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Pepperdine University School of Law
Legal Summaries

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UNITED STATES COURT OF APPEAL

OTSUKA PHARMACEUTICAL CO., LTD. v. PRICE
869 F.3d (D.C. Cir. 2017)

Synopsis:

A drug manufacturer sought review of the Food and Drug Administration’s (FDA) approval of an Abbreviated New Drug Application, granted to a competing drug. Drug manufacturer alleged that the new drug violated its marketing exclusivity under the Food, Drug, and Cosmetic Act. The United States Court of Appeals for the District of Columbia affirmed the district court’s grant of summary judgment for the FDA.

Facts and Analysis:

Otsuka Pharmaceutical (Otsuka) manufactures an antipsychotic drug called Ablify Maintena.1 Since 2002, Otsuka has obtained FDA approval for multiple products containing the active moiety, aripiprazole.2 Under its two most recent iterations, Otsuka has obtained three-year marketing exclusivity periods of three years each set to expire on February 28, 2016 and December 5, 2017.3

When Alkermes filed for approval of a drug, Aristada, Otsuka petitioned the FDA to deny the approval based on the fact that both drugs “ultimately metabolize into the same molecule in the body, and that Aristada relied in part on studies showing safety and efficacy of a precursor product to Ablify Maintena.”4 According to Otsuka, Aristada drug would violate Otsuka’s ongoing period of marketing exclusivity.5 The FDA rejected Otsuka’s arguments and instead, concluded that a drug’s active moiety both determines the eligibility

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2 Id. at 991.
3 Id.
4 Id. at 989.
5 Id.
for market exclusivity and defines the field of drugs subject to that exclusivity.\textsuperscript{6}

“Otsuka sought judicial review, contending among other things, that the FDA’s same-moietiy limitation on the scope of drug’s marketing exclusivity conflicts with the [Food, Drug, and Cosmetic Act (FDCA)]”.\textsuperscript{7} The district court granted summary judgment for the FDA concluding that “the FDA’s same-moietiy test is a reasonable construction of the statute and consistent with the agency’s regulations.”\textsuperscript{8}

Under the FDCA, an applicant can seek FDA approval of a drug either when the drug is a “bioequivalent” version of a previously approved drug or when a product relies, in part or in whole, on studies that were not conducted by or for the applicant.\textsuperscript{9} To avoid competitors relying on other’s studies to “free ride” off of the work of the original manufacturer, the FDCA provides for a period of marketing exclusivity.\textsuperscript{10} This period of exclusivity is determined by three distinct provisions.\textsuperscript{11} The first, allows for a marketing exclusivity period of five years when there no active ingredient in that drug that has been approved in any other application.\textsuperscript{12} The second, allows for exclusivity for three-years “for a drug, which includes an [active moiety] that has been approved in another application . . . if the application contains reports of new clinical investigations . . . essential to the approval of the application and conducted or sponsored by the applicant.”\textsuperscript{13} The third, allows for a three-year exclusivity period for applicants “that supplement a previously approved application if obtaining approval of the supplement requires submitting additional reports.”\textsuperscript{14}

\textsuperscript{6} Id.
\textsuperscript{7} Id. at 990.
\textsuperscript{8} Id.
\textsuperscript{9} Id.
\textsuperscript{10} Id.
\textsuperscript{11} Id.
\textsuperscript{12} Id. (citing 21 U.S.C. § 335(c)(3)(E)(ii); C.F.R. § 314.108(a)).
\textsuperscript{13} Id. (citing 21 U.S.C. § 335(c)(3)(E)(iii)) (internal quotations omitted).
\textsuperscript{14} Id. (citing 21 U.S.C. § 335(c)(3)(E)(iv)).
In looking at the second and third provisions, the court noted that although the relationship between the second drug and the first drug necessary to grant exclusivity is ambiguous, all parties agreed that there must be some relationship.\textsuperscript{15} The court did not find Otsuka’s broader argument that exclusivity must be determined by whether two drugs are \textit{legal equivalents} compelling.\textsuperscript{16} Under Otsuka’s proposed standard, exclusivity exists whenever one drug relies on another to receive approval.\textsuperscript{17} Instead, however, the court deferred to the FDA’s interpretation that the new drug must contain the same active-moiety to fall under the exclusivity of another.\textsuperscript{18} In doing so, the court found that the FDA’s interpretation was consistent with the statutory terms and reasonable because it provided exclusivity based on the degree of innovation, contained statutory grounding, protected specific features of a drug (active moiety) and not the specific drug, and was not unambiguously foreclosed by the statute.\textsuperscript{19}

