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Corner Post, Inc. v. *Board of Governors of the Federal Reserve System*

Administrative Law – Statute of Limitations

No. 22–1008

Opinion Date: 7/1/2024

Vote: 6-3

Author: Barrett, J.

Lower Court: 8th Cir.

In *Corner Post*, the Supreme Court addressed the time limitations that apply to judicial review of federal agency action. The Administrative Procedure Act allows any party "aggrieved" by agency action to bring suit to challenge that action, and 28 U.S.C. § 2401(a) requires that a party suing the United States must file suit within six years of when its "right of action first accrues." The question in *Corner Post* was whether the right to challenge the validity of an agency regulation "accrues" on the date the agency issues the rule—starting the six-year clock on that date—or on the date the plaintiff was first *injured* by the rule, which (as was the case with Corner Post) may occur more than six years after the rule's enactment.

In a decision reversing the Eighth Circuit and disagreeing with most courts of appeals to consider this issue, the Supreme Court held that the six-year clock starts on the date the plaintiff is injured. Because Congress had not provided a special rule for limitations periods as applied to APA suits, the Court reasoned, the "standard rule for limitations periods" should apply to APA challenges. Under that rule, a limitations period begins to run when a plaintiff has a "complete and present cause of action." Because the APA allows only an "aggrieved" party to bring suit, the Court held, Corner Post lacked a "complete and present cause of action" until it was injured by the rule, starting the six-year limitations clock on that date.

Corner Post *holds that a party may challenge a federal rule under the APA within six years of when the party is first injured by the rule, regardless of how long ago that rule was adopted.*

Corner Post opens the door to challenges to longstanding agency rules by parties who have only recently been affected by those rules (such as newly formed businesses). It remains to be seen whether such challenges will succeed, particularly when rules have previously been upheld against an APA challenge. Such prior decisions will carry the force of *stare decisis*—requiring plaintiffs to make a very strong showing that the decision should be revised—even if the agency had previously prevailed based on deference to its legal views to which it is no longer entitled. *See Loper Bright Enterprises* v. *Raimondo*, p. 2.

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Loper Bright Enterprises v. *Raimondo / Relentless, Inc.* v. *Dep't of Commerce*

Administrative Law – Deference to Agencies' Statutory Interpretations

Nos. 22-451 and 22-1219

Opinion Date: 6/28/2024

Vote: 6-3

Author: Roberts, C.J.

Lower Courts: D.C. Cir. and 1st Cir.

The Supreme Court's landmark 1984 *Chevron* decision required courts to defer to an agency's reasonable interpretation of an ambiguous statutory provision. *Chevron* set out a familiar two-step test: First, did Congress speak directly to the issue before the court? Second, if not, did the agency reasonably interpret the ambiguous provision? In recent years, *Chevron* has been criticized as shifting interpretive authority from the federal courts to executive agencies.

In these cases, the Supreme Court overruled *Chevron* and held that courts must exercise their independent judgment in interpreting statutes and deciding whether an agency has acted within its statutory authority. The Court rejected the basic assumption undergirding *Chevron*—that Congress intends to delegate to agencies the authority to resolve ambiguities in the statutes those agencies implement. The Court also reasoned that *Chevron* deference is incompatible with the Administrative Procedure Act, which directs courts to "decide all relevant questions of law" and "interpret" the relevant "statutory provisions." The Court did not, however, tell courts to ignore agency interpretations. Instead, it noted that courts should give the agency's views appropriate weight, and that a consistent agency interpretation adopted contemporaneously with the passage of the statute is most likely to persuade. And when a statute explicitly delegates discretion or interpretive authority to an agency, a court may continue to defer to the agency's views.

Loper Bright *overturns the* Chevron *doctrine. Courts must now determine the best meaning of ambiguous statutory provisions, although they may give weight to agency views, especially if those views are longstanding and consistent.*

Notably, overruling *Chevron* does not open up for reexamination all previous cases decided under "step two" of the *Chevron* regime. Prior decisions upholding agency interpretations will still be subject to *stare decisis*, even if courts had invoked *Chevron* in those cases to defer to the meaning offered by the agency.

