

10-15-2013

Legal Summaries

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Recommended Citation

Hsuan Li, *Legal Summaries*, 33 J. Nat'l Ass'n Admin. L. Judiciary Iss. 2 (2013)

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**Pepperdine University School of Law
Legal Summaries**

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SUPREME COURT OF THE UNITED STATES**Kloeckner v. Solis,
133 S. Ct. 596 (2012)****Synopsis:**

Petitioner Carolyn Kloeckner, an employee of the Department of Labor (DOL), filed a complaint with the agency's civil rights office, alleging that the agency had engaged in unlawful sex and age discrimination by subjecting her to a hostile work environment.¹ Before her Equal Employment Opportunity Commission (EEOC) hearing took place, the DOL terminated petitioner's employment.² Petitioner subsequently filed an appeal to the Merit Systems Protection Board (MSPB), claiming that her termination was a discriminatory removal.³ Petitioner made a request for a consolidation of her two cases and the proceeding took place before the EEOC judge, who terminated her proceeding on the basis of her bad-faith discovery misconduct.⁴ After her appeal of the EEOC decision lost before DOL, petitioner sought MSPB review of the DOL's decision.⁵ MSPB dismissed petitioner's appeal as untimely.⁶ Petitioner then brought this action against DOL in the U.S. District Court of Eastern Missouri.⁷ The court dismissed the complaint for lack of jurisdiction, holding that under section 7703(b)(1) of the Civil Service Reform Act of 1978⁸ (CSRA), petitioner should have sought review in the Federal Circuit because petitioner's claims had been dismissed on procedural grounds.⁹ The district court further stated that, pursuant to section 7703(b)(2) of the same act, only discrimination cases that MSPB had decided on the merits could go

¹ Kloeckner v. Solis, 133 S. Ct. 596, 602 (2012).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 603.

⁶ *Id.*

⁷ *Id.*

⁸ 5 U.S.C. § 7703 (b)(1) (2012).

⁹ Kloeckner, 133 S. Ct. at 603.

to district court.¹⁰ The Eighth Circuit affirmed the holding.¹¹ The Supreme Court reversed, holding that a federal employee who has an agency action claim that is appealable to the MSPB based on an antidiscrimination statute listed in section 7703(b)(1) should seek review in district court, rather than the Federal Circuit, regardless of whether the MSPB decided her case on procedural grounds or on the merits.¹²

Facts, Analysis, and Ruling:

A basic understanding of the statutory framework is required to understand the facts of this case. CSRA provides federal employees procedural protections based on the severity of the adverse employment action taken against the employee.¹³ An employee has the right to appeal to an independent adjudicator of federal employment disputes called the MSPB, but only when the employer's action is particularly serious—such as for a termination of employment or a reduction of pay.¹⁴ When the employee couples such a claim with a charge against the agency for discrimination based on a federal statute, such as Title VII¹⁵ or the Age Discrimination in Employment Act of 1967,¹⁶ she is said to have brought a “mixed case,” as defined by section 7702(a)(1).¹⁷ A mixed case may proceed in many ways, by either (1) the filing of a discrimination complaint with the employee's agency, from which a decision is appealable to the MSPB or by suing the agency in district court; or (2) the initiation of a suit with the MSPB, from which a decision is appealable to the EEOC or by judicial review.¹⁸ The issue in this case concerns where that post-MSPB judicial review should take place—in the Federal Circuit or in federal district court.¹⁹

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 607.

¹³ *Id.* at 600.

¹⁴ *Id.*

¹⁵ 42 U.S.C. §§ 1981 to 2000h-6 (2006).

¹⁶ 29 U.S.C. §§ 621–634 (2006).

¹⁷ *Kloeckner*, 133 S. Ct. at 601.

¹⁸ *Id.*

¹⁹ *Id.*

Section 7703(b)(1) of CSRA provides that a petition to review the MSPB's final decision shall be filed in the Federal Circuit, and section 7703(b)(2) spells out the exception to this basic rule: cases of discrimination subject to section 7702 ("mixed cases"), shall be filed under the enforcement sections of antidiscrimination statutes, under which plaintiffs are authorized to bring suit in federal district court.²⁰

The facts here establish a mixed case. In June 2005, petitioner Carolyn Kloeckner filed a complaint with the agency's civil rights office, alleging that her employer, DOL, had engaged in unlawful sex and age discrimination by subjecting her to a hostile work environment.²¹ Because petitioner did not suffer a sufficiently serious personnel action, her case was not appealable to the MSPB, and she was assigned an EEOC hearing instead.²² DOL discharged her a month later, before the EEOC hearing took place.²³ Petitioner believed the agency's action was discriminatory, which—coupled with her previous claim—gave her a mixed case.²⁴

Petitioner initiated her discriminatory removal suit with the MSPB but realized her claims there were so similar to her EEOC claims that she was concerned about incurring duplicative discovery costs.²⁵ Petitioner thus asked the MSPB to dismiss her case without prejudice, and the MSPB granted such a dismissal for four months with the right to refile thirty days after her EEOC case decision was rendered, or by January 18, 2007, whichever occurred first.²⁶ The EEOC judge terminated the EEOC proceeding and returned petitioner's case for DOL to decide, after the judge determined that petitioner had engaged in bad-faith conduct during discovery.²⁷ Six

²⁰ *Id.* "Notwithstanding any other provision of law, any such case filed under any such [statute] must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702." 5 U.S.C. § 7703(b)(2) (2012). See *infra* text accompanying note 38 (language of § 7702).

²¹ *Kloeckner*, 133 S. Ct. at 602.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 602–03.

months later, in November of 2007, DOL found against petitioner on all of the claims.²⁸ Petitioner filed a timely appeal for the DOL ruling, but MSPB declined to treat it as an ordinary appeal, dismissing petitioner's appeal as an attempt to reopen her expired MSPB case.²⁹

Petitioner then brought an action against DOL in federal district court, where the court dismissed the complaint for lack of jurisdiction.³⁰ Because petitioner's case was dismissed on procedural grounds, the court found that she should have sought review under the Federal Circuit, pursuant to section 7703(b)(1).³¹ Only where MSPB decided petitioner's discriminatory claims on the merits, could petitioner file in federal district court.³² The Eighth Circuit concurred, but the Supreme Court reversed, finding that the Secretary of Labor's interpretation was inconsistent with the natural reading of sections 7703(b)(1) and 7703(b)(2).³³

The Secretary argued that CSRA intended to limit the district court to MSPB merit decisions and to procedural rulings to the Federal Circuit because the section 7703(b)(2) exception for mixed cases applies only when the MSPB's decision in a mixed case is a "judicially reviewable action" under section 7702.³⁴ Additionally, the Secretary argued that section 7702(a)(3) defines what "judicially reviewable actions" are and, read together with section 7702(a)(1), excludes procedural decisions from the realm of "judicially reviewable actions."³⁵ This conclusion is reached by reading two sections of CSRA together.³⁶ Section 7702(a)(3) states, "any decision of the Board under *paragraph (1)* of this subsection shall be a judicially reviewable action as of . . . the date of issuance of the decision."³⁷ Section 7702(a)(1) states the time limit by which the

²⁸ *Id.* at 603.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 604.

³⁴ *Id.*; *see supra* note 20 (language of 5 U.S.C. § 7703(b)(2) (2012)).

³⁵ *Kloeckner*, 133 S. Ct. at 605.