Otsuka also argued that the FDA’s interpretation was “irreconcilable with the agency’s own regulations and past statements.”\textsuperscript{20} Noting that an agency’s interpretations of its own regulations are entitled to judicial deference unless plainly erroneous or inconsistent with the regulations, the court found that no reason to reject the FDA’s interpretation.\textsuperscript{21}

Last, Otsuka argued that the FDA “was required to adopt the same-moiety limitation through notice-and-comment rulemaking.”\textsuperscript{22} However, the court found that the FDA’s interpretation was not inconsistent with previous regulations and did not make a substantive change in regulations.\textsuperscript{23}

\textsuperscript{15} \textit{Id.} at 992.
\textsuperscript{16} \textit{Id.} at 992–93.
\textsuperscript{17} \textit{Id.}
\textsuperscript{18} \textit{Id.} at 993.
\textsuperscript{19} \textit{Id.} at 993–995.
\textsuperscript{20} \textit{Id.} at 1001.
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Id.} at 1002.
\textsuperscript{23} \textit{Id.}
Holding:

Applying Chevron deference, the court affirmed the FDA’s interpretation that the three-year exclusivity period only bars approval of subsequent applications when the drug at issue contains the same active moiety because it was consistent with the statutory language and reasonable.24

Impact:

As a result of the court’s holding, new drug approvals that contain overlapping conditions of approval with a previous drug do not violate the first drug’s marketing exclusivity if they each contain a different active moiety. Additionally, applications that supplement a previously approved drug do not violate marketing exclusivity if they contain a different active moiety.

Susquehanna International Group, LLP v. Securities and Exchange Commission
866 F.3d 442 (D.C. Cir. 2017)

Synopsis:

Two national securities exchanges petitioned for review of the Securities and Exchange Commission’s approval of a clearing agency’s plan that made changes to paid fees. The U.S. Court of Appeals, District of Columbia Circuit found that the SEC’s approval was arbitrary and capricious and remanded the case, but did not vacate the order.

Facts and Analysis:

The Options Clearing Corporation (OCC), “the only clearing agency for standardized U.S. options listed on U.S. national

24 Id. at 993.
securities exchanges[,]” sought to increase its capital reserves.\(^{25}\) Under OCC’s previous plan, OCC charged fees for transactions and sets the rate for these fees each year based on its projected expenses, along with a buffer.\(^{26}\) At the end of the year, OCC would refund all excess paid fees to clearing members.\(^{27}\)

After determining that it needed an additional $222 million of capital along with another $117 million in Replenishment Capitals, OCC developed a new Capital Plan.\(^{28}\) Under this Plan, OCC’s five shareholders would make capital contributions to reach OCC’s target and would agree to provide additional capital upon request.\(^{29}\) In return, OCC would pay out dividends to the shareholders. Under this scheme, approximately half of the unused fees would go to the shareholders as dividends and the other half would be refunded to clearing members.\(^{30}\) The plan would also decrease the buffer used to calculated each year’s fees and would provide for a permanent end to refunds, but not dividends, “if the Replenishment Capital becomes necessary and is not repaid in 24 months or if the target capital requirement is not restored within that period.”\(^{31}\)

Given its significant role, the SEC closely monitors and regulates OCC, and as a result, the SEC must approve the plan before it becomes effective.\(^{32}\) In 2016, the SEC issued a final Order approving the plan.\(^{33}\) Two non-shareholder exchanges, a clearing member, and a market participant sought judicial review.\(^{34}\)

The court reviewed the SEC’s Order under the Administrative Procedure Act, “which requires [the court] to hold unlawful agency action that is ‘arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law’ or that is ‘unsupported by
substantial evidence.'" The court noted that the SEC must approve OCC's proposed rule changes only if they are consistent with the Exchange Act, and the SEC must determine if the rules meet certain requirements. Petitioners argued that the Plan did not meet several of these requirements.

First, Petitioners argued that the "Plan overcompensates shareholder exchanges, which unjustifiably burdens competition by nonshareholders." Second, Petitioners argued that the "Plan harms investors and the public by transforming the OCC from a public utility to a profit-seeking monopoly and by increasing the fees charged to OCC's customers." Third, Petitioners argued that the Plan unfairly discriminates between shareholder exchanges and non-shareholder exchanges. Fourth, Petitioners contended that OCC failed to notify non-shareholder exchanges while it developed the Plan.

The court did not reach any of Petitioner's first arguments because Petitioners also argued that the SEC failed to find or determine that the plan met any of those requirements, and instead effectively abdicated that responsibility to OCC. Additionally, the court noted that the SEC's Order approving of the Plan, reflected little or no evidence of the basis for the Plan. Citing to Gerber v. Norton, the court pointed out that it has previously rejected this kind of "decision making" before, and that "[w]hen a statute requires an agency to make a finding as a prerequisite to an action, it must do so." In fact, the SEC's appellate counsel acknowledged that the SEC must make its own independent review.

