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Environmental Protection Agency v. EME Homer City Generation, L.P.,
134 S. Ct. 1584 (2014)

Synopsis

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

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

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2 Id.
3 Id.
4 Id.
5 Id.
6 Id.
7 Id.
8 Id. at 1598.
Transport Rule and held that the EPA had exceeded agency authority in developing the Transport Rule standards.\textsuperscript{9} The Supreme Court reversed the D.C. Circuit Court of Appeals, holding that the EPA’s interpretation of the Good Neighbor Provision was reasonable.\textsuperscript{10}

Background

When air pollution is generated by a state, it is carried downwind across state boundaries.\textsuperscript{11} Without regulations, pollution-associated costs are borne by the state whose air quality is compromised, not necessarily by the state that produced the pollution.\textsuperscript{12} Ideally, the producing state would be responsible for all of the costs incurred as a result of the air pollution it produces, regardless of where the negative effects are felt; however, it is difficult to regulate for several reasons.\textsuperscript{13} First, it is difficult to identify from which state downwind pollution originated.\textsuperscript{14} Pollution from one state may be carried to several downwind states, some states receive pollution from several upwind states, and some states both generate and receive pollution.\textsuperscript{15} Second, pollutants are chemically transformed as they travel downwind, which causes measurement issues for the EPA.\textsuperscript{16} The gasses nitrogen oxide (NO\textsubscript{X}) and sulfur dioxide (SO\textsubscript{2}) (collectively “upwind gasses”) often transform into ozone and fine particulate matter (PM\textsubscript{2.5}) (collectively “downwind gasses”).\textsuperscript{17} The challenge for the EPA is how to determine what amount of upwind gasses must be reduced to meet acceptable levels of downwind gasses.\textsuperscript{18}

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

\textsuperscript{9} Id.\
\textsuperscript{10} Id.\
\textsuperscript{11} Id.\
\textsuperscript{12} Id.\
\textsuperscript{13} Id. at 1593–94.\
\textsuperscript{14} Id. at 1594.\
\textsuperscript{15} Id.\
\textsuperscript{16} Id.\
\textsuperscript{17} Id.\
\textsuperscript{18} Id.
health.\textsuperscript{19} Once NAAQS are set, the CAA requires the EPA to
determine locations where the concentration of pollutants exceeds the
NAAQS (“nonattainment areas”).\textsuperscript{20} States are required to submit
State Implementation Plans (SIPs) to the EPA within three years of
new or updated NAAQS.\textsuperscript{21} SIPs must include adequate provisions to
“prohibit . . . any source or other type of emissions activity within
the [s]tate from emitting any air pollutant in amounts which will . . .
contribute significantly to nonattainment in, or therefore with
maintenance by, any other [s]tate with respect to any . . .
[NAAQS].”\textsuperscript{22} This CAA requirement is called the Good Neighbor
Provision.\textsuperscript{23} If a SIP is missing or inadequate, the EPA must issue a
Federal Implementation Plan (FIP).\textsuperscript{24}

In an effort to explain the scope of the Good Neighbor Provision,
the EPA issued several rules that defined what it meant to “contribute
significantly” to downwind nonattainment.\textsuperscript{25} The rule at issue, the
Transport Rule, limited NO\textsubscript{X} and SO\textsubscript{2} emissions from twenty-seven
upwind states to meet downwind attainment of three NAAQS.\textsuperscript{26}
Under the Rule, the EPA used a two-step process to determine which
states “contributed significantly” to downwind nonattainment.\textsuperscript{27}
Upwind states were required to eliminate emissions that “(1)
produced one percent or more a NAAQS in at least one downwind
state (step one) and (2) could be eliminated cost-effectively, as

