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Pepperdine University School of Law Legal Summaries

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Pepperdine University School of Law Legal Summaries

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**CHARTER COMMUNICATIONS, INC V. NATIONAL LABOR RELATIONS
BOARD**
939 F.3D 798 (6TH CIR. 2019)

Synopsis:

After the National Labor Relations Board (NLRB) concluded that Charter Communications Inc. (Charter) repeatedly violated the National Labor Relations Act (NLRA) and discharged employee Johnathan French with anti-union animus in violation of the NLRA, Charter petitioned the Sixth Circuit to review the Board's decisions. The Court found that there was sufficient evidence supporting the Board's determination and denied Charter's petition for review and granted the General Counsel's petition for enforcement.

Facts and Analysis:

The NLRA guarantees an employee's right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."¹ An employer violates this provision when "substantial evidence demonstrates that the employer's actions, considered from the employees' point of view, had a reasonable tendency to coerce."²

Jonathan French who worked as an auditor at Charter and a few other employees decided they wanted better pay by unionizing. French reached out to a local chapter union organizer French created a set of pro-union flyers to distribute at the Charter office. In the three months that followed Charter observed the hand billing on site and had a manger watching take notes of who was interested in the union information, further surveilled and interrogated employees, reassigned French's union sympathizing group to remote work locations, an eventually fired French and two other employees. After his termination, French brought this action to the NLRB who concluded Charter had committed violations of NLRA.

The court recognized that the Appellate Court's review of a Board decision is "quite limited" and applies a deferential standard,

¹ 29 U.S.C. § 157 (2018).

² *Caterpillar Logistics, Inc. v. NLRB*, 835 F.3d 536, 543 (6th Cir. 2016) (brackets omitted) (quoting *Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651, 659 (6th Cir. 2005)).

requiring that they uphold the NLRB's factual determinations as sufficient if they are supported by "such relevant evidence as a reasoned mind might accept s adequate to support a conclusion".³ The court analyzed each of the five violations of the Act: (1) surveillance of the union hand billing, (2) the surveillance, (3) the interrogation, (4) reassignment of employees to rural areas, (5) safety check and finally the alleged discriminatory discharge of French and two other employees. In analyzing these incidences, the court relied on various provisions of the NLRA and found sufficient evidence to support the Board's finding of a violation of each of the five incidences.

Turning to the discharge of French, the court used the *Wright Line* burden shift test, the court found that there was enough evidence, with to invite an inference of anti-union animus due to the fact that French was terminated three months after reaching out to union organizers, making pro-union flyers and suggesting organizers distribute them, leading Charter to know French was involved. In addition, in those three months are when all the violations of the Act occurred further weighing toward anti-union sentiments. With the burden shifted to Charter, they were unable to prove that they would have made the same employment decision regardless of French's protected activity because the evidence suggested the Charter failure to conduct even a rudimentary investigation into the stated basis for French's discharge.⁴ The court found the evidence supported a finding of pretext under 29 U.S.C.A § 158(a)(3).⁵

Finally, in analyzing the discharge of the two other employees, the Board recognized that it was "immaterial that the employee was not in fact engaging in union activity as long as that was the employer's perception and the employer was motivated to act based on that perception."⁶ The court noted evidence that Charter's perceptions of the two employees was linked to union sympathies because the evidence on the record that the employer asked them how they felt about the union and told them to steer clear of it, the fact they were included in the group assigned to rural areas after their names came up after the hand billing incident, and the fact that they were discharged on the same day as French.⁷ Meeting the first prong, the court ruled that the second stage of the *Wright Line* test of pretextual nondiscriminatory reasons for discharge was met because there was evidence that suggested that

³ Charter Commc'ns, Inc. v. Nat'l Labor Relations Bd., 939 F.3d 798, 809 (6th Cir. 2019).

⁴ *Id.*

⁵ *Id.*

⁶ Dayton Hudson Dep't Store Co., 324 N.L.R.B. 33, 35 (1997).

⁷ *Charter*, 939 F.3d at 818.

employees were not fired for the same conduct the employer pointed to as reason for termination.⁸

Holding:

The Court held that surveilling union hand billing, creating an impression of surveillance, threatening closer supervision because of union activity, soliciting grievances from employees during union organizing campaign, reassigning employees suspected of union organizing to rural areas, threatening employee with reprisal for his union activity were substantial evidence supporting the Board's determination that the employer engaged in unfair labor practice. In addition, the court held that there was sufficient evidence of employer's anti-union animus to support the Board's determination that an employer had engaged in unfair labor practice by discharging an employee and other employees because of their perceived union activity.

Impact:

This case will likely have an impact on Labor Relations Board decisions that are looking for examples of what constitutes as substantial evidence for unfair labor practice as it relates to treatment of union activity of its employees. Overall, the ruling enforces the idea that a finding by the NLRA Board is difficult to overturn upon review of an appellate court because the standard of review is so minimal and deferential that anything a reasoned mind might find adequate qualifies as sufficient evidence. Mostly, it is positive precedent in protection for union sympathizers in California.

JOMAA V. UNITED STATES
940 F.3D 291 (6TH CIR. 2019)

Synopsis:

After Georgiana Rizk's daughter's visa petition revocation by the United States Citizenship and Immigration Services (USCIS) was then affirmed by the Board of Immigration Appeals (BIA) the noncitizen and her daughter appealed the decision. The USCIS had

⁸ *Id.* at 819.

denied the noncitizen mother's daughter because her mother had obtained citizen status by a fraudulent marriage. The Sixth Circuit affirmed the judgement of the district court dismissing her claim.