35 Id. at 445 (citing 5 U.S.C. § 706(2)(A), (E)).
36 Id.
37 Id.
38 Id.
39 Id.
40 Id.
41 Id. at 446.
42 Id.
43 Id.
44 294, F.3d 173, 185–86 (D.C. Cir. 2002).
45 Susquehanna Int'l Grp., LLP, 866 F.3d at 446 (citing Gerber v. Norton, 294 F.3d 173, 185–86 (D.C. Cir. 2002)).
46 Id.
The court determined that the Order failed to show that the Plan pays dividends to shareholder exchanges at a reasonable rate, and instead incorrectly relied on OCC’s determination. On appeal, the SEC first argued “that it was reasonable for it to ‘trust the process’ undertaken by OCC.” The court rejected this argument and stated that the SEC cannot rely on OCC’s process without actually examining the substance of the Plan itself. Second, the SEC argued that the Plan’s structure guarantees reasonable dividends. The court also rejected this argument finding that the SEC merely purported to defend “its unquestioning reliance on OCC’s claim that the dividend rate is reasonable by its unquestioning reliance on OCC’s claim that the Plan’s structure is reasonable.”

The court found four additional instances of unreasoned decision making. First, the Order failed to show that the Plan’s capital target was reasonable. Second, the SEC “was too quick to accept OCC’s claims that the Plan would not increase fees for customers.” Third, the order did not explain why Petitioners allegation that the Plan unfairly discriminated clearing members from shareholders were unavailing. Fourth, the Order failed to show how Petitioner’s objection that OCC violated its own bylaws “by failing to notify nonshareholder exchanges earlier in its development of the plan.”

After finding that “the SEC’s order was arbitrary and capricious, unsupported by substantial evidence, and otherwise no in accordance with law,” the court turned to finding the proper remedy. Because the SEC may be able to approve the plan conducting a proper analysis on remand, and unwinding the plan would be a “logistical

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47 Id. at 447.
48 Id.
49 Id. at 448.
50 Id.
51 Id.
52 Id. at 449.
53 Id.
54 Id. at 450.
55 Id.
56 Id. at 451.
nightmare," the court remanded the case, but chose not to vacate the order.\textsuperscript{57}

\textit{Holding:}

The court held that "the SEC's order was arbitrary and capricious, unsupported by substantial evidence, and otherwise not in accordance with law," and remanded the case, but did not vacate it.\textsuperscript{58}

\textit{Impact:}

The court emphasized its stance that the SEC must independently analyze a self-regulatory organization's (SRO) proposed rule changes and cannot merely accept the SRO's determinations. This will take more time and resources from the SEC, and in essence will require the SEC to fund experts and lawyers that justify approval of a proposed rule change in the same way that the SRO has already done when filing for its proposal.

\textbf{PRICE v. U.S. DEPARTMENT OF JUSTICE ATTORNEY OFFICE}
\textit{865 F.3d 676 (D.C. Cir. 2017)}

\textit{Synopsis:}

A federal prisoner, who sought records related to his criminal case, brought a Freedom of Information Act action against the United States Department of Justice. The district court granted summary judgment for the government based on the government's argument that the prisoner had waived his rights to the records. The Court of Appeals for the District of Columbia reversed and remanded.

\textit{Facts and Analysis:}

In March 2007, William Price (Price) entered into a plea agreement that included a waiver of his rights to records under the

\textsuperscript{57} Id.
\textsuperscript{58} Id.
Freedom of Information Act (FOIA).\textsuperscript{59} In 2011, Price submitted a request for records under FOIA to the FBI.\textsuperscript{60} Because the records Price sought were related to his previous case, The FBI denied his request.\textsuperscript{61} Price brought a suit in district court where he argued that FOIA rights cannot be waived.\textsuperscript{62} In granting the government’s motion for summary judgment, the district court concluded that “it would be anomalous to forbid the waiver of a statutory right under FOIA when the Supreme Court has allowed the waiver of important constitutional rights.”\textsuperscript{63} After Price appealed, the court appointed an amicus to brief and argue the case because Price was unrepresented by counsel and did not submit a brief.\textsuperscript{64} On appeal, Amicus argued that FOIA rights are not waivable, and that waiver of FOIA rights contravenes public policy.\textsuperscript{65}

The Court of Appeals for the District of Columbia, first recognized that criminal defendants can generally waive both constitutional and statutory rights and that statutory rights.\textsuperscript{66} Additionally, the court noted that statutory rights can generally be waived unless Congress affirmatively provides that they are not waivable.\textsuperscript{67} However, amicus argued that based on the text of FOIA itself and through the fundament principle that a requesting party’s identity has no bearing on the FOIA request, Congress has shown that FOIA rights are not waivable.\textsuperscript{68}