\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Id. at 1595 (emphasis added).
\textsuperscript{23} Id. The Good Neighbor Provision was first implemented in 1970 and
revised in 1977. Id. The current formulation of the provision was put in place in
1990. Id.
\textsuperscript{24} Id. at 1594.
\textsuperscript{25} Id. at 1595. In 1998, the EPA issued the NO\textsubscript{X} SIP Call rule, which limited
NO\textsubscript{X} emission in twenty-three states. Id. The rule was upheld by the D.C. Circuit
in \textit{Michigan v. EPA}, 213 F.3d 663 (2000). In 2005, the EPA issued the Clean Air
Interstate Rule (CAIR), which regulated both NO\textsubscript{X} and SO\textsubscript{2} emissions. 134 S. Ct.
at 1595. The rule was initially vacated by the D.C. Circuit, but was eventually
upheld on rehearing in \textit{North Carolina v. EPA}, 550 F.3d 1176, 1178 (C.A.D.C.
2008). The Transport Rule, issued in 2011, was the EPA’s response to the \textit{North
Carolina} decision. 134 S. Ct. at 1596.
\textsuperscript{26} 134 S. Ct. at 1596.
\textsuperscript{27} Id.
For every state regulated by the Transport Rule, the EPA determined that the state had not submitted an adequate SIP, and issued a FIP if the determination was not challenged within sixty days.29

Facts, Analysis, and Ruling

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

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

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

28 Id. at 1597.
29 Id.
30 Id. at 1598.
31 Id.
32 Id. at 1599.
33 Id. at 1600.
34 Id. at 1601.
35 Id. at 1600.
powers under the CAA, the Supreme Court concluded that the EPA’s method of allocation of emission reductions was “a permissible, workable, and equitable interpretation.” 36 The statute requires upwind states “to eliminate those ‘amounts’ of pollution that ‘contribute significantly to nonattainment’ in downwind States.” 37 In light of the absence of statutory direction regarding how to reduce upwind emissions in only those amounts, the Supreme Court applied *Chevron* deference 38 to the EPA’s interpretation. 39 The statutory ambiguity allowed the EPA to use its discretion to find a reasonable solution. 40 The court of appeals believed that the Good Neighbor Provision included a proportionality requirement on emission restrictions. 41 However, nothing in the text of the statute forces the EPA to make its determinations based on a state’s proportional contribution to the problem. 42 The Supreme Court rejected the D.C. Circuit’s determination and gave deference to the EPA’s authority to reasonably interpret the Good Neighbor Provision of the CAA. 43

**Dissent**

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

36 *Id.* at 1610.
37 *Id.* at 1603 (quoting 42 U.S.C. § 7410(a)(2)(D)(i) (2012)).
38 *Chevron* deference is a two-step process used to answer questions of statutory construction in administrative law. *Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If the statute’s intent is unambiguous, then the statute’s construction controls. *Id.* at 842–43. If the statute’s intent is ambiguous, then the agency’s construction controls. *Id.*
39 134 S.Ct. at 1604.
40 *Id.*
41 *Id.*
42 *Id.*
43 *Id.* at 1610.
44 *Id.*
“complex and difficult,” but argued that the problem may not be regulated by the EPA in a manner inconsistent with the administrative structure enacted by Congress, regardless of the seriousness of the problem.45

**Impact**

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

*Scialabba v. Cuellar de Osorio,*

134 S. Ct. 2191 (2014)

**Synopsis**

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

45 *Id.* at 1621.
46 *Id.* at 1600.
49 *Id.*
allowed the same immigration status and order of consideration of the parent—meaning when a visa becomes available to a principal beneficiary, a visa also automatically becomes available to any derivative beneficiary as well.\(^{50}\) However, since the immigration process can take years to complete, some beneficiaries (both principal and derivative) reach age twenty-one—and therefore “age out”—after the sponsoring petition was filed and a visa became available, but before completing the immigration process.\(^{51}\) In that situation, the Child Status Protection Act (CSPA)\(^{52}\) ensures that the time spent processing immigration papers does not count against the beneficiary in determining his or her status.\(^{53}\) But sometimes a beneficiary ages out while waiting for a visa to become available.\(^{54}\)

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

**Background**

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

\(^{50}\) *Id.*

\(^{51}\) *Id.*


\(^{53}\) 134 S. Ct. at 2196.

