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Legal Summaries

Emily Edwards

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**Pepperdine University School of Law
Legal Summaries**

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SUPREME COURT OF THE UNITED STATES

Astrue v. Capato ex rel. B.N.C., 132 S. Ct. 2021 (2012)

Synopsis:

Karen Capato conceived twin children through in vitro fertilization after her husband's death. Ms. Capato applied for Social Security surviving child's insurance benefits for the twins. However, the Social Security Administration (SSA) denied the application. Ms. Capato brought this action for review of the SSA's denial of her application for surviving child's insurance benefits under the Social Security Act. The United States District Court for the District of New Jersey affirmed the SSA's decision, and Ms. Capato appealed to the United States Court of Appeals for the Third Circuit. The Third Circuit affirmed the District Court's decision, in part, and vacated the decision, in part. The Supreme Court granted certiorari. Upon review, the Supreme Court held that because the twin children could not inherit from the decedent under Florida's intestacy laws, they were not entitled to Social Security survivors benefits. Furthermore, the Supreme Court determined that the provisions of the Social Security Act, which the SSA asserted governed the determination of the status of posthumously conceived children, met the standards of rational basis review. Thus, the Supreme Court reversed the Third Circuit's decision, in part, and remanded the case.

Facts, Analysis, and Ruling:

Karen and Robert Capato married in 1999; however, Robert died of cancer in 2002.¹ At his death, Mr. Capato resided in Florida, and his will, executed in Florida, provided for the son born of his marriage to Karen and two children from a previous marriage.² The will did not include any provisions for children conceived after his death.³ Shortly after Mr. Capato's death, Karen Capato began in

¹ Astrue v. Capato ex rel. B.N.C., 132 S. Ct. 2021, 2026 (2012).

² *Id.*

³ *Id.*

vitro fertilization using her husband's frozen sperm, and eighteen months after Robert Capato's death, Karen Capato gave birth to twins.⁴ Karen Capato then filed a claim for survivors' insurance benefits on behalf of the twins; however, the Social Security Administration denied her application.⁵ The United States District Court for the District of New Jersey affirmed the SSA's decision.⁶ The District Court determined that the twins would qualify for survivor's insurance benefits only if they were entitled to inherit from the deceased wage earner, their father Mr. Capato, under state intestacy laws.⁷ As Robert Capato died domiciled in Florida, Florida intestacy laws applied. Under Florida law, posthumously born children may inherit through intestate succession only if the child is conceived during the decedent's lifetime.⁸ The district court concluded that because the twins were conceived after Robert Capato's death, they could not inherit from their father under state intestacy laws; and, therefore, they also did not qualify for survivor's insurance benefits.⁹ Karen Capato appealed to the United States Court of Appeals for the Third Circuit. The Third Circuit reversed the district court's decision, holding that "the undisputed biological children of a deceased wage earner and his widow' qualify for survivors benefits without regard to state intestacy law."¹⁰ In order to resolve this conflict, the Supreme Court granted certiorari.

Section 402(d) of the Social Security Act states, "every child of a deceased insured individual shall be entitled to child's insurance benefit[s]."¹¹ However, the Supreme Court had to determine whether the Capato twins qualified as children of the deceased insured under the Social Security Act.¹² In order to address this question, the Supreme Court specifically looked to two sections of the Social

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Astrue*, 132 S. Ct. at 2026.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 2027.

¹¹ *Astrue*, 132 S. Ct. at 2027; *see also* 42 U.S.C. § 402(d) (2012).

¹² *Astrue*, 132 S. Ct. at 2026.

Security Act, section 416(e) and section 416(h)(2)(a).¹³ Section 416(e) defines the term child as “the child or legally adopted child of an individual.”¹⁴ However, section 416(h)(2)(a) states that, when determining whether an applicant is the child of an insured individual, the “Commissioner of Social Security shall apply the intestacy law of the insured individual’s domiciliary State.”¹⁵ The SSA argued that section 416(h)(2)(a) clarified the definition of child offered in section 416(e), and thus section 416(h)(2)(a) governed the meaning of the term child when dealing with applicants for insurance benefits.¹⁶ On the other hand, Karen Capato, on behalf of her twin children, argued that the Supreme Court should adopt the Third Circuit’s interpretation of the Social Security Act, of which section 416(e) controlled the meaning of the term child.¹⁷ The Supreme Court evaluated both the SSA’s and the Third Circuit’s arguments and ultimately determined that the SSA’s interpretation of the Social Security Act was more persuasive.¹⁸

In reaching this decision, the Supreme Court first evaluated the Third Circuit’s decision that section 416(e)’s definition of child governed which applicants were entitled to insurance benefits.¹⁹ The Third Circuit asserted that section 416(h)(2)(a) only governs when a child’s family status needs to be determined; and, as there was no family status to determine in this case, section 416(e)’s definition of child must govern.²⁰ The Supreme Court recognized that family status was not at issue in this case as there was no question that the twins were the biological children of Robert and Karen Capato.²¹ However, the Supreme Court looked to the language of the Social Security Act and the intent of Congress to determine that section 416(h)(2)(a) was intended to compliment and further clarify section

¹³ *Id.* at 2027–28.

¹⁴ *Id.* at 2027; *see also* 42 U.S.C. § 416(e)(1) (2012).

¹⁵ *Astrue*, 132 S. Ct. at 2028; *see also* 42 U.S.C. § 416(h)(2)(a) (2012).

¹⁶ *Astrue*, 132 S. Ct. at 2028.

¹⁷ *Id.* at 2029.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Astrue*, 132 S. Ct. at 2029.

416(e)'s vague definition of child.²² Section 416(h)(2)(a) specifically refers to "this subchapter," and this reference includes both section 402(d) and section 416(e).²³ Thus, the Supreme Court determined that Congress intended section 416(h)(2)(a) to provide a "plain and explicit instruction on how the determination of child status should be made."²⁴ Furthermore, the Court also found that the Social Security Act commonly refers to state law for matters of family status as seen with the Act's reference to state law to define such terms as wife, widow, or parent of an insured individual.²⁵ Therefore, the Court held that requiring all "child" applicants to qualify as children of the insured decedent under state intestacy law created a simple and clear test that ensured benefits for those plainly contemplated by Congress and avoided congressional entanglement in state-law family relations.²⁶

The Court also determined that using section 416(h)(2)(a)'s definition of "child" furthers the purpose of the Social Security Act. Congress's intent with the Act was to create a program that would provide "dependent members of a wage earners family with protection against the hardships occasioned by the loss of the insured's earnings."²⁷ If a child can take personal property from the deceased's estate under state intestacy laws, the Court determined that it is reasonable to assume the child will more likely be dependent during the parent's life and at the parent's death.²⁸ Thus, the state intestacy laws help to further the overall purpose of the Social Security Act.²⁹

Finally, the Supreme Court addressed Karen Capato's constitutional claim. Mrs. Capato asserted that the SSA's interpretation of the Act raised equal protection and due process concerns because their interpretation treated posthumously conceived children as an "inferior subset of natural children who are ineligible

²² *Id.* at 2030–31.