³⁶ *Id.*

³⁷ *Id.* (emphasis added).

MSPB has to “decide both the issue of discrimination and the appealable action in accordance with the Board’s appellate procedures”³⁸ DOL first contends that the “issue of discrimination” in section 7702(a)(1) can only be a decision of the Board when it is decided on the merits; a procedural decision is not a decision of the Board.³⁹ Secondly, because it is not a decision of the Board, then under 7702(a)(3) it is also not a “judicially reviewable action.”⁴⁰ The Supreme Court rejected such a reading, holding that DOL failed to explain why Congress would have “constructed such an obscure path” to achieve the simple result of directing procedural reviews to the Federal Circuit.⁴¹

Impact:

This case demonstrates that courts can reject DOL’s interpretation of a statute if the agency’s construction is inconsistent with the natural reading of the statute.⁴² Furthermore, the case clarifies the law for all mixed cases filed under the CSRA: when the employee-complainant opts for judicial review of an MSPB decision, the federal district court, rather than the Federal Circuit, is the appropriate venue for appeal on not only merits-based cases but also dismissals based on procedural grounds.⁴³

Decker v. Northwest Environmental Defense Center,
133 S. Ct. 1326 (2013)

Synopsis:

In September 2006, respondent Northwestern Environmental Defense Center (NEDC) filed suit against certain corporations that were engaged in logging and paper-production (including petitioner

³⁸ *Id.* (quoting § 7702(a)(1)).

³⁹ *Id.* at 605.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See id.* at 604.

⁴³ *Id.* at 607.

Georgia-Pacific West) and state and local governments and officials (including petitioner State Forester of Oregon, Doug Decker).⁴⁴ The suit alleged that petitioners had violated the Clean Water Act for discharging channeled stormwater runoff into two Oregon rivers without a National Pollutant Discharge Elimination System (NPDES) permit.⁴⁵ The U.S. District Court for the District of Oregon dismissed the action for failure to state a claim, concluding that the “ditches, culverts, and channels” that carried the runoff were not point sources of pollution and petitioners were thus exempt from the NPDES permitting scheme.⁴⁶ The Ninth Circuit reversed in favor of respondents,⁴⁷ finding that the Environmental Protection Agency’s (EPA) Silvicultural Rule, which defined what categories of discharges were point sources,⁴⁸ was ambiguous on whether the conveyances at issue were point sources.⁴⁹ The Ninth Circuit further held that petitioners had been in violation of the Act because their discharges were from point sources that are not exempt from the NPDES permitting scheme under the EPA’s Industrial Stormwater Rule.⁵⁰ The Supreme Court reversed, holding that the EPA’s interpretation was a permissible one and thus the discharges did not require a NPDES permit.⁵¹

Facts, Analysis, and Ruling:

Oregon’s abundant rainfall carries a large amount of dirt and crushed gravel from forest logging roads into a system of ditches, culverts, and channels that discharge into streams and rivers.⁵² This stormwater runoff is a source of water pollution containing sediment

⁴⁴ Decker v. Nw. Env’tl. Def. Ctr., 133 S. Ct. 1326, 1333 (2013).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 1333–34.

⁴⁸ *Id.* at 1331.

⁴⁹ *Id.* at 1333.

⁵⁰ *Id.* at 1334.

⁵¹ *Id.* at 1338.

⁵² *Id.* at 1333.

that can degrade water quality and harm aquatic life.⁵³ While Oregon owns and controls the logging roads in the Tillamook State Forest, the logging and paper-product firms are contractually obligated to maintain the roads that they use to haul timber.⁵⁴ NEDC invoked the Clean Water Act's citizen suit-provision,⁵⁵ and sued petitioners for causing "discharges of channeled stormwater runoff into two waterways—the South Fork Trask River and the Little South Fork Kilchis River."⁵⁶ In its suit, NEDC alleged that the logging firms violated the Act by failing to obtain NPDES permits.⁵⁷

The Federal Water Pollution Control Act,⁵⁸ also known as the Clean Water Act, was enacted in 1972 to regulate the discharge of pollutants into navigable waters.⁵⁹ The Act made it unlawful for water to be discharged from a point source without the required NPDES permit and defined "point source" to include any "ditch, channel, tunnel, conduit . . . from which pollutants are or may be discharged."⁶⁰ To clarify the law, the EPA issued new regulations such as the Silviculture Rule,⁶¹ which defined "point sources" with more precision.⁶² The Silviculture Rule brought "any discharge from a logging-related source that qualifies as a point source" within the NEDC permitting scheme.⁶³

Congress modified the Silviculture Rule by adding statutory exemptions for certain stormwater runoffs, including "discharges composed entirely of stormwater."⁶⁴ The general exemption does not

⁵³ *Nw. Env'tl. Def. Ctr. v. Brown*, 476 F. Supp. 2d 1188, 1191 (D. Or. 2007), *rev'd*, 640 F.3d 1063 (9th Cir. 2011), *rev'd sub nom. Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326 (2013).

⁵⁴ *Id.*

⁵⁵ 33 U.S.C. § 1365 (2006).

⁵⁶ *Decker*, 133 S. Ct. at 1333.

⁵⁷ *Id.*

⁵⁸ 33 U.S.C. §§ 1251–1274 (2006).

⁵⁹ *Summary of the Clean Water Act*, U.S. EPA, <http://www2.epa.gov/laws-regulations/summary-clean-water-act> (last visited Oct. 21, 2013).

⁶⁰ *Decker*, 133 S. Ct. at 1331 (quoting 33 U.S.C. § 1362(14) (2006)).

⁶¹ 40 C.F.R. § 122.27(b)(1) (2012).

⁶² *Decker*, 133 S. Ct. at 1331.

⁶³ *Id.*

⁶⁴ *Id.* at 1331–32.

apply to all stormwater discharges, however.⁶⁵ Congress also directed the EPA to continue regulating industrial stormwater discharges.⁶⁶ Accordingly, the EPA issued the Industrial Stormwater Rule, which defined stormwater discharge as any discharge that is “directly related to manufacturing, processing or raw materials storage areas at an industrial plant.”⁶⁷ The Industrial Stormwater Rule explicitly included discharges from “immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the *facility*.”⁶⁸ The Industrial Stormwater Rule names certain industries—which are classified as Standard Industrial Classification 24—as industrial activities covered by the rule.⁶⁹ Standard Industrial Classification 24 encompasses the “Logging” industry, which it identifies as “[e]stablishments primarily engaged in cutting timber and in producing . . . primary forest or wood raw materials.”⁷⁰ The Industrial Stormwater Rule underwent an amendment three days before this case was argued before the Court, but it was not germane to this decision as the Court refused to conduct a “first view” on the amended regulation.⁷¹ However, the Court stated that the new regulation does not render moot the current suit because petitioners might still be liable for their past violations under the pre-amended regulation.⁷²

NEDC argued that the general exemption did not apply in this case because harvesting timber is unambiguously an “industrial” activity that triggers the application of the EPA’s Industrial Stormwater Rule.⁷³ NEDC contended that support could be found in

⁶⁵ *Id.* at 1332.

⁶⁶ *Id.* (quoting 33 U.S.C. § 1342(p)(2)(B) (2006) (stating that a “discharge associated with industrial activity” is an exception to the general exemption for discharges consisting entirely of stormwater).

⁶⁷ *Id.*

⁶⁸ *Id.* (emphasis added) (quoting 40 C.F.R. § 122.26(b)(14) (2006)).