\(^{54}\) *Id.*

\(^{55}\) *Id.* at 2196–97.

\(^{56}\) *Id.* at 2197.

\(^{57}\) *Id.* at 2202.

\(^{58}\) *Id.*

\(^{59}\) *Id.* at 2197.
Immigration and Nationality Act, a person must fall into one of six immigration categories to be considered. One of those categories is for immediate relatives; the remaining five categories are for “family-sponsored” immigrants, which includes more distant relatives of U.S. citizens. In order to obtain an immigration visa, the sponsoring U.S. citizen must file a petition for the principal beneficiary. If the principal beneficiary is an immediate family member, then he or she receives the visa as soon as the sponsoring petition is approved; however, if the principal beneficiary falls into one of the family-sponsored categories, then approval of the sponsoring petition gets the beneficiary a place in line for a visa. The principal beneficiary’s status also applies to any derivative beneficiaries.

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

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

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60 Id.  
61 Id.  
62 Id. at 2198.  
63 Id.  
64 Id. at 2199.  
65 Id. at 2198.  
66 Id. at 2199.  
67 Id.  
68 Id. at 2200.
determination. If a beneficiary ages out before a visa becomes available, section 1153(h)(3) automatically converts the beneficiary’s petition to an “appropriate category.” The BIA considered the meaning of section 1153(h)(3) in Matter of Wang.

Wang was the principal beneficiary of a family preference visa that his U.S. citizen sister filed for him in 1992. At the time, Wang had a ten-year-old daughter who qualified as a derivative beneficiary. Wang waited for a visa for over a decade and by the time one was available, his daughter was twenty-two, and therefore too old to qualify as a child derivative beneficiary to Wang. Wang used the visa to travel to the United States and became a legal permanent resident. He then filed a new petition for his daughter, with himself as the legal sponsor instead of his sister. Wang argued that under the CSPA, his daughter’s petition should automatically convert and she should be able to retain the original priority date. The BIA rejected the argument, stating that the statute doesn’t expressly state which petitions qualify for automatic conversion, and thus applied its own administrative discretion in the face of the statutory ambiguity. The BIA looked to the “recognized meaning” of the words “automatic conversion” in immigration law. According to the BIA, this language only applied when a petition could “move seamlessly from one family preference category to another—not when a new sponsor was needed to fit a beneficiary into a different category.”

69 Id. at 2200–01.
70 Id. at 2201 (quoting 8 U.S.C. § 1153(h)(3) (2012)).
72 134 S. Ct. at 2201.
73 Id.
74 Id.
75 Id.
76 Id.
77 Id.
78 Id.
79 Id.
80 Id.
81 Id. at 2202.
qualifying relationship with the original visa sponsor, her petition could not “automatically convert,” and she had to go to the start of the visa availability line.82

Facts, Analysis, and Ruling

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

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

82 Id. at 2201.
83 Id. at 2202.
84 Id.
85 Id.
86 Id.
87 Id.
88 Id.
89 Id.
90 Id.
91 Id.
92 Id. at 2203.
The Court applied *Chevron* deference\(^93\) to the BIA’s interpretation of section 1153(h)(3).\(^94\) The statute is ambiguous because it “addresses the issue in divergent ways,” making it possible to come to alternative reasonable conclusions.\(^95\) The first part of section 1153(h)(3) reads: “If the age of an alien is determined under paragraph (1) to be [twenty-one] years of age or older . . . .”\(^96\) This is a condition that all aged-out beneficiaries meet.\(^97\) But the second part of the section states: “[T]he alien’s petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original position.”\(^98\) This clause instructs immigration officials to “convert” the beneficiary’s petition from a category for children to an “appropriate” adult category.\(^99\) The conversion is a change in category only, not a change in petition or sponsor.\(^100\) Therefore, only beneficiaries whose petitions can be automatically converted into a different category—beneficiaries who retain qualifying relationships with their sponsor before and after turning twenty-one—are covered by the section despite the inclusive language at the beginning of the section.\(^101\)

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

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

\(^94\) 134 S. Ct. at 2203.

