MoloLamken

Supreme Court Business Briefing

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SUPREME COURT BUSINESS BRIEFING

The Supreme Court's docket this year was jam-packed with blockbuster decisions on hot-button issues. The Court decided a trio of politically charged cases in an election year. It rejected an effort to remove Donald Trump from a State's presidential primary ballot under the Fourteenth Amendment's Insurrection Clause. It narrowly construed a statute used to prosecute violent protestors following the 2020 election. And it recognized a presidential immunity from criminal liability for official acts that may pare back the multiple prosecutions pending against former President Trump. Beyond that, the Court rejected a challenge to the FDA's expansion of access to the abortion pill mifepristone, concluding that the plaintiffs lacked standing to sue. It also upheld a federal statute prohibiting individuals subject to domestic violence restraining orders from possessing firearms.

The Court's business docket was equally groundbreaking. The Court issued two major decisions on the authority of administrative agencies. In one, the Court overruled the *Chevron* doctrine—a forty-year-old principle that had required courts to defer to reasonable agency interpretations of ambiguous statutes—holding that courts should instead independently interpret the law. In the other, the Court held that the Seventh Amendment right to a jury trial precluded the SEC from enforcing securities fraud statutes by seeking civil penalties in its own in-house tribunals.

Both decisions have profound implications for the separation of powers, reining in the Executive Branch while expanding the powers of the judiciary. The cases also have enormous practical significance for businesses. Regulated parties now have potent new tools to challenge agency statutory interpretations. And many regulated parties can now insist that agency enforcement actions be brought in federal court, where defendants enjoy procedural rights lacking in administrative proceedings.

The Court also issued its most important bankruptcy decision in years, holding that Purdue's reorganization plan was unlawful because it granted releases to the company's owners, who had not themselves declared bankruptcy. Plan proponents argued that the non-debtor releases were crucial to a deal that raised billions of additional dollars for opioid victims and other creditors. But the Court held that the Bankruptcy Code did not permit discharges for third parties who had not subjected their own assets to the bankruptcy process.

Finally, the Court weighed in on the rights of social media companies like Facebook and YouTube to make content moderation decisions. The Court held that those companies had a First Amendment right to make editorial judgments about the content on their platforms and that States could not restrict those decisions to promote greater ideological balance.

With those and other leading decisions in mind, we are pleased to present the fourteenth annual MoloLamken Supreme Court Business Briefing. We have identified cases with the greatest potential impact on a wide range of businesses. For each, we have distilled the facts and holdings to a concise summary and highlighted why the decision matters to business. Our aim is to allow busy people to stay current on the Supreme Court's docket and understand the potential impact of its decisions with a minimum of time and effort. We hope you find it informative.

ABOUT MOLOLAMKEN

MoloLamken is a law firm focused exclusively on representing clients in complex disputes and investigations. Our clients are based throughout the world.

Our founding partners, Steven Molo and Jeffrey Lamken, developed national reputations based on their courtroom successes while partners at large, full-service firms, where they held leadership positions. They formed the firm with an abiding belief that complex disputes and investigations are most effectively handled by smaller teams comprised of smart, highly experienced lawyers focused on results rather than process.

We provide experienced advocacy—for plaintiffs and defendants—before juries, judges, arbitral forums, and appellate courts, including the Supreme Court of the United States. We also represent clients in criminal and regulatory investigations, and we conduct internal investigations.

Our strength lies in the intellect, creativity, and tenacity of our lawyers and our experience in applying those attributes to achieve great results for clients in serious matters.

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Bissonnette v. LePage Bakeries Park St., LLC, No. 23-51

arbitration — transportation worker exemption

Bissonnette addressed the scope of the Federal Arbitration Act's exemption for employment contracts of transportation workers.

The Federal Arbitration Act makes arbitration agreements valid and enforceable to the same extent as other contracts. Section 1, however, contains a carve-out: The FAA does not apply to employment contracts of "workers engaged in foreign or interstate commerce"—a term the Supreme Court has previously construed to refer only to transportation workers.

The plaintiffs were distributors of Wonder Bread and other baked goods. Delivering those products from warehouses to retail stores was a major component of their work. When the distributors sued the manufacturer for alleged violations of federal and state wage laws, the manufacturer sought to enforce an arbitration clause in the parties' distribution agreements. The plaintiffs resisted arbitration on the ground that the agreements fell within the FAA's exemption for transportation workers.

The district court held that the plaintiffs were not transportation workers within the meaning of the FAA, and the U.S. Court of Appeals for the Second Circuit affirmed. The court of appeals held that, to qualify for the transportation worker exemption, an employee not only must perform transportation work, but also must work in the transportation industry. In the court's view, the plaintiffs worked in the baked goods industry, so they did not qualify.

