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Recent Developments

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RECENT DEVELOPMENTS

RUTLEDGE V. PHARMACEUTICAL CARE MANAGEMENT ASS'N[1]

The United States Supreme Court upheld an Arkansas law regulating how pharmacies are reimbursed by pharmacy benefit managers. In *Rutledge v. Pharmaceutical Care Management Ass'n*, a unanimous Court decided that Arkansas Act 900, passed in 2015, was not pre-empted by the federal Employee Retirement Income Security Act of 1974 ("ERISA").

Act 900 ensures that rural and independent pharmacies are reimbursed by pharmacy benefit managers—the intermediaries between pharmacies and prescription drug plans—an amount equal to or higher than the price pharmacies pay to get their drugs. After the Act's passage in 2015, Pharmaceutical Care Management Association, a national trade organization representing the 11 largest pharmacy benefit managers in the country, filed suit in the Eastern District of Arkansas alleging the Act was pre-empted by ERISA. The District Court agreed, and the Eighth Circuit affirmed that decision. The Supreme Court reversed, holding that the Act was not pre-empted by ERISA because it "has neither an impermissible connection with nor reference to ERISA."

Justice Sotomayor wrote the opinion and explained that ERISA pre-empts state laws that govern a "central matter of plan administration" or that "interfere[] with nationally uniform plan administration." However, ERISA does not pre-empt state laws that "merely increase costs or alter incentives for ERISA plans without forcing plans to adopt any particular scheme of substantive coverage." Neither does it pre-empt state laws that act immediately and exclusively upon ERISA plans or "where the existence of ERISA plans is essential to the law's operation."

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[1] Rutledge v. Pharm. Care Mgmt. Ass'n, No. 18-540, 2020 WL 7250098 (U.S. Dec. 10, 2020).

Because the Court determined that Act 900 amounted only to indirect cost regulation with no impermissible connection or reference to ERISA, it upheld the law. Justice Thomas wrote a separate concurrence because he "continue[s] to doubt" the Court's ERISA pre-emption jurisprudence but nevertheless agreed that the Court properly applied those precedents.

ROMAN CATHOLIC DIOCESE OF BROOKLYN V. CUOMO[2]

In one of her first appearances in a Supreme Court decision, Justice Barrett provided the fifth vote in *Roman Catholic Diocese of Brooklyn v. Cuomo*, a 5-4 decision granting temporary injunctive relief to religious organizations in New York from strict COVID-19 restrictions imposed by Governor Cuomo. The Governor's executive order limited in-person attendance at religious services to 10 people for services in "red" zones and 25 people for services in "orange" zones, no matter the size of the facility or the protective measures taken. The Roman Catholic Diocese of Brooklyn and Agudath Israel of America applied for emergency relief, arguing that the restrictions in these zones violated the Free Exercise Clause of the First Amendment because the restrictions treated houses of worship worse than comparable secular facilities.

A majority of the Court issued a per curiam opinion ruling that the applicants were "clearly" entitled to relief pending appeal because they showed "that their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest." Specifically, the majority noted the discrepancy between restrictions for houses of worship and businesses categorized as "essential." For example, while a church or synagogue in a "red" zone could not admit more than 10 people, an acupuncture facility could admit as many people as it wished. The majority ruled that the restrictions were not "neutral" and were not likely "narrowly tailored" to survive strict scrutiny.

Justices Gorsuch and Kavanaugh wrote separate concurrences. Justice Gorsuch's lively concurrence lamented the

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[2] Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020).

strict restrictions imposed on religious services while hardware stores, liquor stores, bicycle repair shops, and lawyers (among other things) were considered "essential" under the executive order. Gorsuch also argued with the dissenting Justices, which would have denied the applications for various reasons. Chief Justice Roberts, dissenting, reasoned that injunctive relief was not warranted because Governor Cuomo had retracted the 10- and 25-person limits a few days before the Court's decision, relegating the applicants' facilities to the more favorable "yellow" zone restrictions. Justice Gorsuch argued that nothing prevented the Governor from reinstating the challenged restrictions, and "[t]o turn away religious leaders bringing meritorious claims just because the Governor decided to hit the 'off' switch in the shadow of our review would be, in my view, just another sacrifice of fundamental rights in the name of judicial modesty." Justice Breyer, dissenting, stressed that injunctive relief is an "extraordinary remedy" and that it was "far from clear" that the restrictions violated the Free Exercise Clause.

The Court's decision came after two prior COVID-19 decisions in which the Court, with the help of Justice Ginsburg, denied injunctive relief from similar (but less restrictive) limits imposed on religious services in California[3] and Nevada.[4] Justice Sotomayor, in her separate dissent, would have followed those decisions, arguing that this was an even "easier" case to defer to the judgment of health officials and executive authorities.

[3] S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020).
[4] Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020).

MYERS V. YAMATO KOGYO CO.[5] *and AMERICAN HONDA MOTOR, CO. V. WALTHER*[6]

In two recent cases, the Arkansas Supreme Court clarified that Arkansas courts should not defer to agency interpretations of statutes. In both cases, the justices were unanimous on the point,[7] declaring that "agency interpretations of statutes will be reviewed de novo."[8]

Myers involved the interpretation of the Arkansas "exclusive remedy statute" for purposes of determining whether the parent companies of a certain corporation were immune from a wrongful death action brought by the plaintiff after she already received workers' compensation following the work-related death of her husband. The Arkansas Worker's Compensation Commission sided with the parent companies, and the Court of Appeals affirmed that decision. The Supreme Court affirmed but took the opportunity to clarify the "confusion in prior cases regarding the standard of review for agency interpretations of a statute."

Justice Womack, writing for the majority, explained that some past cases have adopted a perplexing standard of review in which the courts decide issues of statutory interpretation de novo, but an agency's interpretation is highly persuasive and will not be overturned unless "clearly wrong." Citing separation of powers concerns, the Court decided to abandon the "clearly wrong" standard and adopt a purely "de novo" standard of review for agency interpretations. "After all, it is the province and duty of this Court to determine what a statute means." The Court further explained, however, that, in cases where ambiguity exists in the

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[5] Myers v. Yamato Kogyo Co., 2020 Ark. 135, 597 S.W.3d 613 (2020).

[6] Am. Honda Motor, Co. v. Walther, 2020 Ark. 349, 610 S.W.3d 633 (2020).

[7] Justice Hart wrote a lone dissent in *Myers* because she disagreed with the majority's interpretation of the statute, but she did not express any disagreement with the de novo standard of review adopted by the Court. The Court in *American Honda* was unanimous.

[8] *Myers*, 2020 Ark. 135, at 5, 597 S.W.3d at 617; *Am. Honda*, 2020 Ark. 349, at 5, 610 S.W.3d at 636.

statute's text, "the agency's interpretation will be one of our many tools used to provide guidance." This represents a significant departure from the federal courts' deferential standard under *Chevron*,[9] in which federal courts defer to an agency's reasonable interpretation of an ambiguous statute.[10]

American Honda involved the interpretation of the Arkansas Tax Procedure Act. The Pulaski County Circuit Court (without the benefit of the *Myers* ruling at the time) deferred to the Arkansas Department of Finance and Administration's ("DFA") interpretation of the Act. American Honda appealed and argued that, while the recent *Myers* case dealt with the interpretation of a workers' compensation law, the case decided more broadly that courts should not give deference to agency interpretations. The unanimous Supreme Court agreed and cited *Myers* for its clarification that "judicial review of the DFA's interpretation of the Tax Procedure Act is de novo."

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[9] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[10] *See id.* at 843-45.