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Pepperdine University School of Law Legal Summaries

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Legal Summaries

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American Wild Horse Campaign v. Bernhardt, 963 F.3d 1001 (9th Cir. 2020)

Synopsis

The plaintiff, a wild horse advocacy group, brought an action against the Bureau of Land Management (BLM), protesting their decision to use various methods to prevent wild horses from breeding. The plaintiff asserted that BLM's decision violated a number of environmental acts. The district court granted BLM summary judgment, after which the advocacy group appealed. The Ninth Circuit Court of Appeals affirmed the decision, addressing each act alleged to be violated in turn.

Facts and Analysis

Congress tasked the defendants with preserving the thousands of wild horses that live in the American West, while also taking into account the "needs of other wildlife and livestock that depend on the resources of public lands."[1] In 2017, BLM determined that an overpopulation of wild horses in Nevada necessitated action, and it planned to "adjust the sex ratio of the population, administer fertility control treatment to mares, and geld and release back to the range some male horses."[2] This plan was called the Antelope and Triple B Complexes Gather Plan ("Gather Plan"), named for the areas of land that contained an excess population of wild horses.[3] The purpose of the gelding component was to allow more horses to remain free-roaming, rather than to slow population growth.[4] The plaintiffs objected specifically to the "geld and release" portion of the plan and claimed that BLM was in violation of the National Environmental Policy Act (NEPA), the Administrative Procedure Act, and the Wild Free-Roaming Horses and Burros Act (WHBA).[5]

BLM obtained a report from the National Academy of Sciences ("NAS Report") that would assist BLM in creating a plan that would address anticipated challenges.[6] The NAS Report noted that BLM must consider "changes in expression of sexual and social behavior" in horses when crafting its plan and emphasized pros and cons of potential sterilization methods.[7] As the NAS Report was inconclusive in terms of the effects of gelding on herds of wild horses, BLM

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[1] American Wild Horse Campaign v. Bernhardt, 963 F.3d 1001, 1004 (9th Cir. 2020).

[2] *Id.*

[3] *Id.* at 1006.

[4] *Id.*

[5] *Id.* at 1004. The court discussed the statutory history of the Wild Free-Roaming Horses and Burros Act at length. *Id.* at 1004–05. The amended version of the Act allows BLM to "remove excess horses when it faces overpopulation" and "the authority to use other population control methods . . . to avoid overpopulation." *Id.* at 1005. Although BLM must consult with state wildlife agencies, it retains broad discretion in removing the excess animals. *Id.*

[6] *Id.*

[7] *Id.* at 1005–06.

conducted a study performing tests as to geldings' effectiveness and its impact on the behavior of free-roaming wild horses.[8]

BLM received almost 5,000 public comments on a 2017 preliminary environmental assessment of the Gather Plan that stated experts' concerns of the effects of gelding on the behavior of wild horses once the geldings were returned to the herd.[9] BLM responded by concluding that the experts' opinions were speculative as "none of them had conducted a study on the topic," and that BLM was not required to create an environmental impact statement ("EIS"), as the Gather Plan would "not significantly affect the human environment."[10] The plaintiffs brought suit challenging BLM's "geld and release" plan, claiming that BLM acted arbitrarily and capriciously.[11]

When considering the potential NEPA violations, the court noted that an EIS is needed when the federal action "'significantly affect[s] the quality of the human environment.'"[12] To make this determination, an agency must consider context and intensity (severity of the impact) of the effects of the action.[13] The plaintiffs asserted that five out of ten intensity factors demonstrated that the Gather Plan may have had a significant impact and thus warranted an EIS.[14] The court examined each contested factor in turn.

The first factor required an agency to prepare an EIS when the possible effects of its actions are "highly uncertain" and raise "substantial questions" about the action's environmental impact.[15] The court found that BLM's plan did not meet this threshold, as they used the research that existed at the time to predict that effects of their plan would likely be insignificant.[16] Drawing from precedents in prior cases, the court acknowledged that the fact that the "[Fish and Wildlife Service] did not have perfect information and had to extrapolate did not make the possible effects 'highly uncertain' and did not require the preparation of an EIS."[17] BLM did not have to find that its plan would have no effect on the environment, but rather that there were "not substantial questions as to whether gelding and release would have a *significant* effect on the environment."[18] Although some of the long-term effects of the plan were unknown, BLM nevertheless drew reasonable conclusions about geldings' behavior and family structures within the herds post-release and provided proper scientific foundation

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[8] *Id.* at 1006. Data from this study was not yet available at the time of the opinion, but will be analyzed in October 2020 at the earliest. *Id.*

[9] *Id.* at 1006–07.

[10] *Id.* at 1007.

[11] *Id.*

[12] *Id.* (citing 42 U.S.C. § 4332(c)).

[13] *Id.* 1008 (citing 40 C.F.R. § 1508.27).

[14] *Id.*

[15] *Id.* (citing 40 C.F.R. § 1508.27(b)(5)).

[16] *Id.*

[17] *Id.* (citing Center for Biological Diversity v. Kempthorne, 588 F.3d 701, 712 (9th Cir. 2009)). *See also* EPIC v. United States Forest Service, 451 F.3d 1005 (9th Cir. 2006); Native Ecosystems Council v. United States Forest Service, 428 F.3d 1233 (9th Cir. 2005).

[18] *American Wild Horse Campaign* at 1009.

for those conclusions.[19] On this factor, the court found that BLM's decision to not require an EIS was not arbitrary or capricious.[20]

The court also concluded that the effects of the Gather Plan were not "highly controversial" with regard to the second factor in question.[21] Again, the plaintiffs did not provide any evidence that cast doubt on BLM's conclusions, as the NAS Report was inconclusive and the plaintiffs' experts provided only speculation, rather than citing existing research.[22] "Opposition to an action does not, by itself, create a controversy within the meaning of NEPA regulations" and, because BLM "considered and addressed existing literature in its environmental assessment and provided reasoning for its conclusions," the court found the NEPA requirements satisfied as to this factor.[23]

When examining the third factor regarding BLM's determination that the gather area was not in proximity to "historic or cultural resources,"[24] the court noted that wild horses cannot be considered a cultural resource under NEPA.[25] This is the case because the management of wild horses and evaluation of the effects of agency actions on wild horses are governed by the WHBA, which states that horses should be managed as "components of the public lands."[26] "A specific statute, such as the WHBA's directive as to how to manage wild horses, governs over a general provision, such as NEPA."[27] Therefore, the court discounted the plaintiffs' issue with this factor.

The plaintiffs also attested that the Gather Plan established precedent for "future actions with significant effects"[28] (the fourth factor), but the court disagreed, finding that BLM's plan did not "establish gelding as an accepted population-management tool" and that the plan was highly specific to the location and the project itself.[29] Finally, there was no threat of a violation of federal law (the fifth factor) because BLM was acting in accordance with the WHBA.[30] After examining all five factors, the court concluded that BLM's determination that an EIS was not required was permissible because all intensity factors were properly considered.[31]

In their second claim, the "plaintiffs also argue[d] that BLM acted arbitrarily and capriciously because it did not address the Gelding Study, did not consider the expert opinions that the plaintiffs highlighted in their public comments, and did not adequately consider the NAS Report."[32] The court again addressed each of the plaintiffs' arguments in turn.