The Supreme Court vacated and remanded. The Court explained that the FAA's transportation worker exemption focuses on the nature of the work an employee performs, not the industry in which the employer operates. The exemption thus applies so long as the employee is a transportation worker—someone who plays a direct and necessary role in the free flow of goods across borders—whether or not the employer operates in the transportation industry. The Court noted that the Second Circuit's focus on the employer's industry would overly complicate FAA cases, presenting thorny questions such as whether a company like Amazon should be considered to be in the retail industry or the shipping industry.

Bissonnette rejects a significant limitation on the FAA's transportation worker exemption, making clear that an employee need not work for a railroad, airline, or shipping company to qualify. The scope of that exemption is frequently litigated in the modern gig economy, in which drivers for Uber, Lyft, DoorDash, and many other companies provide transportation services in a wide array of industries. *Bissonnette* could strengthen the hand of those workers if they seek to litigate disputes in court rather than in arbitration, although other obstacles to invoking the exemption likely remain.

Nonetheless, *Bissonnette* does not augur a sea change in the Court's more general trend of decisions favoring arbitration. The Court cautioned that the transportation worker exemption is not limitless. For example, not every employee who loads or unloads goods—such as a worker stocking grocery store shelves—qualifies as a transportation worker. Many workers are therefore likely to be held to a contractual requirement to settle disputes in arbitration.

Bissonnette *could strengthen the hand of workers in the gig economy if they seek to litigate disputes in court rather than in arbitration.*

Harrington v. Purdue Pharma L.P., No. 23-124

bankruptcy — non-debtor releases

Purdue addressed whether the Bankruptcy Code authorizes courts to release claims against non-debtor third parties as part of a reorganization.

Chapter 11 of the Bankruptcy Code permits a court to discharge a bankrupt debtor's liabilities upon confirmation of a reorganization plan. To obtain a discharge, the debtor must subject virtually all of its assets to the court's oversight and work with creditors to develop a plan to distribute the assets. Normally, a discharge extends only to the debtor's own liabilities. In recent years, however, plan proponents have sought to include non-debtor releases that extinguish liabilities of other parties who have not themselves declared bankruptcy.

This case involved Purdue Pharma, the company that manufactured the opioid pain medication OxyContin. Purdue was owned by the Sackler family. It earned billions of dollars from OxyContin sales, but its liabilities started to mount after plaintiffs began suing Purdue for understating the drug's addiction risks. Over the years, the Sacklers withdrew most of Purdue's earnings and transferred them overseas. Purdue then filed for bankruptcy.

The plaintiffs' claims far exceeded Purdue's remaining assets. And although many plaintiffs asserted claims against the Sacklers too, their prospects were uncertain because much of the Sacklers' wealth was shielded in overseas trusts and family-owned companies. The Sacklers offered to return billions of dollars for distribution to creditors, but only if the reorganization plan included releases that shielded them from liability. Most plan participants supported that approach, including the vast majority of individual victims who voted on the plan. The bankruptcy court confirmed the plan, but the district court reversed. The U.S. Court of Appeals for the Second Circuit reversed, reinstating the plan.

The Supreme Court reversed. It held that the bankruptcy court lacked authority to approve a plan releasing claims against non-debtors—parties who had not themselves declared bankruptcy—without the claimants' consent. Although Chapter 11 permits plans to include a wide range of provisions, the Court explained, the common thread is that the provisions must concern the debtor's own rights and obligations, not those of third parties. The bankruptcy court therefore exceeded its authority by approving the Sackler releases.

Purdue is the Supreme Court's most important bankruptcy case in years. For decades, parties have used third-party releases in high-profile mass tort bankruptcies, including those relating to the Dalkon Shield, Dow Corning silicone breast implants, and the abuse scandals in the Catholic Church and the Boy Scouts. Proponents argue that the provisions are necessary to achieve litigation peace and to maximize recoveries for victims. But opponents insist that they are an abuse of the bankruptcy process because they enable third parties to obtain the benefits of a discharge without subjecting themselves to bankruptcy's requirements and safeguards.

After *Purdue*, parties will have to devise new strategies to secure support for reorganization plans. Alternatively, Congress may step in. Congress already approved third-party protections for asbestos cases. *Purdue* may prompt Congress to act more comprehensively.

(Disclosure: MoloLamken LLP represented amici curiae *in this case.)*

*After **Purdue**, parties will have to devise new strategies to secure support for reorganization plans.*

Loper Bright Enterprises v. Raimondo, No. 22-451

administrative law — deference to agencies

Loper Bright addressed whether federal courts must defer to administrative agencies' interpretations of ambiguous statutes.