Facts and Analysis:

Under 5 U.S.C.A §706(2)(A) an agency decision is arbitrary and capricious if an agency fails to examine relevant evidence or articulate satisfactory explanation for decision and a review of agency decision under the Administrative Procedure Act the court must ensure that the agency action is in accordance with law, such that there is not conflict with language of statute relied upon by agency.⁹

The USCIS initially granted Rizk's petition but later revoked it, saying it should have never granted it in the first place because Rizk had entered into a sham marriage, making her ineligible for a future visa pursuant to §206 of the Immigration and Nationality Act (INA).¹⁰ Rizk claims the second decision was arbitrary and capricious. The USCIS cites to 8 U.S.C.A §1154(c) which states, "orphan petitions approved for a single petitioner; prohibition against approval in cases of marriages entered into in order to evade immigration laws; restriction on future entry of aliens involved with marriage fraud."¹¹ The USCIS had denied citizenship to the daughter of the noncitizen mother because according to the statute, that was the consequence of obtaining citizenship falsely by means of a fraudulent marriage.

Rizk's appeal was based on the argument that 8 U.S.C. §1154 did not apply to her and thus, did not have the resulting effect on her daughter. Plaintiff contends that the provision cannot apply to her because she did not have fraudulent marriage certificates but that she was legally married to Mr. Derbass because she even had a marriage ceremony claiming that she entered the two-year marriage in good faith.¹² However, the immigration officer who had interviewed her under oath reported that she had given no evidence of shared residence with the alleged husband and gave conflicting statements about the fatherhood of her children and the whereabouts of her first alleged ex-husband, Mohamed Jomaa. Evidence also came to light she Rizk had been married to Mohamed Derbass while still married to Jomaa.¹³ The court reasoned that the lack of fraudulent marriage certificates was not the issue, but the emphasis was on the level of

⁹ 5 U.S.C.A § 706(2)(A).

¹⁰ 8 U.S.C.A § 1154(c).

¹¹ *Id.*

¹² *Jomaa v. United States*, 940 F.3d 291, 293 (6th Cir. 2019) 297.

¹³ *Id.* at 294.

deception to evade immigration officials.¹⁴ Because Rizk had tried not only to deceive the USCIS but also the state of Michigan as to her eligibility to marry when she tried to enter into a bigamous marriage where the marriage should have been “null and void because, at the time of their marriage, [one participant] was still legally married to someone else.”¹⁵ The court reasoned that, on the contrary, a fraudulent marriage more than fraudulent documents, warranted a more severe punishment if anything.¹⁶ Rizk admitted that she “met Derbass in a family setup deal so she could come to the United States.”¹⁷ With this undeniable evidence of a sham marriage, according to Section 1154(C) the petition for immediate relative status must be revoked by reason of a marriage determined to have been entered into for the purpose of evading the immigration laws.¹⁸

Holding:

The court held that a marriage which is void because of a prior existing marriage and which was entered into for the same purpose of evading immigration laws and where no bona fide husband and wife relationship ever existed or was intended is the kind of situation to which Section 1154(c) is applicable. Since the USCIS revoked the Rizk’s petition because it discovered that it had revoked her mother’s prior visa because she had entered into a sham marriage while married to another was not a discretionary act but one driven by Section 1154(c) provision. Therefore, the USCIS’s decision to revoke the petition was not arbitrary and capricious.

Impact:

Congress has demonstrated a growing concern about marriage fraud as shown by the passing of the Immigration Marriage Fraud Act of 1986. This case, too, emphasizes decisions further defining Section §1154 revoking visa petitions not just for fraud in marriage documents but for the fraudulent use of marriage itself.

¹⁴ *Id.* at 298.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 299.

¹⁸ *Id.* at 298.

**CALIFORNIA BY AND THROUGH BROWN V. ENVIRONMENTAL
PROTECTION AGENCY**
938 F.3D 1371 (6TH CIR. 2019)

Synopsis:

After the Environmental Protection Agency (EPA) revised its determination of greenhouse gas emission standards, a coalition of states, environmental groups and electric industry representatives brought petitions for review of the new determination claiming they were not appropriate, violated procedural and substantive requires of relations and was arbitrary and capricious under the Administrative Procedure Act (APA). However, under the APA only “final action” is reviewable. The Appellate Court dismissed the petition for lack of jurisdiction because it found that the EPA’s determination was not judicially reviewable since it was only announcing its intention to revisit its original determination.

Facts and Analysis:

Section 202(a) of the Clean Air Act (CAA) provides that the EPA can ““prescribe (and from time to time revise)” standards for “the emission of any air pollutant from ... new motor vehicles or new motor vehicle engines,” which “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”¹⁹ The Secretary of Transportation delegated rulemaking authority to the National Highway Traffic Safety Administration (“NHTSA”) has rulemaking authority from the Secretary of Transportation to work together with the EPA to publish emission and fuel economy standards for 2017 to 2025 vehicles.²⁰ Because of this long time frame and NHTSA’s need to conduct a further rulemaking to finalize the augural standards, the agencies also committed in 2012 to conduct a “comprehensive mid-term evaluation,” which would include public notice and comment.²¹ If, at the end of the mid-term evaluation, EPA concluded that the 2012 standards remained appropriate under Section 202(a), that determination would be “final agency action . . . subject to

¹⁹ 42 U.S.C. § 7521(a) (2018).

²⁰ California *ex rel.* Brown v. Envntl. Prot. Agency, 940 F.3d 1342, (D.C. Cir. 2019).