⁶⁹ *Id.*

⁷⁰ *Id.* (emphasis added) (citing the DEPT. OF LABOR, STANDARD INDUSTRIAL CLASSIFICATIONS MANUAL, *available at* http://www.osha.gov/pls/imis/sic_manual.html (last visited Nov. 1, 2013)).

⁷¹ *Id.* at 1332, 1335.

⁷² *Id.* at 1335.

⁷³ *Id.* at 1336.

the Industrial Stormwater Rule itself, as the regulation included discharges from “immediate access roads . . . used or traveled by carriers of raw materials.”⁷⁴ NEDC also pointed out that the Industrial Stormwater Rule included “[f]acilities classified as Standard Industrial Classificatio[n] 24,” of which “logging” was included.⁷⁵ The EPA disputed this interpretation, arguing that the Industrial Stormwater regulation’s reference to “facilities,” and the Standard Industrial Classification 24’s reference to “establishments,” both demonstrated that the Rule was intended to regulate discharges from industrial sites “more fixed and permanent than outdoor timber-harvesting operations.”⁷⁶ The Supreme Court determined that, while the regulation could be read either NEDC’s or the EPA’s way, the EPA’s interpretation would prevail and exempt the NPDES permit requirement for discharges of stormwater runoff from logging roads.⁷⁷ “*Auer* deference”⁷⁸ to the EPA’s interpretation of its own regulation was appropriate because the agency had been consistent in its view that permits were not required for the types of discharges at issue.⁷⁹ The Supreme Court further held that the EPA’s interpretation was a permissible one, not one that was “plainly erroneous or inconsistent with the regulation.”⁸⁰

⁷⁴ *Id.* (quoting 40 C.F.R. § 122.26(b)(14) (2006)); *see supra* text accompanying note 67 (language of the Industrial Stormwater Rule).

⁷⁵ *Decker*, 133 S. Ct. at 1336 (alteration in original) (quoting 40 C.F.R. § 122.26(b)(14)); *see supra* text accompanying note 68 (language of the Standard Industrial Classification 24).

⁷⁶ *Decker*, 133 S. Ct. at 1336–37.

⁷⁷ *Id.* at 1337.

⁷⁸ *Auer* deference means that when Congress has not directly spoken to the specific issue, courts must sustain the agency’s approach as long as it is a permissible construction of the relevant statute. *Auer v. Robbins*, 519 U.S. 452, 457 (1997) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

⁷⁹ *Decker*, 133 S. Ct. at 1337; *see* *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012) (holding that the Department of Labor’s new interpretation of its regulation was not accorded deference because the Court found it was a *post hoc* justification adopted in response to litigation).

⁸⁰ *Decker*, 133 S. Ct. at 1337 (quoting *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011)).

Impact:

With this decision, the Supreme Court reaffirms *Auer* deference to agency decisions, which is an issue that goes “to the heart of administrative law.”⁸¹ This case shows that the EPA’s authority, as an agency, to interpret its own regulations will continue to enjoy deference unless the interpretation is “plainly erroneous or inconsistent with the regulation.”⁸² Furthermore, this case establishes that, even where amendments to regulations at issue are made, a justiciable controversy remains because liability may still attach under the earlier version of the regulation.⁸³

Sebelius v. Auburn Regional Medical Center,
133 S. Ct. 817 (2013)

Synopsis:

Hospitals sought review of ten-year-old Medicare reimbursement payments but were denied review by the Secretary of the Department of Health and Human Services (HHS).⁸⁴ HHS rejected the providers’ claims based on untimeliness, as provided under 42 U.S.C. § 1395oo(a)(3).⁸⁵ The district court dismissed the hospitals’ claims, holding that equitable tolling did not apply because Congress did not provide for it anywhere in the statute.⁸⁶ The court of appeals reversed, making a contrary finding that nothing in the statute indicated that Congress precluded equitable tolling and, furthermore, the same rebuttable presumption of equitable tolling that applies to suits against private defendants should apply to suits

⁸¹ *Id.* at 1339 (Roberts, J., dissenting).

⁸² *Id.* at 1337 (majority opinion) (quoting *McCoy*, 131 S. Ct. at 880).

⁸³ *Id.* at 1335.

⁸⁴ *Sebelius v. Auburn Reg’l Med. Ctr.*, 133 S. Ct. 817, 821 (2013).

⁸⁵ *Id.*

⁸⁶ *Id.* at 823; *see also* *Auburn Reg’l Med. Ctr. v. Sebelius*, 686 F. Supp. 2d 55, 70 (D.D.C. 2010), *rev’d*, 642 F.3d 1145 (D.C. Cir. 2011), *rev’d*, 133 S. Ct. 817 (2013).

against the United States.⁸⁷ The Supreme Court granted certiorari to the Secretary of HHS to resolve a conflict among courts of appeals deciding whether the 180-day time limit stated in § 1395oo(a)(3) was jurisdictional and whether equitable tolling applies to healthcare providers' Medicare reimbursement appeals to the Provider Reimbursement Review Board (PRRB).⁸⁸

Facts, Analysis, and Ruling:

The Medicare program reimburses a fixed amount per person for certain inpatient services that hospitals provide for Medicare beneficiaries.⁸⁹ To offset higher per-patient costs incurred by lower-income patients, Congress authorized an upward adjustment of the total reimbursement amount for hospitals with a "disproportionate share" of low-income patients.⁹⁰ The Centers for Medicare & Medicaid Services's (CMS) calculation of the Supplemental Security Income fraction (SSI fraction) for each participating hospital in part determines the disproportionate share adjustment to which each hospital is entitled.⁹¹ The CMS submits the numbers to government contractors known as fiscal intermediaries, which calculate the total payment due to each hospital.⁹² Upon receipt of the Notice of Program Reimbursement (NPR) informing the provider how much it will be reimbursed, the hospital has 180 days to appeal to the PRRB.⁹³ The problem in this case arose from the CMS's erroneous omission of several categories of SSI data from its calculations, which resulted in the underpayment of healthcare providers for many years.⁹⁴ The mistake was not disclosed to all affected providers until March 2006, at which time the hospitals in this case filed a complaint

⁸⁷ *Sebelius*, 133 S. Ct. at 823; *see also* *Sebelius*, 642 F.3d 1145 (D.C. Cir. 2011), *rev'd*, 133 S. Ct. 817 (2013).

⁸⁸ *Sebelius*, 133 S. Ct. at 824.

⁸⁹ *Id.* at 822.

⁹⁰ *Id.*

⁹¹ *Id.* The SSI fraction is determined by the percentage of patients served by the hospital who are eligible for SSI payments. *Id.*

⁹² *Id.*

⁹³ *Id.*; *see also* 42 U.S.C. § 1395oo(a)(3) (2006).