First, amicus argued that “FOIA requires the disclosure of all records except those specifically exempted from its coverage.”\textsuperscript{69} Because FOIA provides for nine specific exemptions, Amicus argued that a waiver of FOIA would “operate[] as a tenth exemption[.]”\textsuperscript{70}

\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} Id. at 691 n.3.
\textsuperscript{65} Id. at 679.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{68} Id. at 679–80.
\textsuperscript{69} Id. at 679.
\textsuperscript{70} Id.
However, the court found that FOIA is concerned with disclosure to the public and not any specific individual.\textsuperscript{71} Whenever the agency invokes an exception, the agency is not required to turn the documents over to anybody in the public.\textsuperscript{72} In contrast, when someone has contracted not to seek those records, any other member of the public can still seek those records—just not the specific person who has agreed not to seek them.\textsuperscript{73} The court concluded that this result is compatible with the text of FOIA.\textsuperscript{74}

Second, Amicus argued that Congress’s intent to protect FOIA right from waiver is inherent in the principle that “the identity of the requesting party has no bearing on the merits of his or her FOIA request.”\textsuperscript{75} The court, however, found that Congress has not forbidden the practice of agency’s denying FOIA requests to those who have specifically contracted with the government not to seek those requests.\textsuperscript{76}

In reviewing Amicus’s public policy argument, the court recognized that there are limitations as to what rights a person can bargain away because prosecutors can only consider legitimate criminal justice concerns when setting a plea deal.\textsuperscript{77} The court noted that the government did not provide any legitimate criminal-justice interest served by including a waiver of FOIA rights in the plea agreement. Instead, the court acknowledged that FOIA requests play a “significant role in uncovering undisclosed [exculpatory] material and evidence of ineffective assistance of counsel.”\textsuperscript{78}

\textit{Holding:}

The court declined to hold that FOIA waivers in plea agreements are always unenforceable.\textsuperscript{79} Instead, the court held that in this case,

\begin{itemize}
  \item \textsuperscript{71} \textit{Id.} at 680–681.
  \item \textsuperscript{72} \textit{Id.}
  \item \textsuperscript{73} \textit{Id.}
  \item \textsuperscript{74} \textit{Id.}
  \item \textsuperscript{75} \textit{Id.} (internal quotations omitted).
  \item \textsuperscript{76} \textit{Id.}
  \item \textsuperscript{77} \textit{Id.} at 681.
  \item \textsuperscript{78} \textit{Id.} at 682.
  \item \textsuperscript{79} \textit{Id.}
\end{itemize}
the government could not deny Price’s FOIA request because it did not provide an adequate basis for enforcing the FOIA waiver “in light of the public-policy harms Price has identified.”

**Impact:**

The court’s opinion left open future arguments on what constitutes a legitimate criminal-justice interest sufficient to support a waiver of FOIA rights. While the court did not find an interest in finality compelling, it did not provide much commentary on the government’s contention, brought only at oral arguments, that because prisoners have plenty of time to time to write many FOIA requests, waiver of these rights helps reduce the burden on agencies like the FBI.

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**ALL AMERICAN TELEPHONE COMPANY, INC. v. FEDERAL COMMUNICATIONS COMMISSION**

867 F.3d 81 (D.C. Cir. 2017)

**Synopsis:**

Competitive local exchange carriers brought a suit against AT&T alleging that AT&T had failed to pay them for services they had performed. AT&T filed a counterclaim alleging that the competitive local exchange carriers had violated the Communications Act. After the case was referred to the Federal Communications Commission (FCC), the FCC found that the carriers had violated the Communications and awarded damages to AT&T Corporation (AT&T). The Court of Appeals for the District of Columbia affirmed the award of damages, but vacated the portions of the FCC’s order that discussed ongoing state law claims.

**Facts and Analysis:**

All American Telephone Co., e-Pinnacle Communications, Inc., and Chasecom (collectively, the Companies), along with Beehive

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80 *Id.*
Telephone Company, Inc., of Nevada, and Beehive Telephone Company, Inc., of Utah (collectively, Beehive), engaged in a traffic-pumping scheme wherein they would artificially inflate the number of calls they would connect so that they could increase the rates that they could charge interexchange carriers such as AT&T. 81 In 2007, the Companies filed a suit against AT&T alleging that they, along with AT&T, were common carriers, subject to the jurisdiction of the FCC, and that AT&T had refused to pay them for access services that they had provided pursuant to valid tariffs filed with the FCC. 82 In response, AT&T filed a counterclaim alleging that the Companies had violated their filed tariffs and Communications Act. 83