²¹ *Id.* at 1346.

judicial review on its merits.”²² At this midterm evaluation, the EPA announced it would consider a rulemaking to potentially alter current 2012 greenhouse gas emission standards for vehicles model year 2022 to 2025.

Plaintiffs sought vacatur of the Revised Determination claiming it was arbitrary and capricious under the Administrative Procedure Act. EPA stated that the “current standards remain in effect” and stated that the Revised Determination was “not a final agency action.”²³

Under the Clean Air Act only “final action is reviewable.”²⁴ The court analyzed if the determination was “final action” according to 5 U.S.C.A §704 agency action is only final if the action “marks the consummation of the agency’s decision-making process rather than being merely tentative or interlocutory in nature and if the action is one by which rights or obligations are determined or from which legal consequences will flow”.²⁵ The court reasoned that the Revised Determination failed the second prong because the Revised Determination only creates a *possibility* that there might be a change in the future but explicitly states that the current standards remain in effect until a formal rulemaking by the EPA, nor did they explain exactly how the 2012 standards would be modified under Section 12(h) only implying with hypothetical language that they “may be too stringent”.²⁶

The State Petitioners contended that even so, the Revised Determination still had tangible effect because it “wiped away the EPS’ previous assurance that the existing standards would remain legally binding.”²⁷ In response, Section 177 states and the District of Columbia needed to act quickly before a final rule was published in order to put in the standards in place within the required two-year lead time to ensure they were in compliance by the time the potential new standards will be applicable.²⁸ The court stated that although the states may be “prudent” to act quickly based on the predicted new standards based on a potential new rule, a state’s voluntary actions or compulsions do not rise to level of legal consequences making the order final agency action.²⁹ The court added that if the EPA’s rulemaking results in changes to the existing standards, it will still be required to provide a reasoned explanation and

²² 77 Fed. Reg. at 62, 784.

²³ Notice of Intention to Reconsider the Final Determination, 82 Fed. Reg. 14,671, 14,671 (Mar. 22, 2017).

²⁴ 42 U.S.C. § 7607(b)(1)

²⁵ *Bennett v. Spear*, 520 U.S. 154, 177–78, (1997).

²⁶ *Brown*, 940 F.3d at 1350.

²⁷ *Id.* at 1352.

²⁸ *Id.*

²⁹ *Id.*

cannot ignore prior factual findings and the supporting record evidence contradicting the new policy.³⁰

Holding:

The court likened the Revised Determination more akin to an agency's grant of a petition for reconsideration of a rule, creating a possibility not a certainty of an adjustment to the underlying rule.³¹ The same way the court is led to a different conclusion based on the outcome of a petition for reconsideration either deciding to stay the course or consider changing the standards, the EPA's final decision determines rights and obligations but not before then. The Court of Appeals held that EPAs' decision to revisit greenhouse gas emission standards it had adopted for motor vehicles was not judicially reviewable final action.

Impact:

Going forward, petitioners wishing to stall deleterious effects of new rules from pending changes declared by administrative agencies, will not be able to be proactive about avoiding effects of the new rule because the court has said there is no jurisdiction to review an administrative order that does not have indices of finality or concrete legal consequences. The ruling of this case essentially states that petitioners asking for review of determinations would be wise to wait until the announcement has been positively enacted as a rule that affirmatively compels them to act.

**NEW YORK V. UNITED STATES DEPARTMENT OF HEALTH AND
HUMAN SERVICES**

414 F. SUPP. 3D 475 (S.D.N.Y. 2019)

Synopsis:

Nineteen states, the District of Columbia, three local governments, and health care provider associations filed suits against the Department of Health and Human Service (HHS) claiming the HHS's new "conscience rule" clarifying Federal health care provider conscience statutes violated Administrative Procedure Act (APA), Spending Clause, Establishment Clause, and Separation of Powers. 5 U.S.C. § 706(2)(A). The rule clarified conscience objections to

³⁰ *Id.* at 1353.

³¹ *Id.* at 1351.

participating in federally-funded medical procedures, programs, services, or research activities. principally addressing objections to abortion, sterilization, and assisted suicide in addition to counseling and referrals related to those services.³² The United States District Court found that the rule was not wholly unconstitutional but did violate the APA's procedural requirements and vacated the entire rule.

Facts and Analysis:

The plaintiffs took issue with a rule recently promulgated by the United States Department of Health and Human Services ("HHS") entitled "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority"(the "Rule").³³ HHS had published the 2019 rule because the withdrawal of the 2008 Rule had created confusion about the Conscience Provision.³⁴ The Rule purports to interpret and provide for the implementation of more than 30 statutory provisions that recognize the right of an individual or entity to abstain from participation in medical procedures, programs, services, or research activities on account of a religious or moral objection.³⁵

Plaintiffs argue this rule was issued in violation of the Administrative Procedure Act (APA) alleging Congress didn't delegate rulemaking authority to HHS and is unconstitutional allege its violating Spending Clause, Establishment Clause, Separation of Powers, and the First Amendment.³⁶ They ask the Court to enter summary judgment invalidating the Rule based on the administrative record, or alternatively, to enter a preliminary injunction staying the Rule's implementation pending further review. As to the APA, plaintiffs argue that the Rule exceeds HHS's statutory authority, was not adopted in accordance with law, is arbitrary and capricious, and was adopted in breach of APA procedural requirements. *See* 5 U.S.C. § 706(2)(A), (C)–(D). As to the Constitution, plaintiffs principally argue that the Rule conflicts with the Spending, U.S. Const. art. I, § 8, cl. 1, and Establishment Clauses, *id.* amend. I, and violates the Separation of Powers.³⁷

³² *New York v. U.S. Dep't of Health & Human Servs.*, 414 F. Supp. 3d 475 (S.D.N.Y. 2019)

³³ 84 Fed. Reg. 23,170 (May 21, 2019) (codified at 45 C.F.R. pt. 88) (the "Rule" or "2019 Rule").