²³ *Id.* at 2031.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Astrue*, 132 S. Ct. at 2031.

²⁷ *Id.* at 2032.

²⁸ *Id.*

²⁹ *Id.*

for government benefits.”³⁰ Just as the Third Circuit had previously rejected this argument, the Supreme Court also rejected this claim. The Court applied rational basis review, as this case did not involve illegitimate children of unwed parents, but only posthumously conceived children.³¹ Under rational basis review, the SSA’s interpretation of the Social Security Act must be reasonably related to the government’s interests.³² Here, the government’s interests are to reserve benefits to those children who have lost a parent’s support and to minimize the administrative burden of proving dependency on a case-by-case basis.³³ The Supreme Court concluded that the SSA’s adoption of section 416(h)(2)(a) as the controlling definition of a “child” is reasonably related to achieving these government interests.³⁴ As the SSA’s interpretation of the statute is at least reasonable, it is entitled to deference under the Chevron standard because Congress gave the SSA the authority to interpret and enforce the Social Security Act, and the SSA’s interpretation in this case was neither arbitrary nor capricious.³⁵ Thus, the Court determined that there were no equal protection or due process violations in the SSA’s interpretation of the Social Security Act.

After considering all of these factors, the Supreme Court held that applications for child insurance benefits, as in this case, must be resolved in reference to state intestacy law.³⁶ Furthermore, the provisions of the Social Security Act determining the status of posthumously conceived children passed rational basis review.³⁷ Therefore, the Supreme Court reversed the Third Circuit’s decision and remanded for further proceedings consistent with this opinion.³⁸

³⁰ *Id.* at 2033.

³¹ *Astrue*, 132 S. Ct. at 2033.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 2033–34.

³⁶ *Astrue*, 132 S. Ct. at 2034.

³⁷ *Id.*

³⁸ *Id.*

Impact:

With this case, the Supreme Court once again showed deference to government agency interpretation of a statute. This deference reinforces the concept that courts want to avoid getting involved in governmental agency decisions when possible. Furthermore, with this decision, the Supreme Court established a standard interpretation of the term child for the Social Security Act. This allows the SSA and the courts to avoid having to make burdensome case-by-case determinations.

Southern Union Co. v. United States, 132 S. Ct. 2344 (2012)*Synopsis:*

Southern Union Co. was convicted by a jury in federal court for violating the Resource Conservation and Recovery Act of 1976 (RCRA). The jury found that Southern Union Co. had knowingly stored liquid mercury without a permit at a subsidiary facility. For violating the RCRA, the probation office set a maximum fine of \$38.1 million and imposed an actual fine of \$6 million. Southern Union Co. argued, on appeal, that by setting this maximum fine and imposing the actual fine, the district court engaged in judicial fact-finding that enlarged the maximum punishment authorized for a particular crime, thus violating their Sixth Amendment rights. The United States Court of Appeals for the First Circuit affirmed the district court's sentencing, holding that Apprendi does not apply to criminal fines. The Supreme Court granted certiorari and determined that Apprendi does apply to the imposition of criminal fines. Thus, the Supreme Court held that, in setting the maximum potential fine and imposing an actual fine on Southern Union Co., the district court did engage in judicial fact-finding that enlarged the maximum punishment the defendant faced beyond what the jury's verdict or the defendant's admissions allowed.

Facts, Analysis, and Ruling:

Southern Union Co. is a natural gas distributor whose subsidiary stored liquid mercury at a facility in Rhode Island.³⁹ In September 2007, a grand jury indicted Southern Union Co. on multiple counts for violating federal environmental statutes; however, only the first count is relevant here. The first count alleged that the company violated the Resource Conservation and Recovery Act of 1976 by knowingly storing liquid mercury without a permit at the Rhode Island facility “from September 19, 2002 until on or about October 19, 2004.”⁴⁰ After a trial in the District Court of Rhode Island, a jury convicted Southern Union Co. of unlawfully storing liquid mercury “on or about September 19, 2002 to October 19, 2004.”⁴¹

RCRA violations are punishable by a fine of no more than \$50,000 for each day of the violation.⁴² The probation office set a maximum fine of \$38.1 million by determining that Southern Union Co. violated the RCRA for 762 days, from September 19, 2002 through October 19, 2004.⁴³ Southern Union Co. argued that this calculation violated *Apprendi*⁴⁴ as the jury was not required to determine the precise duration of the company’s violation.⁴⁵ The company pointed to the fact that the jury verdict form only listed an approximate start date for the violation and permitted a conviction if the jury found a violation for even one day.⁴⁶ Thus, imposing a fine greater than the single day penalty of \$50,000 required the district court to engage in judicial fact-finding, violating the *Apprendi* precedent.⁴⁷ In response, the Government acknowledged that the

³⁹ *Southern Union Co. v. United States*, 132 S. Ct. 2344, 2349 (2012).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000). This case reserves to juries the determination of any fact, other than that of a prior conviction, which might increase a criminal defendant’s maximum potential sentence. The case has been applied to multiple cases involving imprisonment or death, but has yet to be applied to cases involving criminal fines. *Southern Union Co.*, 132 S. Ct. at 2349.

⁴⁵ *Southern Union Co.*, 132 S. Ct. at 2349.

⁴⁶ *Id.*

⁴⁷ *Id.*

jury was not required to specify the duration of the violation, but argued that Apprendi does not apply to criminal fines.

The district court held that Apprendi did apply to criminal fines, but upheld the sentencing because the court concluded that based on the content and context of the verdict the jury had found a 762-day violation.⁴⁸ Therefore, the district court enforced a \$6 million fine and \$12 million community service obligation on Southern Union Co.⁴⁹ The company appealed to the United States Court of Appeals for the First Circuit. The First Circuit rejected the district court's finding that the jury necessarily found a 762-day violation, but upheld the sentence by concluding that Apprendi did not apply to criminal fines.⁵⁰ As the circuit courts have reached contradictory conclusions on the application of Apprendi, the Supreme Court granted certiorari in order to resolve the conflict.⁵¹

In order to resolve this conflict, the Supreme Court had to consider the scope of the Sixth Amendment right of jury trial. Apprendi states that besides prior convictions, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."⁵² According to Apprendi, the statutory maximum is the maximum sentence a judge can impose based solely on the facts reflected in the jury verdict or admitted by the defendant.⁵³ The Supreme Court determined that the purpose of Apprendi is to ensure that the jury is the one who determines the facts that warrant punishment for a statutory offense.⁵⁴ This concern applies whether the sentence is a criminal fine, imprisonment, or death.⁵⁵ The Government argued that because criminal fines are less serious punishments than incarceration or death, Apprendi should not apply.⁵⁶ However, the Supreme Court rejected this argument. The

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Southern Union Co.*, 132 S. Ct. at 2349.

