹ *Id.*

employee relations and human resources.”¹³² In light of this, the Court held that the ESQD information at issue does not fall within that exemption because the ESQD information is “data and maps [that] calculate and visually portray the magnitude of hypothetical detonations” and not related to “‘personnel rules and practices,’ as that term is most naturally understood.”¹³³ The ESQD information, data, and maps “concern the physical rules governing explosives, not the workplace rules governing sailors; they address the handling of dangerous materials, not the treatment of employees.”¹³⁴ In light of this, the Court concluded that the Navy could not use Exemption 2 to prevent disclosure of the requested EQSD information.¹³⁵

¹³² *Id.* at 1271.

¹³³ *Id.* at 1266.

¹³⁴ *Id.*

¹³⁵ *See id.* The Government offered two additional readings of Exemption 2 to support withholding of the ESQD information: the construction of Exemption 2 established by *Crooker*, which implements the “High 2” circumvention test; and an interpretation adopted “on a clean slate” and “based on the plain text . . . alone.” *See id.* at 1266-67, 1269. The Court rejected the first reading because it is disconnected with the text of Exemption 2 and has no basis in such. *See id.* at 1267. “The 1986 amendment does not ratify, approve, or otherwise signal agreement with *Crooker*’s interpretation of Exemption 2.” *Id.* at 1268.

Regarding the second proffered reading, the Government argued that Exemption 2 “encompasses records concerning an agency’s internal rules and practices for its personnel to follow in the discharge of their governmental functions.” *Id.* at 1269. Thus, according to the Government, Exemption 2 would apply to all of an agency’s rules and practices for its personnel, such as internal rules and policies that guide personnel in performing their duties, and, under this reading, the ESQD data would be exempted under Exemption 2 because it assists Navy personnel in storing munitions. *See id.* But the Court rejected this reading as well, stating that the “purported logic in the Government’s definition eludes us.” *Id.* “We would not say, in ordinary parlance, that a ‘personnel file’ is any file an employee uses, or that a ‘personnel department’ is any department in which an employee serves.” *Id.* The Court went on to note that the term “personnel,” when used to modify “rule or practice,” is generally understood to be *about* personnel, in that it relates to employee relations or human resources, and not *for* personnel. *See id.* One looking at the EQSD data could not say “that the data and maps relate to ‘personnel rules and practices.’” *Id.* Therefore, the Court rejected the Government’s “clean slate” approach to Exemption 2, which “stripp[ed] the word ‘personnel’ of any meaning” and would violate the narrow construction of Exemption 2 that Congress intended. *Id.* at 1269-70.

Impact:

This case has a wide impact on all administrative organizations required to disclose information under the FOIA. As the Court itself stated, “[W]e acknowledge that our decision today upsets three decades of agency practice relying on *Crooker*, and therefore may force considerable adjustments.”¹³⁶ But, even so, there are additional methods by which the Government may protect sensitive information: “We also note, however, that the Government has other tools on hand to shield national security information and other materials,” such as Exemptions 1, 3, and 7, which respectively prevent access to (1) classified documents, (2) records that any other statute exempts from disclosure, and (2) information compiled for law enforcement purposes that meets one of several criteria, including where the disclosure of such law enforcement material “could reasonably be expected to endanger the life or physical safety of any individual.”¹³⁷ So, while this case may have a broad impact on agencies who had previously relied on Exemption 2 as justification for many of their withholdings in that they may no longer use that exemption beyond matters related to employee relations and human resources, not all hope is lost because agencies have additional protections and exemptions at their disposal to protect and withhold from disclosure information that impacts national security or the lives and safety of individuals.

Graham County Soil & Water Conservation Dist. v. Wilson,
130 S. Ct. 1396 (2010)

Synopsis:

Under the False Claims Act (“FCA”), both the Attorney General and private *qui tam* relators may bring an action to recover from persons who make false or fraudulent payment claims to the United States; however, *qui tam* actions are barred where the basis of the action is the public disclosure of allegations or transactions in an administrative report, hearing, audit, or investigation.¹³⁸ Here, Respondent Karen T. Wilson (“Respondent” or “Wilson”) alerted

¹³⁶ *Id.* at 1271.

¹³⁷ *Id.*

¹³⁸ *Graham County Soil & Water Conservation Dist. v. Wilson*, 130 S. Ct. 1396, 1398 (2010) (citing 31 U.S.C. § 3730(e)(4)(A)).

federal and local officials about possible fraud in federal contracts seeking to remediate areas in two North Carolina counties that had been damaged by flooding.¹³⁹ “Wilson filed a *qui tam* action, alleging . . . that petitioners, county conservation districts and local and federal officials, knowingly submitted false payment claims in violation of the FCA.”¹⁴⁰ However, “[b]oth the county and the State issued reports identifying irregularities in the contracts’ administration.”¹⁴¹ Because of these reports, the District Court dismissed Wilson’s case for lack of jurisdiction, but the Fourth Circuit Court of Appeals reversed, holding that “only *federal* administrative reports may trigger the public disclosure bar.”¹⁴² The Supreme Court of the United States granted certiorari and determined that the “reference to ‘administrative’ reports, audits, and investigations in [Section] 3730(e)(4)(A) encompasses disclosures made in state and local sources as well as federal sources.”¹⁴³

Facts, Analysis, and Ruling:

In 1995, the United States Department of Agriculture (“USDA”) entered into contracts with two North Carolina counties that enabled those counties or others they hired to cleanup and repair areas that had been damaged by flooding, with the Federal Government covering seventy-five percent of the contract costs.¹⁴⁴ Wilson, at that time an employee of the Graham County Soil and Water Conservation District, the special purpose government body with partial responsibility for the cleanup and repair efforts, suspected possible fraud in connection with the remediation effort, so she voiced her concerns to various government agencies and officials, including local officials and the USDA.¹⁴⁵ Pursuant to her concerns, Graham County officials launched an investigation, and the accounting firm hired as part of this investigation produced an audit report (“Audit Report”) that “identified several potential irregularities

¹³⁹ See *Wilson*, 130 S. Ct. at 1398.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See *id.* (emphasis added).