After *Loper Bright*, agencies will have to hew more closely to the statutes they interpret, and cannot reverse positions once a court has decided the best reading of the statute. Courts may still give weight to agency views, but that weight will vary.

Securities and Exchange Commission v. *Jarkesy*

Administrative Law – Jury-Trial Right

No. 22-859

Opinion Date: 6/27/2024

Vote: 6-3

Author: Roberts, C.J.

Lower Court: 5th Cir.

In the Dodd-Frank Act, Congress authorized the SEC to enforce the antifraud provisions of several federal securities laws in either of two ways: by filing suit in federal court or by initiating an enforcement action before the SEC itself, in a proceeding that does not involve a jury and may result in the imposition of civil penalties. *Jarkesy* addressed the constitutionality of the latter approach.

The SEC initiated an enforcement action against George Jarkesy in front of an administrative law judge (ALJ), and ultimately imposed a $300,000 penalty. The Fifth Circuit vacated that order on three grounds, holding that: (i) adjudicating the matter in-house violated Jarkesy's Seventh Amendment right to a jury trial; (ii) Congress violated the nondelegation doctrine by allowing the SEC to choose either in-house or federal-court proceedings for its enforcement actions; and (iii) SEC ALJs enjoy an unconstitutional level of protection from removal.

The Supreme Court addressed only the Seventh Amendment issue, and affirmed. The Court held that the jury-trial right extends to statutory claims that resemble common-law causes of action and, in particular, pursue remedies traditionally available at common law. Because civil penalties were a remedy traditionally available at common law and securities fraud also resembles common-law fraud, the Seventh Amendment was implicated. The Court also rejected the SEC's argument that the claims fall under an exception to the jury-trial right for matters involving "public rights"—matters that historically could have been determined exclusively by the executive and legislative branches.

Jarkesy *holds that the SEC may no longer bring fraud claims for civil penalties under the Securities Act, Exchange Act, or Investment Advisers Act before an in-house adjudicator.*

The direct takeaway from *Jarkesy* is that, absent consent, the SEC may no longer bring fraud claims under the securities laws before an in-house adjudicator if it intends to seek civil penalties; it must file a lawsuit in federal court. Other questions remain open, such as whether other remedies, like disgorgement, trigger the Seventh Amendment, and how the ruling might apply to other statutes administered by other federal agencies.

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Bissonnette v. *LePage Bakeries Park St., LLC*

Arbitration – Transportation Worker Exemption

Under Section 1 of the Federal Arbitration Act (FAA), the FAA does not apply to "workers engaged in foreign or interstate commerce." The lower courts were divided on whether this "transportation worker exemption" turns on the industry in which a worker is employed—*i.e.*, the transportation industry—or the type of work the employee does—*i.e.*, whether the worker engages in some form of transportation work. The Supreme Court chose the latter (broader) interpretation in *Bissonnette*, likely making more employees eligible for the exemption.

In *Bissonnette*, distributors of packaged bakery foods produced by Flowers Foods alleged that the company had underpaid them in violation of state and federal wage laws. The distributors allegedly spent at least 40 hours per week delivering Flowers's products. The Second Circuit held that the distributors did not qualify for the FAA's transportation worker exemption from their contractual agreements to arbitrate their claims because Flowers Foods is in the business of "bread" and "buns," not transportation.

The Supreme Court unanimously vacated that decision, holding that Section 1 turns on whether a "person is a transportation worker," not whether the person's *employer* is engaged in the transportation industry. That decision makes clear that workers outside the transportation industry will be able to rely on the FAA's transportation worker exemption. But the Court remanded the case for the Second Circuit to determine whether the distributors are in fact transportation workers, noting that the distributors' jobs extended beyond transporting products to other tasks, such as setting up promotional displays. The precise definition of a "transportation worker" will thus remain the subject of future litigation.

No. 23-51

Opinion Date: 4/12/24

Vote: 9-0

Author: Roberts, C.J.

Lower Court: 2d Cir.