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[19] *Id.*
[20] *Id.* at 1011.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.* (citing 40 C.F.R. § 1508.27(b)(3)).
[25] *Id.* at 1011.
[26] *Id.* (citing 16 U.S.C. § 1333(a)).
[27] *Id.* (citing Perez-Martin v. Ashcroft, 394 F.3d 752, 758 (9th Cir. 2005)).
[28] *Id.* (citing 40 C.F.R. 1508.27(b)(6)).
[29] *Id.* at 1011–12.
[30] *Id.* at 1012.
[31] *Id.*
[32] *Id.*

Although the court noted that BLM did not address its Gelding Study at length in its environmental assessment, nor wait to authorize the plan until the data from the Study was collected, BLM did consider relevant factors raised by the study and "explained why additional information was not available."[33] The Gelding Study had not yet provided data on the effects of releasing gelded horses, so it was reasonable for BLM to not address this issue.[34] However, after receiving complaints about the lack of research, BLM included a description of the study in its final environmental assessment, along with a note that the findings would not be ready for several years.[35] This was sufficient to comply with NEPA's "hard look" standard.[36]

Furthermore, the plaintiffs also argued that the Gather Plan violated the Administrative Procedure Act through BLM acting arbitrarily and capriciously in including gelding and release in the plan "without explaining why BLM no longer deemed the Study's results necessary for informed-decision making."[37] However, the court concluded that BLM did not find the Study unnecessary – rather, components of the Gather Plan itself were meant to improve BLM's knowledge of the effects of gelding and release.[38] Furthermore, the WHBA does not obligate BLM to address all expert opinions submitted during the period for public comment.[39] The court found that BLM's action was not arbitrary or capricious in this respect because it gave reasons for not relying on those experts and pointed them toward sections of the environmental assessment that addressed the experts' concerns.[40] Finally, BLM complied with the WHBA in that it consulted the National Academy of Sciences to determine how "appropriate management levels should be achieved."[41] Although BLM did not address vasectomy expressly, the court noted that the NAS Report was ambivalent on the issue and BLM's guidebook expresses similar uncertainty.[42] Because the BLM's reasoning for rejecting vasectomies were clear, the failure to respond to comments about the issue was not arbitrary or capricious.[43]

Holding

The court affirmed the lower court's judgment, finding that BLM did not act arbitrarily and capriciously.[44] The court emphasized that specific acts, such as the WHBA, supersede general provisions such as NEPA.[45] Because all intensity factors as to whether the Gather Plan would have a significant impact on the

[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.* (citing In Defense of Animals v. U.S. Department of the Interior, 751 F.3d 1054, 1072–73 (9th Cir. 2014)).
[37] *Id.* at 1012.
[38] *Id.* at 1012–13.
[39] *Id.* at 1013 (citing 16 U.S.C. § 1333(b)(1)).
[40] *Id.*
[41] *Id.* (citing 16 U.S.C. § 1333(b)(1)).
[42] *Id.*
[43] *Id.* at 1013–14.
[44] *Id.* at 1004.
[45] *Id.*

environment were properly considered, BLM's decision not to prepare an EIS was permissible.[46] Furthermore, because BLM's reasoning was clear in its environmental assessment, there was no arbitrary and capricious action in its failure to respond to all expert complaints or address all alternative methods of accomplishing its goal.[47]

Impact

A broadly applicable concept from this case to administrative law as a whole is the court's ruling that specific acts will always supersede general provisions, such as the WHBA's domination over general NEPA provisions. Additionally, the court clarifies aspects of NEPA in this case, as well as establishes the standards for arbitrary and capricious agency action in terms of responding to public comments, relying on experts, and addressing all available research. Finally, the court clarifies that wild horses do not fall under the "cultural resource" aspect of NEPA; rather, their care and protection falls under the WHBA.

[46] *Id.* at 1012.
[47] *Id.* at 1014.

Doe v. University of St. Thomas, 972 F.3d 1014 (8th Cir. 2020)

Synopsis

A male student brought a negligence claim against the defendant (a private university) regarding an investigation of a sexual misconduct claim by a female student. The investigation resulted in the male student's suspension from the university. Following an appeal of the district court's grant of summary judgment to the university, the Eighth Circuit Court of Appeals held that a private university's common-law duty to prevent arbitrary expulsions of students covers expulsion as a result of non-academic related misconduct. However, upon examination of the facts of this case, the court of appeals found that the university's disciplinary process was not arbitrary and affirmed the ruling of the lower court.

Facts and Analysis

The plaintiff John Doe, a student at the University of St. Thomas, was suspended from the university after a female student accused him of sexual misconduct.[48] In response, Doe filed suit against the university asserting state law claims and Title IX violations.[49] After hearing the case, the district court granted summary judgment to the university, "finding that Doe had not shown a genuine issue of fact that the disciplinary proceedings were biased against him or that any alleged procedural flaws breached the University's duty of reasonable care."[50] The court reviewed the grant of summary judgment de novo.[51]

On appeal, Doe argued that the university breached its duty of care because its "disciplinary process unfairly favored accusers and did not afford the necessary procedural due process protections."[52] The court first stated that it must determine what duty of care a private university owes its students.[53] Although the parties agreed that Minnesota common law governed the determination, they disagreed over "whether the duty of care requires private universities investigating non-academic misconduct violations to act reasonably and in a manner that comports with constitutional due process or just refrain from acting arbitrarily."[54]

The court noted that the Minnesota Supreme Court had not decided this issue (which would govern their decision), but cited a recent case, *Abbariao v. Hamline University School of Law*, which addressed the "common law duty universities owe their students."[55] The case involved a law student who claimed that an expulsion for failure to maintain required grades was a violation of his

[48] Doe v. University of St. Thomas, 972 F.3d 1014, 1016 (8th Cir. 2020).
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.* at 1016–17.
[55] *Id.* at 1017.

procedural due process rights and a common law duty of fair treatment.[56] There, the Minnesota Supreme Court found that "an academic expulsion from a state actor violate[d] due process if it 'results from the arbitrary, capricious, or bad-faith actions of university officials.'"[57] However, the court provided that "'judicial examination into issues of academic performance may well be different from cases involving expulsion for alleged misconduct not directly related to academic proficiency.'"[58] As private universities are not subject to federal due process requirements, the court noted that under Minnesota common law, "'a university may not arbitrarily expel a student,'" relying on another case to reach this conclusion.[59] After *Abariao*, the Minnesota Court of Appeals found that even in non-academic misconduct discipline, the arbitrary manner standard was the proper measure to use.[60]

When looking at the case at hand, the court observed that the district court rejected precedent in *Abariao* and *Rollins*, instead using the reasonable care standard proposed by Doe, which stated that the university was obligated to utilize a process that was fair and impartial to all parties involved in the proceeding, and to provide some measure of due process to ensure accuracy in the eventual outcome.[61] The court found that the lower court erred in rejecting this precedential standard, noting that there was no reason to disregard *Rollins*, as it applied the common law duty to a non-academic expulsion by a private university.[62] The district court instead incorrectly applied the arbitrary standard used in *Gleason*, which involved a student with both academic and misconduct charges.[63]

However, the court ultimately found that "[e]ven under the district court's more permissive reasonable care standard, Doe's claims did not survive summary judgment."[64] Applying the correct standard of *Abbariao*, the court reached the same conclusion.[65] Doe brought evidence alleging that the university's training materials caused officials to be biased against accused students, providing samples of materials and statistics made available to university staff.[66] The district court found that "Doe had not overcome the presumption of honesty and

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[56] *Id.* (referencing Abbariao v. Hamline University School of Law, 258 N.W.2d 108, 111 (Minn. 1977)).