³⁴ *Id.* at 506.

³⁵ *Id.* at 496.

³⁶ *Id.* at 497.

³⁷ *Id.* at 497.

First the court looked at the alleged APA violation as the court is required by the APA to “hold unlawful and set aside agency action that is arbitrary and capricious.” In respect to all Conscience Provisions, the Court found that HHS acted arbitrarily and capriciously in promulgating the Rule, in violation of § 706(2)(A) of the APA, because (1) HHS’s stated reasons for undertaking rulemaking are not substantiated by the record before the agency, (2) HHS did not adequately explain its change in policy, and (3) HHS failed to consider important aspects of the problem before it.³⁸

The court also looked at if the rule was within the HHS’s authority to make in the first place and whether it simply clarified (housekeeping) or disrupted the status quo. HHS was not expressly granted rulemaking authority in “housekeeping statutes”, the court ruled that the text and history of the housekeeping provisions only gives authority to make internal department affairs, internal agency administration does not give the HHS authority to make rules regarding substantive legal obligations of regulated entities.³⁹ The HHS was never delegated, nor did they have substantive rule-making authority announces new rights and imposes new duties—one that shapes the primary conduct of regulated entities.

Next the court took up the issue that the rule that HHS proposed did not provide an exception for emergencies which the court found was different than existing conscience laws. Specifically, by its terms, EMTALA does not include any exception for religious or moral refusals to provide emergency care.⁴⁰ The court generally agrees ... that the requirement under EMTALA that certain hospitals treat and stabilize patients who present in an emergency does not conflict with Federal conscience and anti-discrimination laws,”⁴¹ such as the other statutes that contain Conscience Provisions: the Church Amendment, Coats-Snowe Amendment, Medicare and Medicaid act.⁴² In its rulemaking, it faulted HHS for not providing a carve out not allowing objections to procedures in non- emergency situations. HHS did state in the Rule, in its cost-benefit analysis, that it estimates that a little over 5% of “recipients will spend an average of 4 hours to update policies and procedures, implement staffing or scheduling practices that respect an exercise of conscience rights under Federal law, or disseminate the recipient’s policies or procedures.”⁴³ But the agency then adds the observation that “[i]f entities were already fully taking steps to be

³⁸ *Id.* at 575.

³⁹ *Id.* at 520.

⁴⁰ *Id.* at 537.

⁴¹ *Id.* at 555.

⁴² *Id.* at 519.

⁴³ *Id.* at 23, 241.

educated on, and comply with, all the laws that are the subject of this rule, there would likely not be any costs.”⁴⁴ That statement reflects the agency's central misapprehension that the Rule does not mark a substantive departure from the status quo. That misapprehension calls into grave question the agency's summary assessment of the affected reliance interests as minimal.⁴⁵ creating conflicts with the legal frameworks set by Title VII and EMTALA as to when religious or conscience objections must be accommodated in the health care arena. As explained below, because the 2019 Rule disrupts the reliance interests of various entities based on the status quo, HHS was obliged to consider the Rule's impact on these interests, and give “a more detailed justification” for a disruption of these interests.

In respect to the Constitutional arguments, the court found that the plaintiffs were wrong about the Establishment Clause Violation because it is facially neutral, but found the rule was in violation of the Spending Clause and separation of powers. The court ruled that the Establishment Clause failed the facial challenge fail because it equally recognizes secular (moral) and religious objections in encompassing all conscience based either from secular or religious.⁴⁶ However, court ruled it was a violation of the Spending Clause because complete termination of funding violated the prohibition of coercion the Spending Clause protects, namely “financial inducement offered” must not be “so coercive as to pass the point at which ‘pressure turns into compulsion.’⁴⁷ The Court found it “unlikely that a State would have accepted federal funds had it known it would be bound [by the purported condition].⁴⁸

Because the court found the Rule was issued in violation of the Administrative Procedure Act (“APA”), 5 U.S.C. § 706, and was unconstitutional the court warranted vacatur of the entire rule. The Court's noted their decision leaves HHS at liberty to consider and promulgate rules governing these provisions. In the future, however, the agency must do so within the confines of the APA and the Constitution.⁴⁹

Holding:

⁴⁴ *Id.* at 241.

⁴⁵ *Id.* at 554.

⁴⁶ *Id.* at 164.

⁴⁷ *Id.* at 569

⁴⁸ *Id.*

⁴⁹ *Id.* at 178.

The Court of Appeals held that the conscience rule was substantive rather than housekeeping and thus exceeded HHS's rulemaking authority. It also found that HHS exceeded its enforcement authority, acting contrary to Title VII and Emergency Medical Treatment and Labor Act (EMTALA) in promulgating the conscience rule. In addition, the court ruled that HHS's promulgation of the conscience rule was arbitrary and capricious and that the rule's definition of discrimination was not a logical outgrowth of notice of proposed rulemaking. Finally, the court found that the rule's authorization of termination of all HHS funding violated separation of powers and the Spending Clause.

Impact:

The court made sure to make clear that their decision in this case was not going to curtail the rule-making ability of the HHS. On the contrary the court said its decision leaves HHS at liberty to create and promulgate rules as long as they do so within the confines of the APA and the constitution.