\(^95\) *Id.*

\(^96\) *Id.*

\(^97\) *Id.*

\(^98\) *Id.*

\(^99\) *Id.* at 2203–04.

\(^100\) *Id.* at 2204.

\(^101\) *Id.* at 2206.

\(^102\) *Id.* at 2206–07.
were merely grandchildren of the sponsors, which is not a relationship that warrants family preference under U.S. immigration law.\textsuperscript{103} For the children to fit into a new category, they must find new sponsors, which does not qualify as “automatic conversion.”\textsuperscript{104}

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

\textbf{Concurrence}

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

\textsuperscript{103} Id. at 2207.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id. at 2214.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 2215.
reasonable and consistent with the ordinary meaning of the statute, Roberts concurred with the plurality’s holding.\textsuperscript{114}

**Justice Alito’s Dissent**

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

**Justice Sotomayor’s Dissent**

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

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

\textsuperscript{114} Id. at 2215–16.
\textsuperscript{115} Id. at 2216 (quoting 8 U.S.C. § 1153(h)(3) (2012)).
\textsuperscript{116} Id.
\textsuperscript{117} Id. at 2216–17 (quoting 8 U.S.C. § 1153(h)(3) (2012)).
\textsuperscript{118} Id. at 2217.
\textsuperscript{119} Id.
inappropriately applied in this case, according to Justice Sotomayor.\textsuperscript{120} The Court should have applied a straightforward interpretation of the statute, without resorting to agency deference.\textsuperscript{121}

\textbf{Impact}

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

\textbf{Burwell v. Hobby Lobby Stores, Inc.}

134 S. Ct. 2751 (2014)

\textbf{Synopsis}

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

\textsuperscript{120} \textit{Id.} at 2219–20.
\textsuperscript{121} \textit{Id.} at 2228.
\textsuperscript{122} \textit{Id.} at 2213.
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} \textit{Id.}
\textsuperscript{126} See \textit{id.}, Part B, at 2199–2202.
the Patient Protections and Affordable Care Act (ACA) that the corporations provide health-insurance coverage for certain contraceptives. The corporations were owned by families with sincere Christian beliefs that life begins at conception. They argued that it would violate their religious beliefs to facilitate access to contraceptive methods that they believed caused abortions. The RFRA “prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.” In this case, the question for the Supreme Court was whether the HHS was allowed to force the corporations to provide insurance coverage for contraceptive methods under the RFRA.

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

Background

Religious Freedom Restoration Act of 1993

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

128 Id.
129 Id. at 2759.
130 Id. (emphasis added).
131 Id.
132 Id. at 2768.
133 Id. at 2759.
134 Id. at 2760.
the test that had formerly been used to determine whether government actions violated the First Amendment.\textsuperscript{136} Congress enacted the RFRA\textsuperscript{137} in response to \textit{Smith} to ensure that the government could not “substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.”\textsuperscript{138} Under the RFRA, the government may not substantially burden a person’s exercise of religion unless the government can demonstrate that the burden: (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that interest.\textsuperscript{139}

\textbf{The Patient Protection and Affordable Care Act of 2010}

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

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


\textsuperscript{138} 134 S. Ct. at 2761.

\textsuperscript{139} \textit{Id.}

\textsuperscript{140} \textit{Id.} at 2762 (quoting 26 U.S.C. §§ 5000A(f)(2), 4980H(a), (c)(2) (2012)).