Bissonnette *holds that a worker need not be employed in the transportation industry to qualify for the Federal Arbitration Act's exemption for transportation workers.*

Coinbase, Inc. v. *Suski*

Arbitration – Deciding Arbitrability Where Contracts Conflict

No. 23-3

Opinion Date: 5/23/2024

Vote: 9-0

Author: Jackson, J.

Lower Court: 9th Cir.

Parties can form multiple levels of arbitration agreements. Most simply, they can agree to arbitrate the merits of a dispute. They also can agree to have an arbitrator decide the threshold arbitrability question—*i.e.*, whether a dispute is subject to arbitration. Prior Supreme Court cases addressed three levels of arbitration disputes: disagreements over (i) the merits of a dispute, (ii) the arbitrability of the merits, and (iii) who decides the arbitrability—the arbitrator or a court. *Coinbase* considers a fourth level: what happens when the parties have entered different contracts that conflict on who decides arbitrability?

The parties in *Coinbase* entered two agreements. The first contained an arbitration provision with a delegation clause, under which all disputes arising out of the contract "shall be decided by an arbitrator." The second contained a forum-selection clause, which gave California courts "sole jurisdiction of any controversies." The parties disagreed on who should decide which contract applies, and thus whether the dispute is arbitrable. The Ninth Circuit ultimately held that a court, and not an arbitrator, should decide.

The Supreme Court unanimously affirmed, holding that where parties form two contracts—one sending arbitrability disputes to arbitration and the other explicitly or implicitly sending such disputes to court—a court, and not an arbitrator, must decide which contract governs. The Court explained that the fundamental principle of arbitration is consent: disputes may be arbitrated only by agreement. Thus, if there is a legitimate disagreement about whether the parties have agreed to arbitrate a matter, a court must resolve that issue.

The Court's decision is narrow: it applies settled contract law principles and should have no impact in cases with only one agreement. But where parties have entered multiple contracts, the decision clarifies what will happen if those contracts are inconsistent on the forum for a dispute: a court will have to decide which contract controls.

Coinbase *holds that where parties have formed separate contracts that are inconsistent on the forum for a particular dispute—court or arbitration—the court rather than the arbitrator must decide which contract governs.*

Smith v. *Spizzirri*

Arbitration – Procedure Under the FAA

When a plaintiff files suit in federal court on claims subject to an arbitration agreement, the defendant may move to compel arbitration of those claims. If the court agrees that the plaintiff's claims are subject to arbitration, Section 3 of the Federal Arbitration Act provides that it "shall on application of one of the parties stay the trial of the action until [the] arbitration" comes to an end.

In *Spizzirri*, the Supreme Court addressed whether that provision also gives a federal court the discretion to *dismiss* (rather than stay) a suit that is subject to arbitration. The district court dismissed the plaintiffs' suit after finding that all of the claims were subject to arbitration, and the Ninth Circuit affirmed. The plaintiffs sought review in the Supreme Court, arguing that the FAA does not permit a district court to dismiss claims that are pending in arbitration proceedings.

The Court unanimously sided with the plaintiffs. Most importantly, the Court explained, the plain text of Section 3 refers only to the court's obligation to enter a stay, and makes no mention of dismissal. The Court also found that allowing district courts to dismiss claims subject to arbitration would be inconsistent with the fact that Congress authorized immediate appeals only when a court *refuses* to compel arbitration, because a party could immediately appeal the dismissal of its claims sent to arbitration. Finally, the Court held that district courts retain no inherent authority to dismiss cases in this context because Congress has overridden that inherent authority in the FAA.

Spizzirri resolves a long-running split among the courts of appeals and provides clarity for parties that are litigating claims in arbitration. Defendants will no longer be able to secure dismissal of actions after succeeding on a motion to compel arbitration, but plaintiffs will not be able to appeal those decisions until the arbitration proceedings conclude.

No. 22–1218

Opinion Date: 5/16/2024

Vote: 9-0

Author: Sotomayor, J.

Lower Court: 9th Cir.

