SULLIVAN & CROMWELL LLP

SUPREME COURT BUSINESS REVIEW

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Arbitration – Federal Jurisdiction to Confirm or Vacate Arbitration Awards

The Federal Arbitration Act (FAA) authorizes parties to an arbitration agreement to ask a federal court to compel an arbitration proceeding, or to confirm or vacate an arbitration award. The FAA does not itself grant federal courts jurisdiction over those disputes. Instead, a federal court generally can hear such a dispute only if (i) it presents a question of federal law separate from the FAA; or (ii) the parties satisfy the requirements for diversity jurisdiction, meaning that no plaintiff resides in the same state as a defendant and at least $75,000 is at stake.

The Supreme Court previously held that federal courts may determine their jurisdiction over petitions to *compel* arbitration by "looking through" the petition to the underlying controversy. If that underlying controversy involves a federal question, then the court has jurisdiction over the request to compel arbitration. The question in *Badgerow* was whether the same rule applies to requests to *confirm or vacate* an arbitration award.

The Court answered no: when a party applies to confirm or vacate an arbitration award, a federal court must ask whether the application *itself* presents a federal question, or if diversity jurisdiction exists. Unlike with petitions to compel arbitration, federal courts may not "look through" the application and consider the underlying controversy. As a result, even if the underlying arbitration resolved a federal claim, a federal court will not necessarily be able to confirm or vacate the award.

An application to confirm or vacate an arbitration award ordinarily involves state contract law and does not itself present a federal question. Thus, in practice, *Badgerow* significantly curtails the power of federal courts to review those applications. Applications to confirm or vacate an arbitration award typically must now be heard in state court unless diversity jurisdiction exists.

No. 20-1143

Opinion Date: 3/21/22

Vote: 8-1

Author: Kagan, J.

Lower Court: 5th Cir.

Following Badgerow, *motions to confirm or vacate an arbitration award typically will be heard by state courts, not federal courts, unless the requirements for diversity jurisdiction are satisfied.*

Morgan v. *Sundance, Inc.*

Arbitration – Waiver of Right to Arbitrate

A litigant can waive a right by knowingly acting in an inconsistent way. Outside the arbitration context, federal courts assessing waiver ordinarily do not ask whether the litigant's actions harmed the other party. But many courts adopted a special rule for rights involving arbitration, requiring a showing of prejudice before finding that such rights are waived. Those courts grounded the prejudice requirement in the FAA's general "policy favoring arbitration."

In *Morgan*, an employee of a Taco Bell franchise owned by Sundance sued Sundance in federal court. Although the employee had signed an arbitration agreement when she was hired, Sundance filed a motion to dismiss and actively litigated the case for eight months without mentioning the agreement. Sundance then changed course and moved to compel arbitration. The employee argued that Sundance had waived its right to arbitrate, but the court of appeals held that Sundance did not do so because Sundance's conduct had not prejudiced the employee.

The Supreme Court unanimously rejected the court of appeals' arbitration-specific prejudice requirement. The Court explained that the FAA's "policy favoring arbitration" does not permit federal courts to devise special pro-arbitration procedural rules. Instead, the policy of the FAA is to make arbitration agreements just as enforceable as other contracts—not more so.

Going forward, parties seeking to enforce arbitration agreements should promptly move to compel arbitration, to avoid waiver or forfeiture. Likewise, litigants should be wary of relying on other judge-made procedural rules that elevate arbitration over litigation as a matter of policy.

No. 21-328

Opinion Date: 5/23/22

Vote: 9-0

Author: Kagan, J.

Lower Court: 8th Cir.

Morgan *teaches that ordinary procedural rules apply in arbitration cases, and holds that a party who litigates a dispute at length before moving to compel arbitration may waive its right to arbitrate.*

Southwest Airlines Co. v. *Saxon*

Arbitration – Transportation Worker Exemption

The FAA generally requires federal courts to enforce arbitration agreements. But it exempts employment contracts of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The plaintiff, a ramp supervisor for Southwest Airlines, relied on this "transportation worker exemption" in an attempt to invalidate her employment contract's arbitration provision and pursue a putative class action in federal court. Southwest moved to enforce the arbitration provision and dismiss the suit.

