NORTH DAKOTA FEDERAL COURT REVIEW

The Federal Court Review summarizes important decisions rendered by the United States Supreme Court, the Eighth Circuit Court of Appeals, and the United States District Court for the District of North Dakota. The purpose of the Federal Court Review is to indicate cases of interest to members of the North Dakota Bar. As a special project, Associate Editors assist in researching and writing the Federal Court Review.* The following topics are included in the Federal Court Review:

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CIVIL LAW – DEPARTMENT OF VETERANS AFFAIRS SERVICE-RELATED DISABILITY BENEFITS APPLICATION REQUIREMENTS AND STANDARD OF REVIEW FOR MIXED QUESTIONS OF LAW AND FACT

Bufkin v. Collins, 604 U.S. 369 (2025).

In *Bufkin v. Collins*, two United States military veteran petitioners, Joshua Bufkin and Norman Thornton ("Petitioners"), applied for disability benefits through the Department of Veterans Affairs (VA) and were dissatisfied with the VA's decision.[1] "Veterans who suffer from service-connected post-traumatic stress disorder (PTSD) are among those entitled to disability benefits."[2] The VA requires medical evidence confirming the condition's diagnosis and connection to the veteran's military service in applications for disability benefits.[3] Both Petitioners submitted medical evidence of PTSD diagnoses with their applications; however, the VA regional offices that fielded the applications concluded the evidence was insufficient to either award benefits completely (in Bufkin's case) or increase eligibility percentages (in Thornton's case).[4] Since Petitioners were dissatisfied with the resolution of their applications, they sought *de novo* review from the Board of Veterans' Appeals ("Board"), "an administrative body within the VA that renders final decisions for the agency," which affirmed the VA regional offices' determinations.[5]

The Petitioners appealed the Board's decisions to the United States Court of Appeals for Veterans Claims (Veterans Court).[6] Per 38 U.S.C. § 7261, the Veterans Court reviews legal issues under a *de novo* standard and factual issues under a clear error standard.[7] By the same statute, the Veterans Court must "take due account" of the VA's benefit-of-the-doubt rule, which "give[s] the benefit of the doubt to the [veteran]" whenever "there is an approximate balance" of evidence on a specific material issue.[8] The Veterans

1. 604 U.S. 369, 375, 377 (2025).
2. *Id.* at 372.
3. *Id.*
4. *See id.* at 375-76 (explaining that Bufkin was diagnosed with PTSD by a VA physician who believed the primary stressor was related to his personal relationship rather than military service); *id.* at 377-78 (explaining that Thornton was granted benefits for service-connected PTSD years prior, but symptoms revealed in the new VA medical examination did not appear to be connected).
5. *See id.* at 373-74, 377-78.
6. *Id.* at 378.
7. 38 U.S.C. § 7261(a); *see also Bufkin*, 604 U.S. at 380.
8. §§ 7261(b)(1), 5107(b).

Court found the Board's determinations regarding the Petitioners' applications were not clearly erroneous and, for that reason, upheld the decisions.[9]

Petitioners appealed to the Federal Circuit and argued "that the statutory command to 'take due account' of the VA's application of the benefit-of-the-doubt rule requires the Veterans Court to review the entire record *de novo* and decide for itself whether the evidence is in approximate balance."[10] The Federal Circuit rejected this argument, and the Court granted certiorari "to decide what it means to 'take due account' of the VA's application of the benefit-of-the-doubt rule" provided in 38 U.S.C. § 7261(b)(1).[11] Justice Clarence Thomas delivered the opinion of the Court.[12]

The Court's opinion was dedicated to determining what the appropriate standard of review should be for mixed questions of law and fact in veterans' benefits cases.[13] The Court started its analysis with a statement of the law at issue: "[§] 7261(b)(1) provides that in making the determinations under subsection (a), the Veterans Court shall take due account of the VA's application of the benefit-of-the-doubt rule."[14] The Court found that the plain language of the statute provided explicit standards in subsection (a), and that judicial review of benefit-of-the-doubt decisions should be reviewed according to those standards—clear error review for factual findings and *de novo* review for legal findings.[15]

Next, the Court determined which standard to apply by evaluating whether the challenge to the VA's application of the benefit-of-the-doubt rule was primarily a factual or a legal one.[16] The Petitioners argued that approximate-balance determinations are legal inquiries, subject to *de novo* review.[17] The Government disagreed and asserted that the determination would be subject to a clear error standard as factual findings.[18] The Court adopted the Government's understanding and further reasoned that "[t]he VA gives the benefit of the doubt to the veteran only after determining that the positive evidence and negative evidence on a material issue are in approximate

9. *See Bufkin*, 604 U.S. at 377-78.
10. *Id.* at 378.
11. *Id.* at 378 (quoting § 7261(b)(1)).
12. *Id.* at 371.
13. *See generally id.* at 379-83 (discussing the appropriate standard of review for challenges brought before the Veterans Court).
14. *Id.* at 379 (citation modified).
15. *Id.* (stating the applicable standard "will depend on whether a veteran raises a legal or factual objection").
16. *See id.*
17. *Id.* at 381.
18. *See id.* ("The Government counters that the determination is a factual finding, or at least a mixed question that is predominantly factual and reviewed for clear error.").

balance."[19] Working toward the conclusion that the approximate balance determination is primarily factual, the Court referenced prior case law which provided that "[t]he appropriate standard of review for a mixed question depends 'on whether answering it entails primarily legal or factual work.'"[20] Therefore, these determinations require application of the clear error standard found in subsection (a).[21]