⁹⁴ *Sebelius*, 133 S. Ct. at 822–23.

with the PRRB within 180 days, seeking readjustment of reimbursements for the years 1987 through 1994.⁹⁵

The PRRB held that it lacked jurisdiction because it had no equitable powers other than what was authorized by Congress or the Secretary.⁹⁶ The Secretary's regulation permits the PRRB to extend the 180-day time limit upon a showing of good cause, but states that such an extension cannot be granted if the request for appeal is filed more than three years after the NPR was mailed to the provider.⁹⁷ The district court held that equitable tolling was not available, but the court of appeals disagreed.⁹⁸ Upon the Supreme Court's grant of certiorari, three positions were briefed: (1) that the 180-day limitation for appeals to the PRRB is "jurisdictional," and therefore HHS and the courts cannot step into Congress's shoes to extend it; (2) that the Secretary has the authority to limit appeals to the PRRB to three years; and (3) the doctrine of equitable tolling applies because the Secretary failed to disclose information that prevented the injured parties from making a timely appeal.⁹⁹

Addressing the jurisdictional argument, the Supreme Court noted the importance of reining in the use of "jurisdiction,"¹⁰⁰ and applied the bright line rule for determining whether a statutory limitation is jurisdictional. A rule is jurisdictional where Congress has "clearly stated" that the rule is jurisdictional.¹⁰¹ If Congress has not made a clear statement, as interpreted by context or explicit language, courts shall treat the restriction as nonjurisdictional.¹⁰² The Court found that the language of § 1395oo(a)(3) "hardly reveals a design to preclude any regulatory extension" and, furthermore, the Court has repeatedly held that filing deadlines, such as § 1395oo(a)(3)'s 180-day deadline, were ordinarily not jurisdictional

⁹⁵ *Id.* at 823.

⁹⁶ *Id.*

⁹⁷ *Id.* at 822; *see also* 42 CFR § 405.1841(b) (2007).

⁹⁸ *Sebelius*, 133 S. Ct. at 823.

⁹⁹ *Id.*

¹⁰⁰ Because objections to a tribunal may be raised at any time, tardy jurisdictional objections can waste adjudicatory resources and disarm litigants. *Id.* at 824.

¹⁰¹ *Id.*

¹⁰² *Id.*

but “quintessential claim-processing rules.”¹⁰³ Additionally, a nonjurisdictional requirement “does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions.”¹⁰⁴

The Supreme Court addressed the equitable tolling argument along with the argument regarding the Secretary’s authority to limit the time of appeal to the PRRB,¹⁰⁵ as the Secretary’s regulation explicitly precludes an extension of the deadline past three years, which inhibits the application of equitable tolling. The Court noted that Congress gave the Secretary the rulemaking authority to administer Medicare and applied *Chevron* deference, stating that it had no authority to overturn the Secretary’s regulation unless it was “arbitrary, capricious, or manifestly contrary to the statute.”¹⁰⁶ The Secretary’s regulation passed this test because it advanced the parties’ interest of finality in reimbursement decisions.¹⁰⁷

The Court also specifically addressed the court of appeals’ holding, which was based on the Supreme Court’s decision in *Irwin v. Department of Veterans Affairs*.¹⁰⁸ In *Irwin*, the Court held that “the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.”¹⁰⁹ The Court stated that the principle did not apply in this case because the presumption of equitable tolling applied only where Congress would have intended it to apply.¹¹⁰ Not only did Congress leave out statutory exemptions when it initially imposed the 180-day deadline, Congress left the provision untouched throughout six amendments over the past forty years.¹¹¹ Additionally, the Secretary has prohibited the PRRB from extending that deadline for nearly forty years as well, and Congress never expressed disapproval

¹⁰³ *Id.* at 824–25.

¹⁰⁴ *Id.* at 825 (citing *Gonzales v. Thaler*, 132 S. Ct. 641 (2012)).

¹⁰⁵ *Id.* at 826.

¹⁰⁶ *Id.* (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (stating *Chevron* deference is owed to the agency where Congress has explicitly left a gap in the laws for the agency to fill by regulation)).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 827; see *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89 (1990).

¹⁰⁹ *Sebelius*, 133 S. Ct. at 827 (quoting *Irwin*, 498 U.S. at 95–96).

¹¹⁰ *Id.*

¹¹¹ *Id.*

of that regulation.¹¹² Lastly, § 1395oo(a)(3) was not meant to be protective of claimants, which are “‘sophisticated’ institutional providers assisted by legal counsel,” and which nonetheless are permitted to apply equitable tolling to address claims of “fraud or similar fault.”¹¹³ Thus, the Court held, § 1395oo(a)(3) was not a jurisdictional issue that precluded the Secretary’s interpretation; and moreover, the Secretary’s preclusion of equitable tolling under § 1395oo(a)(3) was permissible.¹¹⁴

Impact:

In her concurrence, Justice Sotomayor wrote separately to clarify that the Court’s decision in this case does not generally preclude the use of the equitable tolling doctrine in administrative appeals.¹¹⁵ As the Court stated, Congress’s intent is the key determination as to whether equitable tolling is available.¹¹⁶ Overall, this case not only more narrowly impacts the ability of healthcare providers to appeal their reimbursement determinations to the PRRB after the three-year deadline,¹¹⁷ it also broadly impacts the way lower courts will analyze the application of the equitable tolling doctrine in other contexts.

UNITED STATES COURTS OF APPEAL

Time Warner Cable Inc. v. FCC,
729 F.3d 137 (2d Cir. 2013)

Synopsis:

Cable companies petitioned for review of the Federal Communications Commission’s (FCC) 2011 Revision of the

¹¹² *Id.*

¹¹³ *Id.* at 828.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 829 (Sotomayor, J., concurring).

¹¹⁶ *Id.*

¹¹⁷ *See id.* at 824 (majority opinion).

Commission's Program Carriage Rules (2011 FCC Order).¹¹⁸ The 2011 FCC Order, which was promulgated under the Communications Act of 1934 (Communications Act) and amended by the Cable Television Protection and Competition Act of 1992 (Cable Act), directed the FCC to "establish regulations governing program carriage agreements and related practices" between the cable companies and the video programming vendors (also known as "networks"), from which they purchased content.¹¹⁹ At issue was the 2011 FCC Order's new standstill rule that required a cable company to maintain certain preexisting contracts for a specified period of time.¹²⁰ The cable companies challenged the order in two ways, by arguing that (1) the order violated their First Amendment right to free speech because it restricted the editorial determinations of the cable companies concerning what networks to provide to their subscribers,¹²¹ and (2) the order's standstill rule violated the notice-and-comment requirements of the Administrative Procedure Act (APA).¹²² The Second Circuit denied the petitions in part regarding the First Amendment challenge and granted the petition in part regarding the APA challenge.¹²³ The court also vacated without prejudice the FCC's standstill rule, to allow the FCC to re-promulgate the rule in a manner consistent with the APA.¹²⁴

¹¹⁸ *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 142 (2d Cir. 2013).

¹¹⁹ *Id.* at 145.

¹²⁰ *Id.* at 150.

¹²¹ *Id.* at 145. This summary will not address the arguments of the First Amendment challenge regarding the 2011 FCC Order's revision of the 1993 FCC Order's requirements for a prima facie case brought by an unaffiliated video programming vendor. *See id.* at 147–49, 154–68.

¹²² *Id.* at 150.

¹²³ *Id.* at 171.

¹²⁴ *Id.* The APA requires agencies to provide notice and an opportunity for public comment as a prerequisite to promulgating a rule. *Id.* at 167; *see also* 5 U.S.C. § 553(b), (c) (2006).