Spizzirri *settles that the Federal Arbitration Act requires federal courts to stay suits that they conclude are subject to arbitration, rather than dismiss them.*

Cantero v. *Bank of America*

Banking Law – Preemption of State Banking Laws

No. 22-529

Opinion Date: 5/30/2024

Vote: 9-0

Author: Kavanaugh, J.

Lower Court: 2d Cir.

Banks in the United States can choose to obtain a charter from either the federal government or a state government. When a bank elects a federal charter and thereby becomes a "national bank," federal law prohibits states from enforcing any law that (i) discriminates against those banks as compared to state banks or (ii) "prevents or significantly interferes with" the powers granted to them by federal law.

Cantero concerned the standard for determining whether a state law significantly interferes with a national bank's power. The Supreme Court considered whether New York could require a national bank to pay interest on mortgage escrow accounts. The case began when private plaintiffs sued Bank of America (a national bank) for unpaid interest, claiming payment of interest was required by state law. On appeal, the Second Circuit sided with Bank of America, holding that New York's law was preempted because it "would exert control over" the bank.

Cantero holds that whether a state law "significantly interferes" with the powers of a national bank—and is therefore preempted—turns on a practical assessment of the degree of interference and is guided by the Court's prior preemption decisions.

The Court vacated and remanded because the Second Circuit did not apply the proper standard for analyzing preemption. In a unanimous opinion, the Court rejected the parties' proposals for bright-line rules. Instead, the Court directed lower courts to make a "practical assessment" of the interference caused by the particular state law at issue in each case. To make that determination, the Court instructed lower courts to compare the state law at issue to those the Court had analyzed in prior preemption decisions. The Court noted that in each of those decisions, many of which found state laws preempted based on low levels of interference, it decided the preemption question based on a combination of the "nature *and* degree" of the state law's interference, guided by "the text and structure of the law[], comparison to other precedents, and common sense."

Following *Cantero*, national banks arguing that state laws are preempted must continue litigating on a case-by-case basis. But the Court's instruction to use its prior preemption decisions to assess the interference caused by state laws should continue to give preemption arguments significant force.

Harrington v. *Purdue Pharma L.P.*

Bankruptcy – Third-Party Releases

The Bankruptcy Code allows a debtor to discharge debts as part of a court-approved reorganization plan, but only if the debtor puts forward virtually all of its assets to satisfy outstanding debts. In *Purdue*, the Supreme Court considered whether a court-approved reorganization plan may also discharge the debts of a *nondebtor* that is related to the debtor but has not surrendered all of its assets as part of the bankruptcy process.

Purdue Pharma is a drug manufacturer owned and controlled by the Sackler family. When Purdue filed for bankruptcy in 2019, the bankruptcy court approved a reorganization plan that released both Purdue (the debtor) and the Sackler family (nondebtors) from all claims based on Purdue's misconduct. In exchange, the Sacklers agreed to contribute $6 billion to the bankruptcy estate. The Second Circuit upheld that plan, reasoning that the Bankruptcy Code allowed the bankruptcy court to craft an appropriate reorganization plan that discharged the Sacklers' liability—even though creditors had not unanimously consented to that discharge.

The Supreme Court reversed, holding that the Bankruptcy Code does not authorize a court to discharge the debts of a nondebtor. The Court explained that the text of the Code focuses on claims against the debtor and reasoned that allowing a nondebtor to discharge its debts without placing all of its assets on the table would frustrate the statutory scheme. The Court rebuffed calls to consider the practical importance of the Sackler discharge to the plan here and, more generally, to the efficient resolution of mass-tort liability.

Following *Purdue*, bankruptcy courts will not be able to use reorganization plans to extinguish claims against a third party without the unanimous consent of that party's creditors, which may have implications for other mass torts. The Court, however, declined to express a view on whether a bankruptcy court may authorize a consensual third-party release or whether its holding will apply to previously approved reorganization plans.

No. 23-124

Opinion Date: 6/27/2024

Vote: 5-4

Author: Gorsuch, J.

Lower Court: 2d Cir.