UNITED STATES V BALDE
943 F.3D 73 (2D CIR. 2019)

Synopsis:

After pleading guilty to a violation of 18 U.S.C. §922(g)(5)(A) and 924(a)(2) (unlawful possession of a firearm by an alien illegally or unlawfully in the United States) Souleymane Balde again appealed to the Second Circuit to dismiss the indictment claiming his plea was in error in light of a Supreme Court's recent decision articulating another element the government must prove to convict under §922(g)(5)(A) and §924(a)(2). Rule 11 of the Federal Rules of Criminal Procedure requires a valid plea to be knowingly and intelligently entered into, with knowledge of the nature of each charge to which the defendant is pleading. The Second Circuit Court of Appeals ruled that it would be a violation of Mr. Balde's rights to impose consequences of a plea that contained a newly added element of which he was not aware at the time of the plea. The Second Circuit Court vacated his guilty plea and granted a petition for rehearing.

Facts and Analysis:

Title 18 of the United States Code, section 922 (g)(5)(A) explains the federal law prohibiting possession of a firearm by individuals illegally or unlawfully in the United States.⁵⁰ For noncitizens who are not lawful permanent residents in the United States, the government must prove that, the individual was illegally or unlawfully in the United States.⁵¹

Souleymane Balde, a citizen of Guinea, moved to the United States without lawful immigration status as a child. He scheduled an interview with the United States Citizenship and Immigration Services to become a lawful permanent resident in 2005 but could not make it to the interview because of intervening circumstances. His application was consequently denied and he was given an order of removal that was unable to be carried out because his expired Guinean passport stymied deportation.⁵² He sought supervised release from detention and remained at liberty under supervision of immigration officials. Balde explicitly expressed that he thought this status was considered parole and that at the time of the guilty plea in this case parole constituted lawful immigration status.⁵³ Seven years later in December 2015, his removal order still pending against him, he possessed and fired a gun.⁵⁴ Due to his immigration status, the court had little trouble concluding that he was well within the category of individuals prohibited from owning firearms under 922(g)(5)(A).⁵⁵ He pled guilty to a violation of unlawful possession of a firearm by “an alien ... [who] is illegally or unlawfully in the United States,”⁵⁶

However, eight days after the court’s first opinion in this case, the Supreme Court ruled in another case involving a possession of firearms by a person of uncertain immigration status that “in a prosecution under 922(g) and 942(a)(2) the government must prove that the defendant knew he belonged to the relevant category of persons barred from possessing a firearm”.⁵⁷ Balde appeals arguing he did not *know* at that time that he was in the United States illegally, the record fails to establish a factual basis for his plea, therefore he is not guilty of violating the new interpretation of the elements of 922(g) and the conviction must be reversed under the plain error standard.⁵⁸

⁵⁰ 18 U.S.C.A. § 922 (West 2019).

⁵¹ *Rehaif v. United States*, 139 S.Ct. 2191, (2019).

⁵² *United States v. Balde*, 943 F.3d 73, 79 (2d Cir. 2019).

⁵³ *Id.* at 97.

⁵⁴ *Id.*

⁵⁵ *Id.* at 87.

⁵⁶ *Id.* at 77.

⁵⁷ *Rehaif*, 139 S.Ct. at 2194.

⁵⁸ *Id.* at 88.

The court noted that the issue of his immigration status was “hotly contested” in the original case.⁵⁹ The court reasoned that even if Balde was aware of the knowledge element, under the present record, the government’s arguments were not so strong that they would leave Balde without a plausible defense at trial and no choice but to plead guilty.⁶⁰ Therefore, the court found that Balde had sufficiently demonstrated a “reasonable probability that, [had he been properly advised of what we now have been instructed are the elements of the offense], he would not have entered the plea.”⁶¹

Holding:

After determining the plea violated Rule 11 of the Federal Rules of Criminal Procedure, the court found the plain error standard met by the district court’s failure to advise Balde of the government’s need to establish that he knew was illegally present in the United States. The plain error “seriously affect[ing] the fairness, integrity or public reputation of judicial proceedings” was met because of the possibility that Balde pled guilty and sentenced to prison for a crime of which, as the Supreme Court now defines it, he was not guilty of all elements.⁶² The court declined to express an opinion as to what Balde, in fact, believed at the time of his plea, ruling that was a question of fact for a jury to decide on remand.⁶³ The Second Circuit vacated his guilty plea and remanded the case for rehearing including the element of knowledge.⁶⁴

Impact:

The fallout of this case is likely to impact those cases that involve non-citizens owning firearms and others under the umbrella of 922(g). The ruling of this case is essentially states that cases, after application of the Supreme Court’s precedent in *Rehaif* need to prove an added essential element of knowledge that the defendant in fact, *knew* that he or she was in the country illegally. This case is not necessarily informative for a wholesale retroactive application, since this case was appealed so close to the Supreme Court’s ruling on the new element. It seems like a ruling that benefits immigrant firearm

⁵⁹ *Id.* at 97.

⁶⁰ *Id.*

⁶¹ *Id.* at 98.

⁶² *Id.*

⁶³ *Id.* at 97.

⁶⁴ *Id.*

users by adding a difficult to prove “mens rea” element to the government’s burden in these cases.

CITY AND COUNTY OF SAN FRANCISCO v. UNITED STATES
CITIZENSHIP AND IMMIGRATION SERVICES
944 F.3d 773 (9th Cir. 2019)

Synopsis:

After, counties, states and organizations won motions for stay and preliminary injunctions on their actions challenging Department of Homeland Security’s (DHS) final rule, DHS filed interlocutory appeals and emergency motion to stay injunctions. Under the Immigration and Nationality Act (INA) determining whether an alien was a “public charge” for the purpose of The court granted the motion for stay and the preliminary injunction finding that the DHS’s re-interpretation of “public charge” was not arbitrary or capricious because the term as used by the INA was ambiguous and therefore allowed additional definition.