Facts, Analysis, Ruling:

A. The Anticompetitive Video Programming Industry and Congress's Attempt to Curb It Via the Cable Act

The video programming industry consists of networks such as ESPN, Bravo, and CNN, “which create or acquire [content], such as television shows and movies”¹²⁵ They sell the content to multichannel video programming distributors (MVPDs), which include cable operators, direct broadcast satellite providers, and phone companies.¹²⁶ They also sell content to online video distributors (OVDs).¹²⁷ When Congress enacted the Cable Act in 1992, cable operators dominated the MVPD market in the United States, where cable companies enjoyed a local monopoly in one or more geographical regions.¹²⁸ For example, to this day, Comcast continues to have a stronghold over “the mid-Atlantic, Chicago, Denver, and Northern California,” while Time Warner’s subscribers are “clustered in New York, . . . the Carolinas, Ohio, Southern California, . . . and Texas.”¹²⁹ Not only did this phenomenon discourage competition, it also created “bottleneck” control for cable companies.¹³⁰ The anticompetitive power of the cable companies was further enhanced by pervasive vertical integration of the market, which is done when a cable company acquires ownership interest in both the programming and distribution system.¹³¹ For instance, Comcast has ownership interests in fifty national networks, including Bravo, E! Entertainment TV, CNBC, and The Weather Channel.¹³² These “affiliated” networks are presumed to enjoy greater advantage

¹²⁵ *Time Warner*, 729 F.3d at 143.

¹²⁶ *Id.* at 143–44.

¹²⁷ *Id.* at 143.

¹²⁸ *Id.* at 145.

¹²⁹ *Id.* at 153 (citing Annual Assessment of the Status of Completion in the Market for the Delivery of Video Programming, 27 FCC Rcd. 8610, 8628–29 n.96 (2012)).

¹³⁰ *Time Warner*, 729 F.3d at 145. “Bottleneck” control is defined as a cable company’s ability to prevent its subscribers from accessing programs it chose to exclude. *Id.*

¹³¹ *Id.* at 146.

¹³² *Id.*

with the cable operators than unaffiliated networks.¹³³ On the other hand, Congress also considered contrary evidence that vertical integration stimulated the development of programming.¹³⁴ Thus, instead of enacting an outright ban on vertical integration, Congress instead chose to bar cable operators from “discriminating against unaffiliated programmers” to reduce their anticompetitive power.¹³⁵

Section 616(a)(3) of the Communications Act gives the FCC clear authority to establish regulations that “govern[] program carriage agreements and related practices” between cable operators and MVPDs and networks.”¹³⁶ The statute specifies that the regulations shall contain provisions designed to prevent MVPDs from “discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors.”¹³⁷ Section 616(a)(5) authorizes the FCC to provide penalties and remedies for such violations, “including carriage.”¹³⁸

B. The 2011 FCC Order and the APA Challenge to Its New Standstill Rule

In 2007, the FCC issued a Notice of Proposed Rule Making (NPRM) as a part of the notice-and-comment procedure to solicit comments on (1) the clarification of the elements of a prima facie section 616(a)(3) violation and (2) the adoption of rules to address the complaint process.¹³⁹ Regarding the latter, the FCC also requested comment on the adoption of rules to protect networks “from potential retaliation if they file a complaint,” and the appropriateness of the existing penalties for section 616(a)(3) violations.¹⁴⁰

The 2011 FCC Order pronounced a new prima facie standard and created a standstill rule.¹⁴¹ The prima facie standard complied

¹³³ *Id.* at 146–47.

¹³⁴ *Id.* at 147.

¹³⁵ *Id.*

¹³⁶ *Id.* at 145 (quoting 47 U.S.C. § 536(a) (2006)).

¹³⁷ *Id.* at 146 (quoting § 536(a)(3)).

¹³⁸ *Id.* (quoting § 536(a)(5)).

¹³⁹ *Id.* at 148.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 149.

with the APA requirement for notice-and-comment rulemaking and thus will not be discussed here. The standstill rule, on the other hand, was met with an APA challenge for its failure to adhere to the notice-and-comment requirements.¹⁴² In substance, the standstill rule allowed the FCC to grant requests to order a MVPD to temporarily maintain its preexisting contract on unchanged terms with a program carriage complainant seeking renewal of the contract.¹⁴³ The purpose of this rule was two-fold: (1) to prevent retaliation against a programming vendor who has filed a legitimate section 616(a)(3) claim of discrimination; and (2) to help networks resist the carriage demands of MVPDs, especially demands that violate the program carriage rules.¹⁴⁴

The FCC denied that notice-and-comment rulemaking applied to the standstill rule, arguing that the rule was one of agency “procedure” rather than of “substance,” as it codified a preexisting procedure to vindicate rights given under section 616(a)(3).¹⁴⁵ The Second Circuit disagreed, stating that the test for whether a rule may be categorized as “procedural” depends on whether the “substantive effect [of the rule] is sufficiently grave” so as to justify public participation “to ensure the agency has all pertinent information before it when making a decision.”¹⁴⁶ The standstill rule does not fall into this procedural exception because it confers authority to the FCC to temporarily extend a contractual agreement, which significantly affects the substantive rights of the parties involved, namely the MVPD and the unaffiliated network that has a pending complaint before the FCC.¹⁴⁷

In any event, the FCC contended that the standstill rule complied with the APA because it was a “logical outgrowth” of the 2007 NPRM’s solicitation for comments on whether the FCC should adopt rules to protect networks “from potential retaliation if they file a complaint.”¹⁴⁸ The Second Circuit also rejected this argument,

¹⁴² *Id.* at 167.

¹⁴³ *Id.* at 150.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 168 (quoting *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 5–6 (D.C. Cir. 2011)).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 150.

holding that the 2007 NPRM solicitations were “too general to provide adequate notice” that the FCC was contemplating a standstill rule.¹⁴⁹ The strongest supporting fact for this finding of insufficient notice is that none of the public commenters addressed the role pursuant to the 2007 NPRM.¹⁵⁰ Finally, the court juxtaposed the present case with the FCC’s *express* solicitation of comments concerning the adoption of a standstill rule for another provision under the Cable Act.¹⁵¹ The court concluded that the standstill rule promulgated in the 2011 FCC Order was substantive and, thus, subject to proper notice-and-comment procedures, which were lacking in this case.¹⁵²

Impact:

The Second Circuit’s decision vacating the 2011 FCC Order may have broad free speech and economic impact for the national video programming industry. Properly promulgated, it impacts the substantive rights of video programming vendors, their distributors, and ultimately the subscribers. With this holding, it is unclear whether the rule will in fact come to fruition following a proper notice-and-comment procedure. This case also provides a demonstration that where even *temporary* substantive rights are conferred—arguably to further agency procedure—the procedural exception to the notice-and-comment rule does not apply. This case further provides a useful “logical outgrowth” analysis to determine whether a solicitation satisfies APA requirements.

¹⁴⁹ *Id.* at 170.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 170–71.

¹⁵² *Id.* at 171.