[57] *Id.* (citing *Abbariao* at 112).

[58] *Id.* (citing *Abbariao* at 113).

[59] *Id.* (citing *Abbariao* at 112). The *Abbariao* court relied on Gleason v. University of Minnesota, a case where the student in question had been charged with both academic deficiencies and "certain insubordinate acts toward the faculty of the University of Minnesota and with inciting younger students to insubordinate acts towards said faculty." *See Gleason*, 104 Minn. 359, 363 (1908).

[60] *Doe* at 1017 (referencing Rollins v. Cardinal Stritch University, 626 N.W.2d 464, 470 (Minn. Ct. App. 2001)).

[61] *Id.* at 1018.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.* at 1018–19.

integrity afforded to school administrators."[67] This presumption cannot be overcome unless "actual bias, such as personal animosity, illegal prejudice, or a personal or financial stake in the outcome can be proven."[68] Because Doe presented no evidence to show individual bias against him, the district court granted summary judgment.[69]

On review, the Eighth Circuit agreed that there was no genuine dispute of material fact in the case.[70] Although the court was "troubled" by the use of stereotypes in the university's training, it noted there was no evidence presented that the materials influenced university officials' judgment and that no reasonable jury would find bias in the investigation.[71] Because there was no evidence of individualized bias or "that University's proceedings were the product of will, instead of judgment," the court affirmed the granting of summary judgment.[72]

Holding

The court affirmed the lower court's decision after a de novo review of its interpretation of state law.[73] After a thorough review of Minnesota case law, the court held that although the district court utilized the wrong standard in granting summary judgment, the correct standard leads to the same result.[74] Because Doe was unable to show any evidence of individualized bias against him or any prejudice in the university's proceedings regarding him, the court affirmed the lower court's granting of summary judgment.[75]

Impact

This case establishes the bar for the extension of common law duties to private universities in matters related to non-academic expulsion in the Eighth Circuit. Defining "arbitrary" in cases such as these, however, will still require further time, as the court noted. Evidence of individualized bias or prejudice in expulsion proceedings will be required to bring a successful case of this type in the Eighth Circuit in the future.

[67] *Id.* at 1019.
[68] *Id.* (citing Richmond v. Fowlkes, 228 F.3d 854, 858 (8th Cir. 2000)).
[69] *Id.* at 1019.
[70] *Id.*
[71] *Id.*
[72] *Id.* at 1019.
[73] *Id.* at 1016.
[74] *Id.* at 1018–19.
[75] *Id.* at 1018.

DV Diamond Club of Flint, LLC v. Small Business Administration, 960 F.3d 743 (6th Cir. 2020)

Synopsis

The Small Business Administration (SBA) enacted a rule excluding sexually oriented businesses from Paycheck Protection Program (PPP) loan guarantees under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). A number of sexually oriented businesses brought an action claiming that the SBA exceeded its statutory authority in adopting this rule. Following the district court's grant of the plaintiffs' motion for a preliminary judgment, the SBA moved for a stay pending an appeal. The Sixth Circuit Court of Appeals found that the SBA should not be allowed a stay.

Facts and Analysis

At issue was the interpretation of congressional legislation meant to address economic hardship caused by COVID-19.[76] Congress enacted the PPP, which allowed the SBA to "guarantee up to $349 billion in PPP loans," and increased the guaranteed amount to $649 billion in April of 2020.[77] The text of the legislation states that:

> in addition to small business concerns, *any* business concern, nonprofit organization, veterans organization, or Tribal business concern described in section 657a(b)(2)(C) of this title *shall* be eligible to receive a covered loan if the business concern, nonprofit organization, veterans organization, or Tribal business concern employs not more than the greater of-- (I) 500 employees; or (II) if applicable, the size standard in number of employees established by the Administration for the industry in which the business concern, nonprofit organization, veterans organization, or Tribal business concern operates.[78]

The SBA enacted a "PPP Ineligibility Rule," which "renders sexually oriented businesses and certain other businesses ineligible to receive PPP loan guarantees."[79] The plaintiffs (owners of various sexually oriented businesses) contended that their businesses were lawful and operated within the constraints of licenses and permits, but that the SBA denied their applications for loans based on the PPP Ineligibility Rule.[80] The district court found that the SBA "exceeded its statutory authority when it adopted this rule and granted the plaintiffs' motion for

[76] DV Diamond Club of Flint, LLC v. Small Bus. Admin., 960 F.3d 743, 745 (6th Cir. 2020).
[77] *Id.*
[78] *Id.* (citing 15 USC § 636(a)(36)(D)(i) (emphasis added)).
[79] *Id.*
[80] *Id.*

preliminary injunctive relief."[81] The SBA responded by moving "to stay the preliminary injunction pending a decision on the merits of the appeal."[82]

The court utilizes a four factor test to determine whether a stay should be granted: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay."[83]

When considering the first factor, the standard of review is highly deferential to the district court and the review is only to determine whether there was an abuse of discretion.[84] The court then turned to the framework for determine the validity of an agency's interpretation of a statute: "[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[85] The district court applied this framework and found that the CARES Act, as written by Congress, prevented the SBA from refusing aid to sexually oriented businesses.[86] Citing the term "any business concern" and noting that 'any' "carries an expansive meaning," the district court found that provided a business met the size criteria, it should be eligible for aid.[87] This interpretation implies that Congress specifically made the SBA's ineligibility rules inapplicable.[88]

The SBA responded that the CARES Act included a specification for "nonprofit organizations" as eligible for PPP loans, despite their normal ineligibility for SBA loans normally.[89] Therefore, if Congress had intended for sexually oriented businesses to be eligible, it could have included similar clarifying language.[90] The court disagreed, however, stating that the broad term "any business concern" encompassed sexually oriented businesses, but not non-profits (as they are not businesses), so specialized language was required for their inclusion.[91]

The court then analyzed the remaining factors as a group, stating that "the harm to the SBA in the absence of a stay is far outweighed by the harm to the plaintiffs if a stay is granted."[92] Without the aid from the PPP (which would likely be unavailable by the conclusion of the appeal), the plaintiffs would likely

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[81] *Id.*
[82] *Id.*
[83] *Id.* at 746 (quoting Mich. Coal of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991)).
[84] *Id.* (citing Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp., 511 F.3d 535, 541 (6th Cir. 2000)).
[85] *Id.* (quoting Chevron, U.S.A., Inc. v. National Res. Defense Council, Inc., 467 U.S. 837 (1984)).
[86] *Id.*
[87] *Id.*
[88] *Id.* at 747.
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*

lose their businesses, which would be contrary to the PPP's stated purpose of "protect[ing] the employment and livelihood of employees."[93] The public interest would also be served in "guaranteeing that any business, including [the] plaintiffs', receive loans to protect and support their employees during the pandemic."[94] As the SBA guarantees loans on a first-come, first-served basis, other businesses may not receive loans whether or not the plaintiffs' businesses are permitted to do so.[95]

The dissent held that Congress's language in the CARES Act remained ambiguous regarding whether "any business concern" was meant to modify the preceding language of the Act or whether, as the court found, it should be interpreted to mean that any business was eligible for a PPP loan with no regard to prior SBA restrictions.[96] Congress noted that PPP loans are meant to be distributed "under the same terms, conditions, and processes" as 7(a) loans, which would normally exclude sexually oriented businesses from eligibility.[97] Because of CARES Act's ambiguity, the dissent found that the plaintiffs had not demonstrated a "strong likelihood of success on the merits" required for the court to deny the stay until a more "careful analysis of the law" could be conducted.[98]

Holding

Applying the *Chevron* framework, the Court upheld the district court's preliminary injunction. It held that sexually oriented businesses were meant to be included under the CARES Act framework because of the broad language Congress chose to use, and could not be excluded from PPP loans by the SBA.[99] Additionally, public policy would better be served by allowing the plaintiffs' businesses to receive loans, as more businesses and employees would be protected during the COVID-19 pandemic.[100] Based on a balancing of the relevant factors, the court denied the SBA's motion for a stay.[101]

Impact

In the difficult times the world now faces with the COVID-19 pandemic, determining who receives what type of aid is not an easy task, and the courts likely will have to interpret Congress's language and intent to make difficult decisions. This order is a prime example. However, as the dissent points out, if the language is ambiguous and can be subject to different meanings among the judges, the courts have a difficult task ahead of them.