⁵¹ *Id.*

⁵² *See Apprendi*, 120 S. Ct. 2348.

⁵³ *Id.*

⁵⁴ *Southern Union Co.*, 132 S. Ct. at 2350.

⁵⁵ *Id.*

⁵⁶ *Id.* at 2351.

Court pointed to the fact that one reason Southern Union Co. was properly accorded a jury trial was due to the seriousness of the potential punishment, the fines.⁵⁷ Furthermore, the Government admitted that the district court made factual findings, which increased the potential and actual fine the court imposed.⁵⁸ This judicial fact-finding that increases the maximum punishment a defendant faces beyond a jury's verdict or the defendant's admission is precisely what Apprendi is intended to guard against.⁵⁹

The Supreme Court also determined that Apprendi does not allow courts to distinguish between a fact that is an element of the crime and a fact that goes to determining the maximum sentence of a crime.⁶⁰ These are both facts that must be determined by the jury, and are not subject to judicial fact-finding. In this case, the fact that will ultimately determine the maximum fine that Southern Union Co. faces is the number of days the company was in violation of the RCRA.⁶¹ The Court decided that the Government must prove to the jury that Southern Union Co. committed the acts constituting the violation for each day of the alleged 762 day long violation. By requiring that the jury must determine the duration of the violation, the Supreme Court ruled that Apprendi applies to the imposition of criminal fines. The Supreme Court remanded the case to the Court of Appeals for further proceedings.

Impact:

In determining that Apprendi applies to the imposition of criminal fines, the Supreme Court established a unified rule for courts to follow when evaluating whether a court has engaged in judicial fact-finding during the sentencing portion of a trial. This ruling resolves any conflict that may have existed between the circuit courts on this matter. Furthermore, this decision does not mark an unexpected extension of the Apprendi doctrine as most circuit courts have already addressed this issue and applied the doctrine to criminal

⁵⁷ *Id.*

⁵⁸ *Id.* at 2352.

⁵⁹ *Southern Union Co.*, 132 S. Ct. at 2352.

⁶⁰ *Id.* at 2356.

⁶¹ *Id.*

finer. Therefore, this decision does not mark a drastic departure from precedent as the Government alleged, but formally recognizes an already widely established application of the Apprendi doctrine to criminal fines.

Roberts v. Sea-Land Services, Inc., 132 S. Ct. 1350 (2012)

Synopsis:

Dana Roberts petitioned for review of an order of the Office of Workers' Compensation Program setting his maximum weekly rate for his Longshore and Harbor Workers' Compensation Act (LHWCA) benefits at the statutory maximum rate for 2002. Roberts argued that his benefits should have been based on the higher statutory maximum rate for 2007, as 2007 was the year in which he was "newly awarded compensation" by an Administrative Law Judge (ALJ). The ALJ denied reconsideration, and the Department of Labor's Benefits Review Board affirmed the ALJ's decision determining that the relevant maximum rate is determined by the date the disability begins. The United States Court of Appeals for the Ninth Circuit affirmed the decision holding that an employee is newly awarded compensation under the LHWCA when the employee first becomes entitled to compensation. The Supreme Court granted certiorari to resolve any conflict regarding when a workers' compensation beneficiary is newly awarded compensation. The Supreme Court affirmed the appellate court decision and held that a claimant is newly awarded compensation under the LHWCA when the employee first becomes entitled to compensation.

Facts, Analysis, and Ruling:

The Longshore and Harbor Workers' Compensation Act provides compensation for the disability or death of employees who suffer an injury or death while working upon navigable waters of the United States.⁶² The employee's compensation depends on the severity of his injury and his pre-injury pay.⁶³ However, section 906 of the

⁶² Roberts v. Sea-Land Services, Inc., 132 S. Ct. 1350, 1354 (2012).

⁶³ *Id.*

LHWCA caps benefits for most types of disability at “twice the national average weekly wage for the fiscal year in which an injured employee is newly awarded compensation.”⁶⁴ In this case, the controversy arises over when an employee is “newly awarded compensation.”

In fiscal year 2002, Dana Roberts slipped and fell on a patch of ice while employed by Sea-Land Services marine terminal in Dutch Harbor, Alaska.⁶⁵ Roberts notified Sea-Land of his injury, and Sea-Land voluntarily paid Roberts workers’ compensation benefits without a compensation order until fiscal year 2005.⁶⁶ After Sea-Land discontinued paying Roberts the benefits, Roberts filed a LHWCA claim and Sea-Land controverted.⁶⁷ After a hearing, in fiscal year 2007, an Administrative Law Judge (ALJ) awarded Roberts benefits based on twice the national average weekly wage for fiscal year 2002, as this was the year Roberts became disabled.⁶⁸ Roberts moved for reconsideration, arguing that he was entitled to benefits based on the national average weekly wage for the fiscal year 2007, as this was the year that he was “newly awarded compensation” by the ALJ’s order.⁶⁹ The ALJ denied reconsideration, and the Department of Labor’s Benefits Review Board affirmed the decision.⁷⁰ The United States Court of Appeals for the Ninth Circuit affirmed the decision holding that an employee is “newly awarded compensation” under section 906(c) of the LHWCA when the employee first becomes entitled to compensation, thus when the injury occurs.⁷¹ The Supreme Court granted certiorari to determine when an employee was “newly awarded compensation.”

Roberts argued that the phrase “awarded compensation” in section 906(c) of the LHWCA refers to a formal order, while Sea-Land argued that the phrase refers to when an employee is statutorily entitled to compensation due to a disability and that a formal order is

⁶⁴ *Id.* See also 33 U.S.C. § 906(c) (2012).

⁶⁵ *Roberts*, 132 S. Ct. at 1355.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Roberts*, 132 S. Ct. at 1355.