Purdue *holds that a bankruptcy reorganization plan may not discharge claims against a nondebtor if creditors have not unanimously consented to the discharge.*

Truck Insurance Exchange v. *Kaiser Gypsum Co.*

Bankruptcy – Insurers' Standing

No. 22-1079

Opinion Date: 6/6/2024

Vote: 8-0

Author: Sotomayor, J.

Lower Court: 4th Cir.

Section 1109(b) of the Bankruptcy Code allows any "party in interest" to "raise" and "appear and be heard on any issue" in a Chapter 11 bankruptcy. In *Truck Insurance*, the Supreme Court considered whether an insurer with financial responsibility for claims against the debtor qualifies as a "party in interest."

Facing thousands of asbestos-related lawsuits, Kaiser Gypsum filed for bankruptcy. The proposed reorganization plan includes an Asbestos Personal Injury Trust that assumes Kaiser Gypsum's liabilities for asbestos claims. Truck Insurance Exchange, Kaiser's primary insurer, would continue to bear insurance liability for such claims under the plan. The lower courts rejected Truck's challenge to the plan, concluding that Truck is not a "party in interest" with standing to object because the plan is "insurance neutral"—*i.e.*, it neither increases Truck's prepetition obligations nor impairs its rights under the insurance contracts.

Following Truck Insurance*, an insurer with financial responsibility for bankruptcy claims may challenge the proposed reorganization plan regardless of whether the plan is "insurance neutral."*

The Court unanimously reversed, rejecting the insurance-neutrality doctrine. That doctrine, the Court reasoned, conflates the merits of an insurer's objection with the threshold question of who qualifies as a "party in interest." The Court looked to both the text and the purpose of Section 1109(b), explaining that the phrase "party in interest" is broad and that the theory behind Section 1109(b) is to allow anyone to participate who has a direct financial stake in the outcome. Applying those principles, the Court held that an insurer with financial responsibility for a bankruptcy claim qualifies as a "party in interest" because it "can be directly and adversely affected by the reorganization proceeding." Of course, party-in-interest status does not entitle an insurer to veto a plan, but only to present its objections.

Truck Insurance takes a broad view of who has a seat at the bankruptcy table, allowing insurers to challenge any plan that includes claims for which they would have financial responsibility.

CFPB v. *Community Financial Services Ass'n*

Constitutional Law – Appropriations Clause

No. 22-448

Opinion Date: 5/16/24

Vote: 7-2

Author: Thomas, J.

Lower Court: 5th Cir.

CFSA involved a constitutional challenge to how Congress provided for funding of the CFPB. The Constitution's Appropriations Clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." When creating the CFPB, Congress set up a unique funding structure that did not rely on annual congressional appropriations. Instead, the CFPB Director is authorized to draw from the Federal Reserve System the amount of funding he determines is "reasonably necessary to carry out" the CFPB's mission, subject only to an inflation-adjusted cap.

After the CFPB adopted its Payday Lending Rule in 2017, trade associations challenged the rule and argued (among other things) that the CFPB's funding structure violated the Appropriations Clause. The Fifth Circuit agreed, holding that the CFPB's funding scheme amounted to an unconstitutional "cession of [Congress's] power of the purse to the Bureau."

In upholding the constitutionality of the CFPB's funding structure, CFSA *holds that a congressional appropriation need only identify a source of public funds and authorize the expenditure of those funds for a designated purpose in order to comply with the Appropriations Clause.*

The Supreme Court reversed that decision and upheld the constitutionality of the CFPB's funding mechanism. The Court explained that, to comply with the Appropriations Clause, Congress "need only identify a source of public funds and authorize the expenditure of those funds for designated purposes." The CFPB's funding mechanism satisfied this requirement, the Court held, because Congress had specified a source for the funding, directed its use, and imposed limits on its magnitude.

CFSA thus rejects an existential challenge to the CFPB that could have had a substantial impact on the Bureau's rulemaking and enforcement capabilities. The decision also sets a high bar for any future Appropriations Clause challenges.

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City of Grants Pass v. *Johnson*

Constitutional Law – Public Camping Regulations

No. 23-175

Opinion Date: 6/28/2024

Vote: 6-3

Author: Gorsuch, J.