Forty years ago, in *Chevron v. Natural Resources Defense Council*, the Supreme Court adopted a two-step framework for interpreting statutes administered by federal agencies. First, courts asked whether a statute spoke clearly to the question at issue. If so, courts applied that interpretation. If the statute was silent or ambiguous, however, courts were required to defer to an agency's reasonable interpretation, even if courts did not think that was the best reading.

Chevron deference became highly controversial. Proponents argued that statutory ambiguities reflected implicit delegations of interpretive authority to the expert agencies responsible for administering the laws. Critics argued that *Chevron* was inconsistent with courts' responsibility to independently interpret the law, and that it put a thumb on the scale in favor of the government. The question in *Loper Bright* was whether *Chevron* should be overruled.

The case arose from a challenge to fishing regulations. The Magnuson-Stevens Fishery Conservation and Management Act requires onboard observers on certain fishing vessels. The Act does not say who must pay for observers on vessels in the Atlantic herring fishery. The agency that administers the Act issued a rule allowing it to require that the fishing vessels themselves pay for those observers. Two groups of fishing businesses challenged the rule. The district courts ruled for the government in both cases. The U.S. Courts of Appeals for the First and D.C. Circuits affirmed. Holding that the statute was ambiguous and that the agency's interpretation was reasonable, they deferred to the agency's interpretation under *Chevron*.

The Supreme Court vacated and remanded. The Court overruled *Chevron* and held that courts must exercise their independent judgment when interpreting federal statutes and determining whether agencies have acted within their statutory authority. The Court explained that the Administrative Procedure Act, which governs judicial review of federal agency actions, requires courts to "decide all relevant questions of law." *Chevron* deference, the Court held, was inconsistent with that requirement. It was also inconsistent with the judiciary's traditional role of interpreting the law independent of the Executive Branch.

Loper Bright is the Supreme Court's most important administrative law decision since *Chevron* itself. For decades, federal agencies were largely free to interpret—and reinterpret—the statutes they administered, so long as their interpretations were deemed reasonable. Sometimes that promoted regulatory certainty, as an agency's interpretation was likely to be upheld by the courts. But it could also foster significant uncertainty, as agencies might change their interpretations each time the presidency changed hands. After *Loper Bright*, courts will have the final word on interpreting statutes administered by federal agencies.

Loper Bright makes it easier for businesses to challenge federal regulations. Agencies will now have to convince courts that their interpretations are the best reading of the statute, not merely a reasonable one. But that does not mean agency expertise is irrelevant in the post-*Chevron* world. The Supreme Court made clear that an agency's expert views, if persuasive, can carry significant weight when courts interpret a statute.

*After **Loper Bright**, courts will have the final word on interpreting statutes administered by federal agencies.*

Macquarie Infrastructure Corp. v. Moab Partners, L.P., No. 22-1165

securities fraud — omissions

Macquarie addressed whether a "pure omission" can give rise to liability for securities fraud under Securities and Exchange Commission Rule 10b-5(b).

Section 10(b) of the Securities Exchange Act prohibits fraud in connection with the purchase or sale of securities. Implementing that provision, SEC Rule 10b-5(b) makes it unlawful to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made . . . not misleading." Separately, Item 303 of the SEC's Regulation S-K requires companies to describe in their annual and quarterly reports any known trends or uncertainties that may materially affect their revenues or income.

Macquarie Infrastructure operated terminals that stored No. 6 fuel oil, a type of oil high in sulfur. In 2016, the United Nations adopted a regulation that restricted the use of high-sulfur fuel oil in shipping. Macquarie did not mention that new regulation in its public reports. Eventually, the decline in the No. 6 fuel oil market caused Macquarie's sales to fall, and its stock price dropped sharply.

A class of investors sued Macquarie under Rule 10b-5(b). They alleged that Item 303 required Macquarie to disclose the potential impact of the new regulation on its business. They claimed that Macquarie's failure to make that disclosure violated Rule 10b-5(b) because Item 303 created a duty to disclose the information. The district court dismissed the complaint. The U.S. Court of Appeals for the Second Circuit reversed, holding that Macquarie's failure to make a disclosure required by an SEC regulation could support a claim for fraud under Rule 10b-5(b).

The Supreme Court reversed. Rule 10b-5(b), it explained, prohibits omissions only when they make other "statements made" misleading. Rule 10b-5(b) thus prohibits half-truths: If a company makes an affirmative statement on an issue, it cannot hold back other facts where their omission makes the statement misleading. But Rule 10b-5(b) does not prohibit "pure omissions," where a company says nothing about the relevant issue at all. As a result, Macquarie's silence regarding the effects of the new United Nations regulation could not support a Rule 10b-5(b) claim merely because Item 303 required Macquarie to disclose the information.