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[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.* at 747 (Siler, J., dissenting).
[97] *Id.* at 748. (Siler, J., dissenting, citing 15 U.S.C. § 636(a)(36)(B)).
[98] *Id.* (Siler, J., dissenting).
[99] *Id.* at 746.
[100] *Id.* at 747.
[101] *Id.*

Greenbrier Hospital, LLC v. Azar, 974 F.3d 546 (5th Cir. 2020)

Synopsis

The plaintiff healthcare provider brought action against the defendant, the Secretary of the Department of Health and Human Services (HHS), to obtain judicial review of the defendant's interpretation of the Medicare reimbursement scheme as it relates to inpatient psychiatric facilities (IPFs). The district court granted summary judgment in favor of the Secretary, and the Fifth Circuit Court of Appeals found that the interpretation of the reimbursement scheme put forth by the Secretary was reasonable.

Facts and Analysis

The conflict in this case surrounded provisions governing the "compensation formula for the payment of certain health care providers—a formula that changes once a year."[102] However, on January 1, it was unclear which formula (the previous year's or the new year's) applied for payments made on that day.[103]

HHS issued a rule at the direction of Congress in 2004 that set forth the new reimbursement scheme for inpatient psychiatric facilities (IPFs).[104] The rule contained a transition schedule from the previous reimbursement system to a new system over a three-year period.[105] During this transition, IPFs would get a "blended payment"—a combination of the old reimbursement scheme and the new one, the combination of which would vary year by year, with the new formula taking effect on July 1.[106] However, in 2005, HHS put forth a correction that allowed the new formula to take effect on January 1, as opposed to July 1.[107] However, the language of the corrected regulation left an ambiguity about which scheme (the old year's or the new year's) applied on January 1.[108] This was a problem because, as the court noted, "[f]or example, a cost reporting period beginning on January 1, 2006, appears to be eligible for both the 25% per diem rate and the 50% per diem rate—an obvious problem because presumably an IPF can be reimbursed under only one formula per year."[109]

The plaintiff IPF, Greenbrier Hospital, asserted that this ambiguity allowed it to choose which formula it wished to apply, and applied for reimbursement under the preceding year's formula.[110] The Centers for Medicare & Medicaid Services (CMS) rejected the plaintiff's claim, paid it under the new formula and reversed a Provider Reimbursement Review Board determination to the contrary.[111] The plaintiff then sought judicial review and the district court

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[102] Greenbrier Hospital, LLC v. Azar, 974 F.3d 546, 548 (5th Cir. 2020).
[103] *Id*. at 547–48.
[104] *Id*. at 548.
[105] *Id*.
[106] *Id*.
[107] *Id*. at 549.
[108] *Id*.
[109] *Id*.
[110] *Id*. at 549–50.
[111] *Id*. at 550.

granted summary judgment to the government, finding that the Administrator's interpretation of the conflicting provisions was reasonable.[112]

In the beginning of the opinion, the court described the protocol for analysis when provisions of the same law appear to conflict. The process began by "attempt[ing] to reconcile the competing provisions in a manner that gives effect to each one."[113] If provisions cannot be reconciled, the court noted that they must save as much of the statute as they can and determine "which of the two conflicting provisions should govern in a particular case."[114] Finally, if the court cannot determine which provision should control, the court should deny both provisions of the law and move forward, although this is a last resort.[115]

When applying this analysis to the provisions at issue in this case, the court chose "to minimize damage to text by giving effect to the provision most obviously dictated by the context of the rule."[116] The court accomplished this by examining the text of the previous rule and noting that the previous timespan was July 1 to June 30, which caused no conflict.[117] Therefore, the court concluded that by following the spirit of the previous rule, the new formula should be given effect on January 1.[118]

When examining this case, the court noted that "reconcil[ing] potentially conflicting provisions by attempting to read the text in harmony" would be impossible here because of the incongruity of the text.[119] The court instead chose to look to context to do the least damage to the text and found that the 2005 rule should be construed "to give effect to the new formula, and not the formula from the preceding year, when presented with a cost report that begins on January 1."[120] HHS made clear in its argument before the court that the correction in question was not a change in policy; rather, it was meant to "conform the regulation text to the actual policy."[121] The court found unpersuasive the plaintiff's argument that it should choose the formula that applies on January 1 because there was no substantive change in policy, and allowing the plaintiff IPF to choose would contradict that notion.[122] Furthermore, nowhere in the text of the rule itself does it allow an IPF to choose the formula itself, and the plaintiff was unable to support this position substantively.[123]

The court noted its decision cannot resolve the conflict in the legislation in its entirety, so it simply affirmed the lower court's decision to "limit the damage to text by applying the new incoming rule on January 1, rather than the old rule from the preceding year."[124]

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[112] *Id*.
[113] *Id*. at 547.
[114] *Id.*
[115] *Id*. at 547–48.
[116] *Id*. at 548.
[117] *Id*.
[118] *Id*.
[119] *Id*. at 550.
[120] *Id.*
[121] *Id*. (citing 70 Fed. Reg. 16724, 16726 (Apr. 1, 2005)).
[122] *Id.* at 551.
[123] *Id*.
[124] *Id*.

Holding

The court affirmed the lower court's decision, agreeing with the agency's proposal for how the compensation scheme should be interpreted.[125] After the proper analysis involving two provisions of the same law that appear to conflict, the court examined previous legislation in the same area to find context for the rule, and used this context to reach a conclusion.[126] The new provisions should be interpreted in the same way that the previous provisions operated: the new system for compensation should take effect on January 1 of the new year, as opposed to the previous year's system.[127]

Impact

This ruling demonstrates the attitude courts have toward interpreting legislation that is internally inconsistent. Here, the court wielded its authority to interpret the rule for specific situations such as the one before it, but ideally to do the least damage to the text possible, to preserve the legislature's role in the branch system. Whether other courts will follow the Fifth Circuit's lead remains to be seen, but this case undoubtedly sets a standard for the judicial attitude toward interpreting conflicting legislation.

[125] *Id*. at 548.
[126] *Id*.
[127] *Id*.

Level the Playing Field v. Federal Election Commission, 961 F.3d 462 (D.C. Cir. 2020)

Synopsis

Level the Playing Field, a non-profit corporation created to enhance public awareness of independent candidates for elected office, challenged the Federal Election Commission's (FEC) dismissal of their complaint under the Administrative Procedure Act. The corporation's complaint challenged the Commission on Presidential Debates' (CPD) use of polling criteria to determine whether a candidate should participate in presidential debates. The complaint also sought equitable relief that the FEC adjust its rules to forbid debate sponsors from using public opinion polls to determine a candidate's eligibility to participate. The Court of Appeals for the District of Columbia held that the FEC did not act arbitrarily or capriciously in making two determinations about the CPD's conduct: that the CPD was not overtly partisan, and that the requirement that a candidate obtain support from at minimum 15% of the national electorate satisfies the requirement for objective criteria.