⁷¹ *Id.*

not required.⁷² The Supreme Court determined that the language of section 906(c) of the LHWCA itself could be interpreted either way. However, after looking to the overall statutory scheme of the LHWCA, the Court determined that only the interpretation offered by Sea-Land was appropriate.⁷³ By interpreting “awarded compensation” to mean “statutorily entitled to compensation because of disability,” the Court ensured the administrative rule would provide for the equal treatment of similarly situated beneficiaries and prevent gamesmanship in the workers’ compensation claims process.⁷⁴

Furthermore, the Court noted that if Roberts’ interpretation of the language was adopted and a formal order was required for an award, section 906(c) would become inapplicable to the majority of disability claims.⁷⁵ Most employers voluntarily make payments to disabled employees upon notification of the disability without engaging in any administrative proceeding.⁷⁶ Thus by interpreting “awarded compensation” to refer to the point at which an employee first becomes statutorily entitled to compensation, when the disability occurs, the Court ensured that employers who voluntarily paid benefits could calculate the compensation cap.⁷⁷ To calculate this cap, the employers would simply look to the average weekly wage for the fiscal year in which the disability occurred.⁷⁸ This means of calculation prevents employers and employees from having to resort to unnecessary administrative proceedings in order to receive compensation. Moreover, the traditional administrative practice is to treat the time of the injury as the relevant date for awarding compensation.⁷⁹ By adopting Sea-Land’s interpretation of “award compensation,” the Court upholds this administrative tradition.

Finally, the Court noted that by establishing that an employee is “newly awarded compensation” when the employee first becomes

⁷² *Id.* at 1356.

⁷³ *Id.* at 1356–57.

⁷⁴ *Id.*

⁷⁵ *Roberts*, 132 S. Ct. at 1357.

⁷⁶ *Id.*

⁷⁷ *Id.* at 1358–59.

⁷⁸ *Id.*

⁷⁹ *Id.* at 1359.

disabled, and thus statutorily entitled to benefits, helps prevent employees from engaging in gamesmanship in the claims process.⁸⁰ If compensation awards were valued based on the time an ALJ ordered the award, then employees would likely wait until a later fiscal year to file the award.⁸¹ By waiting until a later fiscal year, the employees would likely receive higher compensation as the compensation cap is based on the average weekly wage for the given fiscal year, and this average weekly wage typically increases each fiscal year. This would allow employees with similar injuries and pre-injury pay rates to receive different levels of compensation simply because of the time they filed their claims and received ALJ compensation orders. The Court notes that this practice would go against Congress's intent in creating the LHWCA.⁸² Thus, after all of these considerations, the Supreme Court affirmed the appellate court's decision and determined that an employee is "newly awarded compensation" when the employee first becomes disabled and thus statutorily entitled to benefits under the LHWCA.⁸³ The year in which a compensation order is issued does not affect the calculation cap of the award the employee is entitled to.⁸⁴

Impact:

With this decision, the Supreme Court prevented similarly situated disabled employees from receiving disparate treatment when determining what statutory maximum rate of compensation the employees were entitled to. This decision also discourages disabled employees from engaging in gamesmanship when filing disability claims. Furthermore, this case prevents unnecessary administrative proceedings, as it does not allow employees to file disability claims years later in an attempt to increase their award. The decision protects employers, who voluntarily pay disability claims when the disability initially occurs, from being subject to higher rates from a compensation order filed years later.

⁸⁰ *Roberts*, 132 S. Ct. at 1359, 1363.

⁸¹ *Id.* at 1359–60.

⁸² *Id.*

⁸³ *Id.* at 1363.

⁸⁴ *Id.*

Sackett v. E.P.A., 132 S. Ct. 1367 (2012)**Synopsis:**

The Sacketts received a compliance order from the United States Environmental Protection Agency (EPA) alleging that their parcel of land was subject to the Clean Water Act (CWA). The compliance order further alleged that by filling about a half acre of their property with dirt and rock the Sacketts had violated the CWA. The order required that the Sacketts restore the property in accordance with the EPA's Restoration Work Plan and provide the EPA with access to all of their records and documents regarding the parcel. The Sacketts brought a civil action against the EPA seeking an injunction and declaratory relief. The United States District Court for the District of Idaho dismissed the matter, and the United States Court of Appeals for the Ninth Circuit affirmed the District Court's decision. The Supreme Court granted certiorari. The Supreme Court determined that the EPA's compliance order was a final agency action for which there was no other adequate remedy other than Administrative Procedure Act (APA) review. Furthermore, the Court determined that the CWA did not prevent this APA review.

Facts, Analysis, and Ruling:

The Clean Water Act prohibits the "discharge of any pollutant by any person, without a permit into the 'navigable waters' of the United States."⁸⁵ If the Environmental Protection Agency determines that any person is in violation of the CWA, the EPA can issue a compliance order or initiate civil enforcement action.⁸⁶ If the EPA prevails in a civil action, the CWA allows the EPA to impose a civil penalty of \$37,500 per day of the violation.⁸⁷ However, if an individual has been issued a compliance order but fails to comply, and the EPA prevails in a civil action, the civil penalty may be increased to \$75,000 per day of the violation.⁸⁸

⁸⁵ Sackett v. E.P.A., 132 S. Ct. 1367, 1369–70 (2012); *see also* 33 U.S.C. §§ 1311, 1344 (2012).

⁸⁶ *Id.* at 1370.

⁸⁷ *Id.*

⁸⁸ *Id.*

The Sacketts owned a residential parcel of land in Idaho.⁸⁹ The parcel lied just north of Priest Lake, but was separated from the lake by several lots containing permanent structures.⁹⁰ In preparation for building a house on the parcel, the Sacketts filled in part of their parcel with rock and dirt.⁹¹ A few months after this filling, the Sacketts received a compliance order from the EPA alleging that the Sacketts had violated the CWA. The order asserted that (1) the Sacketts' parcel contained wetlands; (2) these wetlands are adjacent to Priest Lake, and Priest Lake is a navigable water of the United States under the CWA, (3) the Sacketts discharged fill material into the wetlands site, filling approximately one half acre; and (4) filling this area constituted a violation of the CWA, as the Sacketts discharged pollutants into waters of the United States without a permit.⁹² The EPA's compliance order required that the Sacketts immediately take steps to restore the site in accordance with an EPA created Restoration Work Plan, and required the Sacketts to turn over all records and documents concerning the site to the EPA.⁹³

The Sacketts did not believe their parcel was subject to the CWA, and thus asked the EPA for a hearing.⁹⁴ Their request for a hearing was denied, and the Sacketts brought this action in the District Court for the District of Idaho seeking an injunction and declaratory relief.⁹⁵ The District Court dismissed their claim for lack of subject-matter jurisdiction, and the United States Court of Appeals for the Ninth Circuit affirmed concluding that the CWA "precludes preenforcement judicial review of compliance orders, and that such preclusion does not violate the Fifth Amendment's due process guarantee."⁹⁶ The Supreme Court granted certiorari, but declined to consider the scope of what constitutes "navigable waters" subject to the CWA.⁹⁷ Instead, the Court limited its review to whether the

⁸⁹ *Id.*

⁹⁰ *Sackett*, 132 S. Ct. at 1370.