After the district court stayed the case under the primary jurisdiction doctrine, AT&T filed a complaint with the FCC and elected to bifurcate the issues of liability and damages. 84 In its decision, the FCC ruled that the Companies were a sham carriers who “participated in an access stimulation scheme designed to collect in excess of eleven million dollars of improper termination access charges from AT&T.” 85 Finding the companies liable to AT&T, the FCC conducted a second proceeding to determine damages. 86 However, the Companies objected by arguing that the FCC no longer had jurisdiction over them because it found them to be sham entities. 87 Finding that the Companies had held themselves out to be common carriers, the FCC determined that it did have jurisdiction over the Companies and awarded AT&T a refund of $252,496.37 that it had previously paid the Companies. 88 The Companies filed a petition for review. 89

In reviewing the FCC’s decision, the court first noted that the FCC’s decision will not be overturned unless it is “arbitrary,

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82 Id. at 87.
83 Id.
84 Id. at 88.
85 Id.
86 Id. at 89.
87 Id.
88 Id.
89 Id.
capricious, an abuse of discretion, or otherwise not in accordance with law.” The court further explained that a decision that exceeds the scope of the FCC’s statutory authority is considered to not be in accordance with the law. The court then turned to the Companies’ arguments.

First, the Companies argued that the FCC did not have authority over them because it had found them to be sham entities rather than genuine common carriers. In finding that the FCC did have jurisdiction over the Companies, the court first analyzed the language of section 208(a) of the Communications Act. Under this section, the FCC has “jurisdiction over complaints alleging ‘anything done or omitted to be done by any common carrier . . . in contravention of the provisions’ of the Communication Act.” The court found that common carriers can include entities providing services pursuant to a tariff even if the tariff is later determined to be invalid, and those that hold themselves out to be one. Ultimately, the court found the Companies were common carriers because they provided common carrier services pursuant to a tariff and held themselves out to be common carriers to the public and to AT&T.

Second, the court turned to whether the FCC’s award of damages was permissible. In concluding that it was, the court found that there existed substantial evidence that the Companies did not render any services that they could charge AT&T for. Instead, the Companies admitted that Beehive was the one that actually provided the services. The court ultimately found that the FCC could award AT&T damages for services it paid to the Companies when they did not provide those services.

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90 Id. (citing Achernar Broad. Co. v. F.C.C., 62 F.3d 1441, 1445 (D.C. Cir. 1995)).
91 Id.
92 Id.
93 Id. (citing 47 U.S.C § 208(a)).
94 Id. at 90.
95 Id. at 90–91.
96 Id. at 91.
97 Id.
98 Id.
99 Id. at 92.
Last, the Companies argued "that the FCC improperly analyzed the merits of their separate and ongoing state-law quantum meruit claims, which include a claim of unjust enrichment."100 In turn, the FCC argued that the Companies lacked standing to raise these arguments because these statements did not injure the Companies and because they failed to file a petition for reconsideration regarding their common law claims.101 The court found that the Companies did have standing because, under the Hobbs Act, the federal courts of appeals have exclusive jurisdiction to review final decisions of the FCC, and the district court might have taken the FCC’s statements at face value.102 Additionally, the court found that the FCC was aware of the Companies’ position as it related to the FCC’s stance on the state law claims, and therefore, it had been afforded a full and fair opportunity to review the Companies’ argument.103

**Holding:**

As a result, the court held that the FCC had jurisdiction to award damages to AT&T because the Companies had held themselves out to be common carriers and had provided services pursuant to a tariff.104 Additionally, to the extent that the FCC’s reached and decided any question of state law, the court vacated those portions of the FCC’s order.105

**Impact:**

The court made sure to not create a loophole for common carriers who are really shell companies, or a sham. Under the Companies’ proposed argument, the FCC would lose jurisdiction of common carriers when they are found to be a sham. However, a finding that a company is a sham is usually directly linked to violations of tariffs or

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100 Id.
101 Id. at 92–93.
102 Id. at 93.
103 Id. at 93–94.
104 Id. at 95.
105 Id.
the Communications Act, which the FCC has express jurisdiction over. The court refused to make this the law.

**BLOMGARDEN v. UNITED STATES DEPARTMENT OF JUSTICE**  
874 F.3d 757 (D.C. Cir. 2017)

*Synopsis:*

Appellant, who requested a former Assistant United States Attorney’s (Assistant) termination letter under the Freedom of Information Act (FOIA), brought suit against the Department of Justice after it denied his request. The district court granted summary judgment for the government because the former Assistant’s privacy interests outweighed the public interests. The Court of Appeals for the District of Columbia affirmed.