¹⁴³ See *id.*

¹⁴⁴ See *id.* at 1400.

¹⁴⁵ See *id.*

in the county's administration of the contracts."¹⁴⁶ The North Carolina Department of Environment, Health, and Natural Resources also released a report ("DEHNR Report") around the same time that identified similar problems, and the USDA later issued a report with additional findings.¹⁴⁷

In 2001, Wilson filed a *qui tam* action alleging, *inter alia*, that the Graham County and Cherokee Conservation Districts and various local and federal officials had violated the FCA by knowingly submitting false claims for payment under the 1995 contracts. Eventually, the District Court dismissed Wilson's claim for lack of jurisdiction because she "had failed to refute that her action was based upon allegations publicly disclosed in the Audit Report and the DEHNR Report," which reports were, according to the District Court, administrative reports within the meaning of the public disclosure bar in Section 3730(e)(4)(A).¹⁴⁸ The Fourth Circuit Court of Appeals, however, reversed the lower court's judgment because the reports had been generated by local and state authorities and not a federal authority, and the Fourth Circuit read the public disclosure bar as qualifying only *federal* administrative reports, audits, or investigations as public disclosures within the meaning of the statute.¹⁴⁹ Because there was a split in the Circuits over this issue of whether only federal administrative reports, audits, or investigations qualify as public disclosures under the FCA, the Supreme Court granted certiorari.¹⁵⁰

The public disclosure bar in Section 3730(e)(4)(A) of the FCA reads as follows:

No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions [1] in a criminal, civil, or administrative hearing, [2] in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or [3] from the news media, unless the action is brought by the

¹⁴⁶ *Id.*

¹⁴⁷ *See id.*

¹⁴⁸ *Id.* at 1401.

¹⁴⁹ *See id.*

¹⁵⁰ *See id.*

Attorney General or the person bringing the action is an original source of the information.¹⁵¹

The issue here turns on the meaning of “administrative” in the second category and whether it is limited to forums federal in nature or whether it extends to local and state sources such as the Audit and DEHNR Reports here.¹⁵² In debating this question, petitioners relied primarily on the text of the statute in support of their argument, while respondent relied on considerations of history and policy in support of her argument.¹⁵³

Looking at the text of the statute, the Court remarked that the term administrative, when used to modify “report, hearing, audit, or investigation,” in the context of a statute about “public disclosure” of fraud on the United States, is “most naturally read to describe the activities of governmental agencies.”¹⁵⁴ “Given that ‘administrative’ is not itself modified by ‘federal,’ there is no immediately apparent textual basis for excluding the activities of state and local agencies (or their contractors) from its ambit.”¹⁵⁵ The statute itself does not expressly limit its reach to federal activities, nor is there anything inherently federal about the word “administrative.”¹⁵⁶ Despite this, the Court of Appeals reached the conclusion that “administrative” is limited to federal sources using the interpretive maxim *noscitur a sociis*, which means, “It is known by its associates.”¹⁵⁷ This maxim “counsels lawyers reading statutes that ‘a word may be known by the company it keeps.’”¹⁵⁸ Because the terms that surround “administrative” in the statute—“congressional” and “Government Accounting Office”—are clearly federal in nature, the Court of Appeals reasoned that this strongly suggests that “administrative” should “likewise be restricted to *federal* administrative reports,

¹⁵¹ 31 U.S.C. § 3730(e)(4)(A).

¹⁵² See *Wilson*, 130 S. Ct. at 1402.

¹⁵³ See *id.* at 1402.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See *id.*

¹⁵⁷ See *id.*

¹⁵⁸ *Id.* (quoting *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923)).

hearings, audits, or investigations.”¹⁵⁹ The Supreme Court, however, found this application of *noscitur a sociis* to be unpersuasive, stating, “A list of three items, each quite distinct from the other no matter how construed, is too short to be particularly illuminating.”¹⁶⁰ Because the adjectives in Category 2 of Section 3730(e)(4)(A) are too few and disparate to qualify as “items in a list” or a “string of statutory terms,” the Court turned to the broader context of “administrative” within the statute.¹⁶¹

Looking at the broader context, the Court took the position, as did petitioners, that all of the sources listed in Section 3730(e)(4)(A) provide interpretive guidance, not just the sources immediately surrounding “administrative,” as respondent argued.¹⁶² “All of these sources drive at the same end: specifying the types of disclosures that can foreclose *qui tam* actions.”¹⁶³ Because “[c]ourts have a ‘duty to construe statutes, not isolated provisions,’” the Court considered the entire text of Section 3730(e)(4)(A) and not just the three categories within that section individually as isolated islands.¹⁶⁴ Looking at the term “news media” in Category 3, the Court remarked that while the “Federal Government funds certain media outlets, and certain private outlets have a national focus . . . no one contends that Category 3 is limited to these sources.”¹⁶⁵ “There is likewise no textual basis for assuming that the ‘criminal, civil, or administrative hearing[s]’ listed in Category 1 must be federal hearings.”¹⁶⁶ “If the Court of Appeals was correct that the term ‘administrative’ encompasses state and local sources in Category 1, [citations], it becomes even harder to see why the term would not do the same in Category 2.”¹⁶⁷ The Court further dismissed respondent’s argument that the sources listed in

¹⁵⁹ See *Wilson*, 130 S. Ct. at 1403 (quoting *Wilson*, 528 F.3d 292, 302 (4th Cir. 2008)).

¹⁶⁰ *Wilson*, 130 S. Ct. at 1403.

¹⁶¹ See *id.* at 1403-04.