Facts and Analysis

The plaintiffs—Level the Playing Field, and one registered voter from the District of Columbia, the Green Party, and the Libertarian National Committee each—brough suit against the FEC (the defendant), asserting that the CPD lends support to Republican and Democratic nominees for public office to the detriment of those nominees from third-parties and that the "CPD uses subjective and biased criteria for selecting debate participants."[128] The government does not fund the CPD; instead, it "is governed by an independent Board of Directors."[129] The CPD imposes three requirements on potential participants in debates it sponsors: that the candidate be qualified for President under the Constitution, that the candidate be "on the ballot of enough states to have a mathematical chance of winning a majority vote in the Electoral College," and that the candidate have "a level of support of at least 15% of the national electorate," a criterion which is determined by an average of the recent results of five public opinion polling organizations.[130] The plaintiffs' administrative complaints challenged the final requirement, and petitioned the FEC to change its rules to "prohibit debate sponsors from using public opinion polls as a criterion for eligibility."[131] The FEC dismissed both complaints.[132]

The plaintiffs brought the case to the district court, alleging a violation of the Administrative Procedure Act.[133] The district court remanded both matters to

[128] Level the Playing Field v. Fed. Election Comm'n, 961 F.3d 462, 463 (D.C. Cir. 2020).
[129] *Id.*
[130] *Id.* at 463–64.
[131] *Id.* at 464.
[132] *Id.*
[133] *Id.*

the FEC, who returned the same result.[134] The district court then granted summary judgment in favor of the FEC, and the plaintiffs appealed, bringing the case before the Court of Appeals for the District of Columbia.[135]

The court began its opinion by noting its deference in judicial review to decisions of the FEC.[136] Although the plaintiffs requested a less deferential standard of review, alleging that the decisions in question display a "partisan agenda," the court noted that decisions involving bias of this manner are those to which the existing arbitrary-and-capricious standard would apply.[137] Accordingly, the court did not create a new standard of review to utilize in this case.[138]

The court then moved to the plaintiffs' assertion that the FEC ignored the CPD's blatant bias against independent candidates.[139] The court agreed with the FEC that early statements made about the CPD around the time of its founding do not describe the CPD in its current form, and supported the need for context surrounding these statements.[140] Additionally, the court concurred with the FEC in that individuals' statements could not be "indicative of CPD's *organizational* endorsement of or support for the Democratic and Republican Parties and their candidates."[141] More contemporaneous statements made by leading officials fell under the same argument.[142] The court of appeals agreed with the district court that a disagreement over whether partisan activities reflect the views of an employee's organization did not relieve the plaintiffs of their burden to prove that the FEC acted in an arbitrary or capricious manner.[143]

The plaintiffs also presented two expert reports to the district court to suggest that the "15% polling requirement to select debate candidates is 'subjective' and favors major-party candidates."[144] The FEC, in examining these reports, found them unpersuasive, and the court in turn found the FEC's critiques of the two reports reasonable.[145] More broadly, however, the court stated that simply because a threshold is difficult to reach for a third party candidate, it does not become an inherently subjective criterion for determining a candidate's eligibility to participate in debates.[146]

The court once again expressed deference to the FEC when considering the plaintiffs' final request, for the FEC to initiate a rulemaking to prohibit debate sponsors from using polling thresholds to determine a candidate's eligibility for debates. Because "[f]ederal agencies have 'broad discretion to choose how to best marshal [their] limited resources and personnel to carry out [their] delegated

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[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.* at 464–65.
[141] *Id.* at 465.
[142] *Id.* at 466.
[143] *Id.*
[144] *Id.* at 467.
[145] *Id.* at 467–68.
[146] *Id.* at 468.

responsibilities,'" the court affirmed the FEC's decision to dismiss the plaintiffs' complaints.[147]

Holding

The Court of Appeals for the District of Columbia found that the plaintiffs did not meet their burden in showing that the FEC's decision in dismissing their complaints was arbitrary or unreasonable.[148] On the contrary, the FEC "thoughtfully evaluated the record" and "offered detailed explanations in support of its view that the plaintiffs failed to show impermissible bias against independent candidates or in favor of candidates from the two major political parties."[149] Noting the increased difficulty for independent candidates to meet the 15% requirement, the court did not find this measure subjective and ruled for the FEC.[150] Finally, because the court "found that the [FEC] acted reasonably in reaching those decisions, [it held] that the [FEC] did not err by electing not to initiate a rulemaking."[151]

Impact

The court's deference to decisions made by the FEC is particularly relevant as 2020 is an election year. The court has noted that it will hold the plaintiffs to the established arbitrary and capricious standard[152] and that a finding of reasonableness in the FEC's actions will likely result in a holding that the FEC did not err in its decision making.[153] The ruling here sets a continued precedent of the judicial system's deference to federal agencies in regard to matters within their control.

[147] *Id.* at 469 (citing Massachusetts v. EPA, 549 U.S. 497, 527–28 (2007)).
[148] *Id.* at 467.
[149] *Id.*
[150] *Id.* at 468.
[151] *Id.* at 469.
[152] *Id.* at 464.
[153] *Id.* at 469.

Mendez v. Barr, 960 F.3d 80 (2d Cir. 2020)

Synopsis

Tomas Mendez was charged by the Department of Homeland Security with being inadmissible due to his conviction of misprision of felony. Following a sustainment of the charge by both an Immigration Judge (IJ) and the Board of Immigrant Appeals (BIA), Mendez petitioned the court for review. The court found that a conviction of misprision did not render an alien inadmissible because a misprision conviction is not categorically a crime involving moral turpitude.

Facts and Analysis

In 2004, Tomas Mendez was admitted to the United States as a permanent resident.[154] Six years later, he was convicted of misprision of a felony under 18 U.S.C. § 4, which criminalizes the act of concealing "knowledge of the commission of a federal felony" and failure to "report it to the appropriate authorities."[155] Upon Mendez's return from a trip overseas in 2016, the Department of Homeland Security found him inadmissible because he was a "noncitizen convicted of a crime involving moral turpitude (CIMT)."[156] "The immigration judge sustained the charge, and the Board of Immigration . . . affirmed," concluding "that the violation of Section 4 meant that [Mendez] had committed a CIMT."[157]

A CIMT is a "crime that is 'inherently base, vile, or depraved, and contrary to the accepted rules of morality and duties owed between persons or to society in general.'"[158] Although misprision was not always considered a CIMT, the Eleventh Circuit found that "a conviction under Section 4 is categorically a CIMT 'because it necessarily involves an affirmative act of concealment or participation in a felony, behavior that runs contrary to accepted societal duties and involves dishonest or fraudulent activity.'"[159] However, this view is not unchallenged throughout the courts.[160]

Mendez brought a motion to terminate removal proceedings and for cancellation of removal, on the grounds that misprision is not categorically a CIMT. The IJ found Mendez removable, and following this, the BIA issued a decision, declining to follow the Ninth Circuit's holding that misprision is not categorically a CIMT. Mendez petitioned the court for review, arguing that "a conviction for misprision is not a CIMT because it does not categorically involve conduct that is inherently base, vile, or depraved" and that the BIA's decision in this case is not entitled to *Chevron* deference.[161]