After *Macquarie*, pure omissions are not actionable under Rule 10b-5(b), even if other SEC regulations impose an independent disclosure duty. The SEC has extensive requirements for what companies must disclose in their periodic reports. After *Macquarie*, investors who suffer losses because a company omits information from those reports must seek some other basis to pursue a claim.

Macquarie leaves other potential avenues open. Often, information omitted from a periodic report in violation of Item 303 may also render other statements in the report misleading. In those cases, investors can still pursue a claim under Rule 10b-5(b) for the resulting half-truth. The Supreme Court also observed that another provision of the securities laws—Section 11 of the Securities Act, which regulates the registration statements companies file when they issue new securities—expressly imposes liability for pure omissions. While remedies like Section 11 may be narrower than Rule 10b-5(b) in certain respects, the existence of those other provisions may limit the impact of the Court's decision.

*After **Macquarie**, investors seeking to hold a defendant liable for omissions may have to show that the omissions rendered other statements misleading.*

Moody v. NetChoice, LLC, No. 22-277

social media platforms — free speech rights

***NetChoice** is a clear if qualified win for social media platforms.*

NetChoice addressed a First Amendment challenge to laws restricting the ability of social media platforms to moderate content.

Social media platforms like Facebook and YouTube routinely engage in content moderation, such as removing or deprioritizing posts that include objectionable material or otherwise violate the platforms' policies. In response to allegations that large social media platforms used content moderation to discriminate against conservative viewpoints, Texas and Florida enacted statutes regulating content moderation. The laws restricted social media platforms' ability to remove, alter, or deprioritize posts based on their source or content. The laws also required platforms to provide individualized explanations to users when removing or altering their posts.

NetChoice, a trade association representing social media platforms, challenged both laws under the First Amendment's protections for freedom of speech. District courts entered preliminary injunctions against both laws. The U.S. Court of Appeals for the Fifth Circuit reversed the injunction against the Texas law, holding that social media platforms' content moderation decisions were not protected by the First Amendment and that the law permissibly advanced Texas's interest in protecting a diversity of views. The U.S. Court of Appeals for the Eleventh Circuit reached the opposite result, ruling that the Florida law likely violated the First Amendment because the platforms' content moderation decisions were protected editorial judgments.

The Supreme Court vacated and remanded both cases. It rejected the Fifth Circuit's view that efforts to regulate social media platforms' content moderation did not implicate the First Amendment. The Court explained that editorial discretion in the selection and display of content created by other parties is a form of protected speech, even if a platform allows the vast majority of content it receives. The Court also made clear that laws restricting those editorial judgments cannot be justified by a State's asserted interest in promoting ideological balance.

Nonetheless, the Court did not decide whether to enjoin either law. NetChoice had brought "facial" challenges that sought to strike down each law in its entirety. To prevail, it had to show that a substantial number of the law's applications were unconstitutional in relation to the law's legitimate sweep. The lower courts had focused mostly on platforms such as Facebook's News Feed and YouTube's homepage, rather than services like direct messaging and email that may not present the same concerns about infringing on editorial judgments. The Court remanded for the lower courts to consider whether NetChoice was entitled to the broad relief it sought.

NetChoice is a clear if qualified win for social media platforms. The Supreme Court left no doubt that content moderation decisions are protected by the First Amendment and that States cannot regulate those decisions merely to promote ideological balance. That ruling spares social media companies from having to comply with a patchwork of regulations that could vary from State to State. But the Court suggested that other online services may not enjoy similar protections. And it left open other questions, such as whether the use of artificial intelligence rather than traditional editorial judgment might affect the First Amendment analysis.

Moore v. United States, No. 22-800

taxation — constitutional limits

Moore addressed whether the Mandatory Repatriation Tax was a permissible exercise of Congress's taxing authority.

The Constitution limits Congress's authority to impose taxes based in part on whether the tax is "direct" or "indirect." Direct taxes—such as property taxes—must be apportioned so that the percentage of the national tax contributed from each State corresponds to the State's percentage of the national population. That requirement makes such taxes impractical and politically unpalatable. By contrast, no apportionment requirement applies to indirect taxes imposed on activities or transactions, such as duties, excise taxes, and income taxes.

This case concerned the Mandatory Repatriation Tax. Congress enacted the MRT in 2017 to tax certain income earned by American-controlled foreign corporations. Since 1962, the Internal Revenue Code has taxed Americans on passive income earned by foreign corporations they control by attributing the company's earnings to its shareholders, even if the company did not pay out dividends or otherwise distribute the earnings. The MRT imposed a similar one-time tax on the accumulated active income of American-controlled foreign companies, attributing that income to shareholders for tax purposes even if the company had not distributed the earnings. The primary goal of the 2017 legislation was to encourage Americans to invest earnings from their foreign investments back in the United States.