The Supreme Court unanimously agreed that the plaintiff falls within the exemption, because she is "directly involved in transporting goods across state or international borders." The Court rejected the plaintiff's argument that all employees of airlines or other major transportation providers fall within the exemption, but also rejected Southwest's narrower reading that only those workers who physically *accompany* goods across interstate borders qualify for the exemption. Instead, the Court reasoned that workers who load and unload goods from vehicles that travel in interstate commerce are covered by the transportation worker exemption, because they are intimately involved in the transportation (or commerce) of those goods. The Court therefore held that the arbitration provision in the plaintiff's employment contract was unenforceable.

Southwest Airlines exempts a moderate class of workers in transportation industries from the FAA, but makes clear that the question will turn on how closely a particular worker's job duties sit to the interstate commerce or transportation of goods or people. Thus, employers in a variety of industries, whether or not those industries are formally labeled transportation, may not be able to enforce arbitration agreements against workers who deal with goods or people that travel across state lines. Notably, however, the Court declined to address whether the exemption covers food delivery drivers and certain other gig economy workers.

No. 21-309

Opinion Date: 6/6/22

Vote: 8-0

Author: Thomas, J.

Lower Court: 7th Cir.

Southwest Airlines *holds that the FAA's "transportation worker exemption" covers the employment contracts of workers whose duties are closely involved with moving goods or people in interstate commerce.*

Viking River Cruises, Inc. v. *Moriana*

Arbitration – Preemption of State Law Compelling Classwide Arbitration

The California Private Attorneys General Act (PAGA) allows employees to sue their employers for violations of the state labor code. Through PAGA, an aggrieved employee brings her own labor law claims, as well as the claims of her fellow employees, in a single suit to enforce the labor laws.

In *Moriana*, the plaintiff sued her former employer, Viking River Cruises, under PAGA, alleging both her own claims and those of other employees. In her employment agreement, she had agreed to arbitrate any employment-related dispute and to waive her right to assert class, collective, or representative PAGA claims in arbitration. The state courts nonetheless declined to compel arbitration, relying on California precedent holding that employees cannot waive their rights to bring representative PAGA suits in court.

The Supreme Court agreed with Viking that the FAA preempts California's rule insofar as it prohibits subjecting *only* individual PAGA claims to arbitration. As the Court explained, an employee who agrees to arbitrate her *own* PAGA claims may be held to the terms of that agreement. On the other hand, an employer cannot be required to also arbitrate the claims of *other* employees without expressly agreeing to do so. And because PAGA does not allow employees to bring representative claims in court unless the employee brings her own claims as well, once an employee's own claims are committed to arbitration, that employee lacks statutory standing to pursue the representative claims in court.

After *Moriana*, California employers can effectively limit PAGA actions brought by employees subject to arbitration agreements. But as Justice Sotomayor noted in her concurrence, California may reinterpret or amend PAGA to allow employees who have agreed to individual arbitration to nevertheless bring representative claims in court.

No. 20-1573

Opinion Date: 6/15/22

Vote: 8-1

Author: Alito, J.

Lower Court: Cal. Ct. App.

Moriana *confirms that California employers may compel arbitration of claims by employees for violations of the state's labor code.*

ZF Automotive US, Inc. v. Luxshare, Ltd.

Arbitration – Discovery for Foreign Arbitral Proceedings

Under 28 U.S.C. § 1782, parties may go to federal court to obtain discovery "for use in a proceeding in a foreign or international tribunal." In *ZF Automotive* and a consolidated case, the Supreme Court considered whether certain international arbitration proceedings qualify as "foreign or international tribunal[s]," thus enabling the parties to invoke Section 1782 to seek discovery in the United States for use in those proceedings.

The Court considered two arbitral proceedings that arose in different contexts. The first, stemming out of a business dispute between two companies, took place before a private arbitration organization based in Germany as required by the companies' merger agreement. The second, involving an investor's expropriation claim against Lithuania, took place before an ad hoc arbitration panel constituted in accordance with a bilateral investment treaty between Russia and Lithuania. In both cases, federal district courts had issued Section 1782 discovery orders in conjunction with the foreign proceedings.

The Court unanimously held that Section 1782 did not authorize domestic discovery for use in either of the arbitration proceedings. The Court reasoned that "foreign or international tribunal" refers only to adjudicative bodies "that exercise governmental authority conferred by one or multiple nations." Applied here, the Court found that the arbitration between two companies before the private German arbitration organization plainly did not meet that definition. And although the treaty-based arbitration against Lithuania presented a closer question, the Court found that the ad hoc arbitration panel exercised no "governmental authority" and thus was likewise outside the scope of Section 1782.