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

\textsuperscript{142} \textit{Id.} Covered employers who provide inadequate coverage may be charged up to $100 per day per inadequately-covered individual. \textit{Id.} Covered employers
employers and religious nonprofit organizations are exempted from the contraceptive coverage requirement.\textsuperscript{143} Although most contraceptive methods prevent egg fertilization, the methods of contraception at issue in these cases prevent pregnancy by inhibiting a fertilized egg from attaching to the uterus.\textsuperscript{144} This method of contraception is akin to abortion by some religious groups.\textsuperscript{145}

\textit{Facts, Analysis, and Ruling}

\textbf{Facts}

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

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

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

\textsuperscript{143} \textit{Id.} at 2763.
\textsuperscript{144} \textit{Id.} at 2762.
\textsuperscript{145} \textit{Id.} at 2759.
\textsuperscript{146} \textit{Id.} at 2764.
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{Id.}
\textsuperscript{149} \textit{Id.} at 2764–65.
\textsuperscript{150} \textit{Id.} at 2765.
\textsuperscript{151} \textit{Id.}
Mardel, and a nationwide chain arts-and-crafts store called Hobby Lobby. The Green family retained sole control over both corporations. Like the Hahns, the Greens ran their companies in accordance with their religious beliefs. All Mardel and Hobby Lobby stores closed on Sunday, and they did not sell products that facilitated or promoted alcohol consumption. They also contributed company profits to Christian missionaries and ministries. Since they believed that some of the contraceptive methods required under the ACA operated in violation of their religious beliefs, they too sued the HHS under the RFRA in an effort to enjoin the application of the ACA’s contraceptive coverage requirement insofar as it required Mardel and Hobby Lobby to provide coverage for the types of contraception that violated their religious beliefs. The district court denied a preliminary injunction. Contrary to the Third Circuit’s decision, the Tenth Circuit Court of Appeals reversed the district court, holding that the contraceptive coverage requirement was a substantial burden on the exercise of religion, and that the HHS had failed to show a compelling interest. The Supreme Court granted certiorari to address the circuit split.

Corporate Personhood

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

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152 Id.
153 Id.
154 Id. at 2766.
155 Id.
156 Id.
157 Id.
158 Id.
159 Id.
160 Id.
161 Id.
RFRA.\textsuperscript{162} Since the RFRA does not define the term “person,” the Court applied the Dictionary Act\textsuperscript{163} definition: a “person” includes “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”\textsuperscript{164} The Court found that there was no intent in the passing of the RFRA to depart from the Dictionary Act definition of person, which includes corporations.\textsuperscript{165} The Court also considered RFRA claims brought by nonprofit corporations in several cases,\textsuperscript{166} thus demonstrating that a nonprofit corporation may be considered a person under the RFRA.\textsuperscript{167} The HHS conceded that a nonprofit corporation may be a “person” within the meaning of the RFRA, and the Court did not find any clear distinction between for-profit and nonprofit corporations that would allow one to retain “personhood” rights under the RFRA while denying the other.\textsuperscript{168}

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

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

\begin{itemize}
  \item \textsuperscript{162} \textit{Id.} at 2768–69.
  \item \textsuperscript{163} “[The Court must] look to the Dictionary Act . . . [i]n determining the meaning of any Act of Congress, unless the context indicates otherwise.” \textit{Id.} at 2768 (quoting 1 U.S.C. § 1 (2012)).
  \item \textsuperscript{164} \textit{Id.} at 2768; 1 U.S.C. § 1 (2012).
  \item \textsuperscript{165} 134 S. Ct. at 2768.
  \item \textsuperscript{167} 134 S. Ct. at 2769.
  \item \textsuperscript{168} \textit{Id.}
  \item \textsuperscript{169} \textit{Id.}
  \item \textsuperscript{170} \textit{Id.} at 2772.
  \item \textsuperscript{171} \textit{Id.}
\end{itemize}
beliefs of large, publicly traded for-profit corporations would be so difficult as a practical matter that Congress could not have intended the RFRA to apply to for-profit corporations.\textsuperscript{172} The Court found, however, that because the corporations at issue in this case were closely held and entirely owned by members of individual families, the sincerity of their religious views was easily discernable.\textsuperscript{173} Therefore, the Court held that “a federal regulation’s restriction on the activities of a for-profit closely held corporation must comply with [the] RFRA.”\textsuperscript{174}