Facts and Analysis:

According to the IRA aliens who seek lawful admission or permanent resident status into the United States may be inadmissible if they are likely to become a public charge.⁶⁵ “Public charge” is defined as someone “likely to become primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.”⁶⁶ In August 2019 the DHS, acting under the authority vested in the secretary of homeland security to establish immigration regulations, adopted a new rule adding several new factors to consider in making a “public charge” determination. These new factors included:” whether the individual can demonstrate “current employment, employment history, or a reasonable prospect of future employment, a medical diagnosis that would.. interfere with the alien’s ability to be self-sufficient and whether or not they are receiving cash non-cash benefits such as food stamps, housing or rental

⁶⁵ 8 U.S.C.A. §§ 1361. 1182(a)(4).

⁶⁶ See 1999 Field Guidance, 64 Fed. Reg. at 28,689.

assistance”.⁶⁷ Prior to the rule taking effect, various state’s municipalities and organizations brought suits seeking a preliminary injunction against its implementation.⁶⁸

The States argue that the Final Rule is invalid because the new definition of “public charge” is contrary to the INA and the Rehabilitation Act.⁶⁹

Under judicial review, a court can set aside an agency’s final action if it does not pass the two-pronged *Chevron* analysis or if it is found to be “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.”⁷⁰ To two prong *Chevron* test is used to determine whether an administrative agency’s interpretation of a statute that it administers is wrong: if Congress has explicitly spoken to the issue and whether the agency’s answer is based on a permissible construction of the statute.⁷¹

The court went through the first prong of the *Chevron* analysis, applying traditional tools of statutory construction: text and history. First, as to text, since the phrase is ambiguous, encompassing a range of meanings, so long as the agency has defined the term within that range of meanings, the court has no ground for questioning the range of meanings, especially because the new factors do not limit the discretion of the officials to those factors but other factors can be considered as well, giving them considerable discretion as long as the new factors are considered at a minimum.⁷² In addition, when Congress grants an agency the authority to administer a statute by issuing regulations it presumes it will use that authority to resolve ambiguities in the statutory scheme.⁷³

The court then looked at the historical understanding of “public charge” disagreeing with the district court, the court were unable to discern one fixed understanding of public charge since 1882.⁷⁴ Congress twice considered but never enacted a definition of “public charge”.⁷⁵ The court determined that because the history indicated the agency has adopted different definitions in different contexts added force to the argument that the definition itself is flexible.⁷⁶ Specifically,

⁶⁷ *City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs.*, 944 F.3d 773, 783 (9th Cir. 2019).

⁶⁸ *Id.* at 780.

⁶⁹ *Id.* at 790.

⁷⁰ 5 U.S.C. § 702(2)(A)(2018).

⁷¹ *Id.* at 790.

⁷² *Id.* at 792.

⁷³ *Id.*

⁷⁴ *Id.* at 796

⁷⁵ *Id.* at 797.

⁷⁶ *Id.* at 798.

self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes." *Id.* § 1601(1). As a result, "[i]t continues to be the immigration policy of the United States that ... aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations."⁷⁷ After passing the first prong, the court found the added definition met second prong of the *Chevron* test easily because it was rational and consistent with the statute as a permissible construction of the INA.⁷⁸ Additionally it was not barred by the Rehabilitation act because individuals were not being denied admission solely based on a disability.⁷⁹ The definition was in line with caselaw that made decisions based on an alien's personal characteristics not a localized job shortage.⁸⁰ Therefore the court found that the rule was not disqualified by rule of law.

Next the court analyzed the decision by the arbitrary and capricious standard, the states said it failed to weigh costs to public health from disenrollment of those not subject to the public charge determination.⁸¹ The court found the State's arguments not strong because DHS raised and addressed many of the State's concerns, when it addressed the comments to the rule.⁸²

The Second Circuit next had to decide whether to grant the stay by balancing irreparable harm with hardship and public interest. DHS had the burden of showing that there would some irreparable harm, and that on the balance of the hardships, the stay is in the public interest.⁸³ Irreparable is defined as "not be[ing] able to recover monetary damages."⁸⁴ The court reasoned that the harm of granting lawful-permanent-resident status to aliens who would otherwise be public charges was irreparable. Then the court applied balance on the equities and the public interest together, considered the States financial, public-health and administrative harms were largely short term resulting during the pendency of the proceedings in the district courts and any appeals to this court and the Supreme Court. The court found that compared to the irreparable non-monetary harm to the government, court could not say which harm was greater decided on the public

⁷⁷ 5 U.S.C. §1601(2) (2018).

⁷⁸ *Id.* at 799.

⁷⁹ *Id.* at 900.

⁸⁰ *Gegiow v. Uhl*, 239 U.S. 3, 10 (1915).

⁸¹ *Id.* at 801.

⁸² *Id.* at 804.

⁸³ *Id.* at 805.

⁸⁴ *Id.* at 806.

interest argument, a balance of the equities is not an exact science, and while both harms were speculative. Due to these “critical” factors and the fact that DHS had mustered a strong showing of likelihood of success on the merits and some irreparable harm, the court found a grant of the stay was warranted.⁸⁵

Holding:

After deciding that “public charge” was ambiguous and that DHS’s interpretation was not arbitrary or capricious, the Second Circuit upheld DHS’s interpretation in accordance with the *Chevron* deference to which it was entitled. The decision rested on the fact that DHS had established a strong likelihood that the final rule did not violate the Rehabilitation Act.