Lower Court: 9th Cir.

In 2019, the Ninth Circuit held that the Eighth Amendment's Cruel and Unusual Punishments Clause limits the authority of municipalities to enforce laws restricting camping in public places against involuntarily homeless individuals. A number of courts have since entered injunctions prohibiting various cities in the Ninth Circuit from enforcing such regulations against the homeless.

In *Grants Pass*, the Supreme Court examined that line of cases. Homeless individuals living in Grants Pass, Oregon, filed suit against the city. Invoking the Eighth Amendment, plaintiffs sought an injunction prohibiting the city from enforcing its public camping ordinances against them while the number of homeless persons exceeded the number of "practically available" shelter beds. The district court granted the injunction, and the Ninth Circuit affirmed.

The Supreme Court reversed the Ninth Circuit's interpretation of the Eighth Amendment. That Amendment, the Court explained, generally limits the punishments that the government may impose after a criminal conviction, not the kinds of behavior that the government may criminalize in the first place. And the punishments imposed for violations of the ordinances at issue, the Court reasoned—including small fines, temporary exclusion from parks, and ultimately short jail sentences—were neither cruel nor unusual. The Court rejected the argument adopted by the plaintiffs and the Ninth Circuit that the ordinances impermissibly criminalized the "mere status" of homelessness alone, given that they apply equally to any individual who violates them, whether a homeless person or a protesting student.

The Court stressed that its opinion addressed only the Ninth Circuit's interpretation of the Eighth Amendment, and that it was simply restoring to local governments one tool they can use to address the complex problem of homelessness. The decision may have practical implications for businesses in areas with encampments or significant homeless populations.

Grants Pass *holds that the enforcement of generally applicable public camping bans against homeless persons does not constitute "cruel and unusual punishment" prohibited by the Eighth Amendment.*

Snyder v. *United States*

Criminal Defense – Federal Bribery Statute

18 U.S.C. § 666(a)(1)(B) makes it a crime for state and local public officials to "corruptly" solicit, accept, or agree to accept anything of value with the intent "to be influenced or rewarded" for an official act. In *Snyder*, the Supreme Court considered whether that statute prohibits officials from accepting *gratuities* for past acts they have already taken, or whether it reaches only *bribes* made to influence a future act.

No. 23-108

Opinion Date: 6/26/2024

Vote: 6-3

Author: Kavanaugh, J.

Lower Court: 7th Cir.

As the mayor of Portage, Indiana, James Snyder purchased five garbage trucks for the city from Great Lakes Peterbilt. A few months later, Great Lakes Peterbilt gave Snyder a check for $13,000. The federal government prosecuted Snyder under Section 666, contending that Snyder had accepted something of value with the intent to be "rewarded." A jury convicted Snyder, and the district court sentenced him to one year and nine months in prison. The Seventh Circuit affirmed Snyder's conviction.

Snyder *holds that it is not a federal crime for state and local officials to accept gratuities for official acts that have already been taken.*

The Supreme Court reversed. The Court drew a distinction between bribes, which are payments made or agreed to *before* an official act and are "inherently corrupt and unlawful," and gratuities, which are paid *after* an official act as a thank you and may occur innocently. The Court concluded that the statutory text, history, and structure all showed that Section 666 is an anti-bribery statute, not an anti-gratuity statute. The Court added that the harsh penalties for violating Section 666 (up to 10 years in federal prison), the balance of power between federal and local governments, and the lack of fair notice to officials all confirmed that the statute should not be read to reach gratuities.

Snyder resolves a circuit split over whether Section 666 criminalizes gratuities. The decision continues a clear trend in the past decade of the Court attempting to curb federal prosecutors' aggressive use of public-corruption statutes. The Court noted several times that while some gratuities are commonplace and innocuous, others can be problematic. But the Court made clear that Section 666 leaves it to state and local governments to regulate gratuities to state and local officials.