ZF Automotive significantly curtails the availability of domestic discovery for foreign arbitral proceedings, and in doing so, harmonizes the discovery regimes for foreign and domestic arbitrations.

Nos. 21-401 and 21-518

Opinion Date: 6/13/22

Vote: 9-0

Author: Barrett, J.

Lower Courts: 2d Cir. and 6th Cir.

ZF Automotive *holds that a federal court cannot issue discovery orders in connection with private adjudicatory proceedings abroad unless the foreign adjudicatory body exercises some governmental authority.*

American Hospital Association v. *Becerra*

Administrative Law – Deference to Agency Interpretations

The Medicare statute authorizes the Department of Health and Human Services (HHS) to set reimbursement rates for some prescription drugs that hospitals provide to Medicare patients. The statute gives two options for how HHS can calculate those rates: (i) survey hospitals about their acquisition costs and set rates for "groups" of hospitals based on the survey results, or (ii) set a flat rate for all hospitals based on the price charged by manufacturers, as "calculated and adjusted" by HHS. In 2018 and 2019, HHS cut reimbursement rates for a particular group of hospitals participating in a separate program that allowed them to purchase drugs at reduced prices. But HHS did not conduct a survey under the first option described above. Hospitals challenged HHS's rate cut, arguing that HHS was required to set a flat rate for all hospitals unless it first conducted a survey of hospitals' acquisition costs.

The Supreme Court held that the 2018 and 2019 reimbursement rates were unlawful. The Court explained that the Medicare statute expressly allows HHS to vary rates among hospital groups only under the first statutory option, which requires HHS to survey hospitals. The Court rejected HHS's argument that it could also vary rates among hospital groups under the second option, based on its authority to "adjust" reimbursement rates.

American Hospital Association is perhaps most notable for what it did *not* say. Many commentators had predicted that the Court might overrule or narrow the longstanding but controversial doctrine of *Chevron* deference, which requires federal courts to defer to agencies' reasonable interpretations of ambiguities in the statutes they administer. The Court, however, did not even mention *Chevron*; it simply treated the statute as unambiguous. This may represent a narrowing of *Chevron* in practice: if the Court sees fewer ambiguities in statutes, it will defer to agencies less often.

No. 20-1114

Opinion Date: 6/15/22

Vote: 9-0

Author: Kavanaugh, J.

Lower Court: D.C. Cir.

American Hospital Association *holds that HHS may not reimburse hospitals at different Medicare rates without surveying those hospitals' costs. Contrary to some expectations, the decision does not mention* Chevron *deference, a longstanding but controversial doctrine of administrative law.*

National Federation of Independent Business v. *OSHA*

Administrative Law – Scope of Regulatory Authority

In 1970, Congress established the Occupational Safety and Health Administration (OSHA). OSHA has the authority to "ensure safe and healthful working conditions for workers by setting and enforcing standards." In September 2021, at President Biden's direction, the agency announced a rule requiring employers with 100 or more employees to ensure that their employees either received a COVID-19 vaccine, or would obtain weekly testing and wear a mask at work. A variety of states and businesses challenged OSHA's rule and asked the Supreme Court to stay it on an emergency basis.

The Court granted the stay request, holding that the challengers were likely to succeed in showing that the vaccine mandate exceeded OSHA's statutory authority. Relying on the "major questions" doctrine, the Court stated that Congress must speak clearly "when authorizing an agency to exercise powers of vast economic and political significance," such as the power to issue a vaccine mandate governing 84 million Americans. And the Court found that the mandate did not "plainly" fall within OSHA's authority to issue "mandatory *occupational* safety and health standards" because COVID-19 is not an "occupational" hazard specific to the workplace but rather is a "universal risk."

NFIB had a significant effect on the federal government's response to the COVID-19 pandemic because it prevented the vaccine mandate from going into effect nationwide. The Court's decision also made clear—as did *West Virginia* v. *EPA*, released later in the Term and discussed below—that the Court will carefully scrutinize agency action involving "major" economic and political issues.

No. 21A244 and 21A247

Opinion Date: 1/13/22

Vote: 6-3

Author: Per Curiam

Lower Court: 6th Cir.