The Moores were two U.S. taxpayers who owned shares in an Indian company named KisanKraft. KisanKraft had earned substantial income over the years but had not distributed any of the earnings to its U.S. shareholders. The Moores owed nearly $15,000 in taxes under the MRT. The Moores paid the tax and sued for a refund. They contended that the MRT was a direct tax on property—their shares in KisanKraft—rather than an indirect tax on income, because they had not realized any income from the shares. They urged that the MRT was therefore unconstitutional because it was not apportioned among the States. The district court rejected their claim, and the U.S. Court of Appeals for the Ninth Circuit affirmed.

The Supreme Court affirmed. The Court declined to address whether Congress could impose an unapportioned tax on an investor's unrealized gains. Even assuming the Constitution imposes a realization requirement, the Court held, Congress could tax the *corporation's* realized income by attributing that income to its shareholders. The Court noted that Congress had imposed similar "pass-through" taxes in other contexts and that the Court's precedents had upheld such taxes.

Moore confirms that Congress has broad authority to tax an entity's earnings at the shareholder level even where the entity has not distributed the earnings. As the Court noted, accepting the contrary view could render vast swaths of the Internal Revenue Code unconstitutional.

Nonetheless, the Court's studious avoidance of whether the Constitution imposes a "realization" requirement is a harbinger of significant disputes to come. Politicians often advocate for new taxes on wealthy individuals, such as taxes on unrealized capital gains and "wealth taxes" on a person's assets or net worth. Many commentators saw *Moore* as a stalking horse for a challenge to a future wealth tax. By deciding the case on narrow attribution grounds, the Court left those broader and more contentious disputes for another day.

***Moore** confirms that Congress has broad authority to tax an entity's earnings at the shareholder level even where the entity has not distributed the earnings.*

Muldrow v. City of St. Louis, No. 22-193

employment discrimination — harm requirement

Muldrow addressed the degree of harm required for employment discrimination claims under Title VII.

Title VII prohibits discrimination in employment. Among other things, the statute makes it unlawful to discriminate against an employee with respect to "compensation, terms, conditions, or privileges of employment" based on certain characteristics, such as sex.

Sergeant Jatonya Clayborn Muldrow was a plainclothes officer in the St. Louis Police Department's Intelligence Division. She oversaw the Gang Unit, served as head of the Gun Crimes Unit, and was deputized as a Task Force Officer with the FBI. That status entitled her to FBI credentials and an unmarked take-home vehicle; she also had a weekday-only work schedule. When a new commander took charge of the Intelligence Division, he replaced Muldrow with a male officer and transferred her to a position where she supervised the day-to-day activities of neighborhood patrol officers. While Muldrow's rank and pay remained the same, her new role was less prestigious and involved more administrative work. She lost her FBI status and her take-home car, and was required to work weekend shifts.

Muldrow sued the City under Title VII, alleging that she was transferred to a less desirable position because she was a woman. The district court granted summary judgment in favor of the City, holding that Muldrow had not shown a "significant" change in working conditions that produced a "material employment disadvantage." The U.S. Court of Appeals for the Eighth Circuit affirmed.

The Supreme Court vacated and remanded. The Court held that, to make out a Title VII claim, an employee need only show "some harm" respecting a term or condition of employment. The harm need not be significant or substantial. The Court explained that Title VII makes it unlawful to "discriminate," which means to "treat worse." Nothing in the statute says how much worse. The Court further clarified that the statute applies not only to changes in contractual terms or conditions, such as pay, but also to changes in the "what, where, and when" of the employee's job. The harms that Muldrow alleged—a less prestigious position involving more administrative work and irregular hours—easily met that mark.

Muldrow makes it easier for employees to pursue Title VII discrimination claims even when the tangible impact of an employment action is modest. Many employees will welcome a ruling that permits them to seek redress for an employer's discriminatory conduct without meeting a heightened standard of significant harm. But employers will likely face a greater number of discrimination suits as a result. Even if many of the suits involve only modest claims for damages, the availability of attorney's fees and other remedies under Title VII could make such suits costly nonetheless.

Even when an employee can show harm from an employment action, the employer is not automatically liable. The employee must also show that discrimination was a motivating factor in the decision, and the employer can limit the plaintiff's remedies by showing that it would have taken the same action regardless.

***Muldrow** makes it easier for employees to pursue Title VII discrimination claims even when the tangible impact of an employment action is modest.*

Murray v. UBS Securities, LLC, No. 22-660

whistleblower protections — retaliatory intent

Murray addressed whether a whistleblower invoking the protections of the Sarbanes-Oxley Act must prove that the employer acted with "retaliatory intent."

