

## CLIENT ALERT

### The Supreme Court Rejects "Specious, but Scary-Sounding, 'Jurisdictional' - 'Nonjurisdictional'" Distinctions in *City of Arlington v. FCC*

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In *City of Arlington, Texas v. Federal Communications Commission*, No. 11-1545, decided on May 20, 2013, the United States Supreme Court took up the question whether the *Chevron* doctrine applies to an agency's interpretation of its own statutory authority, also referred to as the agency's jurisdiction.

The petitioners in this case challenged the FCC's authority to interpret a provision of the Telecommunications Act of 1996 requiring local zoning authorities to act "within a reasonable period of time" on applications to site communications towers and antennas. 47 U.S.C. § 332(c)(7)(B)(ii). The FCC had issued a declaratory ruling interpreting "reasonable period" to mean 90 days for an application to place a new antenna on an existing tower, or 150 days for any other application. The cities of Arlington and San Antonio challenged that interpretation, contending that the agency lacked jurisdiction to impose deadlines on local government action.

In a curious 6-3 split, with Justice Scalia writing for a majority that included Justices Ginsburg, Sotomayor, and Kagan against a dissent authored by Chief Justice Roberts, the Court dispensed with distinctions between jurisdictional and nonjurisdictional questions of agency authority. "[J]udges should not waste their time in the mental acrobatics needed to decide whether an agency's interpretation of a statutory provision is 'jurisdictional' or 'nonjurisdictional,'" Justice Scalia wrote. "Once those labels are sheared away, it becomes clear that the question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not."

What emerges from the opinion is a strengthened *Chevron* doctrine that forecloses challenges to agency actions based on "[t]he false dichotomy between 'jurisdictional' and 'nonjurisdictional' agency interpretations," which Scalia characterizes as "no more than a bogeyman." He concludes that "[w]here Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow." In the majority's view, an agency's statutory constructions, whether jurisdictional in nature or not, must be evaluated through the lens of *Chevron*.

The decision was a great disappointment to those who, concerned with the growing breadth and practical unaccountability of the administrative state, hoped that the Court would side with the circuits that had

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refused to accord *Chevron* deference to agencies to decide the scope of their own authority. Though Scalia gently dismissed fears of leaving "the fox in charge of the hen house," the dissent articulated substantial constitutional concerns, shared by many in the regulated community. Surely it is the role of the Judiciary, before deferring to an agency's interpretation, to ask the prerequisite question whether Congress in fact intended the courts to give *Chevron* deference to a particular agency's determination that it is entitled to *Chevron* deference. In other words, before it may grant deference to an agency's interpretation of the law, a court must decide "whether Congress has actually delegated to the agency lawmaking power over the ambiguity in question." As the Chief Justice concluded, "We do not leave it to the agency to decide when it is in charge."

But after *City of Arlington*, that may no longer be true. Consider a case like *Northern Illinois Steel Supply Co. v. Secretary of Labor*, 294 F.3d 844 (7th Cir. 2002). There, the Seventh Circuit overturned the Mine Safety and Health Administration's exercise of jurisdiction over a supply company delivering steel to a mine. Refusing to defer to MSHA's conclusion that the steel company was a mine operator and therefore subject to the Federal Mine Safety and Health Act, the court reviewed the Act de novo and vacated for lack of jurisdiction an MSHA citation. In a future case with similar facts, a regulated entity may not be able to argue simply that the agency's statutory interpretation is wrong; it might instead have to make the more complex argument that the interpretation does not deserve *Chevron* deference because the statute is not ambiguous or, if it is ambiguous, the agency produced an impermissible interpretation of it.

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