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Moody v. *NetChoice* / *Netchoice* v. *Paxton*

First Amendment – Regulation of Social Media Platforms

Nos. 22-277 and 22-555

Opinion Date: 7/1/2024

Vote: 9-0

Author: Kagan, J.

Lower Courts: 5th Cir. and 11th Cir.

In 2021, Florida and Texas enacted statutes that seek to limit the ability of social media platforms to moderate content posted by users, and require platforms to provide an individualized explanation to a user any time a post is removed or altered. Those laws divided the lower courts. The Fifth Circuit upheld Texas's law on the ground that platforms' content-moderation practices were not "expressive" activities protected by the First Amendment. The Eleventh Circuit reached the opposite conclusion, holding that Florida's law infringed on platforms' "editorial discretion" and chilled protected speech.

The Supreme Court declined to resolve the merits of either case. Facial challenges under the First Amendment, the Court explained, require a court to first determine the full range of activities regulated by state law—here, all the various websites and apps the laws could apply to—and then assess whether the unconstitutional applications are "substantial" when compared to the constitutional ones. Because neither court of appeals had conducted that analysis, the Court sent the cases back to be resolved by the lower courts in the first instance.

But the Court articulated important principles to guide the lower courts' analysis on remand. First, the Court confirmed that social media platforms engage in protected activity when they compile and curate speech posted by their users, and that those platforms do not lose First Amendment protection solely because they accept the majority of content posted by their users. Second, the Court explained that states do not have a legitimate interest in regulating private speech for the purpose of achieving "ideological balance" or ensuring that the public has access to a "wide range of views."

In laying out these principles, *Moody* shows that social media platforms' content-moderation practices are protected by the First Amendment, and that states cannot regulate those practices in order to eliminate perceived censorship.

Moody *explains that social media platforms' content-moderation practices will receive First Amendment protection and that states cannot regulate those practices solely for the purpose of achieving ideological balance.*

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National Rifle Association of America v. *Vullo*

First Amendment – Regulatory Coercion

The First Amendment prohibits the government from punishing or suppressing disfavored speech. In *Vullo*, the Supreme Court considered what sort of conduct by government officials to exert pressure on the decisions of private parties can qualify as punishment or suppression of speech in violation of the First Amendment.

The underlying lawsuit was brought by the National Rifle Association (NRA) against Maria Vullo, the former superintendent of New York's Department of Financial Services. The NRA alleged that Vullo used government authority to penalize its speech about guns, in violation of the First Amendment. Specifically, it alleged that Vullo had coerced certain insurers into terminating their relationships with the NRA, including by telling the insurers that New York would not investigate them if they ceased providing services to the NRA and by issuing official guidance to insurers and banks explaining that severing ties with the NRA would be "fulfilling their corporate social responsibility." The Second Circuit found that the NRA's complaint failed to state a First Amendment claim.

The Supreme Court unanimously reversed. Although the Court made clear that government officials are free to express their own beliefs about contested issues, the Court explained that officials cannot go further and threaten adverse government action in order to punish or suppress speech they disfavor. The Court concluded that given Vullo's position of authority and the context of her statements to insurers, the conduct alleged in the NRA's complaint plausibly amounted to an unconstitutional attempt to punish the NRA's gun-related advocacy.

Vullo makes clear that the government cannot coerce or induce businesses into taking some action if the government's ultimate goal is to suppress speech. The government cannot couch its actions as government advocacy if it is acting with an implicit threat of penalty (or promise of forbearance of penalties).

No. 22-842

Opinion Date: 5/30/2024

Vote: 9-0

Author: Sotomayor, J.

Lower Court: 2d Cir.

Vullo *holds that government officials violate the First Amendment when they pressure regulated entities to take unfavorable action against other private parties based on those parties' speech.*

Great Lakes Insurance SE v. *Raiders Retreat Realty Co.*

Insurance – Choice of Law

No. 22-500

Opinion Date: 2/21/2024

Vote: 9-0

Author: Kavanaugh, J.

Lower Court: 3d Cir.

Sullivan & Cromwell obtained a unanimous victory for client Great Lakes Insurance in a dispute about the enforceability of choice-of-law provisions in marine insurance contracts.