*Facts and Analysis:*

Appellant, serving a sentence of life imprisonment, sought a copy of the Assistant’s termination letter under FOIA. Appellant hoped that the letter would help him contest his sentence because the Assistant had served as lead prosecutor against him and the letter alleged a series of profession inadequacies on the part of the Assistant.\(^{106}\) The government refused to release the letter pursuant to Exemption 6 of FOIA.\(^{107}\) After Appellant brought suit, the government moved for summary judgment arguing that Exemption 6 allows the government to withhold records to protect personal privacy interests.\(^{108}\) The district court found that the Assistant’s privacy interests outweighed the public interests and granted summary judgment.\(^{109}\) Appellant appealed arguing that the district

\(^{106}\) Bloomgarden v. United States Dep’t of Justice, 874 F.3d 757, 758 (D.C. Cir. 2017).  
\(^{107}\) *Id.*  
\(^{108}\) *Id.*  
\(^{109}\) *Id.*
court erroneously balanced the public interest against the Assistant’s privacy interests.\textsuperscript{110}

In reviewing Appellant’s argument, the court first noted that “Exemption 6 of FOIA allows the government to withhold ‘personnel . . . files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.’”\textsuperscript{111} The court further emphasized that it cannot consider the interest of any particular requester, and instead must focus on the interests of the “general public in learning ‘what their government is up to.’”\textsuperscript{112}

Appellant argued that because prosecutors have a unique and powerful role, there exists a greater public interest in any disciplinary process involving prosecutors.\textsuperscript{113} Additionally, Appellant argued that the Assistant was a government employee that should be entitled to a lesser degree of privacy as opposed to a private citizen.\textsuperscript{114}

Even though the court recognized that the presumption of disclosure is strong under Exemption 6, and that the government bears the burden of rebutting the presumption, the court concluded that the district court was correct in finding that the privacy interests outweighed the modest public interest.\textsuperscript{115} In doing so, the court reasoned that the letter was over twenty years old and did not reveal present personnel policies. Additionally, even assuming that the public interest for information on prosecutors is significant, the court still found that the letter only alleged unprofessionalism and not allegations of prosecutorial misconduct.\textsuperscript{116}

Turning to the privacy interests, the court found that the interest was substantial because the Assistant was still a practicing lawyer who would be embarrassed by the disclosure of the letter.\textsuperscript{117} The court found even more concerning the fact that the letter only

\textsuperscript{110} Id. at 761.
\textsuperscript{111} Id. at 759 (citing 5 U.S.C. § 552(b)(6)).
\textsuperscript{112} Id. (citing U.S. Dep’t of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 773 (1989)).
\textsuperscript{113} Id.
\textsuperscript{114} Id. at 760.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id. at 761.
contained allegations that were never adopted by the deputy-attorney general’s office.\textsuperscript{118}

Appellant also argued that the Assistant had waived his privacy interest by placing the letter into the public domain.\textsuperscript{119} The court found it easy to reject this argument because the Assistant had never followed up with his appeal to the Merit Systems Protection Board and was the letter ever made public.\textsuperscript{120}

Lastly, Appellant sough to reform the judgment below to show that he partially prevailed in his action because he was able to was able to acquire the release of many other documents so that he could recover costs under the Federal Rules of Civil Procedure.\textsuperscript{121} However, the court explained that the form of judgment does not control who is entitled to costs under FOIA.\textsuperscript{122} Because the issue of costs was not before the court, it had no basis to grant Appellants plea for modification.\textsuperscript{123}

\textit{Holding:}

The court held that disclosure of the letter was clearly unwarranted under Exemption 6 of FOIA given the Assistant’s substantial privacy interests and affirmed the district courts grant of summary judgment.\textsuperscript{124} Additionally, the court held that there did not exists any grounds for modification of the district court’s judgment.\textsuperscript{125}

\textit{Impact:}

The court recognized the importance of protecting people, even government employees, from matters that are of private concern. Had the letter provided insight into Department of Justice policies that

\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id. at 762.
\textsuperscript{125} Id.
could have functioned as a road map to contests a conviction, the court might have ruled differently.

**Gill v. United States Department of Justice**

875 F.3d 677 (D.C. Cir. 2017)

**Synopsis:**

The Federal Bureau of Investigation (FBI) revoked Kaiser Gill’s security clearance for conducted unauthorized searches of the FBI’s database while he was employed as a special agent. Gill brought suit against the FBI and the Department of Justice alleging that the revocation violated the Equal Protection Clause, Due Process Clause, and Foreign Intelligence Surveillance Act. The district court granted the government’s motion to dismiss. The Court of Appeals for the District of Columbia affirmed.