⁹¹ *Id.*

⁹² *Id.* at 1370–71.

⁹³ *Id.* at 1371.

⁹⁴ *Id.*

⁹⁵ *Sackett*, 132 S. Ct. at 1371.

⁹⁶ *Id.* at 1371.

⁹⁷ *Id.* at 1370.

compliance order was a final agency decision thus subjecting the order to judicial review under Chapter 7 of the Administrative Procedure Act.⁹⁸

There was no dispute that the compliance order was an agency action; however, the question remained whether the action was final.⁹⁹ The Court first concluded that the order determined the Sacketts' rights and obligations. Under the order, the Sacketts had a legal obligation to restore their property according to the EPA generated and approved Restoration Work Plan, and had the legal obligation to turn over all records and documents related to the fill site.¹⁰⁰ In addition to these legal obligations, the compliance order also subjected the Sacketts to legal consequences. The order allows the Government to potentially impose a penalty of up to \$75,000 per day of the violation if the Government pursues future enforcement proceedings.¹⁰¹ Furthermore, the order severely limits the Sacketts' ability to get a permit for their actions from the Army Corps of Engineers, as the Army Corps of Engineers will not process a permit application until any EPA compliance issues are resolved.¹⁰²

The Court then looked to the issuance of the order in relation to the EPA's decision-making process. The Court determined that the issuance of a compliance order marked the end of the EPA's decision-making process.¹⁰³ As exemplified by the denial of the Sacketts' request for a hearing, the findings and conclusions of a compliance order are not subject to further agency review.¹⁰⁴ The fact that the Sacketts could engage in informal discussion with the EPA regarding the terms of the order was not sufficient to "make an otherwise final agency action nonfinal."¹⁰⁵ Moreover, the APA requires that the person seeking "APA review of the final agency action have 'no other adequate remedy in court.'"¹⁰⁶ Typically in

⁹⁸ *Id.* at 1371.

⁹⁹ *Id.*

¹⁰⁰ *Sackett*, 132 S. Ct. at 1371–72.

¹⁰¹ *Id.* at 1372.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Sackett*, 132 S. Ct. at 1372.

¹⁰⁶ *Id.*

CWA enforcement cases judicial review occurs as a result of a civil action brought by the EPA.¹⁰⁷ However, the Sacketts, in this case, would have to wait for the EPA to initiate a civil action before having an opportunity for judicial review.¹⁰⁸ Thus, each day that the EPA does not file a civil action, the Sacketts become potentially liable for additional fines associated with violating the compliance order.

The Supreme Court then reviewed the Government's argument that, under section 701(a)(1) of the APA, the CWA qualified as a statute that specifically precluded judicial review and thus excludes APA review of the compliance order.¹⁰⁹ The Court rejected this argument concluding that the APA intends to provide judicial review for all final agency actions, especially when these agency actions are not subject to further review mechanisms.¹¹⁰ The Court further acknowledged that by allowing judicial review of final agency actions, such as compliance orders, the EPA might be less inclined to use compliance orders, as the orders would no longer encourage voluntary compliance.¹¹¹ However, the Court determined that efficiency was not sufficient to overcome the APA's presumptions of allowing judicial review for final agency action.¹¹² After all of these considerations, the Supreme Court determined that the EPA's compliance order, issued to the Sacketts, constituted a final agency action for which APA review is the only adequate remedy available, and that the CWA does not preclude this review.¹¹³

Impact:

This decision provides recipients of final agency actions, specifically EPA issued compliance orders, with a means of obtaining judicial review. This is particularly important for recipients such as the Sacketts who would have continued to accrue potential liability fines until the agency, the EPA, initiated a civil

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1373.

¹¹⁰ *Sackett*, 132 S. Ct. at 1372.

¹¹¹ *Id.* at 1374.

¹¹² *Id.*

¹¹³ *Id.*

action. Thus, this decision provides compliance order recipients with an alternative option, judicial review, instead of forcing them to choose to voluntarily comply or simply wait for the EPA to take civil action. Furthermore, with this decision, the Supreme Court firmly established that the APA places greater importance on the fairness of the process than efficiency in the process.

UNITED STATES COURTS OF APPEAL

Spirit Airlines, Inc. v. U.S. Dep't of Transp., 687 F.3d. 403
(D.C. Cir. 2012)

Synopsis:

Spirit Airlines, in conjunction with other airlines, petitioned for review of the Department of Transportation (DOT) final rule Enhancing Airline Passenger Protections. The DOT issued this rule pursuant to its authority to regulate unfair and deceptive practices in the airline industry. The airlines challenged three provisions of the Enhancing Airline Passenger Protections rule—the Airline Advertising Rule, the Refund Rule, and the Post Purchase Price Rule. The airlines alleged that the provisions violated their right to free speech, and that the provisions were arbitrary and capricious under the Administrative Procedure Act (APA). The United States Court of Appeals for the District of Columbia found that all three provisions were reasonable, not arbitrary or capricious under the APA. The D.C. Circuit also found that the Airfare Advertising Rule did not deprive the airlines of First Amendment protection of commercial speech, that the Refund Rule did not violate the Airline Deregulation Act, and that the Post Purchase Price Rule was procedurally lawful. Thus, the D.C. Circuit denied the airlines petition for review of the DOT's final rule Enhancing Airline Passenger Protections.

Facts, Analysis, Ruling:

Despite Congress passing the Airline Deregulation Act in 1978, the Department of Transportation retained the authority to regulate

and prohibit unfair and deceptive practices in the airline industry.¹¹⁴ The DOT exercised this authority by issuing a final rule entitled Enhancing Airline Passenger Protections.¹¹⁵ Spirit Airlines, and other airlines, challenged three of the provisions under this final rule—the Airline Advertising Rule, the Refund Rule, and the Post Purchase Price Rule.¹¹⁶ The Airline Advertising Rule required that total, final prices for airline fares be the most prominent price figure displayed.¹¹⁷ The Refund Rule required that airlines must allow passengers to cancel reservations without penalty for twenty-four hours if the reservation was made one week or more before the flight’s departure.¹¹⁸ Finally, the Post Purchase Price Rule prohibited airlines from increasing the price of seats, passenger baggage, or fuel surcharge after the air transportation had been purchased, except in the case of an increase in a government-imposed tax or fee.¹¹⁹ Spirit Airlines, and other airlines, challenged all three of these provisions as arbitrary and capricious under the Administrative Procedure Act, and then specifically alleged that the Airlines Advertising Rule violated airlines’ First Amendment right to engage in commercial and political speech.¹²⁰ The United States Court of Appeals for the District of Columbia took the airlines’ petition for review under review to examine these challenges.