NFIB *holds that the Occupational Health and Safety Administration lacks the authority to adopt a vaccine mandate for employers with 100 or more employees across the United States.*

West Virginia v. *EPA*

Administrative Law – Scope of Regulatory Authority

In 2015, the Environmental Protection Agency (EPA) adopted the Clean Power Plan to substantially reduce carbon pollution from coal-fired power plants. The Clean Power Plan required those plants to either reduce their own energy production; build or invest in natural gas, wind, or solar energy facilities; or purchase emissions credits under a cap-and-trade scheme. The agency estimated at the time that the rule would cause dozens of coal plants to close and would eliminate tens of thousands of jobs, as part of a broader effort to tackle climate change.

The EPA based its authority to adopt the Clean Power Plan on Section 111 of the Clean Air Act, which directs the agency to first determine the "best system of emission reduction" for different facilities and then to set emissions limits that reflect that best system. Even though Section 111 is largely concerned with new or modified facilities, the EPA invoked a rarely used provision of the statute to regulate *existing* facilities.

The Supreme Court held that the EPA lacked the authority to issue the Clean Power Plan. The Court began its analysis by invoking the "major questions" doctrine, under which courts "presume that Congress intends to make major policy decisions itself." Because of that presumption, an agency must point to "clear congressional authorization" before taking regulatory actions with sweeping economic or political consequences. Here, the Court found no such clear congressional directive in the ancillary provision the EPA relied upon in its effort to effectively transform the American energy sector.

Although *West Virginia* resolves a years-long debate about the EPA's authority to regulate greenhouse gas emissions from coal plants, its application of the major questions doctrine could extend well beyond this case. Parties challenging significant assertions of federal regulatory power may now rely on that doctrine to demand clear congressional authorization of economically significant agency action.

No. 20-1530

Opinion Date: 6/30/22

Vote: 6-3

Author: Roberts, C.J.

Lower Court: D.C. Cir.

West Virginia *holds that federal agencies may issue regulations with major "economic and political significance" only if they can show clear authorization from Congress for such action.*

City of Austin v. *Reagan National Advertising of Austin, LLC*

Constitutional Law – Commercial Advertising

The Supreme Court has held that laws targeting speech based on its communicative content must be reviewed under a stringent constitutional test. By contrast, speech restrictions that do not target particular content are subject to less demanding review. In *City of Austin*, the Supreme Court clarified what qualifies as a content-based speech restriction.

Like many municipalities, Austin, Texas restricts "off-premises" signs—signs that advertise services and products located on a different property than the sign itself. An Austin ordinance prohibits constructing any new off-premises signs and digitizing existing off-premises signs. By contrast, Austin permits digitizing "on-premises" signs that advertise goods and services located on the same property as the sign. Advertising companies challenged Austin's ordinance under the First Amendment. They argued that the ordinance was a content-based restriction because a government official would have to review a sign's content to know whether the ordinance applied to the sign.

The Supreme Court rejected the advertisers' theory. To determine whether a restriction is content-based, the Court explained, courts must look to whether the regulation discriminates based on the topic or idea expressed. Although a government official would have to read a sign's content to know whether the sign is covered, Austin's ordinance did not single out any particular message for disfavored treatment. The Court thus held that Austin's "neutral, location-based" speech restriction is not content-based.

City of Austin is most relevant for location-based speech restrictions like Austin's on-/off-premises sign ordinance. More generally, *City of Austin* makes clear that a restriction is not content-based just because it requires government officials to review the content of the speech.

No. 20-1029

Opinion Date: 4/21/22

Vote: 6-3

Author: Sotomayor, J.

Lower Court: 5th Cir.

Under City of Austin, *location-based speech restrictions that merely require government officials to review the content of the speech are not presumptively unconstitutional "content-based" speech restrictions.*

Cummings v. *Premier Rehab Keller, P.L.L.C.*

Civil Rights Litigation – Availability of Emotional Distress Damages

In *Cummings*, the Supreme Court considered whether a private plaintiff suing for discrimination under federal antidiscrimination laws such as the Rehabilitation Act and the Affordable Care Act (ACA) may recover emotional distress damages. The plaintiff, who is deaf and legally blind, sued for emotional distress damages after being denied a sign language interpreter when seeking physical therapy. The lower courts dismissed her suit after concluding that such damages are not available in private suits brought under either statute.