**Substantial Burden on Religious Exercise**

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

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

\textsuperscript{172} Id. at 2774.
\textsuperscript{173} Id.
\textsuperscript{174} Id. at 2775.
\textsuperscript{175} Id.
\textsuperscript{176} Id. at 2775–79.
\textsuperscript{177} Id. at 2776.
\textsuperscript{178} Id. at 2777.
\textsuperscript{179} Id.
burden on religious exercise.\textsuperscript{180} Traditionally, the Court has held that a sincere religious belief that sets a moral standard must only be found to reflect an “honest conviction” to qualify as religious exercise.\textsuperscript{181} The Court found that there was a substantial burden on the corporations to either provide health insurance or face a heavy financial penalty that violated a sincerely held religious conviction.\textsuperscript{182}

Compelling Government Interest and Least Restrictive Means

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

\textsuperscript{180} Id. at 2778.
\textsuperscript{181} Id. at 2779.
\textsuperscript{182} Id.
\textsuperscript{183} Id.
\textsuperscript{184} Id. at 2780.
\textsuperscript{185} Id.
\textsuperscript{186} Id.
\textsuperscript{187} Id. at 2781.
coverage.\textsuperscript{188} While the Court cannot make decisions to create new programs, the Court still used that analysis to determine that the HHS did not employ the least restrictive means in furthering its governmental interest.\textsuperscript{189} Thus, the Court’s final determination was that “the contraceptive mandate, as applied to closely held corporations, violate[d] the RFRA.”\textsuperscript{190}

Dissent

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

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

\textsuperscript{188} Id. at 2780.
\textsuperscript{189} Id. at 2781–82.
\textsuperscript{190} Id. at 2785.
\textsuperscript{191} Id. at 2787.
\textsuperscript{192} Id. at 2790 (quoting Emp’t Div., Dep’t. of Human Res. of Or. V. Smith, 494 U.S. 872, 878–79 (1990)).
\textsuperscript{193} Id.
\textsuperscript{194} Id. at 2791.
\textsuperscript{195} Id. at 2793–2803.
**Impact**

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

**UNITED STATES COURTS OF APPEALS**

**Atrium Medical Center v. United States Department of Health and Human Services,**

_766 F.3d 560 (6th Cir. 2014)_

**Synopsis**

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

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198 Id.
inpatient services reimbursements. The Sixth Circuit Court of Appeals affirmed the district court’s decision to support the Secretary’s determination to include the programs’ hours.

**Facts, Analysis, and Ruling**

**Background**

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

199 Id.  
200 Id.  
201 Id.  
203 Atrium, 766 F.3d at 564.  
204 Id. at 564–65.  
205 "‘Wages’ are . . . the dollar value of every hour the hospital paid its employees.” Id. at 565.  
206 "‘Wage-related costs’ are essentially fringe benefits, like health insurance and retirement plans, and are not linked to paid hours.” Id.  
207 "‘Paid hours’ are the actual hours associated with an employee’s wages rather than simply the amount of time an employee spent working at the hospital; for example, paid hours includes ‘paid lunch hours’ and ‘paid holiday, vacation, and sick leave hours.’” Id.  
208 Id. at 564. Here is a simplified version of the formula used to calculate the wage index: (wages + wage-related costs) / (paid hours). Id. at 565.  
209 Id.
hospital would not want to report a cost as a wage that other hospitals in the same region reported as a wage-related cost because it would lower the hospital’s wage index in comparison to the other hospitals in the region.210

Standards of Review

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

210 Id.
211 Id. at 566.
212 Chevron deference is a two-step process used to answer questions of statutory construction in administrative law. Chevron, U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984). If the statute’s intent is unambiguous, then the statute’s construction controls. Id. at 842–43. If the statute’s intent is ambiguous, then the agency’s construction controls. Id.
213 766 F.3d at 566.
214 Even if an agency’s interpretation of a statute controls under Chevron, the interpretation may nevertheless be rejected if it is arbitrary or capricious. Id. at 567. Under Auer, the agency’s interpretation is controlling unless it is “plainly erroneous or inconsistent with the regulation.” Id. (quoting Auer v. Robbins, 519 U.S. 452, 461 (1997)).
215 Id. at 569.
216 Id. at 575.
The Secretary’s Decision: Short-Term Disability Payments