¹⁶² See *id.* at 1404.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

Category 1 are themselves only federal by stating, “No court has ever taken such a view of these sources.”¹⁶⁸

In sum, although the term ‘administrative’ may be sandwiched in Category 2 between terms that are federal in nature, those terms are themselves sandwiched between phrases that have been generally understood to include nonfederal sources; and one of those phrases, in Category 1, contains the exact term that is the subject of our inquiry. These textual clues negate the force of the *noscitur a sociis* canon, as it was applied by the Court of Appeals.¹⁶⁹

Thus, the Court reasoned that the textual reading of the statute does not give rise to the inference that “administrative” as used in Category 2 of Section 3730(e)(4)(A) is endowed with exclusively federal character.¹⁷⁰

The Court next turned to address arguments relying on considerations of history and policy for their support. “As originally enacted, the FCA did not limit the sources from which a relator could acquire the information to bring a *qui tam* action.”¹⁷¹ This lack of a limit allowed parasitic suits, even where the relator discovered the fraud by reading a federal criminal indictment!¹⁷² Congress reacted in 1943 by passing what “came to be known as a Government knowledge bar: ‘[O]nce the United States learned of a false claim, only the Government could assert its rights under the FCA against the false claimant.’”¹⁷³ The years following that amendment saw a decline in the volume and efficacy of *qui tam* litigation, and the Court again sought to reform the *qui tam* system in 1986 in order to achieve a balance between adequate incentives for whistle-blowing insiders and discouragement of opportunistic plaintiffs who have no significant information of their own to contribute.¹⁷⁴ The present text

¹⁶⁸ *Id.* at 1405. The Court also noted that such arguments are not supported by the statute’s text either. *See id.*

¹⁶⁹ *Id.* at 1406.

¹⁷⁰ *See id.*

¹⁷¹ *Id.*

¹⁷² *See id.*

¹⁷³ *Id.* (quoting *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997)).

¹⁷⁴ *See id.* at 1406-07.

of Section 3730(e)(4)(A) was enacted in 1986 as part of this reform, and Congress replaced the Government knowledge bar with the public disclosure bar in an effort to achieve the balance mentioned above.¹⁷⁵ Respondent argues that this historical background of Section 3730(e)(4)(A) favors the view of “administrative” as an exclusively federal interpretation for three separate reasons.¹⁷⁶ First, she argues that the drafting history of the public disclosure bar suggests that Congress intended such a result.¹⁷⁷ Second, because a major aim of the 1986 amendments was to limit the scope of the Government knowledge bar, construing Section 3730(e)(4)(A) as exclusively federal furthers this purpose by encouraging more private enforcement suits; and third, the Attorney General is much less likely to learn of fraud disclosed in state or local proceedings.¹⁷⁸ As a policy argument, respondent further argued that “it would be perverse to include nonfederal sources in Category 2, as local governments would then be able to shield themselves from *qui tam* liability by discretely disclosing evidence of fraud in ‘public’ reports.”¹⁷⁹ The Court addressed each of these arguments in turn.

In response to the first argument, the Court noted that “the drafting history of the public disclosure bar raises more questions than it answers.”¹⁸⁰ It also noted that significant substantive changes were made without floor debate, and “[n]either the House nor the Senate Committee Report explained why a federal limitation would be appropriate, and the subsequent addition of ‘administrative’ sources . . . might be taken as a sign that such a limitation was rejected by the full Chambers.”¹⁸¹ In light of the statute’s muddy drafting history, the Court also noted in response to respondent’s second argument that “there is no ‘evident legislative purpose’ to guide [the Court’s] resolution of the discrete issue [before it].”¹⁸²

¹⁷⁵ *See id.* at 1407.

¹⁷⁶ *See id.*

¹⁷⁷ *See id.*

¹⁷⁸ *See id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 1408.

¹⁸² *Id.* at 1409.

In response to respondent's third argument, the Court noted that respondent's proposition is not implausible but is still "sheer conjecture."¹⁸³ Furthermore, the Court pointed out that the right question is "whether the allegations of fraud have been 'public[ly] disclos[ed],' . . . not whether they have landed on the desk of a DOJ lawyer."¹⁸⁴

In response to the public policy concern that local and state "governments will insulate themselves from *qui tam* liability 'though careful, low key "disclosures" of potential fraud," the Court remarked that such "argument rests not just on speculation but indeed on rather strained speculation."¹⁸⁵ As elucidated by petitioners, "Given the fact that the submission of a false claim to the United States submits a defendant to criminal liability, fines, [and other damages], no rational entity would prepare a report that self-discloses fraud with the sole purpose of cutting off *qui tam* actions."¹⁸⁶ Furthermore, the Court noted, "Congress carefully preserved the rights of the most deserving *qui tam* plaintiffs: those whistle-blowers who qualify as original sources [notwithstanding public disclosure]."¹⁸⁷

Based on the above reasoning and analysis, the Court concluded that the term "administrative" in Category 2 of Section 3730(e)(4)(A) is not limited to federal sources, and thus reversed the judgment of the Court of Appeals and remanded the case for further proceedings.¹⁸⁸

Impact:

By holding that the term "administrative" in Category 2 of Section 3730(e)(4)(A) includes local and state disclosures, the Court limited the number of *qui tam* actions that can be brought. In other words, if there is some level of administrative government involvement and disclosure through an audit, investigation, report, or hearing, whether that government is local, state, or federal, courts are

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 1410.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* Whether respondent here could qualify as an original source is "one of many issues that remain[ed] open on remand." *Id.* at 1411.

¹⁸⁸ *See id.*

prevented from having jurisdiction over a *qui tam* action based upon that disclosure, unless the plaintiff is the “original source” of the information. The Court makes the case that this limit of *qui tam* actions is in line with the prevention of parasitic plaintiffs and that sufficient protections are afforded true whistle-blowers who may qualify as the “original source.” This definition holds water when the definition of “original source” is examined: “A separate statutory provision defines an ‘original source’ as ‘an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on this information.’”¹⁸⁹ Thus, where a private individual discovers a false claim independent of the government, and notifies the government of this information, that individual may file an action under the FCA regardless of whether the government later makes a public disclosure of the allegations. However, an issue may arise in the situation where a private individual and the government discover the false claim independent of each other and the government publicly discloses the allegations before the private individual can provide to the government the information on which the allegations are based; this issue, however, would align more with an interpretation of the original source definition in Section 3730(e)(4)(B) and not necessarily as much with Section 3730(e)(4)(A).