The Supreme Court agreed. As the Court explained, Congress passed both the Rehabilitation Act and the ACA pursuant to its authority under the Constitution's Spending Clause. Spending Clause legislation operates by consent: if entities choose to accept federal funding, they are on notice that they must comply with the statutes' antidiscrimination requirements. But because the Rehabilitation Act and the ACA do not specify the remedies available in a private antidiscrimination suit, federal-funding recipients have consented to be liable only for "*usual* contract remed[ies] in private suits."

Applying that analysis here, the Court concluded that emotional distress damages are not a "usual" contract remedy in private suits, and thus are not recoverable in an action under the Rehabilitation Act and the ACA. The Court acknowledged that emotional distress damages are *occasionally* available in certain types of private contract suits, but declined to hold that federal-funding recipients are on notice of those more fine-grained rules of contract law.

The Court's holding in *Cummings* extends to private suits under Title VI and Title IX, which Congress similarly passed pursuant to its Spending Clause powers. As a result, private plaintiffs bringing suit under any Spending Clause statutes may seek only the "usual" contract remedies, such as compensatory damages or an injunction.

No. 20-219

Opinion Date: 4/28/22

Vote: 6-3

Author: Roberts, C.J.

Lower Court: 5th Cir.

After Cummings, *emotional distress damages are not recoverable in private suits brought under the Rehabilitation Act, the Affordable Care Act, Title VI, or Title IX. Plaintiffs suing federal funds recipients under those statutes are limited to other damages and injunctions.*

Hughes v. *Northwestern University*

ERISA – Duty of Prudence in Investment Selection

Many employers offer defined-contribution retirement plans that allow employees to choose their investments from a menu of options. The Employee Retirement Income Security Act (ERISA) requires the administrators of those plans to exercise "care, skill, prudence, and diligence" when selecting the investments made available. In *Hughes*, the Supreme Court considered whether an ERISA plan administrator violates that "duty of prudence" by including more expensive investment options in a plan alongside cheaper options with identical benefits, even when employees are free to select the cheaper alternative.

Northwestern's ERISA plan included two identical mutual fund investments, except that one had higher cost "retail" fees and the other had lower cost "institutional" fees. Beneficiaries of the plan argued that it was imprudent for Northwestern to include the higher-fee option, even though the beneficiaries were not required to select it. In a unanimous opinion, the Supreme Court agreed. As the Court explained, "even in defined-contribution plans where participants choose their investments," plan administrators have an ongoing duty to "conduct a regular review" of available investments and to "remove any imprudent ones."

Following *Hughes*, plan administrators cannot simply "assemble a diverse menu of options" to avoid liability. They also must ensure that each option is a prudent investment. At the same time, the Court explained that lower courts should exercise some deference in assessing whether an investment option is prudent. Because administrators sometimes have to make "difficult tradeoffs," "courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise."

No. 19-1401

Opinion Date: 1/24/22

Vote: 9-0

Author: Sotomayor, J.

Lower Court: 7th Cir.

Hughes *clarifies that ERISA plan administrators violate their duty of prudence by offering a more expensive investment option alongside a cheaper one, even if the beneficiaries are free to choose the cheaper option.*

Cassirer v. *Thyssen-Bornemisza Collection Foundation*

Foreign Sovereign Immunities Act – Choice of Law

Under the Foreign Sovereign Immunities Act (FSIA) a foreign state and its instrumentalities are typically immune from suit in U.S. courts, unless a claim falls within one of the FSIA's limited exceptions. In *Cassirer*, the Supreme Court considered what substantive law applies when a foreign sovereign is *not* immune from suit.

Claude Cassirer brought suit against an instrumentality of the Kingdom of Spain to recover a Camille Pissarro painting that the Nazis had expropriated from his Jewish grandmother. The parties disputed whether Spanish or California property law applied to decide rightful ownership of the painting. In a suit involving a private party, state choice-of-law rules would typically determine the answer to that question. In *Cassirer*, the Court considered whether, under the FSIA, different choice-of-law rules apply when a foreign sovereign is involved.