Chamber of Commerce of the United States v. NLRB,
721 F.3d 152 (4th Cir. 2013)

Synopsis:

Chambers of commerce challenged a rule promulgated by the National Labor Relations Board (NLRB), arguing that the NLRB lacked authority to enact such a rule.¹⁵³ The NLRB defended its rulemaking authority, contending the National Labor Relations Act (NLRA),¹⁵⁴ vests in the NLRB the authority to enact the rule “requir[ing] employers subject to the [NLRA] . . . to post an official Board notice informing employees of their rights under the Act.”¹⁵⁵ The U.S. District Court for the District of South Carolina held that the NLRB had exceeded its authority, and granted summary judgment to the plaintiffs.¹⁵⁶ The Fourth Circuit agreed with the district court that the NLRA’s rulemaking function was limited to “its statutorily defined reactive roles in addressing unfair labor practice charges and conducting representation elections upon request.”¹⁵⁷ Therefore, the court concluded that the NLRB had no authority to promulgate the challenged rule.¹⁵⁸

Facts, Analysis, Ruling:

The NLRA, enacted in 1935, regulates relations between private sector employers, labor unions, and employees.¹⁵⁹ Section 6 of the NLRA (Section 6), conferred rulemaking power on the NLRB, giving it the “authority from time to time to make, amend, and rescind, in the manner prescribed by [the APA], such rules and regulations as may be necessary to carry out the provisions of [the NLRA].”¹⁶⁰

¹⁵³ Chamber of Commerce of U.S. v. NLRB, 721 F.3d 152, 154 (4th Cir. 2013).

¹⁵⁴ 29 U.S.C. §§ 151–169 (2006).

¹⁵⁵ *Chamber of Commerce of U.S.*, 721 F.3d at 154.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 155 (quoting 29 U.S.C. § 156 (2006)).

On August 30, 2011, the NLRB promulgated a regulation titled “Notification of Employee Rights Under the National Labor Relations Act.”¹⁶¹ The Chamber of Commerce of the United States and the South Carolina Chamber of Commerce (collectively, “Chambers”) challenged the rule in federal district court, asking for injunctive relief against the NLRB.¹⁶² The NLRB made its argument on two distinct legal bases.

First, according to *Mourning v. Family Publications Service, Inc.*,¹⁶³ Section 6’s rulemaking grant required the NLRB’s rules to be upheld if they “reasonably related to the purposes of the enabling legislation.”¹⁶⁴ The Fourth Circuit rejected this argument, stating that *Mourning* applies only where the court has already affirmed that Congress had delegated interpretative powers to the agency.¹⁶⁵ Here, it was at issue whether Congress had in fact delegated interpretative powers to the agency.¹⁶⁶

Second, the NLRB’s broad rulemaking authority under Section 6 was affirmed by the Supreme Court in *American Hospital Ass’n v. NLRB*.¹⁶⁷ As such, the NLRB should have the power to promulgate rules as it sees fit, except where Congress has expressly withheld that authority.¹⁶⁸ The Fourth Circuit rejected this argument as well, stating that the NLRB’s rulemaking authority, found in *American Hospital Ass’n*, was in fact limited.¹⁶⁹ In *American Hospital Ass’n*, the Court upheld the NLRB’s promulgated rule, which proactively defined whether a designated unit was appropriate for the purposes of collective bargaining.¹⁷⁰ The NLRB had authority to make such a rule because section 9(a) of the NLRA granted authority to the NLRB to *make bargaining unit*

¹⁶¹ *Id.* at 156.

¹⁶² *Id.* at 157.

¹⁶³ 411 U.S. 356 (1973).

¹⁶⁴ *Chamber of Commerce of U.S.*, 721 F.3d at 158 (quoting *Mourning*, 411 U.S. at 369).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ 499 U.S. 606 (1991).

¹⁶⁸ *Chamber of Commerce of U.S.*, 721 F.3d at 159.

¹⁶⁹ *Id.* at 164.

¹⁷⁰ *Id.* at 159.

determinations “in each case.”¹⁷¹ Section 9(a), read in conjunction with Section 6’s rulemaking provision, gave the NLRB the power to create a general rule that categorically makes decisions on behalf of the NLRB, precluding the need for the NLRB to make case-by-case adjudications.¹⁷² Moreover, the grant of authority in *American Hospital Ass’n* was narrow.¹⁷³ In sum, the Fourth Circuit stated that the NLRB was not free to promulgate any rule as it sees fit absent a grant of rulemaking authority from Congress.¹⁷⁴

Applying the *Chevron* analysis,¹⁷⁵ the Fourth Circuit reasoned that Congress did not give the NLRA rulemaking authority to make the notice-posting rule here pursuant to the APA’s notice-and-comment procedure.¹⁷⁶ First, congressional intent could not be found in the plain language of the statute.¹⁷⁷ Section 6 “grants the [NLRB] authority to issue rules that are ‘necessary to carry out’ provisions of the Act.”¹⁷⁸ The ambiguity of the term “necessary” did not indicate congressional delegation of authority.¹⁷⁹ Secondly, the structure of the NLRA revealed that none of the provisions showed that Congress intended to give the NLRB this type of rulemaking authority.¹⁸⁰ On a broader context, the NLRB serves only two “expressly reactive roles”: (1) to conduct representative elections and (2) to resolve unfair labor practice charges.¹⁸¹ Read more specifically, none of the provisions gave the NLRB the authority to make the notice-posting rule.¹⁸² The Fourth Circuit even rejected the NLRB’s argument that

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 160.

¹⁷⁴ *Id.*

¹⁷⁵ The *Chevron* analysis requires: (1) using “‘traditional tools of statutory construction’ to ascertain congressional intent” and (2) if the statute is silent on the issue, then asking “whether the agency’s answer is based on a permissible construction of the statute.” *Id.* (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

¹⁷⁶ *Id.* at 154, 161.

¹⁷⁷ *Id.* at 160–61.

¹⁷⁸ *Id.* at 160 (quoting 29 U.S.C. § 156 (2006)).

¹⁷⁹ *Id.* at 161–62.

¹⁸⁰ *Id.* at 162.

¹⁸¹ *Id.*

¹⁸² *See id.* at 162–63.

it had authority from Section 6 to make the failure to follow the notice-posting rule an unfair labor practice as defined by section 8(a)(1).¹⁸³ The Fourth Circuit reasoned that this “bootstrapping” would not be allowed.¹⁸⁴ Thirdly, the legislative history of the Act did not provide evidence of the NLRB’s alleged power to enact the notice-posting rule.¹⁸⁵ Not only do early versions of the Act indicate that only a reactive role was intended for the NLRB, Congress has also considered and rejected another notice provision for the NLRA.¹⁸⁶ Finally, the history of regulation in this area shows that Congress has not intended for the NLRB to have authority to make a notice-posting rule, as several federal labor statutes passed between 1936 and 1974—the date of the last NLRB amendment—provide for the posting of notices.¹⁸⁷ One labor law was even amended to impose such a requirement.¹⁸⁸ By contrast, the NLRA’s three amendments remain without a notice-posting provision.¹⁸⁹ Therefore, the NLRB’s notice-posting rule is invalid for going beyond the NLRB’s limited scope of rulemaking authority.¹⁹⁰

Impact:

This decision specifically denies the NLRB power to promulgate a notice-posting rule.¹⁹¹ More significantly, it clarifies the scope of NLRB’s rulemaking authority, limiting it to the NLRB’s ability to conduct representative elections and to resolve unfair labor practice charges.¹⁹² Above all, it provides that where Congress has not expressly defined the boundaries of an agency’s power, courts

¹⁸³ *Id.* at 163.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 164.

¹⁸⁶ *Id.* at 164–65. The contemplated notice requirement proposed to require any employer that was party to a NLRA-conflicting contract “to notify its employees of the violation and indicate the contract would be abrogated.” *Id.* at 165.

¹⁸⁷ *Id.* at 165–66.

¹⁸⁸ *Id.* at 166.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 154, 166.

¹⁹¹ *Id.* at 154.