Justices Ketanji Brown Jackson and Neil Gorsuch authored a dissenting opinion.[22] They argued that the majority was incorrect in its conclusions that the standards set forth in subsection (a) apply to challenges to the VA's application of the benefit-of-the-doubt rule and that an approximate-balance determination is primarily a factual one calling for a clear error standard of review.[23] The dissent contended that in ruling this way, the majority was implying "Congress meant nothing when it inserted subsection (b)(1)."[24] The dissent maintained that Congress intended the benefit-of-the-doubt rule to require that, when there is uncertainty in how to rule, the scales should be tipped in favor of the veteran as recognition of their service.[25]

The Court's decision in this case importantly provided what evidence is required for disability benefits applications through the VA and clarified the standards of review for mixed questions of law in veterans' benefits disputes.[26] Specifically, "[§] 7261(b)(1) does not establish a new standard of review for challenges to the VA's application of the benefit-of-the-doubt rule."[27] Rather, the standards incorporated by Congress under subsection (a) govern.[28] Additionally, the Court clarified that an approximate-balance determination is primarily a factual one requiring the clear error standard of review.[29]

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19. *Id.*
20. *Id.* at 382 (quoting U.S. Bank N.A. *ex rel.* CWCapital Asset Mgmt., LLC v. Village at Lakeridge, LLC, 583 U.S. 387, 396 (2018)).
21. *See id.* (reasoning that assigning weight to each piece of evidence and their respective levels of credibility under an approximate-balance determination "necessarily immerses the Board 'in case-specific factual issues'" (quoting *U.S. Bank N.A.*, 583 U.S. at 396)).
22. *See generally id.* at 387 (Jackson & Gorsuch, JJ., dissenting).
23. *See id.*
24. *Id.* at 389.
25. *See id.*
26. *See id.* at 382-83 (majority opinion).
27. *Id.* at 387 (citing 38 U.S.C. § 7261(b)(1)).
28. *See id.* (citing § 7261(a)).
29. *Id.* at 387-88 (citing § 7261(a)(4)).

ADMINISTRATIVE LAW – EIGHTH CIRCUIT VACATES AMENDMENT TO FEDERAL TRADE COMMISSION'S NEGATIVE OPTION RULE

Custom Communications, Inc. v. Federal Trade Commission, 142 F.4th 1060 (8th Cir. 2025).

For many American consumers, "continuing to pay for unwanted products or services" has become a reality when these consumers neglect to cancel their subscription.[30] "Negative option" programs take many forms, "but [they] generally share the key feature of a term or condition allowing sellers to interpret a customer's silence, or failure to take any affirmative action, as acceptance of an offer."[31] The Federal Trade Commission ("FTC" or "Commission") sought to regulate this practice in 1973, 2019, 2023, and 2024 by promulgating rules in accordance with the authority expressly authorized by statute.[32] In *Custom Communications, Inc. v. Federal Trade Commission*, the Eighth Circuit reviewed a challenge to an amendment issued by the FTC to C.F.R. § 425 ("Rule"), its rule regarding negative option plans.[33]

Section 5 of the FTC Act grants the Commission authority to "prevent . . . unfair or deceptive acts or practices in or affecting commerce."[34] "The Commission carries out this mandate through its own administrative proceedings, litigation in federal district courts, and rulemaking."[35] Section 18 of the FTC Act houses the Commission's formal rulemaking authority.[36] Under § 18, the FTC may promulgate rules defining unfair or deceptive practices, but only when it has reason to believe such practices are prevalent and when the

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30. Custom Commc'ns, Inc. v. FTC 142 F.4th 1060, 1064 (8th Cir. 2025) (per curiam).

31. *Id.*

32. *See id.* at 1064-67. *See generally id.* at 1064 ("[T]he [FTC] set out to modernize its original negative option rule, promulgated in 1973, which covered only one form of negative option plan [(the "1973 Rule")]. In 2023, the Commission proposed extending the scope of the 1973 Rule to cover 'all forms of negative option marketing in all media.' In October 2024, the FTC amended the 1973 Rule by a 3-2 vote, adding provisions that bar sellers from misrepresenting material facts and require disclosure of material terms, express consumer consent, and a simple cancellation mechanism." (first citing Regulations Pertaining to the Use of Negative Option Plans, 38 Fed. Reg. 4896 (Feb. 22, 1973) (to be codified at 16 C.F.R. pt. 425); and then citing Negative Option Rule, 88 Fed. Reg. 24716-01 (proposed Apr. 24, 2023) (to be codified at 16 C.F.R. pt. 425))); *id.* at 1066-67 (explaining FCT's modernization efforts beginning in 2019 (citing Rule Concerning the Use of Prenotification Negative Option Plans, 84 Fed. Reg. 52393 (Oct. 2, 2019) (to be codified at 16 C.F.R. pt. 425))).

33. *Id.* at 1064-65 (first citing Regulations Pertaining to the Use of Negative Option Plans, 38 Fed. Reg. 4896 (Feb. 22, 1973) (to be codified at 16 C.F.R. pt. 425); and then citing Negative Option Rule, 88 Fed. Reg. 24716-01 (proposed Apr. 24, 2023) (to be codified at 16 C.F.R. pt. 425)).

34. *Id.* at 1065 (omission in original) (quoting 15 U.S.C. § 45(a)).