The court began by addressing Mendez's first argument. The BIA and the courts use a "'categorical approach' focusing on the intrinsic nature of the

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[154] Mendez v. Barr, 960 F.3d 80, 82 (2d Cir. 2020).
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.* at 82–83 (citing Rodriguez v. Gonzales, 451 F.3d 60, 63 (2d Cir. 2006)).
[159] *Id.* at 83 (citing Itani v. Ashcroft, 298 F.3d 1213, 1216 (11th Cir. 2002)).
[160] *Id.* at 83. *See* Robles-Urrea v. Holder, 678 F.3d 702, 710-12 (9th Cir. 2012).
[161] *Mendez* at 83–84.

offense" to determine whether a conviction qualifies as a CIMT.[162] The conviction elements under Section 4 consist of "(1) the principal committed and completed the alleged felony, (2) the defendant had full knowledge of that fact, (3) the defendant failed to notify the authorities, and (4) the defendant took steps to conceal the crime."[163] The court found that the categorical approach failed in this case, as a critical component of a CIMT is an evil intent, but nothing in Section 4 references intent whatsoever.[164] The court provided several examples to further emphasize its point that the crime of misprision can occur without any evil intent in the mind of the defendant.[165] Furthermore, the BIA itself has previously held that misprision does not contain an intent element that would qualify it as a CIMT.[166]

The government attempted to combat these findings by relying on precedent "that a crime in which fraud is an ingredient involves moral turpitude."[167] The court disagreed, however, finding that Congress would have chosen to include an intent requirement had it felt it appropriate and if an intent requirement was "implied" into Section 4, it would be extremely difficult to determine whether any crime was a CIMT.[168]

The dissent concluded that misprision should qualify as a CIMT because it involves "dishonest and deceitful behavior."[169] The majority dismissed the dissent's argument by noting that should it be accepted, it would "eviscerate the distinction in the law between generic criminal conduct and crimes involving moral turpitude, thus turning almost all crimes into CIMTs."[170] Furthermore, the court notes that it is unlikely that Congress intended that any individual who fails to inform proper authorities of a crime has "committed a crime that is inherently vile and immoral."[171] According to its own precedent, the BIA has held that more than deceit or intent to conceal is needed to qualify a crime as a CIMT.[172]

The government also argued that *Chevron* deference should be given to the BIA's decision that Section 4 be classified as a CIMT.[173] The court disagreed, finding that although *Chevron* deference applies to the BIA's published interpretations of the Immigration and Nationality Act, it does not apply to its "interpretation of a criminal statute."[174]

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[162] *Id.* at 84 (citing Gill v. I.N.S., 420 F.3d 82, 89 (2d Cir. 2005)).

[163] *Id.* (citing United States v. Cefalu, 85 F.3d 964, 969 (2d Cir. 1996)).

[164] *Id.*

[165] *Id.* at 85.

[166] *Id.* S*ee* Matter of Mendez, 27 I&N Dec. 219, 223 (B.I.A. 2018); Matter of Espinoza-Gonzales, 22 I&N Dec. 889, 896 (B.I.A. 1999); Matter of Sloan, 12 I&N Dec. 840, 842 (B.I.A.1968).

[167] *Mendez*, 960 F.3d at 86 (quoting Jordan v. De George, 341 U.S. 223, 227 (1951)).

[168] *Id.*

[169] *Id.* at 93 (Sullivan, J., dissenting).

[170] *Id.* at 86.

[171] *Id.* at 87.

[172] *Id.* at 88. To support this point, the court cites a number of examples of BIA decisions in which the BIA found that an intent element was required for a crime to merit a distinction of a CIMT.

[173] *Id.* For a discussion on *Chevron*, *see supra* pg. 3.

[174] *Mendez* at 88.

Holding

The court found that because crimes under Section 4 do not have an evil intent requirement among their elements, they cannot be categorically classified as CIMTs.[175] The BIA's argument that an intent requirement could be "implied" into Section 4 was also rejected, as it would make the test too difficult to practically apply.[176] Finally, the court did not give *Chevron* deference to the BIA's interpretation of Section 4, as it was only an interpretation of a criminal statute rather than an interpretation of the Immigration and Nationality Act."[177]

Impact

In this decision, the Second Circuit joined with the Ninth Circuit in holding that misprision cannot be categorically classified as a CIMT.[178] This decision could have repercussions for the immigration system and potentially loosen the definition of a CIMT. If a crime does not explicitly contain an intent requirement in its elements, it likely cannot be considered a CIMT for the purposes of charges by the Department of Homeland Security. Additionally, the court clarified that *Chevron* deference should only be given to the BIA's interpretations of the Immigration and Nationality Act, rather than any interpretation made by the agency.

[175] *Id.* at 85.
[176] *Id.* at 86.
[177] *Id.* at 88.
[178] *Id.*

UNITED STATES DISTRICT COURT

National Association for the Advancement of Colored People v. DeVos, 2020 WL 5291406 1 (D.D.C. 2020)

Synopsis

The plaintiff advocacy groups, public school districts, and parents of children enrolled in public school, brought an action against the defendant Department of Education (Department) to challenge its implementation of the provision of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) regarding funding to aid schools. They specifically challenged the Department's finding that the legislation prohibited differentiation between private and public schools when considering aid distribution. The district court granted summary judgment for the plaintiffs, finding that the Department was meant to provide equitable services using the framework set forth in the Elementary and Secondary Education Act of 1965 (ESEA) and that the Department exceeded its authority in using an interim final rule in interpreting the provision of the CARES Act.

Facts and Analysis

Congress passed the CARES Act in response to the COVID-19 crisis, which in part allocated billions of dollars to schools to assist them through the challenges of the global pandemic.[179] Of the three sub-funds, two were relevant to this litigation: the Governors' Emergency Relief Fund (GEER), which provided governors "with discretion to distribute funding to the Local Education Agencies (LEAs) that need it the most," and the Elementary and Secondary School Emergency Relief Fund (ESSER), which directed the Department of Education to distribute funds to each state, which would then in turn distribute to LEAs, which would pass on the funding to schools according to a formula.[180] While the GEER fund allowed room for discretion in distribution of funds, the ESSER did not – it mandated that funds "shall be allocated by the Secretary to each state in the same proportion as each State received under part A of title I of the [ESEA] of 1965 in the most recent fiscal year."[181] Additionally, the CARES Act dictated how private schools could qualify for GEER and ESSER funding by referencing the method established in the ESEA, which stated that expenditures to private schools should be equal to "the proportion of funds allocated to participating school attendance areas based on the number of children from low-income families who attend private schools."[182]

In April of 2020, the Department of Education "advised that GEER and ESSER funds should be used to 'serve all non-public school students and teachers

[179] National Association for the Advancement of Colored People v. DeVos, 2020 WL 5291406, at *1 (D.D.C. 2020).

[180] *Id.* at 1.

[181] *Id.* (citing Pub. L. No. 116-136, 134 Stat. 281 (2020)).