In a unanimous opinion authored by Justice Kagan, the Supreme Court held that courts must apply the *same* choice-of-law rules in a dispute involving a foreign sovereign as would apply in a similar suit between private parties. The Court reasoned that, when enacting the FSIA, Congress intended to create a uniform body of law governing immunity from suit, but it did not intend to alter the substantive rules governing claims brought against sovereigns. Accordingly, under *Cassirer*, once a court satisfies itself that a foreign state is amenable to suit, the foreign state should be subject to the same liability rules as any private party.

Cassirer enhances the predictability of cases involving foreign sovereigns by clarifying the liability rules in those cases. Although foreign states enjoy immunity from many suits, once in court, they must play by the same rules as private parties.

No. 20-1566

Opinion Date: 4/21/22

Vote: 9-0

Author: Kagan, J.

Lower Court: 9th Cir.

Cassirer *holds that a foreign sovereign not immune from suit in federal court is subject to the same substantive liability rules as a private party.*

Unicolors, Inc. v. *H&M Hennes & Mauritz, L.P.*

Intellectual Property – Mistakes in Copyright Registration

To register a copyright, a copyright holder must file an application with the U.S. Copyright Office. Under the Copyright Act, inaccurate information on a registration application will not invalidate the registration, so long as the applicant did not have "knowledge that it was inaccurate." In *Unicolors*, the Supreme Court resolved an important question about the scope of that provision: does it apply only to factual mistakes, or does it also protect an applicant's misunderstanding of the law?

Unicolors registered a copyright in various fabric designs using a single application. When it sued H&M for infringing those designs, H&M argued that Unicolors' registration was invalid because Unicolors' application improperly sought registration for different works published at different times, thus rendering its application inaccurate. Although Unicolors said it was not aware of that legal requirement, the court of appeals held that Unicolors' knowledge of the law was irrelevant. Because Unicolors knew the relevant facts, the court concluded that it had the requisite "knowledge" that its application was inaccurate.

The Supreme Court reversed. The Court reasoned that the Copyright Act makes no distinction between legal and factual mistakes, so a mistake of either kind "can excuse an inaccuracy in a copyright registration." As the Court explained, an applicant will have "knowledge" that a statement is inaccurate whenever she has "actual awareness" of the inaccuracy or "willful blindness" as to its accuracy. Because Unicolors did not have "knowledge" that the law rendered its application's publication dates inaccurate, that mistake did not affect its registration.

To invalidate a copyright registration, defendants in infringement actions need to show both that the registration was inaccurate and that the applicant knew about the error or was willfully blind to it. After *Unicolors*, that burden is more demanding. Copyright owners can now defend inaccuracies in their registration by arguing that they did not know the law, even if they correctly understood the facts.

No. 20-915

Opinion Date: 2/24/22

Vote: 6-3

Author: Breyer, J.

Lower Court: 9th Cir.

Unicolors *makes it easier for copyright holders who made a mistake of law in their copyright registration to sue for infringement.*

Boechler, P.C. v. *Commissioner of Internal Revenue*

Tax – Tax Court Review of IRS Collection Due Process Hearings

The Internal Revenue Service (IRS) can seize taxpayer property to satisfy a tax debt. A taxpayer, in turn, can challenge such a seizure at a "collection due process hearing" before the IRS's Independent Office of Appeals. Under Section 6330(d)(1) of the Internal Revenue Code, a taxpayer unsatisfied with the outcome of that hearing has 30 days from the Office of Appeals' decision to petition the Tax Court for review.

A North Dakota law firm missed the deadline to seek review by one day. The Tax Court dismissed the firm's petition for lack of jurisdiction, reasoning that the firm's failure to meet the 30-day deadline deprived it of the power to review the Office of Appeals' decision. The court of appeals affirmed.

The Supreme Court unanimously reversed and held that the Tax Court has the authority to excuse a missed deadline and review an Office of Appeals decision in appropriate circumstances. The Supreme Court explained that it will not construe a procedural requirement like the 30-day deadline to be jurisdictional (and thus inexcusable) unless the statute clearly says so. The Court concluded that the Internal Revenue Code provision imposing the limit here could be interpreted in several different ways—not all of which would make the deadline jurisdictional—and thus does not provide such a clear statement. The Court then held that the 30-day deadline is subject to equitable tolling, meaning that the Tax Court can decide whether to use its equitable power to excuse petitions filed beyond the deadline.