35. *Id.*

36. *Id.*

rule defines them with specificity.[37] The statute also imposes procedural requirements beyond what is required by the agency for Administrative Procedure Act (APA) notice-and-comment rulemaking.[38] These procedures include publishing an advance notice of proposed rulemaking, issuing a notice of proposed rulemaking, allowing public comment, and preparing both the preliminary and final regulatory analyses evaluating the rule's benefits, costs, and reasonable alternatives.[39] However—and critical for the case at hand—"the preliminary and final regulatory analysis requirements *do not apply* to '*any amendment to a rule*' unless the FTC estimates that the amendment 'will have an annual effect on the national economy of $100,000,000 or more.'"[40]

Pursuant to this authority and procedural guidance, in April 2023, the FTC issued a notice of proposed rulemaking (the "NPRM") to expand its negative option rule across all media, citing the prevalence of deceptive practices.[41] The proposed amendments broadened the Rule's scope and introduced new requirements for disclosures, consent, and cancellation.[42] The FTC declined to prepare a preliminary regulatory analysis, asserting that the rule would not exceed the $100 million economic threshold and would impose minimal additional burdens on businesses.[43]

Despite the FTC's decision to forego the preliminary regulatory analysis, interested parties disputed material facts surrounding the costs of the proposed rule.[44] In January and February 2024, industry participants challenged the FTC's cost estimates before an Administrative Law Judge (ALJ).[45] The ALJ presiding over the hearings concluded that "such an estimate was clearly unrealistically low" and that the Rule would likely exceed the $100 million threshold and therefore require a preliminary regulatory analysis.[46] Despite

37. *Id.*

38. *Id.*

39. *See id.* at 1065-66 (citing 15 U.S.C. § 57a(b)(2)(A); then citing § 57a(b)(1)(A); then citing § 57a(b)(1)(B)-(C), (c); then citing § 57b-3(b)(1)(B)-(C); and then citing § 57b-3(b)(2)).

40. *Id.* at 1066 (emphasis added) (quoting § 57b-3(a)(1)(A); *see also id.* at 1069 (stating Petitioners contend that a preliminary regulatory analysis was required and thus the rule should be set aside under § 57b-3(c)(1)).

41. *Id.* at 1067 (citing Negative Option Rule, 88 Fed. Reg. 24716, 24716 (proposed Apr. 24, 2023) (to be codified at 16 C.F.R. pt. 245)) (noting that the commission also based its determination on "complaint data, studies, survey results, and law enforcement actions" (quoting Negative Option Rule, 88 Fed. Reg. at 24725)).

42. *Id.* (citing Negative Option Rule, 88 Fed. Reg. at 24726-30).

43. *Id.* at 1067-68 (emphasis added) (citing Negative Option Rule, 88 Fed. Reg. at 24731).

44. *See id.*

45. *Id.* at 1068.

46. *Id.* (citation modified) ("[T]he ALJ overserved that unless each business used fewer than twenty-three hours of professional services at the lowest end of the spectrum of estimated hourly rates, the Rule's compliance cost would exceed $100 million.").

the ALJ's decision, however, the FTC *did not* produce a preliminary regulatory analysis, yet it finalized the Rule in November 2024.[47]

The final Rule, adopted by a 3-2 vote, imposed new requirements "related to any form of negative option program in the media."[48] The final amended Rule issued by the Commission comprised four major changes.

> First, the Rule bars sellers from misrepresenting any material fact, including but not limited to cost, negative option feature terms, and other information about the underlying good or service. Second, the Rule requires clear and conspicuous disclosure, immediately adjacent to the means of recording the consumer's consent to the recurring subscription, of all material terms, regardless of whether those terms directly relate to the Negative Option Feature. Third, the Rule requires sellers to obtain the consumer's unambiguously affirmative consent to the Negative Option Feature separately from any other portion of the transaction. Fourth, the Rule introduces an equal dignities requirement for cancellation of negative option contracts. Sellers must provide a simple mechanism for cancellation that allows consumers to immediately stop all recurring charges and is at least as easy to use as the mechanism the consumer used to consent to the subscription initially.[49]

Taking the ALJ's decision into account, the Commission then "issued a final regulatory analysis in conjunction with the final Rule as required by § 22 of the FTC Act."[50] Thereafter, the amended Rule was challenged by industry groups and individual businesses ("Petitioners"), and the consolidated petitions were ultimately assigned to the Eighth Circuit for review.[51]

The Eighth Circuit considered whether the FTC was required to produce a preliminary regulatory analysis, whether failure to provide a preliminary regulatory analysis if one was required would so constitute harmless error, and whether vacatur of the FTC's amended rule is the appropriate remedy.[52] The court noted its authority under the FTC Act and the APA to set aside agency action that is arbitrary, capricious, or procedurally deficient, and reviewed the FTC's procedural compliance *de novo*.[53] The court then turned to

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47. *Id.*

48. *Id.* (quoting 16 C.F.R. § 425.1 (2024)).

49. *Id.* (citation modified).

50. *Id.* at 1068-69 (first citing 15 U.S.C. § 57b-3(b)(2); and then citing Negative Option Rule, 89 Fed. Reg. 90476, 90517-34 (Nov. 15, 2024) (to be codified at 16 C.F.R. pt 425)).

51. *See id.* at 1065, 1069 (citing 28 U.S.C. § 2112(a)).

52. *See id.* at 1070-74.

53. *Id.* at 1070 (first citing 15 U.S.C. § 57a(e)(3); then citing 5 U.S.C. § 706(2)(A)-(D); and then citing Citizens Telecomms. Co. of Minn. v. FCC, 901 F.3d 991, 1001 (8th Cir. 2018)).

the first issue of Petitioners' procedural challenge relating to the Commission's decision to forgo a preliminary regulatory analysis.[54]

The court held that the FTC was required to conduct a preliminary regulatory analysis, despite the FTC's initial economic estimates, because of the ALJ's finding during the informal hearing.[55] The court began by pointing out that the Commission was aware of the ALJ's findings and proceeded anyway to issue a final regulatory analysis and the final rule.[56] The court then examined the plain language of § 22 of the FTC Act that states, "[i]n any case in which the Commission publishes a notice of proposed rulemaking, the Commission shall issue a preliminary regulatory analysis relating to the proposed rule involved," provided that the annual estimated economic impact is less than $100 million.[57] The court acknowledged that § 22 of the FTC Act limits judicial review by precluding the reviewing court from scrutinizing the specifics of the preliminary regulatory analysis; however, an exception exists when the Commission has "failed entirely" to prepare a regulatory analysis.[58]

Given the exception to § 22, the Commission contended that "nothing in the FTC Act requires a preliminary regulatory analysis at that late stage of rulemaking."[59] Relying on the plain language of § 22, the court rejected that argument, emphasizing that the statute mandates a preliminary analysis "in any case" where the $100 million threshold is met.[60] The court also noted that after the ALJ made the appropriate findings at the informal hearing, "the Commission could have reissued the NPRM with the required preliminary analysis."[61]

The court further stated that this provision suggests that a preliminary analysis would still be required even after the NPRM because without it, the Commission cannot provide any responses to comments on its earlier analysis in the final regulatory analysis.[62] Thus, if no preliminary regulatory analysis is conducted, it would be impossible for interested parties to submit

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54. *See id.*

55. *See id.* at 1070-72.