Mayo Found. For Med. Educ. & Research v. United States,
131 S. Ct. 704 (2011)

Synopsis:

Petitioners (“Mayo”) offer residency programs to medical school graduates who seek additional instruction in a given specialty.¹⁹⁰ Participants in these programs—“residents”—are trained primarily through hands-on experience—the bulk of their time, fifty to eighty hours a week, is spent caring for patients—but they also receive formal education training.¹⁹¹ Residents receive so-called “stipends”

¹⁸⁹ See *id.* at 1402 n.4 (quoting 31 U.S.C. § 3730(e)(4)(B)).

¹⁹⁰ *Mayo Found. For Med. Educ. & Research v. United States*, 131 S. Ct. 704, 706 (2011).

¹⁹¹ See *id.*

over \$40,000 from Petitioner and are provided with health insurance, malpractice insurance, and paid vacation time.¹⁹² The Federal Insurance Contributions act (“FICA”) requires employees and employers to pay taxes on all “wages” earned by employees.¹⁹³ “Wages” is defined by statute to encompass “all remuneration for employment,” and FICA defines “employment” to mean “any service . . . performed . . . by an employee for the person employing him,” but exempts any “service performed in the employ of . . . a school, college, or university . . . if such service is performed by a student who is enrolled and regularly attending classes at [the school].”¹⁹⁴ “In 2004, the [Treasury] Department issued regulations providing that ‘[t]he services of a full time employee’—which includes an employee normally scheduled to work 40 hours or more per week—‘are not incident to and for the purpose of pursuing a course of study.’”¹⁹⁵ The Department maintains that this analysis “is not affected by the fact that the services . . . may have an educational, instructional, or training aspect,” and the “rule offers as an example a medical resident whose normal schedule requires him to perform services 40 or more hours per week, and concludes that the resident is not a student.”¹⁹⁶ Mayo filed suit challenging this rule as invalid, and the District Court agreed.¹⁹⁷ The Eighth Circuit, however, reversed, applying the *Chevron* framework and concluding that the regulation was a permissible interpretation of an ambiguous statute.¹⁹⁸ The Supreme Court of the United States granted certiorari, and, upon review, determined that the Treasury Department’s full-time employee rule is a reasonable construction of Section 3121(b)(10).¹⁹⁹

¹⁹² *See id.*

¹⁹³ *See id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *See id.*

¹⁹⁸ *See id.*

¹⁹⁹ *See id.*

Facts, Analysis, and Ruling:

Individuals who graduate from medical school typically pursue additional education in a specialty by means of a medical residency.²⁰⁰ Mayo offers such residency programs, and these programs generally last three to five years and consist mainly of hands-on experience and training.²⁰¹ “Residents often spend between 50 and 80 hours a week caring for patients . . . [and] are generally supervised in this work by more senior residents and by faculty members known as attending physicians.”²⁰² Mayo pays its residents an annual “stipend” ranging from \$41,000 to \$56,000 and provides for them health insurance, malpractice insurance, and paid vacation time.²⁰³ In addition to their work duties, residents also participate in an educational program: “they are assigned textbooks and journal articles to read and are expected to attend weekly lectures and other conferences . . . [They] also take written exams.”²⁰⁴ But the “bulk of residents’ time is spent caring for patients.”²⁰⁵

Congress has created a national insurance system—Social Security—that provides benefits to retired, disabled, and unemployed workers, and this system is funded by taxing employees and employers under FICA on the wages employees earn.²⁰⁶ “Wages” is defined by Congress as “all remuneration for employment,” and “employment” is similarly broadly defined as “any service, of whatever nature, performed . . . by an employee for the person employing him.”²⁰⁷ Congress has also created, however, certain exemptions from FICA’s demands, including “service performed in the employ of . . . a school, college, or university . . . if such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university.”²⁰⁸ Dating as far back as 1951, the Treasury Department has applied this exception to

²⁰⁰ See *id.* at 708. The purpose of this additional education and training is to become board certified and to practice in that specialty field. See *id.*

²⁰¹ See *id.*

²⁰² *Id.*

²⁰³ See *id.*

²⁰⁴ *Id.* at 708-09.

²⁰⁵ *Id.* at 709.

²⁰⁶ See *id.*

²⁰⁷ See *id.*

²⁰⁸ *Id.*

“exempt from taxation student who work for their schools ‘as an incident to and for the purpose of pursuing a course of study’ there.”²⁰⁹ Prior to 2005, an individual’s eligibility for this exemption was determined on a case-by-case basis in consideration of the number of hours worked and the course load taken.²¹⁰ The Social Security Administration (“SSA”), which had a similar provision for students, also evaluates cases on a singular basis, but has “always held that resident physicians are not students.”²¹¹ When the Eighth Circuit held in 1998 that the SSA could not categorically exclude residents from student status, the Internal revenue Service (“IRS”) was faced with “more than 7,000 claims seeking FICA tax refunds on the ground that medical residents qualifies as students under [Section] 3121(b)(10) of the Internal Revenue Code.”²¹² Faced with this deluge of claims, the Treasury Department adopted and issued a new rule “prescribing that an employee’s service is ‘incident’ to his studies only when ‘[t]he educational aspect of the relationship between the employer and the employee, as compared to the service aspect of the relationship, [is] predominant.’”²¹³ “The rule categorically provides that ‘[t]he services of a full-time employee’—as defined by the employer’s policies, but in any event including any employee normally scheduled to work 40 hours or more per week—‘are not incident to and for the purpose of pursuing a course of study.’”²¹⁴

After the Department promulgated this rule, Mayo filed suit, asserting that its residents were exempt under Section 3121(b)(10) and that the rule was invalid.²¹⁵ The District Court granted summary

²⁰⁹ *Id.*

²¹⁰ *See id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 709-10.