¹⁹² *Id.*

have the authority to draw those boundaries by extrapolating Congress's intent.¹⁹³

Shweika v. Department of Homeland Security,
723 F.3d 710 (6th Cir. 2013)

Synopsis:

Applicant prosecuted a single application for naturalization before the United States Citizenship and Immigration Services (USCIS) and the District Court for the Eastern District of Michigan.¹⁹⁴ Because USCIS denied applicant's petition, applicant continued to pursue his case in district court, where a de novo review of the denial was conducted.¹⁹⁵ The district court also raised the issue of whether it had subject-matter jurisdiction to grant the application, as it was unclear whether the statute contained administrative hearing and administrative-exhaustion requirements, and, if so, whether the applicant had fulfilled the exhaustion requirement allowing for district court review.¹⁹⁶ The district court determined that the administrative-exhaustion requirement could be inferred from the governing statute, the Immigration Act of 1990, and also determined that it imposed jurisdictional limitations on a district court.¹⁹⁷ Because applicant failed to complete his administrative hearing, the district court lacked subject-matter jurisdiction to decide his case.¹⁹⁸ The Sixth Circuit addressed the jurisdictional issues that the district court raised as a matter of first impression and determined that, in the absence of Congress's clear statement to the contrary, the administrative-hearing requirement is nonjurisdictional.¹⁹⁹ The

¹⁹³ *See id.*

¹⁹⁴ *Shweika v. Dep't of Homeland Sec.*, 723 F.3d 710, 711–12 (6th Cir. 2013).

¹⁹⁵ *Id.* at 713.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 713–14.

¹⁹⁹ *Id.* at 719.

circuit court remanded the case to reconsider whether the applicant satisfied the administrative-hearing requirement.²⁰⁰

Facts, Analysis, Ruling:

Applicant Mazen Shweika applied to become a naturalized citizen in April 2004, but was denied a complete review for three years.²⁰¹ Applicant obtained a writ of mandamus from the federal district court to compel the USCIS to review his application.²⁰² The USCIS denied applicant's petition in 2008, based on his failure to provide certified copies of documents related to a prior arrest, and applicant then sought an administrative hearing to appeal the denial.²⁰³ Applicant did not receive a hearing after ten months, even though by regulation the USCIS was required to schedule one within 180 days of a timely request.²⁰⁴ Applicant then returned to district court to seek a writ of mandamus to compel USCIS to review his appeal and, in the alternative, he sought a hearing *de novo*.²⁰⁵ USCIS finally granted applicant's administrative hearing in February 2010 and conducted a *de novo* review of the application, which led to questions about a prior conviction and domestic violence allegations made by applicant's ex-wife.²⁰⁶ Applicant left the interview at the advice of his counsel before the completion of the hearing.²⁰⁷ This led to USCIS's denial of the application on the basis of the record before it and, among other things, for the applicant's failure to establish good moral character—a requirement for naturalization.²⁰⁸ Applicant resumed his case in the district court, which held its own *de novo* review of the denial and determined that applicant had established his good moral character.²⁰⁹ The district court also

²⁰⁰ *Id.* at 720.

²⁰¹ *Id.* at 712.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 713.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

ordered additional briefing to determine whether it had subject-matter jurisdiction over applicant's case.²¹⁰

Under 8 U.S.C. § 1421(c), a person whose application for naturalization is denied under that subchapter can obtain a district court's de novo review "after a hearing before an immigration officer under section 1447(a)."²¹¹ At issue was whether that language in § 1421(c) and the Immigration Act of 1990 confer an administrative-hearing requirement.²¹² The district court held that such a requirement had been inferred for § 1421(c) and that it was a jurisdictional restriction on the district court's ability to grant the de novo review.²¹³ The district court further read a completion requirement into the administrative-hearing requirement.²¹⁴ Because applicant failed to complete the administrative hearing, he did not fulfill the administrative-exhaustion requirement of § 1421(c), and thus the district court lacked jurisdiction over his application.²¹⁵

The Sixth Circuit began its review of applicant's appeal by determining whether the district court was correct in holding the administrative-exhaustion requirement as jurisdictional.²¹⁶ This was a matter of first impression for the court.²¹⁷ The court applied the bright line rule stated by the Supreme Court in various cases,²¹⁸ that a threshold limitation on a statute's scope is jurisdictional only where Congress clearly states that a statute is jurisdictional.²¹⁹ To discern whether Congress spoke on the character of the requirement requires an analysis of the limitation's "text, context, and relevant historical treatment."²²⁰

²¹⁰ *Id.*

²¹¹ *Id.* (quoting 8 U.S.C. § 1421(c) (2012)).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 713–14.

²¹⁶ *Id.* at 714.

²¹⁷ *Id.* at 714–15.

²¹⁸ *Id.* at 714 (including, most recently, *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817 (2013)).

²¹⁹ *Id.* (citing *Sebelius*, 133 S. Ct. at 824).

²²⁰ *Id.* (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010)).

The Sixth Circuit determined that the text of the section “does not speak in jurisdictional terms” as compared to other statutes that also concern the district court’s role in naturalization proceedings; rather, it lacks statements such as: “[the district] court has jurisdiction” or district courts “shall have authority to administer.”²²¹ As to context, the court looked to the function of the requirement to determine whether it was meant to be jurisdictional.²²² The Supreme Court has repeatedly held that the administrative-hearing requirement is a “claim-processing rule” that requires exhaustion of the administrative proceedings, but is nonjurisdictional in almost all cases.²²³ Thus, the court concluded, “Congress has not made a clear statement regarding jurisdiction.”²²⁴

The circuit court then contemplated whether *Chevron* deference applied in regards to the USCIS’s interpretation of the statutory provision that confers jurisdiction on federal courts.²²⁵ This was also a matter of first impression for the court.²²⁶ Adopting the view of its sister courts, including the Second, Fourth, Fifth, Tenth, and D.C. Circuits, the Sixth Circuit held that “*Chevron* deference does not apply to an agency’s interpretation of a federal court’s jurisdiction.”²²⁷ First, the conditions that license *Chevron* do not apply because *Chevron* deference is warranted only where Congress has vested authority in the agency, whereas a jurisdiction-conferring statute delegates authority on federal courts.²²⁸ Second, courts defer to agencies because of their expertise, and here, federal courts are the “experts when it comes to determining the scope” of subject-matter

²²¹ *Id.* at 715 (citing 8 U.S.C. §§ 1447(b), 1421(b)(1) (2012)).

²²² *Id.* at 716.

²²³ *Id.*

²²⁴ *Id.* at 717.

²²⁵ *Id.* When reviewing the validity of an agency’s interpretation of a statute that it administers, courts will apply the *Chevron* analysis, which requires the court to: (1) use “‘traditional tools of statutory construction’ to ascertain congressional intent” and (2) if the statute is silent on the issue, to then ask “whether the agency’s answer is based on a permissible construction of the statute.” *Id.* (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

²²⁶ *Id.* at 718.