56. *Id.* at 1070.

57. *Id.* (alteration in original) (first citing 15 U.S.C. § 57b-3(b)(1); and then citing § 57b-3(a)(1)(A)).

58. *Id.* at 1070-71 (quoting § 57b-3(c)(1)).

59. *Id.* at 1071.

60. *Id.* (quoting § 57b-3(b)(1)).

61. *See id.* ("It is not uncommon for administrative agencies, including the FTC, to issue supplemental notices of proposed rulemaking as the scope of a proposed rule changes in response to comments or to ensure statutory compliance." (first citing Business Opportunity Rule, 76 Fed. Reg. 76816, 76818-19 (Dec. 8, 2011) (to be codified at 16 C.F.R. pt. 437); and then citing Regulations Under the Fur Products Labeling Act, 79 Fed. Reg. 30445, 30447 (May 28, 2014) (to be codified at 16 C.F.R. pt. 301))).

62. *Id.* (rejecting the Commission's argument that § 22 of the FTC Act only applies to the public comment period).

comments, "in response to the preliminary regulatory analysis."[63] Therefore, the court concluded that § 22 required the Commission to issue a preliminary regulatory analysis after the ALJ found that the Rule would exceed the $100 million threshold, despite the Commission's initial estimates.[64] The Commission thus exceeded the bounds of its statutory authority by adopting an interpretation that would allow it to "sidestep" a statutorily mandated procedure.[65]

On harmless error, the Commission argued that even if any procedural error was committed by not preparing the preliminary regulatory analysis, such error was harmless.[66] The court responded by noting that § 18 of the FTC Act incorporates APA § 706 into the Act which instructs reviewing courts to take "due account of the rule of prejudicial error."[67] The court explained that "the burden of showing that an error is harmful normally falls upon the party attacking the agency's determination," and in this case, Petitioners met that burden.[68]

Petitioners claimed to have suffered prejudice because the Commission failed to provide a list of reasonable alternatives to the proposed rule.[69] In addition, Petitioners argued that the Commission also failed to consider the received comments detailing less burdensome alternatives that potentially could provide comparable benefits.[70] The Commission responded by stating that the opportunity was given to Petitioners during notice-and-comment and also during informal hearings before an ALJ.[71] The court rejected this argument and sided with the Petitioners that "lost a notable opportunity to dissuade the FTC from adopting the Rule as proposed in the NPRM."[72] That lost opportunity is prejudicial under APA procedures.[73] The court highlighted that Petitioners "do not have a high burden in demonstrating prejudice in notice-and-comment cases. In general, an utter failure to comply with notice

63. *See id.* (citations omitted).
64. *See id.* at 1072.
65. *See id.*
66. *Id.*
67. *See id.* (citation modified).
68. *Id.* (citation modified).
69. *Id.* ("When required, a preliminary regulatory analysis must include a description of reasonable alternatives to the proposed rule, a cost-benefit analysis of each alternative, and an assessment of the effectiveness of the proposed rule and each alternative in achieving the Commission's stated objectives in promulgating the rule." (citing 15 U.S.C. § 57b-3(b))).
70. *Id.* ("Petitioners could have attempted to show the Commission that their industries do not engage in the allegedly prevalent unfair and deceptive practices the Rule sought to root out.").
71. *Id.* ("And during the informal hearing process before the ALJ, interested parties submitted their own briefs and expert reports addressing the Rule's costs and benefits, which the Commission considered in promulgating the final Rule.").
72. *Id.* at 1073.
73. *See id.* (citing Citizens Telecomms. Co. of Minn. v. FCC, 901 F.3d 991, 1006 (8th Cir. 2018)).

and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure."[74]

The court continued by parsing out the Commission's argument that alternatives were discussed and taken into consideration. Namely, the court explained that the NPRM discussion of "significant alternatives" only pertained to "consent requirements (additional consent for free trials) and reminder requirements (narrowing the scope of product types requiring reminders)."[75] "Neither the informal hearing nor final regulatory analysis" gave the Petitioners a chance to engage with the Commission in the cost-benefit analysis nor were Petitioners given an opportunity to convince the FTC to change course.[76] Furthermore, the court was not persuaded by the Commission's discussion of alternatives in the final regulatory analysis, calling the Commission's discussion of alternatives "perfunctory."[77] Despite the court characterizing the Commission's justification as "perfunctory," the court did not find that the Commission acted in bad faith or with the express purpose of "dodg[ing] . . . APA procedures" by forgoing the preliminary regulatory analysis requirement of § 22 of the FTC Act.[78] However, Petitioners have addressed and raised "enough uncertainty whether their comments would have had some effect if they had been considered, especially in the context of a closely divided Commission vote that elicited a lengthy dissenting statement."[79] Due to this rulemaking deficiency by the Commission, the court held that Petitioners had met their burden of demonstrating prejudicial error.[80]

Finally, the court held that vacatur of the Commission's Rule in its entirety was the appropriate remedy. Applying APA principles, it found the procedural deficiency serious, the prejudice substantial, and the scope of the rule too broad for partial relief to be workable.[81] Therefore, despite denouncing the practice of negative option marketing, the court granted the petitions for review and vacated the amended Rule.[82]

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74. *Id.* (citation omitted).
75. *Id.* (quoting Negative Option Rule, 88 Fed. Reg. 24716, 24732-33 (proposed Apr. 24, 2023) (to be codified at 16 C.F.R. pt. 425)).
76. *Id.*
77. *Id.*
78. *Id.* (citation modified).
79. *Id.* (citation modified).
80. *See id.* at 1073-74.
81. *See id.* at 1074-75.
82. *Id.* at 1075.