[182] *Id.* (citing 20 U.S.C. § 6320(a)(4)(A)(i)).

without regard to family income, residency, or eligibility based on low achievement.'"[183] It issued an interim final rule expressing the same position in July 2020, finding that the "text of the CARES Act was ambiguous and its interpretation was reasonable in light of the text, structure, and purpose of the CARES Act."[184] In its interim order, the Department stated that LEAs have two choices: to "disburse funds equally between all public schools and all private schools *or* disburse funds based on low-income student population for both public and private schools."[185] Regardless of the method employed by LEAs, the Department interpreted the CARES Act to prohibit "differentiation between public and private schools."[186] As the CARES Act did not vest rulemaking authority on the Department, the Department instead utilized its general rulemaking powers in "administer[ing] programs under its purview."[187] Furthermore, the typical notice and comment rulemaking was foregone by the Department, who instead cited the Administrative Procedure Act (APA) exception for good cause, noting the current global pandemic.[188]

The plaintiffs brought suit in July of 2020 and moved for a preliminary injunction or summary judgment in August 2020.[189] They contended that "the Department did not have the authority to issue the interim final rule" and that "the interim final rule the Department did issue was contrary to the CARES Act."[190]

To assess the plaintiffs' claims, the court utilized the *Chevron* analysis – it first determined whether the statute was ambiguous as written and if not, the inquiry ends.[191] However, if the statute is ambiguous, the court determines whether the interpretation of the agency at question is reasonable, and if so, it is entitled to proper deference.[192]

When applying that analysis to the statute at issue here, the court found that "[i]n describing the funding mechanism for the GEER and ESSER sub-funds, Congress spoke with clarity and precision" by "us[ing] mandatory language, cross-referenc[ing] a statutory provision by section number, and [leaving] no term up to interpretation."[193] By using ordinary language in the statute, Congress's intent was to ensure that LEAs distributed funds in the same manner as in the cross-referenced statute (Section 1117 of the ESEA), using the same methodology and procedures (in this case, a formula "that accounts for the number of children from low-income families").[194] Furthermore, the court noted that if Congress had meant to provide equal funding to private and public schools without distinction

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[183] *Id.* at 2 (citing *Providing Equitable Services to Students and Teachers in Non-Public Schools Under the CARES Act Programs*, https://oese.ed.gov/files/2020/06/Providing-Equitable-Services-under-the-CARES-Act-Programs-Update-6-25-2020.pdf (Apr. 30, 2020) at 3).

[184] *Id.*

[185] *Id.* (referencing 85 Fed. Reg. 39,482) (emphasis in original).

[186] *Id.* (referencing 85 Fed. Reg. 39,482).

[187] *Id.* (referencing 85 Fed. Reg. 39,481).

[188] *Id.*

[189] *Id.*

[190] *Id.* at 3.

[191] *Id.* (referencing Chevron v. Nat. Res. Def. Council, 467 U.S. 837, 843 (1984)).

[192] *Id.* (referencing Holland v. Nat'l Mining Ass'n, 309 F.3d 808, 815 (D.C. Cir 2002)).

[193] *Id.* at 4.

[194] *Id.*

by income, it could have instead cited Section 8501 of the ESEA, which allows for that very formula.[195] Congress's choice of Section 1117 makes its intent in the manner of fund distribution clear.[196]

The Department put forth several arguments in defense of its interpretation of the statute. It first attempted to argue that the term "equitable services" was ambiguous and in light of that, its interpretation was reasonable.[197] While the court noted that this notion may have been true in isolation, it also found that Congress's cross referencing of Section 1117 of the ESEA should have directed the Department's attention to the specific formula found there.[198] The Department also argued that Section 18005(a) was facially ambiguous, but the court states that "simply because Congress could have been clearer, that alone does not render an unambiguous text ambiguous."[199] The Department also relied on the supposed disparity between the CARES Act (to deliver emergency relief to all schools) and Title I-A (to allow aid to low-achieving students).[200] The court noted that purposive arguments such as this cannot overcome the text of the statute and that the text of the CARES Act itself "calls for '[a]ctivities to address the unique needs of low-income children or students.'"[201]

The Department's final argument, based on the statute's structure, claimed that provisions of Section 1117 of the ESEA would render other sections of the CARES Act superfluous, such as sections about public schools consulting with private schools about equitable services and public schools retaining control over funds.[202] The court counters with precedent that redundancy does not affect the plain meaning of the statute as written – "that it incorporates that formula described in Section 1117 for distributing equitable services by the number of children from low-income families."[203]

The plaintiffs' final argument "contend[ed] that the Department exceeded its delegated authority by promulgating the interim final rule."[204] Upon examining this argument, the court found that neither general rulemaking authority provision set out in precedent accounted for the Department's action here.[205] The text of the CARES Act directs the Secretary to allocate funds from the sub-funds in the same manner cross-referenced in the ESEA statute, as contrasted with other portions of the CARES Act that provide the Secretary with

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[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] *Id.* at 5.

[200] *Id.*

[201] *Id.* (citing CARES Act § 18003(d)(4)).

[202] *Id.*

[203] *Id*. *See* Bruesewitz v. Wyeth LLC, 562 U.S. 223, 236 (2011); Rimini St., Inc. v. Oracle USA, Inc., 139 S. Ct. 873, 881 (2019).

[204] *DeVos* at 5.

[205] *Id.* at 6. *See* Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n, 466 F.3d 134, 139 (D.C. Cir. 2006) ("Agencies are … bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes").

discretion in the allocation of funds.[206] Because of this disparity, Congress's decision to withhold authority from the Secretary regarding this section was intentional.[207] The court ultimately concluded that "[b]ecause the Act is not ambiguous and did not otherwise delegate rulemaking authority, the Department acted beyond its authority in promulgating the interim final rule."[208]

Holding

The court granted the plaintiffs' expedited motion for summary judgment.[209] Under the APA, courts are to "'hold unlawful and set aside agency action' that is in excess of statutory authority or 'not in accordance with law.'"[210] The court agreed with the plaintiffs that the interim final rule created by the Department was "contrary to the unambiguous mandate of the Act" and that the Act did not provide the Department with rulemaking authority nor ambiguity for the agency to address.[211] Congress's intent in the CARES Act was not ambiguous as it specifically cross-referenced a section of the ESEA that allowed for a specific formula of distributing funds.[212] Additionally, the Department acted outside of its granted authority in the CARES Act by issuing the final interim rule in regard to this section.[213] The court therefore set aside the interim rule.[214]

Impact

The court expresses deference to the clear language of Congress in this case, noting that a department has overstepped its bounds in attempting to interpret an unambiguous statute in a contrary way. It notes substantial precedent for the notion that a regulation crafted by a department that is contrary to an existing statute should be regarded as null and void.[215] Furthermore, the court notes that "[a] lthough some might agree with the Department's position as a matter of policy, "'[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.'"[216] This is undoubtedly a warning to government agencies to be mindful of their boundaries when interpreting policy.

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[206] *DeVos* at 6.
[207] *Id.*
[208] *Id.*
[209] *Id.* at 1.
[210] *Id.* at 3 (citing 5 U.S.C. § 706(2)(A), (C)).
[211] *Id.*
[212] *Id.* at 4.
[213] *Id.* at 6.
[214] *Id.* at 3.
[215] *See* Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue, 297 U.S. 129, 134 (1936); Orion Reserves Ltd. P'ship v. Salazar, 553 F.3d 697, 703 (D.C. Cir. 2009); Nat'l Min. Ass'n v. U.S. Army Corps of Engineers, 145 F.3d 1399, 1409 (D.C. Cir. 1998).
[216] *Id.* at 4 (citing Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 325 (2014)).