²²⁷ *Id.*

²²⁸ *Id.*

jurisdiction.²²⁹ Third, the Supreme Court has repeatedly stated that a strong presumption exists for judicial review of administrative action, which has not been overcome by any evidence of Congress's intent to overcome this strong presumption.²³⁰ Thus, the circuit court concluded, the courts do not owe *Chevron* deference to the USCIS's decision.²³¹ Further, the Sixth Circuit found that Congress has not made § 1421(c)'s administrative-hearing requirement jurisdictional.²³² Because this determination was made incorrectly at the district court level, the circuit court remand the proceeding back to the district court to determine "whether § 1421(c)'s administrative-hearing requirement implies a completion requirement" and whether applicant satisfied it.²³³

Impact:

The Sixth Circuit determined as a matter of first impression that § 1421(c) does not contain a jurisdictional limitation, which confirmed the view taken by a number of circuit courts.²³⁴ The case also has a wider application as it provides a clear analysis showing that *Chevron* deference does not apply in agency interpretations of federal court subject-matter jurisdiction.²³⁵

SEC v. Das,
723 F.3d 943 (8th Cir. 2013)

Synopsis:

Defendant, a former chief financial officer of a publicly traded corporation, was prosecuted under the Securities Exchange

²²⁹ *Id.*

²³⁰ *Id.* at 718–19.

²³¹ *Id.* at 719.

²³² *Id.*

²³³ *Id.* at 719–20.

²³⁴ *Id.* at 718.

²³⁵ *Id.* at 719.

Act of 1934 (Exchange Act) for violating several securities laws.²³⁶ The district court, after a ten-day jury trial, found defendant liable on every claim.²³⁷ Several issues were on appeal in the Eighth Circuit, including whether the district court abused its discretion in instructing the jury by omitting the requirement of scienter for the section 14(a), Rule 14a-9, Rule 13b2-1, and Rule 13b2-2 claims.²³⁸ The Eighth Circuit rejected defendant's argument that scienter was required for violating those securities laws and affirmed the district court's jury instructions.²³⁹

Facts, Analysis, Ruling:

Stormy Dean was a former chief financial officer (CFO) at infoUSA, a publicly traded corporation headquartered in Omaha, Nebraska.²⁴⁰ infoUSA's predecessor company was founded by Vinod Gupta, who served as infoUSA's chief executive officer and chairman until 2008.²⁴¹ Gupta was discovered to have used infoUSA's funds to pay for his personal expenses, such as private jet travel, yacht payments and expenses, luxury cars, membership to thirty private country clubs, and personal life insurance policies.²⁴² These payments were not reported in infoUSA's filings, which Dean certified as the company's CFO.²⁴³

Following an informal inquiry in late 2007, the Securities and Exchange Commission (SEC) brought a civil enforcement action in 2010 against Dean and another former CFO, Rajnish Das.²⁴⁴ The action included allegations of: (1) soliciting false proxy statements in violation of section 14(a) of the Exchange Act, Rule 14a-3, and Rule 14a-9; (2) falsifying books, records, or accounts in violation of section 13(b)(5) and Rule 13b2-1; and (3) deceiving auditors in

²³⁶ SEC v. Das, 723 F.3d 943, 946 (8th Cir. 2013).

²³⁷ *Id.*

²³⁸ *Id.* at 952–56.

²³⁹ *Id.* at 955–56.

²⁴⁰ *Id.* at 946.

²⁴¹ *Id.*

²⁴² *Id.* at 947.

²⁴³ *Id.*

²⁴⁴ *Id.* at 946.

violation of Rule 13b2-2.²⁴⁵ The U.S. District Court for the District of Nebraska ruled in favor of the SEC on every claim and Dean appealed.²⁴⁶

One of the appeals was based on Dean's contention that the district court abused its discretion concerning the jury instructions by omitting the scienter requirement for the section 14(a) and Rule 14a-9 claims.²⁴⁷ The jury instructions had required the SEC to demonstrate that Dean had merely *negligently* approved or signed the proxy statements that later proved to be false or misleading.²⁴⁸ Relying on previous dicta and the decisions of sister courts, the Eighth Circuit determined as a matter of first impression that scienter was not an element of a section 14(a) or Rule 14a-9 claim against a corporation's officer.²⁴⁹ Thus, the Eighth Circuit affirmed the district court's jury instructions.²⁵⁰

Another basis of Dean's appeal was whether the district court abused its discretion as to the Rules 13b2-1 and 13b2-2 jury instructions, which required the jury to find Dean liable if it determined that he did not act "reasonably."²⁵¹ Borrowing the Seventh Circuit's *Chevron* analysis,²⁵² the court rejected Dean's argument that the correct standard for Rule 13b2-1 was "knowingly."²⁵³ When Congress amended section 13(b) to provide that scienter was a requirement to impose *criminal* liability, this

²⁴⁵ *Id.* at 947.

²⁴⁶ *Id.* at 947–48.

²⁴⁷ *Id.* at 952.

²⁴⁸ *Id.* at 953.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 953–54.

²⁵¹ *Id.* at 954.

²⁵² When reviewing the validity of an agency's interpretation of a statute that it administers, courts will apply the *Chevron* analysis, which requires the court to: (1) use "'traditional tools of statutory construction' to ascertain congressional intent" and (2) if the statute is silent on the issue, to then ask "whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

²⁵³ *Das*, 723 F.3d at 954 (citing *McConville v. SEC*, 465 F.3d 780, 789 (7th Cir. 2006)).

“plainly” implied that section 13(b) did not require the defendant take knowing action in order to be held accountable for civil liability.²⁵⁴

The court engaged in statutory interpretation regarding Rule 13b2-2 by examining the plain language of section 13(b)(2),²⁵⁵ from which Rule 13b2-2 was derived.²⁵⁶ Section 13(b)(2) requires issuers of securities to make and keep accurate records, while section 13(b)(4) states “[n]o criminal liability shall be imposed” for failure to comply with section 13(b)(2) unless section 13(b)(5) applies.²⁵⁷ Section 13(b)(5) states that “[n]o person shall knowingly” falsify records as described under section 13(b)(2).²⁵⁸ The court interpreted section 13(b)(5) as proof of Congress’s intent for “knowing” acts to trigger the criminal liability provision contained in section 13(b)(4).²⁵⁹ This, the court reasoned, indicated that “knowing” is “otherwise not an element of a civil claim.”²⁶⁰ Moreover, the court stated that Congress did not adopt section 13(b)(5), which contains the knowing provision, until 1988—after Rule 13b2-2 was issued.²⁶¹ Finally, the court gave substantial deference to the SEC’s construction of its own regulations.²⁶² This reasoning persuaded the court to affirm the district court’s omission of scienter from the jury instructions at issue.²⁶³

Impact:

In this case, the Eighth Circuit weighed in on the requirement of scienter for important provisions of the Exchange Act, setting the stage for a possible Supreme Court ruling on the issue. The Eighth Circuit ruled that there is no scienter requirement to prove a section 14(a) or Rule 14a-9 claim, which is a view consistent with that of the

²⁵⁴ *Id.* (citing *SEC v. McNulty*, 137 F.3d 732, 741 (2d Cir. 1998)).

²⁵⁵ *Id.* at 955.

²⁵⁶ *Id.* at 956.

²⁵⁷ *Id.* at 955.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 955–56.

²⁶¹ *Id.* at 956.

²⁶² *Id.*

²⁶³ *See id.*

Seventh, Second, and Third Circuits.²⁶⁴ In agreement with the Seventh and Second Circuits, the court also ruled that Rules 13b2-1 and 13b2-2 do not require a finding that a defendant has acted “knowingly.”²⁶⁵ This case also demonstrated that in accordance with *Chevron*, the SEC’s interpretation of its own regulations is entitled to substantial deference.²⁶⁶

²⁶⁴ *Id.* at 954.

²⁶⁵ *Id.* at 954, 956.

²⁶⁶ *Id.* at 956.