CRIMINAL LAW – THE USE OF PHYSICAL FORCE UNDER 18 U.S.C. § 924(C)

Delligatti v. United States, 604 U.S. 423 (2025).

In *Delligatti v. United States*, the Supreme Court of the United States explored the outer boundaries of the "use of physical force" when applied in the context of omissions rather than actions.[83] Referencing its decision in *United States v. Castleman*, where the Court held "the knowing or intentional causation of bodily injury necessarily involves the use of physical force," the Court was presented with two questions in *Delligatti*.[84] Namely, the Court considered whether the principle announced in *Castleman* applies to 18 U.S.C. § 924(c)(3)(A) and, if so, whether the principle in *Castleman* applies "in cases where an offender causes bodily injury by omission rather than action."[85] The Court answered both inquiries in the affirmative.[86]

In 2014, defendant Salvatore Delligatti, a member of one of "New York Mafia's so-called Five Families," orchestrated a failed murder plot against a suspected informant.[87] He was convicted of second-degree murder under New York law, which served as the predicate for a violent-crimes-in-aid-of-racketeering (VICAR) offense, and sentenced to twenty-five years' imprisonment.[88]

Delligatti appealed to the United States Court of Appeals for the Second Circuit, arguing that because homicide in New York can be committed by omission—a failure to perform a legal duty—it does not necessarily involve the "use of force."[89] "While Delligatti's appeal was pending, the Second Circuit" heard and rejected a similar position in *United States v. Scott* in 2021.[90] In *Scott*, the Second Circuit relied on *Castleman* to hold that the "knowing or intentional causation of bodily injury *necessarily* involves the use of physical force, even when the defendant causes harm by omission."[91] When

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83. 604 U.S. 423, 425-26 (2025).

84. *Id.* at 425 (quoting United States v. Castleman, 572 U.S. 157, 169 (2014)).

85. *Id.* at 425-26; 18 U.S.C. § 924(c)(3)(A) ("For purposes of this subsection the term 'crime of violence' means an offense that is a felony and has an element the use, attempted use, or threatened use of physical force against the person or property of another . . . .").

86. *Delligatti*, 604 U.S. at 426.

87. *Id.* (stating Delligatti "is an associate of the Genovese crime family").

88. *Id.* at 426-27 (explaining that the district court's denial held "that there can be no serious argument that VICAR attempted murder is not a crime of violence" (citation modified)).

89. *Id.* at 427-28 (providing an example that "a parent who intentionally causes his child's death by withholding food or medical care commits second-degree murder under New York law" (citing People v. Best, 609 N.Y.S.2d 478, 479 (App. Div. 1994), *aff'd*, 648 N.E.2d 782 (N.Y. 1995))).

90. *Id.* at 428 (citing United States v. Scott, 990 F.3d 94 (2d Cir. 2021) (en banc)).

91. *Id.* (internal quotations omitted) (quoting *Scott*, 990 F.3d at 111, 114).

Delligatti's appeal was heard by the Second Circuit, the court applied *Scott* to find that "New York attempted second-degree murder—and, by extension, a VICAR offense predicated on it—is a crime of violence because it necessarily involves at least the attempted use of force."[92]

The Supreme Court "granted certiorari to decide whether an individual who knowingly or intentionally causes bodily injury or death by failing to take action uses physical force within the meaning of the elements clause."[93] To make this determination, the Court applied a "categorical approach," which required it to consider "whether the offense in question 'always' involves the use, attempted use, or threatened use of force."[94]

Delligatti contended that the extension of *Castleman*'s logic cannot square with § 924(c)'s violent force requirement because practically any amount of force would qualify as an injury if the victim is sensitive enough.[95] Put differently, Delligatti "argues there cannot be an 'automatic connection' between injury and the *violent* force § 924(c) requires because even a small degree of force might injure an 'eggshell' victim."[96] The Supreme Court rejected this argument and affirmed the Second Circuit's holding that causing bodily harm by omission requires the use of force.[97] The Court extended the logic in *Castleman* by stating, "the use of physical force in § 924(c) encompasses the knowing or intentional causation of bodily harm. There is no exception to this principle when an offender causes bodily injury by omission rather than affirmative act."[98] The Court explained that even though in *Castleman* the use of force was "battery-level" force and the use of force in the case at hand is "violent" force, the fact that any force may be applied indirectly makes the distinction between the two types of force immaterial.[99]

To be sure of this, the Court referenced Justice Antonin Scalia's concurring opinion in *Castleman* and the majority opinion of *Stokeling v. United States*, which held that "violent force encompasses the force required for common-law robbery which is the quintessential [Armed Career Criminal Act]-predicate crime."[100] The Court also drew from an admission made in Delligatti's brief to bolster its application of *Castleman* to the statute at

92. *Id.* (citation omitted).

93. *Id.*

94. *Id.* (citing United States v. Taylor, 596 U.S. 845, 850 (2022)).

95. *See id.* at 432.

96. *Id.* (quoting Brief for the Petitioner, Delligatti v. United States, 604 U.S. 423 (2025) (No. 23-825), 2024 WL 3914120, at *37-38).

97. *See id.* at 436, 439.

98. *Id.* at 429 (citation modified).