**Facts and Analysis:**

The FBI revoked Kaiser Gill’s security clearance while he worked for the FBI as a special agent because he conducted unauthorized searches of the FBI’s Automated Case Support system.126 After the revocation, Gill sought review with the Department of Justice’s Access Review Committee (ACR) where he admitted the misconduct.127 The affirming the FBI’s revocation, the ACR found that “accessing sensitive information for personal reasons ... raise[d] straightforward concerns regarding [Gill’s] ability to safeguard classified information.”128 Gill then filed a complaint against the FBI and Department of Justice alleging violations of the Equal Protection Clause, Due Process Clause, and Foreign Intelligence Surveillance Act (FISA).129

The government moved to dismiss the claims asserting several defenses, including that under the Supreme Court’s decision in

126 Gill v. United States Dep’t of Justice, 875 F.3d 677, 679 (D.C. Cir. 2017).
127 *Id.*
128 *Id.* (internal quotations omitted).
129 *Id.* at 680.
Department of Navy v. Egan, 484 U.S. 518 (1988), “federal courts lack authority to review challenges to agency revocations of security clearances.” The district court, finding that Gill’s claims were either meritless or barred, granted the government’s motion to dismiss. Gill appealed reiterating the same arguments that he brought in the district court.

Conducting de novo review, the Court began with Gill’s claim that the FBI violated FISA because the “FBI used information gained through FISA-authorized surveillance in the ACR proceeding without the required disclosure.” The court reiterated the district court’s conclusion that there must be a valid waiver of sovereign immunity for Gill to properly bring his claims against the government and that no such waiver existed. Because Gill raised his arguments in support of a finding of a valid waiver for the first time on appeal, the court dismissed Gill’s FISA argument.

As to Gill’s argument that the revocation violated his rights under the due process clause. While Gill and the government debated on whether Gill had stated a protectable liberty interest, the court found that even if Gill had stated a proper liberty interest, Gill had received all of the process that was due to him because he had been afforded a full hearing with a right to counsel and the opportunity to make his case before the ARC.

Gill further argued that “the ACR proceeding could not have satisfied the requirements of due process because it was tainted by the alleged FISA violation.” However, the court emphasized that the misconduct was not found through an electronic surveillance under FISA, but rather through a security unit interview. Additionally, Gill argued that the ACR proceeding failed to comply with his due process rights because the Committee based its decision on

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130 Id.
131 Id.
132 Id.
133 Id.
134 Id.
135 Id. at 681.
136 Id.
137 Id.
138 Id.
on a perceived influence of Gill’s foreign born relatives.\textsuperscript{139} However, the court found that Gill misread the ACR’s decision and that the ACR had instead relied on the trustworthiness concerns that Gill’s misconduct raised.\textsuperscript{140}

Lastly, Gill argued that the ACR violated due process because it took five years to issue a decision and his inability to seek redress during that time was per se harmful.\textsuperscript{141} In rejecting Gill’s argument, the court found that “an agency’s delay in issuing an otherwise valid decision does not offend principles of due process without some showing of harm caused by the delay[,]” and found that the delay was not per se harmful.\textsuperscript{142}

As to Gill’s equal protection claim, Gill argued that he received harsher punishment for his misconduct than other non-Muslim agents who committed similar offenses, and “because the ACR treated his naturalized family members ‘differently than native born [U.S.] citizens.’”\textsuperscript{143} The court found that Gill’s second argument relied on a misreading of the ACR’s opinions as it had previously discussed. As to his first argument that the FBI revoked his clearance because he is Muslim, the court determined that because Gill had failed to raise this argument before the ACR, Gill had waived it.\textsuperscript{144}

\textit{Holding:}

Therefore, the court held that the government did not violate FISA or Gill’s due process and equal protection rights, and affirmed the district court’s grant of the government’s motion to dismiss.

\textit{Impact:}

The court emphasized the importance of raising issues down below to not waive them on appeal. Finding that Gill had waived this argument, the court also left open questions about whether under

\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id. at 681–82.
\textsuperscript{144} Id.
Clark v. Library of Congress,\textsuperscript{145} sovereign immunity would not be barred by violations of equal protection or due process rights, and whether Section 702 of the Administrative Procedure Act acts as a waiver of sovereign immunity whenever a plaintiff only seeks injunctive relief.

**RHINO NORTHWEST, LLC v. NATIONAL LABOR RELATIONS BOARD**  
867 F.3d 95 (D.C. Cir. 2017)

**Synopsis:**

After group of employees formed a separate collective-bargaining unit, employer Rhino Northwest, LLC (Rhino) refused to bargain with them. The National Labor Relations Board’s (NLRB) found that they had violated the National Labors Relations Act in doing so. Rhino filed a petition of review of the NLRB’s order. The Court of Appeals for the District of Columbia denied the petition and granted the Board’s cross-application for enforcement of its order.