Enacted in the wake of the Enron scandal, the Sarbanes-Oxley Act sought to prevent and punish corporate fraud. The statute provides that publicly traded companies may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of" the employee's protected whistleblowing activity. A whistleblower invoking the statute's protections bears the initial burden of showing that the whistleblowing was a "contributing factor" in the employer's adverse personnel action. The burden then shifts to the employer to show, by clear and convincing evidence, that it would have taken the same action even if the employee had not engaged in the whistleblowing activity.

In this case, Trevor Murray, a former UBS research strategist, sued his former employer for wrongfully terminating him because of his whistleblowing. Murray's job involved producing reports on the commercial mortgage-backed securities market. SEC regulations required him to certify that the reports were produced independently and accurately reflected his own views. Murray alleged that UBS traders pressured him to skew his reports to support their business strategies. After he reported the issue to his supervisor, he was fired.

The case went to trial, and the jury found in Murray's favor. The U.S. Court of Appeals for the Second Circuit vacated the verdict. Although the trial court had instructed the jury that Murray had to prove that his whistleblowing was a "contributing factor" in his termination, the court of appeals held that this instruction was insufficient. In its view, the trial court also should have instructed the jury that Murray had to prove that UBS acted with "retaliatory intent"—something akin to animus toward the employee.

The Supreme Court reversed. The Court explained that the text of Sarbanes-Oxley requires only that the whistleblowing be a "contributing factor" in the employer's decision to take an adverse employment action. The statute does not mention a "retaliatory intent" requirement. The Court rejected UBS's argument that the statute's mandate that an employer may not "discriminate" against an employee "because of" the employee's whistleblowing inherently requires retaliatory intent. While discrimination involves intentionally treating an employee differently because of the whistleblowing activity, the employer need not be motivated by animus.

Murray confirms that the "contributing factor" framework Congress adopted for whistleblower protections is lenient and plaintiff-friendly. Requiring whistleblowers to prove not only that their whistleblowing played a role in the employer's decision, but also that the employer acted with hostile or malevolent intent, would have foreclosed recovery in many cases. And while *Murray* arose under the Sarbanes-Oxley Act, its holding likely applies to numerous other federal statutes that have similar "contributing factor" frameworks.

Murray *confirms that the "contributing factor" framework for whistleblower protections is lenient and plaintiff-friendly.*

Ohio v. EPA, No. 23A349

environmental regulation — Clean Air Act

Ohio v. EPA concerned the Environmental Protection Agency's ability to enforce a federal emissions-control plan under the Clean Air Act's "good neighbor" provision.

The Clean Air Act authorizes the EPA to set national standards for air pollutants. It then requires States to submit plans for meeting those standards within their respective territories. Under the Act's "good neighbor" provision, an upwind State's plan must include emissions controls that adequately limit pollution that travels to downwind States. If the EPA finds a state plan noncompliant, it must issue a federal plan for that State instead.

In 2022, the EPA disapproved twenty-three state implementation plans for failing to meet the Act's "good neighbor" requirements with respect to ozone pollution. The agency then proposed a federal implementation plan for those States instead. The federal plan sought to limit emissions of nitrogen oxide, a key precursor to ozone, in a cost-effective manner. The EPA finalized its federal plan in 2023. In the meantime, however, multiple States and industry groups had filed lawsuits challenging the EPA's disapproval of various state plans. Several courts issued stays of those disapprovals, preventing the EPA from enforcing its federal plan for twelve of the twenty-three States for which the federal plan was designed.

States and industry groups also directly challenged the EPA's federal plan in court. Several challengers moved for stays of the federal plan pending the outcome of their challenges. The U.S. Court of Appeals for the D.C. Circuit denied the motions. The challengers then sought stays from the Supreme Court.

The Supreme Court granted the applications and stayed the EPA's federal plan. The Court recognized that the challengers and the EPA both had strong arguments about the harms they might face with or without a stay. But the Court found that a stay was warranted because the EPA's federal plan was likely to be set aside. The plan had identified optimal cost-effective measures for reducing ozone based on an assumption that the plan would cover all twenty-three upwind States. But the Court found that the agency had not adequately explained whether or how those optimal measures would change if the plan covered fewer than all those States—a risk that loomed large once courts started staying the EPA's disapprovals of specific state plans.

Ohio v. EPA spares regulated industries from the costs of complying with the EPA's federal plan for reducing ozone pollution while challenges to the plan proceed in lower courts. Those costs would have been substantial, estimated at hundreds of millions if not billions of dollars. The Supreme Court's decision also signals that the challenges are ultimately likely to succeed, which could require the EPA to go back to the drawing board or at least offer a more comprehensive analysis of the issue the Court identified.