99. *Id.* at 430.

100. *Id.* at 431 (internal quotation omitted) (first citing United States v. Castleman, 572 U.S. 157, 175 (2014) (Scalia, J., concurring in part and concurring in the judgment); and then citing Stokeling v. United States, 586 U.S. 73, 80 (2019)).

issue.[101] Markedly, "Delligatti also concedes that it is possible to use violent force indirectly, as when a person tricks another into eating food that has aged to the point of becoming toxic."[102] The Court concluded, "the knowing or intentional causation of bodily injury necessarily involves the use of physical force under § 924(c) just as it d[id in *Castleman*] under § 922(g)(9)."[103]

Delligatti insisted that New York second-degree murder is beyond the reach of *Castleman* because "a person can commit the offense through omission of a legal duty."[104] Moreover, Delligatti contends "the law may *deem* the offender the cause of the victim's death through 'legal fiction,' but that fiction is not enough to make the person the 'actual cause.'"[105] The Court swiftly dismissed a portion of this argument by plainly stating that "*Castleman*'s logic forecloses Delligatti's challenge."[106] The Court explained that "[u]nder New York law, second-degree murder requires proof that the defendant intentionally 'cause[d] the death of another person.'"[107] Thus, the Court reasoned "second-degree murder in New York—and, by extension, Delligatti's VICAR offense premised on it—is a crime of violence under § 924(c)'s elements clause."[108] The Court then turned to the remainder of Delligatti's argument, and again the Court quickly disposed of Delligatti's "actual cause" contention.[109] Namely, the Court iterated, "we have explained that the test for actual causality is whether the victim's death would not have occurred in the absence—that is, but for—the defendant's conduct."[110] The Court illustrated this point with an example:

> [w]hen a young child starves to death after his parents refuse to give him food, that harm would not have occurred but for the parents' choice. Both in the eyes of the law and as a practical matter, the parents' conduct is no less a cause of the child's death than if the parents had poisoned him.[111]

In the alternative, Delligatti argued that *Castleman*'s "rule is unsound as applied to omissions [because a]n offender who causes harm by omission . . .

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101. *Id.* at 432-33 (citing Brief for the Petitioner, *supra* note 96, at *7).
102. *Id.* (citation modified).
103. *Id.* at 433 (citation modified).
104. *Id.* (citations omitted).
105. *Id.* (citing Reply Brief for the Petitioner, Delligatti v. United States, 604 U.S. 423 (2025) (No. 23-825), 2024 WL 4665529, at *7).
106. *Id.*
107. *Id.* (second alteration in original) (quoting N.Y. PENAL LAW § 125.25(1) (2024)).
108. *Id.* (citing 18 U.S.C. § 924(c)) ("And, it should go without saying, intentionally causing death counts as deliberately causing injury.").
109. *See id.*
110. *Id.* (citation modified).
111. *Id.*

does not make 'use' of physical force 'against the person . . . of another."[112] The Court rejected the former part of the argument and called upon two illustrations to reinforce their position that "[i]t is perfectly natural to say that a person makes 'use' of something by deliberate inaction."[113]

> A car owner, for example, can "use" the rain to wash his vehicle simply by leaving it parked on the street. And, a fugitive can "use" the cover of darkness to hide by lying still at night. In the same way, a mother who purposely kills her child by declining to intervene when the child finds bleach and starts drinking it makes "use" of the bleach's poisonous properties to accomplish her unlawful end. And, a husband who deliberately abandons his wife to die in the cold "use[s] th[e] forces" of "the elements" to cause her death.[114]

The Court then rejected the latter half of the Delligatti's "argument that the phrase 'against another' excludes crimes of omission."[115] The Court explained that "[a]t most, that phrase requires that another person be 'the conscious object' of the force the offender uses."[116] Essentially, the phrase "'against another' specifies the required object of the force . . . , and possibly also the *mens rea* with which the object must be targeted."[117] The Court explained, "[w]henever an offender deliberately causes bodily harm by omission, he necessarily makes another person the conscious object of physical force."[118] Expanding upon the example above, the Court illustrated:

> [i]n the bleach example, the mother's refusal to take away the bleach is not an accident, but rather a deliberate effort to make the child suffer the bleach's poisonous effects. The mother thus uses force *against her child*. It would be passing strange to say the mother used force to cause the child's death, but did not use force *against* anyone.[119]

After rejecting Delligatti's argument, the Court also turned to the context to confirm "that crimes of omission fall within the elements clause" of § 924(c).[120] The Court explained that "[i]ntentional murder is *the* prototypical

112. *Id.* at 433-34 (second omission in original) (citing § 924(c)(3)(A)).
113. *Id.* at 434.
114. *Id.* (alterations in original) (quoting Territory v. Manton, 7 Mont. 162, 168, 14 P. 637, 638-639 (1887)); *see also id.* ("Delligatti's proposed action-inaction distinction has no basis in ordinary meaning.").
115. *Id.*
116. *Id.* (quoting Borden v. United States, 593 U.S. 420, 430 (2021) (plurality opinion)).
117. *Id.* (citing *Borden*, 593 U.S. at 430-34).
118. *Id.* at 434-35.
119. *Id.* at 435.
120. *Id.*

'crime of violence,' and it has long been understood to incorporate liability for both act and omission."[121] Further, "murder was not the only violent crime that States recognized could arise from omission. Knowingly causing nonlethal injury to one's child by neglect, for example, could amount to common-law battery."[122] The Court concluded by explaining that it "cannot adopt Delligatti's interpretation without excluding traditional and widely accepted definitions of murder and other prototypical violent crimes from the elements clause's reach."[123] "The elements clause is thus the natural home for murder and other prototypical violent crimes, and the unreasonableness of excluding such crimes from the elements clause is an 'additional reason to read the statute as we do.'"[124]

Ultimately, the United States Supreme Court affirmed the Second Circuit's decision and held that "[t]he knowing or intentional causation of injury or death, whether by act or omission, necessarily involves the use of physical force against another person," clarifying the meaning of 18 U.S.C. § 924(c).[125]

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121. *Id.* ("At the time of the elements clause's enactment, it was widely accepted that one could commit murder by refusing to perform a legal duty, like feeding one's child." (citations omitted)).