Impact:

The amount of response during the 60 day public comment period suggests there are various stakeholders who believe the outcome of a challenge to this rule has a significant impact, applying to anyone applying for admission or adjustment of status after the after October 15, 2019. This decision may mean a few new obstacles to overcome for those seeking to enter the United States or seeking to evade classification as “public charge.” The change means four factors weigh heavily against the alien in becoming a public charge but two factors weigh heavily in favor of the alien in a public charge determination. An unintended result would be a that the weight of these extra factors may cause aliens to disenroll from Medicaid and healthcare in order to avoid the determination that they are a public charge and be admitted for citizenship. However, as the court noted, these factors still give the officers significant discretion as they are part of many factors to be considered whose weighing is still an ad hoc balancing test so the added factors by DHS are not outcome determinative.

**CONSOL PENNSYLVANIA V. FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION
941 F.3D 95 (3d Cir. 2019)**

Synopsis:

⁸⁵ *Id.*

After the Federal Mine Safety and Health Review Commission upheld a \$5,000 citation against him, a mine operator petitioned the Third Circuit Court for review of the citation issued by the Mine Safety and Health Administration (MSHA) for failure to notify them of an injury in his mine within 15 minutes of it occurring. In a case of first impression, the Third Circuit Court ruled that the mine operator had fair notice, the Commission had substantial evidence, and was required to impose the statutory minimum penalty. The Third Circuit denied the petition.

Facts and Analysis:

The Federal Mine Safety and Health Act of 1977 (“the Mine Act”) says that “ When “the operator realizes that the death of an individual at the mine, or an injury or entrapment of an individual at the mine which has a reasonable potential to cause death, has occurred[,]” the notification must “be provided by the operator within 15 minutes.”⁸⁶

Coal miner Robert Stern was crushed between two multi-ton pieces of mining equipment and rushed to the hospital without delay.⁸⁷ Not all of Stern’s symptoms gave cause for concern, as he appeared coherent, conscious, without any problem with his breathing, but at the same time he showed obvious signs of internal bleeding and he told those with him, “if something did happen to [him] please tell [his] wife and family that [he] love[s] them.”⁸⁸ Consol Pennsylvania Coal Company, LLC notified MSHA two hours after the incident and MSHA inspector decided to issue a citation and the minimum fine under the statute, \$5,000 .⁸⁹ Consol first litigated the fine before an administrative law judge and then the Commission itself, raising three challenges: that the legal standard is inappropriate, the citation is not supported by substantial evidence, and the Commission was not bound by the mandatory minimum penalty.

The court noted that they have never had occasion to interpret 30 U.S.C. § 813(j) or 30 C.F.R. § 50.10(b), so it started from first principles of statutory and regulatory construction.⁹⁰ As to textual interpretation, since the rule was plainly statute driven, not ambiguous, the court gave effect to its plain meaning. On its face, doesn’t specify

⁸⁶ 30 U.S.C. § 813(j) (2018).

⁸⁷ Consol Pennsylvania Coal Co., v. Fed. Mine Safety & Health Review Comm'n, 941 F.3d 95, 100 (3d Cir. 2019).

⁸⁸ *Id.* at 100.

⁸⁹ *Id.* at 99.

⁹⁰ *Id.* at 104.

the standard by which one is to determine whether an injury from a mine accident has a reasonable potential to cause death.⁹¹ As to structure, first the court looked to the stated purpose to protect miners, not to balance miner safety with mine operators inconvenience.⁹² As to purpose, the court found that the intent of the notification requirement to encourage rapid notification so MSHA can both respond to an emergency and preserve evidence to facilitate later investigation.⁹³ Thus, concern for the preservation “of any evidence which would assist in investigating the cause or causes” of accidents, and stabilizes the situation and preserve vital evidence that can otherwise be easily lost.⁹⁴ After using the “traditional tools of construction” carefully considering the text, structure, history and purpose of the statute and the regulation, all justifying the Commission’s legal standard in light of the notification requirement should be interpreted to effectuate the goal of safety.⁹⁵ Here, we have concluded that the Commission’s legal standard is plainly compelled by the statute and regulation. The court came to the conclusion that the Commission’s legal standard is sound.⁹⁶ Next, the court analyzed the claimed Due Process violation. The Fifth Amendment’s Due Process Clause is violated for lack of fair notice if a statute or regulation “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standard-less that it authorizes or encourages seriously discriminatory enforcement.”⁹⁷ In addition, fair notice is deemed given unless “the relevant standard is ‘so vague as to be no rule or standard at all[,]’⁹⁸ With no evidence that the Commission’s legal standard was so vague to fall into that category.⁹⁹ Furthermore, the court notes that reasonable doubts are to be resolved in favor of notification.¹⁰⁰ Thus the court ruled that Consul thus had fair notice of it.¹⁰¹

In conclusion, the court ruled furthermore, no risk to miners would result from an erroneous MSHA notification, whereas substantial risk could result from a failure to notify, with MSHA being prevented from initiating an emergency response and beginning a successful

⁹¹ *Id.* at 106.

⁹² *Id.* at 105.

⁹³ *Id.*

⁹⁴ Emergency Mine Evacuation, 71 Red. at 71,431, 71,435.

⁹⁵ *Id.* at 104, 106.

⁹⁶ *Id.* at 106.

⁹⁷ *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 249 (3d Cir. 2015).

⁹⁸ *Wyndham*, 799 F.3d at 250.

⁹⁹ *Id.* at 113.

¹⁰⁰ *Id.* at 111.