More broadly, the decision illustrates the Supreme Court's increasing willingness to scrutinize federal agency actions. Although not the highest-profile administrative law case this Term, the Court's probing analysis of the agency's reasoning is consistent with its other decisions cutting back the authority of the administrative state. Many industries will welcome the greater judicial oversight of federal agencies. But the trend will also make it more difficult for agencies to provide conclusive and timely guidance to industries about their obligations under federal law.

***Ohio v. EPA**'s probing analysis of an agency's reasoning is consistent with the Court's other decisions cutting back the authority of the administrative state.*

SEC v. Jarkesy, No. 22-859

agency enforcement — jury trial rights

Jarkesy addressed whether the Seventh Amendment precludes the Securities and Exchange Commission from seeking civil penalties for securities fraud in its own administrative tribunals rather than in the federal courts.

The SEC enforces the federal securities laws in two different ways. It may bring a civil suit in federal court. Or it may pursue charges administratively before its own in-house tribunals. In the latter forum, the case is heard by an SEC administrative law judge, and the respondent has fewer procedural rights. Historically, the SEC could seek more potent remedies in court than in administrative proceedings. In 2010, however, the Dodd-Frank Act granted the SEC broader authority to seek civil penalties in administrative proceedings as well. This case concerned whether the SEC's exercise of that power violated the Seventh Amendment's guarantee of the right to a jury trial in "suits at common law."

The case arose out of an SEC enforcement proceeding before an in-house tribunal against George Jarkesy and his investment management firm, Patriot28. The SEC accused Jarkesy of committing securities fraud by misleading investors about the strategies he employed, the identities of the funds' auditor and prime broker, and the value of the funds' assets. An SEC administrative law judge found Jarkesy liable. The Commission imposed a civil penalty of $300,000 and ordered Patriot28 to disgorge $685,000 in profits. The U.S. Court of Appeals for the Fifth Circuit vacated the decision, holding that the proceeding violated Jarkesy's Seventh Amendment right to a jury trial.

The Supreme Court affirmed. The Court reasoned that, because the SEC's action seeking civil penalties for securities fraud was a "suit at common law," the Seventh Amendment entitled Jarkesy to a jury trial. The Court observed that civil penalties are a form of monetary relief and that money damages are a prototypical common law remedy. The Court also noted that securities fraud actions under the federal securities laws bear a close resemblance to common law fraud claims. Given those similarities to common law claims, the Seventh Amendment required that federal securities fraud claims be tried in court before a jury, rather than in the SEC's in-house tribunals.

Jarkesy has major implications for businesses facing enforcement proceedings by the SEC or other agencies. Many agencies rely on in-house tribunals to enforce the statutes they administer. Respondents often complain that those proceedings are unfair because the presiding officials may be biased toward the agency and because those proceedings provide fewer procedural rights than suits in federal court. *Jarkesy* will force agencies like the SEC to bring more of their enforcement proceedings in court, where businesses facing agency charges have greater procedural rights.

Jarkesy does not spell the end for administrative tribunals. Agencies can still bring administrative proceedings when they seek only equitable remedies, such as injunctions, debarment, or disgorgement of profits. Agencies can also use in-house tribunals to resolve disputes over "public rights" such as revenue collection, customs, and public benefits. Finally, the Court indicated that an agency can enforce a statute administratively when the claim bears less resemblance to a traditional common law cause of action.

***Jarkesy** will force agencies like the SEC to bring more of their enforcement proceedings in court, where businesses facing agency charges have greater procedural rights.*

Snyder v. United States, No. 23-108

public corruption — gratuities

Snyder addressed whether federal law makes it illegal for state and local officials to accept gratuities for official acts.

Public corruption law generally distinguishes between "bribes" and "gratuities" paid to government officials. Bribes are payments made or agreed to before an official act to influence the official with respect to that act. Gratuities are payments made after an official act as a token of appreciation. Federal law makes it a crime for federal officials to accept both bribes and gratuities for official acts, while recognizing many exceptions for small gifts, awards, and the like.

A different federal statute, 18 U.S.C. §666, governs state and local officials. That statute makes it a crime for state or local officials to "corruptly" solicit, accept, or agree to accept anything of value while "intending to be influenced or rewarded" in connection with certain official acts. The law also makes it a crime to make or offer such payments. The question in this case was whether §666 prohibits both bribes and gratuities, or only bribes.