122. *Id.* at 436 (citations omitted).

123. *Id.*

124. *Id.* at 436-37 (quoting United States v. Castleman, 572 U.S. 157, 167 (2014)).

125. *Id.* at 439.

PROPERTY LAW – DETERMINING RIGHTS OVER MINERAL ROYALTIES

McKenzie County v. United States, 131 F.4th 877 (8th Cir. 2025).

In *McKenzie County v. United States*, plaintiff McKenzie County ("the County"), located in western North Dakota, sued the United States, claiming it had ownership over mineral royalties that were the subject of prior litigation.[126] The United States Court of Appeals for the Eighth Circuit held in favor of the United States.[127] This case is unique in that it deals with disputes over various tracts of land involved in nearly 100 years of litigation stemming from legislative acts of the 1930s enacted in response to various environmental tragedies and the economic turmoil stemming from the Great Depression.[128] In this same time period, through proceedings under the Condemnation Act and the Declaration of Taking Act, the United States acquired tracts of land, some of which were located in the County.[129] While the district court in the 1930s awarded the United States "title to the [tracts of] lands 'in full fee simple'" in these proceedings ("1930's Condemnation Judgments"), it did so with the exception that a 6.25% mineral royalty interest be given to the County.[130]

Over the next four decades, the Bureau of Land Management (BLM), on behalf of the United States, complied with the royalty interests awarded in the 1930's Condemnation Judgments.[131] In 1985, the BLM notified the County that it would no longer recognize the County's royalty interests due to a "law [that] prohibit[ed] the County from reserving interests in lands it had acquired through tax forfeiture proceedings."[132] In 1987, the County sued

126. 131 F.4th 877, 881 (8th Cir. 2025), *cert. denied*, 146 S. Ct. 357 (2025).

127. *See id.*

128. *See id.* at 882-83 ("Congress responded to the crisis with a series of emergency relief bills authorizing the President to acquire and restore these 'submarginal' lands. Eventually, Congress enacted the Bankhead-Jones Farm Tenant Act, which, like the earlier acts, codified the authority to 'acquire by purchase, gift, or devise, or by transfer from any State, Territory, or political subdivision, any submarginal land and land not primarily suited for cultivation. The Act also permitted the Secretary of Agriculture to acquire these lands 'subject to any reservations, outstanding estates, interests, easements, or other encumbrances which would not interfere' with the Act's Purposes." (first citing National Industrial Recovery Act, Pub. L. No. 73-67, §§ 201-03, 48 Stat. 195, 200-03 (1933); then citing Emergency Relief Appropriation Act of 1935, Pub. L. No. 74-11, 49 Stat. 115; then citing Emergency Relief Appropriation Act of 1936, Pub. L. No. 74-739, 49 Stat. 1608; and then citing Bankhead-Jones Farm Tenant Act, Pub. L. No. 75-210, § 32(a), 50 Stat. 522, 525-26 (repealed 1962))).

129. *Id.* (first citing Condemnation Act, Pub. L. No. 50-728, 25 Stat. 357 (codified as amended at 40 U.S.C. § 3113); and then citing Declaration of Taking Act, Pub. L. No. 71-736, 46 Stat. 1421 (codified as amended at 40 U.S.C. §§ 3114-16, 3118)).

130. *Id.* at 883.

131. *Id.*

132. *Id.*

in United States District Court for the District of North Dakota over the 6.25% royalty interest and sought relief in the form of "quiet title in the name of the County, to the 6[.25]% royalty under the subject lands."[133] "[T]he district court certified questions of law to the North Dakota Supreme Court," where the court held that the County was not precluded from reacquiring "title to mineral interests through operation of a condemnation judgment."[134] "[B]ased on the North Dakota Supreme Court's opinion and answers to the certified questions," the County moved for summary judgment.[135] In 1991, the district court granted the motion "quieting title in the County to the disputed minerals" and reestablishing that the "County is the owner of the disputed minerals (6[.25]% royalty)" ("1991 Judgment").[136]

Soon thereafter, the County grew suspicious of the "BLM's compliance with the 1991 Judgment" and began an investigation into the BLM's actions, which would span the next several years.[137] While the County received communications from the BLM in 2004 indicating that the BLM did not recognize royalty interests on all lands under the 1930's Condemnation Judgments, the County did not sue the United States until 2016.[138] At that time, the United States moved to dismiss the County's Quiet Title Act claim over the disputed mineral royalties due to the County's greater than twelve-year lapse in bringing suit, which exceeded the statute of limitations to bring such a claim.[139] The United States' motion to dismiss was denied.[140] "The County then filed its second amended complaint . . . , which included an additional claim for relief" under "the All Writs Act and the Federal Rules of Civil Procedure 70(c) . . . to enforce the 1991 Judgment or the 1930's Condemnation Judgments which, in [the County's] view, included the royalty interest underlying" the land in dispute.[141] The district court found in favor of the County and granted its motion for summary judgment.[142] The United States appealed to the Eighth Circuit, arguing that the County should only be able to "proceed, if at all, under the Quiet Title Act because the All Writs Act does not provide a remedy; that the County's Quiet Title Act claim is untimely;