²¹⁴ *Id.* at 710. In addition, “The amended provision clarifies that the Department’s analysis ‘is not affected by the fact that the services performed . . . may have an educational, instructional, or training aspect.’” *Id.* The rule included as an example a medical resident employed by a university; in the example, the resident’s normal work schedule calls for him to perform 40 or more hours of work per week, and because of this, according to the rule, his service is “not incident to and for the purpose of pursuing a course of study,” and he is not an exempt student. *Id.*

²¹⁵ *See id.*

judgment for Mayo, holding that the full-time employee rule is inconsistent with the unambiguous text of Section 3121.²¹⁶ The Court of Appeals, however, reversed in its application of the standard set forth in *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*²¹⁷ The Supreme Court of the United States granted certiorari.²¹⁸

The Court began its analysis with the “first step of the two-part framework announced in *Chevron* . . . and ask[ed] whether Congress has ‘directly addressed the precise question at issue.’”²¹⁹ The Court reasoned that Congress had not done so: “The statute does not define the term ‘student,’ and does not otherwise attend to the precise question whether medical residents are subject to FICA.”²²⁰

Ordinarily, the Court would automatically turn to the second step of the two-part *Chevron* framework, but the parties here disagreed as to the proper framework to be used.²²¹ On one hand, the government argued for the use of the *Chevron* framework at step two, under which a court “may not disturb an agency rule unless it is ‘arbitrary or capricious in substance, or manifestly contrary to the statute.’”²²² On the other hand, Mayo argued for the use of the multi-factor test used in *National Muffler*,²²³ a less deferential test that may “view an

²¹⁶ *See id.*

²¹⁷ 467 U.S. 837 (1984).

²¹⁸ *Mayo*, 131 S. Ct. at 710.

²¹⁹ *Id.* at 711.

²²⁰ *Id.* Mayo argued that the full-time employee rule must be rejected at step one of *Chevron*, contending that the dictionary definition of “student”—one who engages in study by applying the mind to acquisition of learning—plainly encompasses residents. *See id.* In addition, Mayo argued, students fulfill the limitation imposed by Congress on students—that they be “enrolled and regularly attending classes at school.” *See id.* However, “Mayo’s reading does not eliminate the statute’s ambiguity as applied to working professionals.” *Id.* The Court further noted that, “To the extent Congress has specifically addressed medical residents in [Section] 3121, moreover, it has expressly excluded these doctors from exemptions they might otherwise invoke.” *Id.* “That choice casts doubt on any claim that Congress specifically intended to insulate medical residents from FICA’s reach in the first place.” *Id.*

²²¹ *See id.*

²²² *Id.* “The sole question for the Court at step two under the *Chevron* analysis is ‘whether the agency’s answer is based on a permissible construction of the statute.’” *Id.* at 712.

²²³ *National Muffler Dealers Assn., Inc. v. United States*, 440 U.S. 472 (1979).

agency's interpretation of a statute with heightened skepticism when it has not consistent over time, when it was promulgated years after the relevant statute was enacted, or because of the way in which the regulation evolved."²²⁴

However, the Court noted that Mayo did not advance any justification for applying a less deferential standard of review to Treasury Department regulations than is applied to the regulations of any other agency, and absent such justification, there is no reason the Court should not use the deferential *Chevron* analysis to the same extent the Court uses it to review other regulations.²²⁵ "*Chevron* deference is appropriate 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgate in the exercise of that authority.'"²²⁶ Here, the Treasury Department "issued the full-time employee rule pursuant to an explicit authorization [by Congress] to 'prescribe all needful rules and regulations for the enforcement ' of the Internal Revenue Code.'"²²⁷ Both this express authorization from Congress to engage in the process of rulemaking and the fact that the Department issued the rule in question only after notice-and-comment procedures were significant indicators that the rule merits *Chevron* treatment and

²²⁴ *Mayo*, 131 S. Ct. at 712. In contrast, under a *Chevron* analysis, "deference to an agency's interpretation of an ambiguous statute does not turn on such considerations." *Id.* "We have repeatedly held that '[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework.'" *Id.*

²²⁵ *See id.* at 713. Mayo argued that because a tax regulation was at issue in *National Muffler*, and the Court used the less deferential multi-factor analysis there, because a tax regulation is at issue here, the Court should use the same test used in *National Muffler* here as well. *See id.* at 712-13. The Court noted, however, "In the absence of [any] justification [for applying a less deferential standard], we are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly '[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.'" *Id.* at 713 (quoting *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999)).

²²⁶ *Mayo*, 131 S. Ct. at 713 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)). "Our inquiry in this regard does not turn on whether Congress's delegation of authority was general or specific." *Mayo*, 131 S. Ct. at 714.

²²⁷ *Mayo*, 131 S. Ct. at 714 (quoting 26 U.S.C. § 7805(a)).

deference.²²⁸ “[T]he ultimate question is whether Congress would have intended, and expected, courts to treat [the regulation] as within, or outside, its delegation to the agency of ‘gap-filling’ authority.”²²⁹

In the *Long Island Care* case, we found that *Chevron* provided the appropriate standard of review “[w]here an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, [and] where the resulting rule falls within the statutory grant of authority.” [citations omitted] These same considerations point to the same result here. This case falls squarely within the bounds of, and is properly analyzed under, *Chevron* and *Mead*.²³⁰

Having determined that the *Chevron* framework was appropriate, the Court turned to the second step of that framework and inquired “whether the Department’s rule is a ‘reasonable interpretation’ of the enacted text.”²³¹ Under this inquiry, the Court reasoned, the full-time employee rule “easily satisfies” the second step of *Chevron*.²³² “Focusing on the hours an individual works and the hours he spends in studies is a perfectly sensible way” of distinguishing between workers who study and students who work.²³³ Because the rule is “not one to which Congress has directly spoken, and because the rule is a reasonable construction of what Congress has said,” the Court affirmed the judgment of the Court of Appeals.²³⁴

Impact:

The impact of this case is that it furthered the importance of the use of the deferential *Chevron* framework when reviewing administrative rules and regulations. As the Court noted, it must use

²²⁸ *Mayo*, 131 S. Ct. at 714.