**Facts and Analysis:**

Rhino employs personnel to set up venues for concerts and other planned events.\textsuperscript{146} A group of employees called “riggers,” who are responsible for using motors to suspend objects at events, sought to create a bargaining unit composed of all riggers.\textsuperscript{147} Rhino opposed the appropriateness of the bargaining unit arguing that any appropriate unit must also include other a plethora of other employees.\textsuperscript{148}

The NLRB rejected Rhinos arguments and found that the riggers had “formed a facially appropriate bargaining unit because they

\textsuperscript{145} 750 F.2d 89 (D.C. Cir. 1984).
\textsuperscript{146} Rhino Nw., LLC v. Nat’l Labor Relations Bd., 867 F.3d 95, 98 (D.C. Cir. 2017).
\textsuperscript{147} Id.
\textsuperscript{148} Id. at 99. These employees included “all audio, audio/visual, camera, construction, deck hand, forklift, lighting, loading, production assistant, stagehand, video, wardrobe, climber/sheaffer, rope access supervisor, and rope access technician employees . . . .” Id.
shared a community of interest and were "readily identifiable as a group based on their classification and function."\textsuperscript{149} Additionally, the Board found that the other employees "did not share an overwhelming community of interest with the riggers."\textsuperscript{150} The Board then directed an election of riggers as a bargaining unit.\textsuperscript{151}

After the riggers voted for union representation, Rhino refused to bargain with the union.\textsuperscript{152} As a result, the union filed an unfair-labor-practice charge with the Board where Rhino argued that it had no duty to bargain with an improperly certified union. After the Board held that Rhino violated the NLRA in refusing to bargain, Rhino petitioned the court for review. In turn, the Board cross-applied for an enforcement of its order.

In analyzing the appropriateness of the bargaining unit, the court explained that under the Board’s decisions, employees must be "readily identifiable as a group" and must share a "community of interest."\textsuperscript{153} The court further explained that more than one appropriate formulation of employees can exist.\textsuperscript{154} As a result, an employer seeking to challenge a prima facie appropriate unit on the basis that it is under inclusive must show that there is no legitimate basis to exclude those employees.\textsuperscript{155} The court also noted that the board’s determination is reviewed with broad discretion.\textsuperscript{156}

Rhino argued that the Board’s "overwhelming community interest" standard is inconsistent with the NLRA.\textsuperscript{157} However, in conformity with seven other circuits, the court found that the Board’s followed its 2011 decision in Specialty Healthcare, and therefore, its formulation was "drawn from Board precedent."\textsuperscript{158}

Additionally, Rhino argued that the Board’s framework has caused it to now necessarily deem any unit comprised of all

\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Id. at 98.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id. at 99.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
employees sharing a job title as an appropriate bargaining unit.\textsuperscript{159} However, the pointed to prior Board decisions that rejected bargaining units that consisted of an entire class or category of employees.\textsuperscript{160}

Rhino further argued that “the NLRA on balance favors marginally larger bargaining units.”\textsuperscript{161} Citing to \textit{NLRB v. Action Auto., Inc.},\textsuperscript{162} the court rejected this argument because the “Supreme Court has recognized the virtues of a contrary vision. . . .”\textsuperscript{163} Lastly, Rhino argued that the Board violated the Administrative Procedure Act because it announced a “new substantive standard via adjudication rather than notice-and-comment rulemaking.”\textsuperscript{164} However, the court found that \textit{Specialty Healthcare} only clarified the precise language that the Board would apply and did not establish a new substantive test. Additionally, the court found that “the Board is not precluded from announcing new principles in an adjudicative proceeding.”\textsuperscript{165}

The court found that there existed substantial evidence to support the Boards determination that the proposed bargaining unit did not share an overwhelming community of interest with Rhino’s proposed employees because they had different wages, training, supervision, equipment, and physical working conditions.\textsuperscript{166}

\textit{Holding:}

The court held that the Board reasonable concluded that the distinctions between the riggers and Rhino’s proposed employees was sufficient to differentiate between the two groups and therefore, the riggers may form their own bargaining unit.\textsuperscript{167} As a result, the

\textsuperscript{159} \textit{Id.} at 101.
\textsuperscript{160} \textit{Id.}
\textsuperscript{161} \textit{Id.}
\textsuperscript{162} 469 U.S. 490, 494 (1985).
\textsuperscript{163} \textit{Id.} at 102.
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Id.} (citing \textit{NLRB v. Bell Aerospace Co.}, 416 U.S. 267, 294 (1974)).
\textsuperscript{166} \textit{Id.} at 102–103.
\textsuperscript{167} \textit{Id.} at 103.
court denied Rhino’s “petition for review and granted the Board’s cross-application for enforcement of its order.”  

Impact:

The court’s decision emphasized the deference that courts will give to the Board’s determination. Unless an employer can that there exists no legitimate basis for the exclusion of certain employees, the Board’s decision will generally not be overturned. Therefore, employers are likely going to have to succumb to employee’s bargaining units.

168 Id.