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

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

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217 Id. at 570.
218 Id.
219 Id.
220 Id.
221 Id. at 573 (citing Barnhart v. Walton, 535 U.S. 212, 225 (2002)).
222 Id.
223 Id.
determination of the Medicare Act was not manifestly contrary and that her reasoning was neither arbitrary nor capricious.224

The Secretary’s Decision: Baylor Plan Hours

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

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

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

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\text{Id.} \\
\text{Id. at 574.} \\
\text{Id.} \\
\text{Id.} \\
\text{Id. at 574–75.} \\
\text{Id. at 575.} \\
\text{Id.} \\
\text{Id.; see also Auer v. Robbins, 519 U.S. 452, 461 (1997).}
\]
employees as full-time employees.232 The Sixth Circuit affirmed the district court’s holding.233

Impact

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

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

Synopsis

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

232 Atrium, 766 F.3d at 575.
233 Id.
234 Id.
235 Id.
237 Atrium, 766 F.3d at 564 (quoting Rehab Ass’n of Va. v. Kozlowski, 42 F.3d 1444, 1450 (4th Cir. 1994)).
238 Avila v. L.A. Police Dep’t, 758 F.3d 1096, 1099 (9th Cir. 2014).
Police Department (LAPD) due to his testimony in a Fair Labor Standards Act (FLSA) lawsuit brought by a fellow officer. Avila brought an action against the LAPD and the City of Los Angeles (collectively, the City) for violations of the FLSA anti-retaliation provision. The jury found in favor of Avila and awarded attorney’s fees and liquidated damages. The City appealed the decision, claiming that Avila had been terminated for insubordination because he failed to claim overtime. The LAPD’s disciplinary body, the Board of Rights (BOR), had previously found Avila guilty of insubordination and recommended termination. The City argued that the BOR determination precluded Avila’s retaliation claim. The district court found that it did not, and the Ninth Circuit affirmed. The City also argued on appeal that the jury was not properly instructed; however, the Ninth Circuit found no reversible error and upheld the district court decision.

Facts, Analysis, and Ruling

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

Id. at 1098.
Id. at 1099; see also 29 U.S.C. § 215(a)(3) (2012).
Avila, 758 F.3d at 1105.
Id. at 1099.
Id.
Id.
Id. at 1100.
Id. at 1099.
Id.
Id.
Id.
Id.
who testified, Richard Romney. Avila and Romney were ordered to appear at a BOR disciplinary hearing. On the day of the hearing, Avila resigned to accept a job offer with another law enforcement agency. The BOR continued the hearing against Avila without him present. The BOR ultimately determined that Avila was guilty of insubordination and recommended his termination. Avila then brought an anti-retaliation charge against the City. The City moved for summary judgment, arguing the Avila’s FLSA claim was precluded because he never sought judicial review of the BOR decision. The jury found in favor of Avila and awarded him $50,000 in liquidated damages and $579,400 in attorneys’ fees. The City appealed.

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

\[251\] Id.
\[252\] Id.
\[253\] Id.
\[254\] Id. The BOR also fired Officer Romney. Id.
\[255\] Id.
\[256\] Id.
\[257\] Id.
\[258\] Id.
\[259\] Id.
\[260\] Id. at 1100.
\[261\] Id. at 1099.
\[262\] Id. at 1100.
\[263\] Id.
On appeal, the City argued that the jury was not given proper instructions. The district court followed Ninth Circuit law by giving instructions to the jury that included the requirement for Avila to prove that his testifying at the Maciel trial was a motivating factor in his termination. The City attempted to include the “same decision” affirmative defense on appeal; however, because the briefs on appeal did not assert an error in the district court’s failure to include the “same decision” instruction, the Ninth Circuit found that the argument was waived. The City requested special instructions in the jury trial to support its argument that Avila was fired because he failed to request overtime and not because he testified. The district court refused the special instructions and the Ninth Circuit held that this refusal was not an abuse of discretion.