²²⁹ *Id.*

²³⁰ *Id.* (quoting *Long Island Care at Home, Ltd. V. Coke*, 551 U.S. 158, 173 (2007)).

²³¹ *Mayo*, 131 S. Ct. at 714.

²³² *Id.*

²³³ *Id.* at 715.

²³⁴ *Id.* at 716.

Chevron’s highly deferential standard unless it is given a compelling reason to use a less deferential standard such as that found in *National Muffler*.²³⁵ The Court also noted the significantly changed administrative landscape since *Chevron*.²³⁶

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Actavis Elizabeth LLC v. FDA, 625 F.3d 760 (D.C. Cir. 2010)

Synopsis:

The FDA awarded five year exclusivity to a name-brand drug manufacturer for the manufacture of a drug used to treat Attention Deficit Hyperactivity Disorder (“ADHD”), and appellant, Actavis Elizabeth LLC (“Appellant” or “Actavis”), a generic drug manufacturer, challenged this award. The name-brand drug manufacturer intervened, and it and the FDA moved for summary judgment, which the District Court granted. Upon review, the Court of Appeal held that the drug was entitled to five year market exclusivity under the Federal Food, Drug, and Cosmetic Act (“FDCA”).

Facts, Analysis, and Ruling:

New drugs, even generic versions of previously approved drugs, must be approved by the FDA before they are put on the market.²³⁷ The FDCA governs the approval process, and it must be shown that the drug is safe and effective before it is approved.²³⁸ The Hatch-Waxman Amendments to the FDCA provide that when generic drugs are submitted for approval, they may gain approval though what is called an “abbreviated new drug application,” meaning that the applicant may, among other things, “rely on clinical studies submitted as part of a previous new drug application.”²³⁹ “The Hatch-Waxman Amendments also grant various period of marketing

²³⁵ *See id.* at 713.

²³⁶ *See id.*

²³⁷ *Actavis Elizabeth LLC v. FDA*, 625 F.3d 760, 761 (D.C. Cir. 2010)

²³⁸ *See id.*

²³⁹ *Id.* This holds true as long as the generic drug contains the same active ingredients as an already “listed:” drug. *See id.*

exclusivity to certain pioneer drugs approved” by the FDA.²⁴⁰ To qualify for five year exclusivity, an approved drug must contain no previously approved active moieties; that is, the drug must contain a new chemical entity.²⁴¹

“In 2005, New River Pharmaceuticals, the predecessor in interest to intervenor-defendant Shire Pharmaceuticals, sought approval to market lisdexamfetamine dimesylate for the treatment of [ADHD] under the brand name Vyvanse.”²⁴² The FDA approved this drug in 2007 and granted it five-year exclusivity under FDA regulations.²⁴³ In 2009, Actavis submitted an abbreviated application for the generic drug lisdexamfetamine dimesylate; however, the FDA returned the application, which mentioned Vyvanse, because the five-year period had not yet expired.²⁴⁴ “Actavis brought this suit in the district court under the Administrative Procedure Act, seeking to force the agency to rescind its grant of exclusivity to Vyvanse and to accept Actavis’ abbreviated application.”²⁴⁵ The FDA, in performing its own administrative review of the matter, affirmed its original determination, and the District Court eventually granted summary judgment to the FDA and Shire.²⁴⁶

The Court thought it important to briefly describe the chemical structure of lisdexamfetamine dimesylate in order to understand Actavis’ arguments.²⁴⁷ Lisdexamfetamine dimesylate is a salt of lisdexamfetamine.²⁴⁸ Because salts are not considered active moieties by the FDA, the FDA focused its analysis on the

²⁴⁰ *Id.* at 761-62. These exclusivity provisions have been implemented by the FDA through regulations.

²⁴¹ *See id.* at 762. “‘Active moiety’ is defined as ‘the molecule or ion, excluding those appended portions of the molecule that cause the drug to be an ester, salt (including salt with hydrogen or coordination bonds), or other noncovalent derivative (such as a complex, chelate, or clathrate) of the molecule, responsible for the physiological or pharmacological action of the drug substance.’” *Id.*

²⁴² *Id.*

²⁴³ *See id.*

²⁴⁴ *See id.*

²⁴⁵ *Id.*

²⁴⁶ *See id.*

²⁴⁷ *See id.* at 762-63.

²⁴⁸ *See id.* at 763.

lisdexamfetamine molecule alone.²⁴⁹ “Lisdexamfetamine consists of a portion of lysine, a common amino acid, connected to dextroamphetamine,” and these two portions are “linked by an amide bond, a type of covalent bond that utilizes a nitrogen atom” to form the bond.²⁵⁰ “What is important is that once it enters the body, lisdexamfetamine undergoes a chemical conversion to produce dextroamphetamine.”²⁵¹ The Court further noted, “Drugs containing dextroamphetamine, but not lisdexamfetamine, had received FDA approval before New River filed its application for Vyvanse.”²⁵²

Actavis argued that the award of five-year exclusivity to Vyvanse conflicted with the FDA’s regulations, but the Court found little merit in this argument.²⁵³ The FDA “interprets its regulations to allow five-year exclusivity for drugs containing derivative molecules or previously approved ‘active moieties’ when those derivative molecules contain non-ester covalent bonds.”²⁵⁴ As the FDA itself stated, “Under FDA’s interpretation of its regulation, the active moiety of a molecule with a non-ester covalent bond is the entire molecule, even if the molecule includes a covalent bond to a molecule that was itself previously an active moiety.”²⁵⁵

“An agency’s interpretation of its own regulations is entitled to judicial deference” unless the agency’s interpretation is shown to be “plainly erroneous or inconsistent with regulation.” The regulation states that the portions of the molecule that cause the drug to be an ester, salt, or other noncovalent derivative are the only excluded portions of the molecule for determining the active moiety.²⁵⁶ “When the drug is not in the form of an ester, salt, or other noncovalent derivative, the FDA treats the entire molecule as that ‘responsible for the physiological or pharmacological action of the drug substance,’ and therefore a separate moiety.”²⁵⁷ Because any