Although *Boechler* confirmed that the Tax Court has the authority to excuse missed deadlines, taxpayers should still make every effort to meet the 30-day deadline to avoid uncertain litigation over whether equitable tolling is warranted. More broadly, *Boechler* continues the Court's trend over the last decade of declining to interpret statutory time limits as imposing jurisdictional limits unless the provision compels such interpretation.

No. 20-1472

Opinion Date: 4/21/22

Vote: 9-0

Author: Barrett, J.

Lower Court: 8th Cir.

Boechler *clarifies that the Tax Court has the authority to excuse a taxpayer's failure to meet the 30-day statutory deadline to petition for review of an IRS determination about a levy of property to fulfill a tax debt.*

S&C's Supreme Court and Appellate Practice

Led by former Acting Solicitor General of the United States Jeff Wall—who has argued more than 30 times before the U.S. Supreme Court—and drawing on the experience of 17 former U.S. Supreme Court clerks and more than 80 former federal circuit court clerks, S&C's Supreme Court and Appellate Practice adeptly handles challenging and high-profile appeals around the country. Our Supreme Court and Appellate lawyers collectively have significant experience before the Supreme Court and scores of other federal and state courts of appeals.

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Please contact any member of the Firm's Supreme Court and Appellate Practice with any questions about Supreme Court or other appellate matters.

Meet the Editors

Judson Littleton

Judd Littleton is a partner in S&C's Litigation Group and co-head of the Firm's Supreme Court and Appellate Practice. His diverse practice focuses on Supreme Court and appellate work, complex commercial litigation, and criminal defense and investigations. Prior to joining the Firm, Judd served as a trial attorney in the Civil Division of the U.S. Department of Justice, where he litigated cases involving a wide range of constitutional and statutory issues and received the Attorney General's Distinguished Service Award, the Department's second-highest award for employee performance. Judd also previously served as a Bristow Fellow in the Office of the Solicitor General at the U.S. Department of Justice, where he worked on numerous cases before the U.S. Supreme Court and federal courts of appeals. He clerked for Chief Justice John G. Roberts, Jr. of the U.S. Supreme Court and for Judge A. Raymond Randolph of the U.S. Court of Appeals for the D.C. Circuit. Judd is a member of the Edward Coke Appellate Inn of Court and the Supreme Court Historical Society. He was recognized by *The National Law Journal* as one of its 2019 D.C. Rising Stars.

Julia Malkina

Julia Malkina is a partner in S&C's Litigation Group and Supreme Court and Appellate Practice, as well as co-lead of the Firm's Securities Litigation Practice. She joined the Firm in 2015 after serving as a law clerk to Justices Sandra Day O'Connor (Ret.) and Stephen G. Breyer of the U.S. Supreme Court, a Bristow Fellow in the Office of the Solicitor General at the U.S. Department of Justice, and a law clerk to then-Judge Brett M. Kavanaugh of the U.S. Court of Appeals for the D.C. Circuit. Her practice comprises appellate court litigation, trial court litigation, and regulatory proceedings in a number of areas, including securities, commodities, and criminal law. She was named a 2022 Rising Star by *Law360* and a 2020 Rising Star by the *New York Law Journal* for her representations in precedent-setting cases across those areas. Julia also represents clients pro bono in criminal matters both at the trial court level and on appeal. She is a member of S&C's Women's Initiative Committee, which seeks to recruit, retain, and advance the Firm's women lawyers.

Morgan Ratner

Morgan Ratner is special counsel in S&C's Litigation Group and is a member of the Firm's Supreme Court and Appellate Practice. Prior to joining the Firm, Morgan served in the Office of the Solicitor General at the U.S. Department of Justice. During her tenure there, she argued eight Supreme Court cases involving areas of federal law such as securities regulation, bankruptcy, employment, intellectual property, criminal law, and elections law. While at the Solicitor General's Office, Morgan also filed over 150 Supreme Court briefs at the merits and certiorari stages and received a John Marshall Award, the Department of Justice's highest award offered to attorneys. Morgan clerked for Chief Justice John G. Roberts, Jr. of the U.S. Supreme Court and then-Judge Brett M. Kavanaugh of the U.S. Court of Appeals for the D.C. Circuit. She is a member of the Edward Coke Appellate Inn of Court and is a volunteer with Street Law, Inc. She was named a 2022 *Law360* Rising Star in the Appellate field.

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