133. *Id.* at 884 (citation modified).
134. *See id.* (first citing McKenzie Cnty. v. Hodel, 467 N.W.2d 701, 705 (N.D. 1991); and then citing De Shaw v. McKenzie Cnty., 114 N.W.2d 263 (N.D. 1962)).
135. *Id.*
136. *Id.* at 884-85 (citation modified).
137. *See id.* at 885.
138. *See id.*
139. *Id.*
140. *Id.*
141. *Id.* at 886.
142. *Id.*

and that . . . the 1930's Condemnation Judgments did not convey a royalty interest to the County in public domain minerals."[143]

The court began its analysis of the County's argument that the All Writs Act governs over the Quiet Title Act because the former provides a form of relief where the Court must use the Act to enforce the 1930's Condemnation Judgments.[144] The United States argued that the County was incorrect in its assessment that the All Writs Act governs the issue because "the Quiet Title Act 'specifically addresses' disputes with the United States over title to real property."[145] The court agreed with the United States' position.[146]

To reach its conclusion, the court outlined two possible applications the All Writs Act to this case: "through enforcing the 1930's Condemnation Judgment or through enforcing the 1991 Judgment."[147]

First, the court provided that the All Writs Act was improper to enforce the terms of the 1991 Judgment because that judgment did not address the subject matter, the minerals, in dispute in this case.[148] The court explained that "the All Writs Act only provides a mechanism for the County to the extent the 1991 Judgment addressed the tracts in the 2019 Complaint."[149] Because neither the 1991 Judgment nor its associating record included the tracts at issue in this litigation in the judgment's scope, the All Writs Act was incapable of providing the relief the County sought as to the 1991 Judgment.[150]

Second, the court analyzed the County's argument "that the All Writs Act [could] be used to enforce the 1930's Condemnation Judgments directly, even without an intervening quiet title judgment."[151] Since the court had not previously "addressed whether a plaintiff [could] enforce or challenge the scope of a prior condemnation judgment through something other than a quiet

143. *Id.*

144. *See id.* at 886-87 ("The All Writs Act grants '[t]he Supreme Court and all courts established by an Act of Congress [the authority to] issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.'" (alterations in original) (quoting 28 U.S.C. § 1651(a))); *see also id.* at 887 ("The Act thus authorizes a federal court to issue such commands as may be necessary or appropriate or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." (citation modified)).

145. *Id.* (citing Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 32 (2002)) ("According to the United States, the Quiet Title Act precludes All Writs Act relief when a plaintiff merely seeks to quiet title against the United States.").

146. *Id.* at 887, 893.

147. *Id.* at 888.

148. *See id.*

149. *Id.*

150. *See id.* at 888-92 ("The All Writs Act could only provide relief to the extent the 1991 Judgment included the royalties from tracts now in dispute. Based on the order's terms and the record upon which it was based, we conclude that the judgment was limited to the tracts listed in Enclosure 1.").

151. *Id.* at 892.

title action," it looked to other Circuits for guidance.[152] The United States Courts of Appeals for the Fourth and Fifth Circuits appeared aligned in their decisions concerning contests over title to condemned properties.[153] Specifically, where property acquired through eminent domain is contested—as in the 1930's Condemnation Judgments at issue in this case—the Quiet Title Act can be applied "to ascertain the validity or substance of the title."[154] The court reasoned that since the Quiet Title Act can apply to the claims at issue, then "*only* the Quiet Title Act can do so."[155] Ultimately, the court held that

> [b]ecause the All Writs Act cannot be used to challenge the scope of the 1930's Condemnation Judgments, and because the 1991 Judgment does not include the mineral royalties at issue in this case, the district court erred in granting summary judgment for the County under the All Writs Act.[156]

Additionally, the court provided that if there was a way for the County to proceed with its seeking of relief, it must do so under the Quiet Title Act.[157]

The court next addressed whether the statute of limitations under the Quiet Title Act had expired.[158] The United States argued that the County was not timely in bringing its claims on January 11, 2016 because the Quiet Title Act has a twelve-year statute of limitations which began to run starting January 10, 2004.[159] The Quiet Title Act statute of limitations period "begins to run once the plaintiff has 'a reasonable awareness' that the United States claims *some* adverse interest" over the disputed property.[160] The United States further contended "that the County knew or should have known about the United States' claim to public domain minerals at multiple points before January 11, 2004."[161] While the County argued that the notification was "vague, ambiguous, and could not have put the County on notice," the Court

152. *Id.* (first citing Klugh v. United States, 818 F.2d 294, 297-98 (4th Cir. 1987); and then citing Bank One Tex. v. United States, 157 F.3d 397, 401 (5th Cir. 1998), *abrogated on other grounds by*, Wilkins v. United States, 598 U.S. 152 (2023)).

153. *Id.*

154. *Id.* (citation modified).

155. *Id.* at 893.

156. *Id.*

157. *Id.*

158. *See id.*

159. *See id.* ("Claims under the Act are barred unless they are brought 'within twelve years of the date upon which [they] accrued'—when the plaintiff 'knew or should have known of the claim of the United States.'" (alteration in original) (quoting 28 U.S.C. § 2409a(g))).

160. *Id.* at 894 (quoting Spirit Lake Tribe v. North Dakota, 262 F.3d 732, 738 (8th Cir. 2001), *abrogated on other grounds by*, Wilkins v. United States, 598 U.S. 152 (2023)).

161. *Id.* (noting that BLM informed the County on November 17, 2003, that it did not recognize the royalty interest in some of the tracts of land listed under the 1930's Condemnation Judgment).

disagreed and found in favor of the United States that the limitations period had expired by the time the County brought its claims in 2016.[162]

Ultimately, the United States Court of Appeals for the Eighth Circuit reversed the district court's judgment, remanding to the district court with instructions to enter judgment in favor of the United States in accordance with the court's opinion.[163]

162. *See id.* at 894-96 ("All that was needed was a reasonable awareness that the Government claims some adverse interest. The County had that awareness here." (citation modified)).

163. *Id.* at 896.