The D.C. Circuit began by looking at the challenge to the Airfare Advertising Rule. The airlines asserted that there is nothing deceptive about listing the taxes of airline fares separately from the total price, and that the DOT lacked sufficient evidence to conclude this was a deceptive practice.¹²¹ The airlines alleged that as the DOT lacked sufficient evidence, this rule was arbitrary and capricious, especially considering that in 2006 the DOT had reaffirmed its policy

¹¹⁴ Spirit Airlines, Inc. v. U.S. Dep’t of Transp., 687 F.3d. 403, 408 (D.C. Cir. 2012).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 408–09.

¹¹⁸ *Id.* at 409.

¹¹⁹ *Spirit Airlines, Inc.*, 687 F.3d. at 409.

¹²⁰ *Id.* at 410.

¹²¹ *Id.*

of allowing base-fare advertising.¹²² The D.C. Circuit, however, was not persuaded by the airlines' argument. In 1984, the DOT passed a rule requiring airlines' advertised prices for air transportation to state the total price the consumer would have to pay, including taxes.¹²³ The disputed Airline Advertising Rule did not substantially alter this 1984 DOT rule, but only added language requiring that the total price be the most prominently advertised price.¹²⁴ The D.C. Circuit noted that the airlines never challenged the original 1984 rule, and thus the circuit court only had to consider whether the DOT acted arbitrarily and capriciously when the DOT enforced the 1984 rule by passing the Airline Advertising Rule.¹²⁵

Government agencies are afforded substantial deference when interpreting their own regulations.¹²⁶ Therefore, unless the DOT's interpretation of the regulation was plainly erroneous or inconsistent, the Airline Advertising Rule would be considered a reasonable interpretation of the DOT's authority to prohibit unfair or deceptive practices. The DOT relied on comments from the original 1984 rulemaking, about 500 comments from a 2006 hearing explaining how consumers were confused by advertised itemized pricing rather than one total price, and feedback from a DOT online forum known as the Regulation Room.¹²⁷ Through this evidence, the DOT concluded that consumers were being deceived by airlines advertising lower price quotes that did not reflect the total cost of travel.¹²⁸ Furthermore, the D.C. Circuit determined that nothing in the Airline Advertising Rule prevents airlines from advertising the breakdown of the cost of the air transportation, including taxes and government fees.¹²⁹ The D.C. Circuit concluded that as the Airline Advertising Rule only requires that the total price be the prominently

¹²² *Id.* Base-fare advertising refers to not requiring airlines to include taxes in their advertised fare. *Id.*

¹²³ *Id.*

¹²⁴ *Spirit Airlines, Inc.*, 687 F.3d. at 410.

¹²⁵ *Id.*

¹²⁶ *Id.* at 411.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Spirit Airlines, Inc.*, 687 F.3d. at 411.

displayed price, the rule was not an arbitrary or capricious exercise of the DOT's authority to prevent unfair and deceptive practices.¹³⁰

Next, the D.C. Circuit addressed the airlines' allegation that the Airline Advertising Rule violated their First Amendment rights. The airlines argued that strict scrutiny should be applied, as the advertising of the airline prices, especially the associated government taxes and fees, was political speech.¹³¹ The D.C. Circuit determined that the advertising of airfares was not political speech, but commercial speech, as the speech referred to a specific product, airfare, and the airlines had economic motivations for the speech.¹³² After determining the speech was commercial in nature, the D.C. Circuit analyzed the regulation of the speech using the Zauderer and Central Hudson frameworks.¹³³ Under Zauderer, an "advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."¹³⁴ The Airline Advertising Rule does not prohibit airlines' speech, but limits the manner in which airlines can advertise airfares by requiring the airlines to disclose and make prominent the total, final price.¹³⁵ Applying Zauderer, the D.C. Circuit determined that this disclosure requirement is not only reasonably related to the government's interest in preventing deception of consumers, but also a reasonable means of achieving this interest.¹³⁶ Furthermore, the rule also satisfied the Central Hudson test. The Central Hudson test requires that (1) the asserted government interest is substantial, (2) the regulation directly advances the asserted government interest, and (3) the means of achieving this interest are reasonable.¹³⁷ The D.C. Circuit determined that the substantial government interest in this case was to ensure accuracy of commercial information in the

¹³⁰ *Id.*

¹³¹ *Id.* at 411–12.

¹³² *Id.* at 412.

¹³³ *Id.*

¹³⁴ *Spirit Airlines, Inc.*, 687 F.3d. at 412; *see also* *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985).

¹³⁵ *Spirit Airlines, Inc.*, 687 F.3d. at 414.

¹³⁶ *Id.* at 414–15.

¹³⁷ *See* *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980).

marketplace.¹³⁸ Then applying the second and third factors, the D.C. Circuit determined that requiring the total, final price of airfare to be the most prominently displayed price not only directly advanced the government interest, but was a reasonable means of accomplishing the interest.¹³⁹ Therefore, as the Airline Advertising Rule met both the Zauderer and Central Hudson frameworks, the rule did not violate the airlines' First Amendment rights.