²⁴⁹ *See id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *See id.*

²⁵⁴ *Id.* An ester bond is one that uses an oxygen atom to perform the linking function. *See id.*

²⁵⁵ *Id.*

²⁵⁶ *See id.*

²⁵⁷ *Id.*

drug that does not contain a previously approved active moiety may receive five-year exclusivity, certain types of prodrugs, such as lisdexamfetamine, that are not esters, salts, or other types of noncovalent derivatives are eligible for five-year exclusivity.²⁵⁸ As such, the agency's interpretation is neither plainly erroneous nor inconsistent with the FDA's regulations.²⁵⁹

Actavis also argued that the FDA's interpretation is inconsistent with the clear meaning of the statute.²⁶⁰ The Hatch-Waxman Amendments permit the five-year grant of exclusivity to drugs "no active ingredient (including any ester or salt of the active ingredient) of which" has been previously approved by the FDA for the market.²⁶¹ Actavis argues that this language prevents the FDA from granting five-year exclusivity rights to a drug that contains "a drug molecule that eventually produces a previously approved drug molecule in the body."²⁶² In other words, according to Actavis, although lisdexamfetamine itself has not been approved, because it produces dextroamphetamine, a drug molecule that has already been approved by the FDA, when consumed, lisdexamfetamine should not be able to qualify for a grant of five-year exclusivity.²⁶³ In support of this argument, Actavis relied on the term "active ingredient," which Actavis argues compels and even obligates the FDA to consider "the particular drug molecule that reaches the 'site' of the drug's action."²⁶⁴ Under this argument, if the molecule that produces the drug's therapeutic effect "has been previously approved, then five-year exclusivity is not warranted."²⁶⁵ "But," the Court noted, "there is nothing to indicate that Congress used the term in the sense Actavis urges."²⁶⁶ "The agency has concluded that, for certain types of prodrugs, the entire pre-ingestion drug molecule should be deemed responsible for the drug's activity, which can include its 'distribution

²⁵⁸ *See id.*

²⁵⁹ *See id.*

²⁶⁰ *See id.* at 764.

²⁶¹ *See id.*

²⁶² *Id.*

²⁶³ *See id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

within the body, its metabolism, its excretion, or its toxicity.’”²⁶⁷
 “There is no reason to believe Congress thought differently—or
 thought about it at all.”²⁶⁸

In addition, Actavis contended that the structure and purpose of the statute in question proscribe the FDA’s interpretation, claiming that the statute “reserves five-year exclusivity only for major innovations.”²⁶⁹ In support of this argument, Actavis offered a “scenario in which drug companies such as Shire are able to maintain never-ending periods of five-year exclusivity for ‘minor’ variations on already drug molecules simply by adding different covalent appendages to them.”²⁷⁰ But the Court found no grounding for this view in reality, stating that “[i]n the nearly two decades since the current FDA regulations came into effect, there is no such example, or at least none that Actavis has identified.”²⁷¹ “[Because] nothing in the text, structure, purpose, or legislative history of the statute ‘speaks directly to the precise question at issue,’ the agency’s interpretation must stand if it is reasonable.”²⁷² Because nothing in the record established the FDA’s interpretation as unreasonable, the Court deferred to the FDA’s interpretation and upheld the grant of summary judgment to the FDA and Shire.

Impact:

The Court here seemed extremely deferential to the agency, seemingly because of the complexity and scientific, technical nature of the subject matter involved. The Court seemed to focus on dismissing the plaintiff’s arguments more so than it did on fully analyzing the law. This case could lead one to believe that plaintiffs challenging agency decisions, regulations, and rules may have difficulty prevailing where the subject matter is highly complex or scientific because the court will likely defer, as it did here, to the agency’s interpretation because of the agency’s “expertise.”

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *See id.* at 765.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

Hardin v. Jackson, 625 F.3d 739 (D.C. Cir. 2010)**Synopsis:**

Appellants, two tomato farmers, brought an action against the Administrator of the Environmental Protection Agency (“EPA”), Jackson, challenging the registration of a particular type of weed control pesticides for rice crops, claiming that the pesticides had been drifting over to their tomato crops and damaging them. The District Court granted the EPA’s motion to dismiss based on a lack of subject-matter jurisdiction on the ground that the appellants did not file the complaint until 2004, beyond the six year limitation period prescribed. The Court of Appeals agreed with the court below that the action is time-barred and held that the farmer’s action accrued as early as the date they filed previous state court actions against pesticide applicators.

Facts, Analysis, and Ruling:

In 1992, BASF Corporation (“BASF”) submitted an application for registration of Facet 50, a pesticide containing the active ingredient quinclorac and used for rice crops.²⁷³ Later in 1992, the EPA notified BASF that it had registered Facet 50 under 7 U.S.C. § 136a(c)(7)(A) & (B).²⁷⁴ Subsequently, in 1994 and 1998, the EPA registered two additional products containing quinclorac, Facet 75 DF and Facet GR, under subsection (c)(7)(A).

²⁷³ *Hardin v. Jackson*, 625 F.3d 739, 741 (D.C. Cir. 2010).