United States v. Cardena, 461 F.Supp.3d 798 (N.D. Ill. 2020)

Synopsis

The defendant, a convict serving time in prison for drug-trafficking-related offenses, filed a motion for compassionate release due to the COVID-19 pandemic. The government alleged that the defendant had not properly exhausted proper administrative remedies. After considering the case, the district court held that the government failed to bear its burden of proof and that even if it had, the exhaustion requirement should be waived. The court found that the extraordinary circumstances surrounding the coronavirus pandemic merited compassionate release and that compassionate release was consistent with relevant statutory sentencing factors.

Facts and Analysis

Robert Cardena, a 41-year-old man, moved for compassionate release under 18. U.S.C. § 3582(c)(1)(A)(i), a statute which permits sentence modification under "extraordinary and compelling circumstances."[217] His original charge related to a racketeering conspiracy and possession of cocaine with the intent to sell, but the court at his sentencing found that Cardena was a minor participant in the offenses and that his involvement was limited.[218] To date, he served more than nine years of his ten year sentence and had one minor disciplinary issue while in prison.[219]

Cardena, had been diagnosed with hypertension and Type II diabetes.[220] Both of these conditions are considered risk factors for COVID-19.[221] Cardena moved for compassionate release based on the fact that the pandemic itself, in addition to his "current placement in a residential reentry center (RRC) where he is in close contact with other inmates circulating in the wider community and very close to the end of his sentence" amounted to "extraordinary and compelling circumstances that the court did not and could not have foreseen at sentencing."[222] Following an emergency letter motion written by Cardena without the assistance of a lawyer asking for compassionate release or home confinement under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), the court appointed a lawyer and set a deadline for the government's response.[223]

In its response, the government asserted that the motion for compassionate release was moot because the Federal Bureau of Prisons (BOP) had transferred Cardena from the federal prison in Milan, Michigan to a halfway house in Wisconsin and that Cardena did not properly exhaust administrative remedies before filing for compassionate release.[224] The court previously rejected the

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[217] United States v. Cardena, 461 F.Supp.3d 798, 799 (N.D. Ill. 2020) (citing 18. U.S.C. § 3582(c)(1)(A)).

[218] *Id.* at 800.

[219] *Id.*

[220] *Id.*

[221] *Id.* at 799–800.

[222] *Id.* at 800.

[223] *Id.*

[224] *Id.*

government's mootness argument and Cardena no longer sought home confinement, only that he be granted compassionate release.[225]

The court first considers the government's claim that Cardena did not exhaust administrative remedies as required by the First Step Act of 2018.[226] The Act states that "the defendant may also bring a motion for compassionate release 'after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility.'"[227] The government asserted that Cardena did not submit a request for compassionate release at the time the case was brought, although he had since filed an administrative request for compassionate release.[228] However, the government conceded that the Seventh Circuit would likely follow the rule in *United States v. Taylor*, which held that "§ 3582(c)(1)(A)'s statutory exhaustion requirement is not jurisdictional but is rather a claims-processing rule."[229] Ultimately, the court found that the statutory exhaustion requirement in Section 3582(c)(1)(A) (as well as the relevant 30-day waiting period) could be waived in certain circumstances.[230]

However, the court noted that it still must examine whether the government met its burden of proof in regard to exhaustion.[231] The government did not inform the court about the result of Cardena's impending request for compassionate release and the court notes that it is unlikely that the BOP has come to a final decision regarding it.[232] The court "cannot assume that facts exist which the government has the burden to prove."[233] However, even if the government had met its burden, the court found that the exhaustion requirement would be waived in this case.[234] "Courts have found that the text of § 3582(c)(1)(A) and the legislative history of the First Step Act demonstrate that in limited circumstances the 30-day waiting period can be waived if it "'could not serve the congressional objective of ensuring prisoners receive a meaningful and prompt opportunity for a judicial determination on the motion.'"[235] When considering the coronavirus pandemic and its risks, the court held that the "purpose of the statute is served by waiving the 30-day waiting period."[236]

The court then moved to the merits of Cardena's motion for compassionate release.[237] It noted the catch-all provision in the current legislation and stated that U.S.S.G. § 1B1.13 (the list of extraordinary and compelling circumstances to be examined on a motion for compassionate release) serves as

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[225] *Id.* at 801.
[226] *Id.*
[227] *Id.* (citing 18 U.S.C. § 3582(c)(1)(A)).
[228] *Id.*
[229] *Id. See* United States v. Taylor, 778 F.3d 667, 671 (7th Cir. 2015).
[230] *Cardena* at 802.
[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] *Id.*
[235] *Id.* (citing United States v. Witter, 2020 WL 1974200 1, 6 (W.D. Wis. 2020)).
[236] *Id.*
[237] *Id.*

guidance rather than binding rules.[238] The court decided that the defendant's medical condition, age, and family circumstances are no longer the only factors to consider, and when considering the present case, Cardena's diagnosed medical conditions, the threat of exposure to COVID-19, and the fact that his sentence was drawing to a close constituted extraordinary and compelling circumstances.[239] In the prison where Cardena was housed when he filed his motion, there were over forty confirmed cases of COVID-19 and the government's contention that the halfway house where Cardena currently resides has no confirmed cases bore little weight, as the BOP tested only those who exhibited symptoms.[240] The court noted that many infected individuals do not show symptoms and the "crowded conditions in halfway houses make an outbreak from even a small number of cases more likely than in the general population because staff and residents often circulate through the facility."[241] With the facts before it, the court concluded that extraordinary and compelling circumstances warranting a compassionate release were present here.[242]

However, the court then conducted its analysis of the factors it considered when it originally sentenced Cardena.[243] When considering the need to protect the public, the court noted that Cardena "has little in the way of a criminal record"[244] and that "the BOP's early transfer of Cardena to a RRC further suggests strongly that it concurs that Cardena has reached the point at which facilitating his transition to the community is warranted."[245] Cardena took courses in prison to assist in his transition and had a solid reentry plan that the court found sufficiently stable as to warrant depriving him of the services and support of a halfway house.[246]

Holding

The court ultimately granted Cardena's motion for compassionate release.[247] Cardena's requirement to exhaust all administrative remedies before making his request would have been waived by the court had the government met its burden of proof on the issue.[248] Furthermore, the extenuating circumstances of the COVID-19 pandemic constituted extraordinary and compelling circumstances allowing for a compassionate release.[249] Finally, when looking at Cardena's situation specifically, the court concluded that due to his lack of a substantial criminal record and his stable reentry plan, compassionate release should be granted.[250]

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[238] *Id. See* United States v. Almontes, 2020 WL 1812713 1, 3 (D. Conn 2020).
[239] *Cardena* at 802–03.
[240] *Id.* at 803.
[241] *Id.*
[242] *Id.*
[243] *Id.*
[244] *Id.*
[245] *Id.* at 804.
[246] *Id.*
[247] *Id.* at 800.
[248] *Id.* at 802.
[249] *Id.* at 803.
[250] *Id.* at 804.

Impact

This case has a short-term impact on those prisoners seeking release due to the COVID-19 pandemic. With prisons being a high-risk area, those with pre-existing conditions now have a district court precedent upon which to rest a motion for compassionate release. It also has a long-term impact in terms of compassionate release requests in the future. Courts are increasingly less bound to the U.S.S.G. § 1B1.13 factors as anything more than guidelines, so prisoners with other extenuating factors have a chance for compassionate release. Furthermore, the court here noted that in limited circumstances, the 30-day waiting period and the requirement to exhaust administrative remedies can be waived. This case will prove instructive for inmates filing for compassionate release both during the coronavirus pandemic and in the future.