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

**Impact**

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

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264 *Id.*
265 *Id.* at 1101.
266 *Id.* at 1100.
267 *Id.* at 1101.
268 *Id.* at 1105.
269 *Id.* at 1100.
270 *Id.* at 1105.
271 *Id.*
272 *Id.* at 1100.
determination was made on improper grounds. Anti-retaliation laws within the FLSA exist to protect employees from being punished for speaking up about labor law violations and to encourage employees to participate in FLSA lawsuits.273 The LAPD singled out the two individuals who testified at Maciel’s trial for a BOR investigation and wrongfully terminated their employment.274 The dissenting judge in this case did not find the “same decision” defense to be waived and found ample evidence to support that defense; however, the panel affirmed the district court’s decision and clarified the circumstances in which state administrative agencies do not preclude individuals’ FLSA claims.275

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

Synopsis

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

273 Id.
274 Id. at 1101.
275 Id. at 1105.
276 Young v. United States, 769 F.3d 1047, 1050 (9th Cir. 2014).
277 Id.
278 Id.
279 Id.
The court held that the Youngs’ claim was not barred and remanded the case to the district court for further proceedings.

**Facts, Analysis, and Ruling**

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

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

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280 Id.
281 Id.
282 Id. at 1051.
283 Id.
284 Id.
285 Id.
286 Id.
287 Id.
288 Id.
289 Id.
290 Id.
291 Id.
292 Id. at 1053.
or the failure to exercise or perform a discretionary function or duty
on the part of a federal agency or an employee of the Government,
whether or not the discretion involved be abused,” does not receive
waiver of immunity.293

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

Step One of the Berkovitz Test: Discretion

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

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

Step Two of the Berkovitz Test: Policy

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

293 Id. (quoting 28 U.S.C. § 1680(a) (2012)).
294 Id.
296 769 F.3d at 1053 (quoting Berkovitz, 486 U.S. at 536).
297 Id. (quoting Berkovitz, 486 U.S. at 536).
298 Id. at 1055.
299 Id.
300 Id. at 1053 (quoting Berkovitz, 486 U.S. at 536).
301 Id. (quoting Berkovitz, 486 U.S. at 536).
Here, the parties’ dispute lies in the determination of whether the decision not to place warning signs at the site of the transformer was policy-driven. The purpose of this requirement is to protect administrative and legislative decisions from being second-guessed by the judiciary. The NPS was created under a statute that established “broad policy considerations that govern [the] NPS’s management of national parks.” The NPS’s management policies also require it to balance visitor safety against conservation and access. However, the policies do not protect all decision the NPS makes. Therefore, there must be some support that a particular NPS decision was “actually susceptible to analysis under the policies the government identified” for the discretionary function exception to apply.

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

Impact

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

302 Id. at 1055.
303 Id.
304 Id. (quoting Terbush v. United States, 516 F.3d 1125, 1130 (9th Cir. 2008)).
305 Id.
306 Id. at 1057.
307 Id.
308 Id. at 1057–58.
309 Id. at 1058.
310 Id. at 1059.
311 Id.
discretionary function exception and those that should not. The exception to the FTCA is important in order to protect government agencies from being subject to heavy judicial oversight of their management decisions. The NPS would likely be better suited to make decisions regarding trail maintenance and snow removal than the courts, however, the importance of individual safety at any government-run building, landmark, or park must be protected as well. This case established important precedent for applying the discretionary function exception by holding that the government is accountable for dangers created by government agencies. Individuals can expect natural hazards in national parks, given that they are areas of preserved wilderness; however, if an injury is incurred due to an unexpected hazard created by the NPS, the government agency should be held accountable.

312 Id. at 1055.
313 Id. at 1059.
314 Id.
315 See id.