²⁷⁴ *See id.* The Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) mandates that a pesticide be registered with the EPA before it can be distributed or sold. *See id.* at 740. Under FIFRA, the registration is either unconditional under Section 136a(c)(5) or conditional under 136a(c)(7). *See id.* Section 137a(c)(7)(A) applies to pesticides if the pesticide “and proposed use are identical or substantially similar to any currently registered pesticide and use thereof, or differ only in ways that would not significantly increase the risk of unreasonable adverse effects on the environment,” and subsection (c)(7)(B) applies where a pesticide’s registration is amended “to permit additional uses of such pesticides.” *See id.* The third conditional registration, in subsection (c)(7)(C), is where the pesticide contains “an active ingredient not contained in any currently registered pesticide,” and the pesticide may be conditionally registered “for a period reasonably sufficient for the generation and submission of required data,” but “only if [the EPA] determines that use of the pesticide during such period will not cause any unreasonable adverse effect on the environment, and that use of the pesticide is in the public interest.” *Id.*

“Beginning in March 1995, the appellants filed multiple civil actions in Arkansas state court against Facet applicators, alleging that ‘drift’ from the sprayed Facet was damaging their tomato crops.”²⁷⁵ And in 2000, the appellants filed a class action against BASF in federal district court, but the District Court granted summary judgment for BASF on the ground that the action was preempted by FIFRA.²⁷⁶ On appeal to the Eighth Circuit, that Court remanded; and on remand the parties settled.²⁷⁷ In 2003, the appellants filed an administrative petition with the EPA to revoke or suspend and cancel registration of Facet pesticides, and while this petition was pending, in 2004, the appellants filed the action at issue here against the EPA, alleging causes of action under the FIFRA, the Mandamus Act, and the Administrative Procedure Act—all three claims were based on the EPA’s conditional registration of Facet 50 in 1992.²⁷⁸ The complaint sought declaratory and injunctive relief and an award of costs, including attorney’s fees.²⁷⁹

The EPA moved to dismiss the complaint on the ground that it was filed beyond the statute of limitations, and the Court eventually “dismissed the complaint for failure to commence the suit within six years after the appellants’ right of action accrued pursuant to 28 U.S.C. § 2401(a).”²⁸⁰ The appellants then filed a timely appeal with the D.C. Circuit.²⁸¹

The Court of Appeals first examined the language of the statute of limitations, which reads as follows:

²⁷⁵ *Id.* at 741.

²⁷⁶ *See id.*

²⁷⁷ *See id.*

²⁷⁸ *See id.* “According to the appellants, because EPA had not previously registered a quinclorac pesticide, Facet 50 was ineligible both for registration under subsection 3(c)(7)(A) . . . and for amended registration under subsection 3(c)(7)(B) (“to permit additional uses”)—the subsections identified in the Facet 50 registration notice.” *Id.* Appellants contended that the Facet 50 product, containing an active ingredient not found in any other registered pesticide, was eligible only for conditional registration under subsection (c)(7)(C), which requires that the EPA determine that use of the product will not have an adverse effect on the environment and will be in the general interest of the public. *See id.* at 742.

²⁷⁹ *See id.*

²⁸⁰ *See id.*

²⁸¹ *See id.*

Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.²⁸²

“Under this statute, a party challenging final agency action must commence his suit within six years after the right of action accrues[,] and the ‘right of action first accrues on the date of the final agency action.’”²⁸³ Thus, applying this rule here, the appellants’ right of action accrued on October 13, 1992, when the EPA finalized registration of Facet 50.²⁸⁴ However, there is an exception to the above rule known as the “discovery rule.”²⁸⁵

“Under the discovery rule, ‘a cause of action accrues when the injured party discovers—or in the exercise of due diligence should have discovered—that it has been injured.’”²⁸⁶ The appellants contend that, under this rule, their right to action accrued when they “discovered their procedural injuries, which did not occur until at least July 2000 when BASF raised its preemption defense in the Arkansas class action and thereby put them on notice that the Facet products had been registered under FIFRA.”²⁸⁷ Therefore, under this application of the rule, appellants argued, the 2004 filing of the complaint here was timely.²⁸⁸ The Court reasoned, however, that, “[e]xercising ‘due diligence,’ the appellants or their counsel should have discovered” the EPA registration of Facet products “long before BASF raised its preemption defense in July 2000.”²⁸⁹ “That Facet 50 was registered was obvious from the registration notice appearing on

²⁸² *Id.* (quoting 28 U.S.C. § 2401(a)).

²⁸³ *Hardin*, 625 F.3d at 743 (quoting *Harris v. FAA*, 353 F.3d 1006, 1009-10 (D.C. Cir. 2004)).

²⁸⁴ *See Hardin*, 625 F.3d at 743.

²⁸⁵ *See id.*

²⁸⁶ *Id.* (quoting *Nat’l Treasury Emps. Union v. FLRA*, 392 F.3d 498, 501 (D.C. Cir. 2004)).

²⁸⁷ *Hardin*, 625 F.3d at 743.

²⁸⁸ *See id.*

²⁸⁹ *Id.*

the label of Facet 50—a label with which [appellants] plainly should have been familiar inasmuch as Facet 50 was the product *sub judice*” in the 1995 Arkansas state court action filed by appellants.²⁹⁰

Therefore, as early as 1995, appellants were on notice of the EPA registration of Facet 50 “and could have requested registration documentation from EPA that would have revealed Facet 50 had been conditionally registered, albeit incorrectly, under subsections 3(c)(7)(A) and 3(c)(7)(B).”²⁹¹ According to the Court, if the appellants believed Facet 50 to be “inherently dangerous” as early as 1995, which the record strongly reflects, there is no reason that appellants could not have investigated the product’s registration as soon as they were put on notice of it, i.e., when they saw Facet 50’s label, which displayed the FIFRA registration number.²⁹²

“Because the appellants knew or should have known of their injuries no later than 1995 when they filed their state lawsuits, we conclude that, even under the discovery rule, the statutory limitation period began to run more than six years before they filed their complaint in this action on August 3, 2004.”²⁹³ Therefore, the Court affirmed the District Court’s dismissal of the suit as time-barred.²⁹⁴

Impact:

This case should give awareness to potential plaintiffs of the importance of statutes of limitations—if one misses the deadline, the court has no jurisdiction to hear your case, and your case will be thrown out of court. In addition, this case helped clarify when the right of action accrues in civil cases against the government, which is generally on the date of the final agency action or, in certain circumstances pursuant to the discovery rule, when the injured party discovers or should have discovered through due diligence that it has been injured.

²⁹⁰ *Id.* at 743-44.

²⁹¹ *Id.* at 744.

²⁹² *See id.*

²⁹³ *Id.* at 744-45.

²⁹⁴ *See id.* at 745.