The D.C. Circuit then addressed the airlines challenge to the Refund Rule. This rule requires that airlines must allow consumers to cancel reservations without penalty for twenty-four hours if the consumers made reservations more than a week before the flight departure.¹⁴⁰ The airlines argue that this rule violates the Airline Deregulation Act as it regulates airfares, and that it prevents the airlines from ensuring their planes are full.¹⁴¹ The D.C. Circuit rejected the airlines' arguments determining that the Refund Rule does not regulate airfares, but regulates airline cancellation policies because existing cancellation policies were deceptive and unfair to consumers.¹⁴² The DOT examined existing airline customer service policies and determined that airlines' cancellation policies in particular were routinely misleading and vague.¹⁴³ The DOT determined that the vagueness and misleading nature of the policies was unfair and deceptive to customers, thus the DOT established the Refund Rule in order to establish industry norms for seats purchased more than a week in advance.¹⁴⁴ The D.C. Circuit held that this rule was not an arbitrary or capricious as the Rule was a reasonable means to prevent unfair and deceptive practices.¹⁴⁵

Finally, the D.C. Circuit examined the Price Rule. The Price Rule prevented airlines from increasing the price of seats, passenger baggage, or fuel surcharge after the air transportation had been purchased, except in the case of an increase in a government-imposed

¹³⁸ *Spirit Airlines, Inc.*, 687 F.3d. at 415.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 416.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Spirit Airlines, Inc.*, 687 F.3d. at 416.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

tax or fee.¹⁴⁶ The airlines argue that this rule is procedurally unlawful, as the airlines had no notice that the DOT was intending to prohibit price increases for optional services after a passenger buys a ticket but before a passenger purchases the optional services.¹⁴⁷ Thus, the airlines argue that the DOT failed to give the airlines proper notice of the scope and general thrust of the proposed rule.¹⁴⁸ The D.C. Circuit rejected this argument and sided with the DOT's view that increases in the price of air transportation, including increases in the price of seats, baggage, or applicable fuel surcharges, after the consumer purchased the airfare, constituted an unfair and deceptive policy. Thus, this rule established reasonable, not arbitrary or capricious, industry guidelines to prevent these unfair and deceptive policies.¹⁴⁹

Having determined that all three of the challenged provisions of the DOT's final rule entitled Enhancing Airline Passenger Protections were reasonable, procedurally lawful, and did not violate the airlines' First Amendment rights, the D.C. Circuit denied the airlines petition for review of the DOT's final rule.¹⁵⁰

Impact:

With this case, the D.C. Circuit reestablishes that the DOT has the authority to prohibit unfair and deceptive practices in the airline industry. This case shows that this authority is broad in scope, and emphasizes that the DOT does not have to come up with the best or least restrictive policies, but only reasonable policies to prevent unfairness and deception. As the case is limited to only three provisions of the DOT's final rule entitled Enhancing Airline Passenger Protections, it is likely that the circuit courts, and possibly the Supreme Court, will be confronted with additional challenges to the DOT's authority in the future.

¹⁴⁶ *Id.* at 409.

¹⁴⁷ *Id.* at 417.

¹⁴⁸ *Spirit Airlines, Inc.*, 687 F.3d. at 417.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

Orellana-Monson v. Holder, 685 F.3d. 511 (5th Cir. 2012)*Synopsis:*

The Orellana-Monson brothers, Jose and Andres, are El Salvadoran citizens who entered the United States on October 22, 2005. The brothers were charged with entering the United States without having been admitted or paroled. The Orellana-Monson brothers applied for asylum and withholding of removal under the Convention Against Torture (CAT). The brothers claimed that they qualified for asylum and withholding of removal as members in a particular social group, which feared future persecution. However, the Board of Immigration Appeals (BIA) rejected their application. The brothers appealed the BIA's decision to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the BIA's ruling finding that the brothers were ineligible for asylum or for withholding of removal, as they failed to qualify for membership in a particular social group for which they feared future persecution.

Facts, Analysis, and Ruling:

Jose and Andres Orellana-Monson were born in El Salvador.¹⁵¹ A gang known as Mara 18 operates openly in El Salvador, and actively recruits young El Salvadoran males.¹⁵² While he was living in El Salvador, a local Mara 18 leader attempted to recruit, 11-year-old Jose to the gang.¹⁵³ Jose claims that when he refused to join the gang, the Mara 18 leader threatened to kill him and his family.¹⁵⁴ After this incident, Jose and his 8-year-old brother Andres fled to the United States.¹⁵⁵ The brothers were charged with entering the United States without having been admitted or paroled.¹⁵⁶ The Orellana-Monson brothers claimed they were refugees eligible for asylum and for withholding of removal because they were being persecuted due

¹⁵¹ Orellana-Monson v. Holder, 685 F.3d. 511, 515 (5th Cir. 2012).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Orellana-Monson, 685 F.3d. at 515.

to their membership in a particular social group.¹⁵⁷ Jose asserted that he was a member of a social group consisting of “Salvadoran males, ages 8 to 15, who have been recruited by Mara 18 but have refused to join due to a principled opposition to gangs.”¹⁵⁸ Andres similarly asserted that he was a member of a social group consisting of “siblings of members of Jose’s social group, or alternatively, family members of Jose and that Mara 18 likely would impute Jose’s anti-gang political opinion to him.”¹⁵⁹ The brothers claimed that membership in these two social groups entitled them to asylum and withholding of removal.

First, an Immigration Judge (IJ) determined that Jose and Andres were ineligible for asylum because the Salvadoran government was trying to control Mara 18, the brothers had not been persecuted, and the brothers did not qualify as members of a particular social group or assert any political opinions.¹⁶⁰ The Orellana-Monson brother appealed to the Board of Immigration Appeals; however, the BIA determined that there was no evidence that the brothers had been persecuted.¹⁶¹ In this initial decision, the BIA did not consider whether the brothers belonged to a relevant social group for asylum purposes.¹⁶² The brothers then appealed to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit initially denied the petition for review, but after an additional petition for a panel rehearing, the Fifth Circuit heard oral arguments from the brothers. The Fifth Circuit then remanded the case back to the BIA requiring the BIA to evaluate the brother’s claim regarding being members of a protected social group entitled to asylum.¹⁶³ On remand, the BIA determined that young Salvadoran males who rejected gang membership and their families did not “possess the social visibility and particularity to constitute membership in a particular social group” and that these alleged groups were overly broad.¹⁶⁴ As the

¹⁵⁷ *Id.* at 516.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Orellana-Monson*, 685 F.3d. at 516.

¹⁶² *Id.*

¹⁶³ *Id.* at 517.

¹⁶⁴ *Id.*

brothers did not qualify for membership in a particular social group, the BIA found that the Orellana-Monson brothers failed to satisfy their burden of showing past persecution on an enumerated ground, and therefore were not entitled to a presumption of fear of future persecution.¹⁶⁵ For all of these reasons, the BIA determined that the brothers did not qualify for asylum, and as withholding of removal has a higher standard of proof than asylum, the brothers also did not qualify for this standard of relief under the Convention Against Torture.¹⁶⁶ The BIA dismissed the Orellana-Monson brother's appeal, and the brother filed a second petition for review to the Fifth Circuit.¹⁶⁷

The Fifth Circuit only reviewed the second BIA decision. Applying the Chevron standard, which gives deference to agency interpretations of the statutes they enforce, the Fifth Circuit first looked at whether the BIA's interpretation of the CAT was "arbitrary, capricious, or manifestly contrary to the statute."¹⁶⁸ The Attorney General has the discretion to grant asylum to refugees, and a refugee is defined as a person

who is outside of his country and is unable or unwilling to return because of persecution or a well-founded fear of persecution, and who has demonstrated . . . membership in a particular social group or political opinion was or will be at least one central reason for the persecution.¹⁶⁹

A refugee must provide specific facts showing that he will be singled out for persecution, and persecution is defined as "the infliction of suffering or harm under government sanction, upon persons who differ in a way regarded as offensive."¹⁷⁰ Furthermore, in order to establish persecution based on membership in a particular group, as the Orellana-Monson brothers allege, they must show that they are

¹⁶⁵ *Id.*

¹⁶⁶ *Orellana-Monson*, 685 F.3d. at 517.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 517–18; *see also* *Chevron, U.S.A, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

¹⁶⁹ *Orellana-Monson*, 685 F.3d. at 518.