¹⁰¹ *Id.* at 113.

investigation.¹⁰² The court thus affirmed the Commission's decision and denied the petition against the fine.

Holding:

In determining if the Commission erred in its decisions, the court held that there was substantial evidence supported the Commission's decision. The court held that it relied on the Commission's totality of the circumstances test and a reasonable person standard to review the operator's decision. The Third Circuit court's decision rested on the fact that statute required the Commission to impose the statute minimum penalty on the operator.

Impact:

Most likely not widely applicable especially since this was a case of first impression. But for regulatory agencies it could mean precedent for rigid adherence to statutorily imposed fines as required by law to impose and difficult to overturn in appellate review if mandated by statute. In addition, it further defines fair notice under the Due Process Clause. If an exorbitant penalty is possible and is outlined in, it is applicable and ignorance is not a valid defense since reasonable doubts are to be resolved in favor of notification.

KHINE V. U. S. DEP'T OF HOMELAND SECURITY
334 F. SUPP. 3D 324 (D.C. CIR. 2019)

Synopsis:

After trying to seek asylum in the United States, Kay Khine together with the charitable organization Catholic Charities brought a putative class action against Department of Homeland Security (DHS) alleging that an organization within DHS, United States Citizenship and Immigration Services (USCIS) violated the Freedom of Information Act (FOIA). FOIA claims require that the plaintiff exhaust administrative remedies before filing suit in federal court which the Plaintiffs contended they could not because of the lack of information they were provided. The court found that the response DHS's sent to Catholic Charities still granted them standing to bring the claim but

¹⁰² *Id.*

granted the defendant's motion to dismiss due to Plaintiff's failure to exhaust administrative remedies.

Facts and Analysis:

Pursuant to the Freedom of Information Act (FOIA), on behalf of Khine Catholic Charities requested materials related to Khine's asylum application.¹⁰³ They requested this information from USCIS who provided 860 pages of material and a letter explaining the statutory provisions under which DHS withheld certain documents.¹⁰⁴ Plaintiffs filed this action to compel USCIS to explain the decision in a more detailed manner so they can file an administrative appeal.¹⁰⁵ DHS's regulations state that a FOIA requester may file an administrative appeal if the agency "did not address all aspects of the [FOIA] request (i.e., *it issued an incomplete response*)."¹⁰⁶ A case brought under the FOIA generally requires exhaustion of administrative remedies before filing suit in federal court so the agency has an opportunity to exercise its discretion and expertise on the matter and make a factual record to support its decision."¹⁰⁷ In short, exhaustion of administrative remedies in a FOIA case is treated as an element of a FOIA claim, which, as with all elements of any claim, must be proved by the plaintiff in order to prevail.¹⁰⁸

DHS moved to dismiss the claim under jurisdictional grounds and substantive grounds, resting both on Plaintiff's failure to exhaust administrative remedies, as prescribed by statute. As to the jurisdictional grounds, the court found that plaintiffs were able to show injury in fact causation and redressability not only demonstrating the existence of the allegedly detrimental policy but easily proved that they are likely to be subjected to the policy again. However, although their claim was enough to satisfy the irreducible constitutional minimum for standing, their failure to exhaust administrative remedies would prove fatal to their substantive grounds.

Plaintiffs argued DHS's response was boilerplate listing FOIA exemptions without containing anything that would have triggered the exhaustion requirement.¹⁰⁹ The court recognized that this argument

¹⁰³ Khine v. United States Dep't of Homeland Sec., 334 F. Supp. 3d 324, 329 (D.C. Cir. 2019).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 329.

¹⁰⁶ *Id.* at 338.

¹⁰⁷ 5 U.S.C.A. § 522 (West 2019).

¹⁰⁸ *Id.* at 334.

¹⁰⁹ *Id.* at 335.

seemed like a Catch-22 saying “a requester cannot appeal within the agency because the agency has not provided the necessary information” but “the requester cannot go to court because the requester has not appealed within the agency.”¹¹⁰ However, the court reasoned that “triggered” means using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits)¹¹¹ Because plaintiffs had not met an essential element of their FOIA claim, the administrative exhaustion requirement, the District Court found dismissal appropriate.¹¹² In declining to address the merits of the alleged bad faith substance of DHS’s initial response, the court noted, if litigation proved to be necessary after an administrative appeal, “the appeal decision would give this Court the benefit of the agency’s experience and expertise” on the issues raised by plaintiff.¹¹³

Holding:

The court held that DHS’s initial response was sufficient to trigger FOIA’s administrative exhaustion requirement. The court’s decision rested on the fact that this exhaustion requirement required requesters to first file administrative appeal to DHS’s initial response. Although the requesters were not ultimately successful the court articulated holdings affected the further standing and justiciability of further claims of this nature, holding that requesters satisfied injury in fact elements of Article III standing to bring policy-or practice claim and that the administrative appeal process and the filing of a lawsuit would not moot requesters’ policy-or practice claim.

Impact:

This case is informative for plaintiffs who wish to bring a FOIA claim. Requesters should proceed accordingly knowing they must satisfy the exhaustion requirement before they are able to bring a policy-or-practice claim. The case’s impact on future FOIA claims is ambiguous. On one hand it is positive that in that the administrative appeal process and the filing of a lawsuit will not moot a requester’s claim. However, it seems that FOIA requires more steps and possibly larger litigation requirements with the required exhaustion of the first avenue in response to a unsatisfactory response from DHS.

¹¹⁰ *Id.*

¹¹¹ 5 U.S.C. § 552(a)(6)(A)(i) (2018).

¹¹² *Id.* at 339.

¹¹³ *Id.* at 339.