James Snyder, the mayor of Portage, Indiana, oversaw the city's procurement of garbage trucks. Snyder awarded two contracts worth $1.1 million to a local truck company, Great Lakes Peterbilt. Soon after, Great Lakes Peterbilt paid Snyder $13,000, supposedly for consulting services. The government alleged that the payment violated §666. Snyder was tried, convicted, and sentenced to 21 months in prison. On appeal, Snyder argued that the statute applied only to bribes, and that the payment he received was at most a gratuity because it was neither made nor agreed to before the official act in question. The U.S. Court of Appeals for the Seventh Circuit rejected Snyder's interpretation and affirmed his conviction.

The Supreme Court reversed. It held that §666 reaches only bribes and does not prohibit state and local officials from accepting gratuities for past official acts. The Court explained that §666 was modeled on the bribery provision applicable to federal officials, rather than the gratuities provision. The Court also considered that, if the statute were read to cover gratuities, it could threaten millions of state and local officials with criminal penalties for seemingly innocuous gifts—such as gift cards or other tokens of appreciation for teachers or firefighters—without any guidance for distinguishing between permissible and criminal conduct.

Snyder limits the scope of federal corruption law governing interactions with state and local officials. The receipt or payment of gratuities no longer threatens federal criminal liability under §666. Federal prosecutors must now prove that a payment was made or offered in order to influence a future official act.

Nonetheless, *Snyder* does not necessarily make gratuities to state and local officials legal. As the Supreme Court noted, many state and local laws comprehensively regulate the payment of gratuities to public officials, each imposing its own thresholds, limits, and exemptions. Businesses dealing with state and local officials must continue to be mindful of those laws before offering any gift or other token of appreciation, even if they no longer face the specter of federal prosecution.

*After **Snyder**, the receipt or payment of gratuities no longer threatens federal criminal liability under §666.*

Vidal v. Elster, No. 22-704

trademarks — names clause

Elster addressed whether a statutory prohibition on registering another person's name as a trademark without that person's consent violates the First Amendment.

The federal Lanham Act establishes a registration system for trademarks. Registration confers important benefits, such as a presumption that the registrant has the exclusive right to use the mark. The Lanham Act's "names clause" prohibits registration of marks that consist of "a name . . . identifying a particular living individual except by his written consent."

This case arose from Steve Elster's application to register the trademark "Trump too small," along with an illustration of a hand gesture, for use on shirts and hats. The trademark referenced a derogatory comment that Senator Marco Rubio made during his 2016 presidential primary campaign about the significance of then-candidate Donald Trump's "small hands."

The U.S. Patent and Trademark Office rejected Elster's application because the mark used Trump's name without his consent. The Trademark Trial and Appeal Board affirmed, but the U.S. Court of Appeals for the Federal Circuit reversed. The court of appeals held that the Lanham Act's names clause violated the First Amendment because it was a content-based restriction on speech that did not advance any substantial government interest.

The Supreme Court reversed. The Court explained that its First Amendment precedents distinguish between content-based regulations that restrict speech based on its subject matter, and a particularly egregious category of content-based regulations that target a speaker's particular views on a subject. In two prior cases, the Court had held that provisions of the Lanham Act prohibiting registration of marks that are "immoral" or "scandalous," or that "disparage" another person, violated the First Amendment because they were viewpoint-based. The names clause, by contrast, is merely content-based: It applies to the use of another person's name in a mark without consent, regardless of what message the registrant wants to convey.

Trademark rights, the Court explained, have long coexisted with the First Amendment despite the fact that trademark protections necessarily require content-based distinctions. From the earliest days, trademark disputes focused on whether a competitor's mark was confusingly similar to the plaintiff's mark. The Court also cited specific examples where trademark protections turned on whether the mark consisted of a person's name. The Court found that history sufficient to support the constitutionality of the Lanham Act's names clause.

Elster provides important clarity over the scope of trademark protections. Trademark law seeks to foster competition and quality by securing to producers the benefits of their good reputations. Many sports figures and other celebrities seek to market products based on the goodwill they have accumulated in their own names. The Supreme Court's decision helps ensure that competitors cannot unfairly exploit that goodwill by obtaining federal protections for their own trademarks using other people's names without consent. While the Court's prior cases had pared back some of the Lanham Act's limitations on registering certain types of marks, *Elster* appears to limit those decisions largely to viewpoint-based restrictions.

*Under **Elster**, businesses cannot obtain federal protections for trademarks based on other people's names without their consent.*

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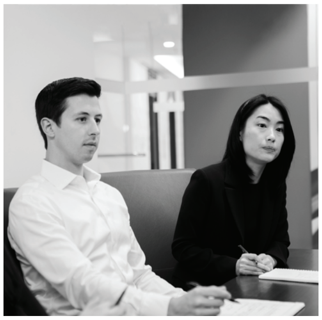

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