¹⁷⁰ *Id.* at 518.

members of a group of persons who have common immutable characteristics that either cannot be changed or that they should not be required to change as the characteristic is fundamental to their individual identities.¹⁷¹ Thus, for asylum based on being a member of a particular social group, the Orellana-Monson brothers have to show that they are not only members of a particular social group, but that this membership is the cause of their persecution. These definitions and requirements for asylum are very specific and establish a high burden; however, the requirements to qualify for withholding removal are even higher.¹⁷² As the standards for withholding removal are more difficult to establish, if the Orellana-Monson brothers fail to meet the requirements for asylum, they will also fail to qualify for withholding removal.

With these definitions and requirements in mind, the Fifth Circuit reviewed the BIA's ruling. The key question for the Fifth Circuit is whether the BIA's interpretation of the term "particular social group," as defined in the Immigration and Nationality Act (INA), is entitled to Chevron deference.¹⁷³ The BIA determined that to qualify for asylum as a member of a particular social group, the social group must be both socially visible and particular.¹⁷⁴ According to the BIA, social visibility refers to the extent to which members of society perceive individuals with common characteristics as member of the perceived social group.¹⁷⁵ Moreover, particularity requires that the social group can be accurately described in a manner that differentiates the group and its members as a "discrete class of persons."¹⁷⁶ The BIA had previously rejected the argument that persons who resisted gang membership constituted a particular social group.¹⁷⁷ The BIA determined that these individuals who resisted gang membership were neither socially visible enough nor particular

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 519–21.

¹⁷⁴ *Orellana-Monson*, 685 F.3d. at 519.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

enough to constitute a particular social group under the asylum requirements.¹⁷⁸

The Fifth Circuit had to review the BIA's interpretation of social visibility and particularity as a matter of first impression in the circuit.¹⁷⁹ After looking at unpublished cases and other circuit court decisions, the Fifth Circuit determined that the BIA's interpretation of these two terms was entitled to Chevron deference. Chevron required the Fifth Circuit to first look at whether the INA defined "particular social group," and if the INA did not define this term, was the BIA's interpretation permissible considering the construction of the statute.¹⁸⁰ The first question was easily answered; the INA does not define the term "particular social group," thus the Fifth Circuit turned to determine whether the BIA's interpretation of the term was permissible.¹⁸¹

The Fifth Circuit determined that the BIA is entitled to use case-by-case analysis to provide meaning to statutorily ambiguous terms such as the term "particular social group."¹⁸² In this case, the BIA determined that the particular social groups the Orellana-Monson brothers alleged they were members of lacked both particularity and social visibility. Jose argued that he was a member of a social group constituting Salvadoran males between ages 8 and 15 who had been recruited, but refused to join Mara 18.¹⁸³ The BIA determined this group was overly broad as Mara 18 recruits from a wide cross section of society, and the only common trait individuals of this social group would share is their refusal to join the gang.¹⁸⁴ This characteristic is not sufficiently particular to be singled out or even identified in El Salvadoran society.¹⁸⁵ Furthermore, this social group also fails the social visibility requirement as there is no evidence to suggest that the social group Jose suggests would even be perceived as a group in

¹⁷⁸ *Id.* at 519–20.

¹⁷⁹ *Orellana-Monson*, 685 F.3d. at 519.

¹⁸⁰ *Id.* at 520.

¹⁸¹ *Id.*

¹⁸² *Id.* at 521.

¹⁸³ *Id.*

¹⁸⁴ *Orellana-Monson*, 685 F.3d. at 522.

¹⁸⁵ *Id.*

El Salvadoran society.¹⁸⁶ It is more likely that these individuals who refused to join Mara 18 would be perceived in the same manner as any other member of society who was opposed to the gangs interests or who represents a threat to the gang.¹⁸⁷

Similarly, Andres argued that he was a member of a social groups consisting of young Salvadoran males who are siblings or family members of Jose's social group.¹⁸⁸ However, Andres's group encompasses an even broader section of society than Jose's group, as it refers to all of the family members of individuals who refused to join Mara 18.¹⁸⁹ The BIA determined that if Jose's alleged group was too broad to meet the particularity and social visibility requirements for asylum, then Andres's even broader group must also fail, as its members would be even less particularized and less socially visible.¹⁹⁰

The Fifth Circuit determined that the BIA's interpretation of the particularity and social visibility requirements for asylum were not arbitrary or capricious, but reasonable given the given the ambiguity of the term "particular social group" in the INA.¹⁹¹ Thus, the Fifth Circuit affirmed the BIA's decision that the Orellana-Monson brothers failed to meet the requirements for membership in a particular social group.¹⁹² As the brothers failed to qualify as members of a particular social group, they could not have a "well founded fear or persecution as a result of membership in such [a] group."¹⁹³ Therefore, the Orellana-Monson brothers were not eligible for asylum.¹⁹⁴ As the requirements for withholding removal are even more stringent than asylum, the Fifth Circuit determined that the brothers were not eligible for withholding removal either.¹⁹⁵

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 521.

¹⁸⁹ *Orellana-Monson*, 685 F.3d. at 522.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Orellana-Monson*, 685 F.3d. at 522.

¹⁹⁵ *Id.*

Impact:

This decision established that the Fifth Circuit, and likely other circuits as well, will give deference to agency interpretations of statutes, as long as the interpretations are reasonable under the Chevron standard. The case also provided the BIA with the authority to interpret any ambiguous terminology in the INA on a case-by-case basis. This case-by-case application has the potential to allow for inconsistent or even contradictory BIA decisions depending on the manner in which the BIA chooses to interpret the terminology in each case. Thus, the circuit courts, and possibly the Supreme Court, will likely be confronted with additional cases challenging the BIA's interpretations of the INA's terms.