Great Lakes insured Raiders's yacht under a policy that included a choice-of-law provision selecting New York law. After the yacht ran aground, the parties went to court in Pennsylvania to litigate the insurance coverage. There, they also disputed whose law applied: Pennsylvania's (where the suit was brought), or New York's (which the choice-of-law provision selected). The district court enforced the choice-of-law provision, but the Third Circuit vacated that judgment and remanded for the district court to consider whether applying New York law would violate Pennsylvania public policy.

The Supreme Court unanimously reversed, holding that the parties' choice-of-law provision was enforceable without regard to Pennsylvania public policy. The Court first explained that choice-of-law clauses in marine insurance agreements are presumptively enforceable as a matter of federal maritime law. It held that this federal presumption is subject only to narrow, federal exceptions, such as when the law chosen by the parties would conflict with a federal statute or with federal maritime policy—neither of which applied to the parties' selection of New York law here. The Court further explained that the federal presumption of enforceability could not be overcome simply because the chosen law would violate the public policy of a state, even if that state had the greatest interest in the dispute.

The decision reaffirms the primacy of federal maritime law and provides greater certainty for the enforceability of choice-of-law provisions in maritime contracts. More generally, the decision includes favorable language regarding choice-of-law provisions in contracts, noting that the benefits of choice-of-law and forum-selection provisions extend beyond the maritime industry.

Great Lakes *clarifies that choice-of-law provisions in marine insurance contracts enjoy a federal presumption of enforceability that is subject only to narrow, federal exceptions.*

Warner Chappell Music, Inc. v. *Nealy*

Intellectual Property – Copyright Damages

No. 22-1078

Opinion Date: 5/9/2024

Vote: 6-3

Author: Kagan, J.

Lower Court: 11th Cir.

The Copyright Act permits a party to sue "within three years after the claim accrued." Lower courts have long applied a "discovery rule" to that provision, under which a copyright-infringement claim accrues when the plaintiff discovers (or should have discovered) the infringement, not when the infringement actually occurred. In *Warner Chappell*, the Court assumed without deciding that the discovery rule is correct and addressed a subsequent question: whether, under that rule, a plaintiff can recover damages for acts that occurred more than three years before the suit began.

In 2018, Sherman Nealy sued Warner Chappell for infringing on his copyrights to certain songs. The infringements had occurred as far back as 2008, when Nealy was in prison. Nealy claimed not to have discovered the infringements until 2016, and he sought damages for all the infringements dating back to 2008. Warner Chappell conceded that Nealy's claim was timely under the discovery rule, but sought to limit his damages to harms suffered within the three years prior to his suit. The Eleventh Circuit rejected that argument, ruling that Nealy was entitled to damages for all of the infringements.

The Supreme Court affirmed. In a brief opinion, the Court explained that the plain text of the Copyright Act does not impose the limit on damages Warner Chappell had envisioned. Thus, *if* the discovery rule is appropriate, then copyright plaintiffs can sue to recover their full damages. The Court expressed some doubt about that premise, however, and suggested that it might someday field a challenge to the discovery rule itself. Defendants in a copyright-infringement action should take care to preserve a challenge to the discovery rule in future cases, even though that rule has long been applied in most circuits.

Warner Chappell *holds that, assuming a "discovery rule" applies to the three-year statute of limitations for copyright-infringement suits, a plaintiff is entitled to damages for infringements that occurred more than three years before the suit.*

Muldrow v. *City of St. Louis*

Labor & Employment – Employment Discrimination

No. 22-193

Opinion Date: 4/17/2024

Vote: 9-0

Author: Kagan, J.

Lower Court: 8th Cir.

Title VII of the Civil Rights Act forbids an employer from altering the terms and conditions of an employee's job because of the employee's race, color, sex, national origin, or religion. Several courts of appeals had held that, to prevail under Title VII, an employee must show that a change in the terms and conditions of employment caused the employee "significant" harm. Applying that standard, the Eighth Circuit held that a job transfer that altered Muldrow's responsibilities, perks, and schedule—because of her sex, Muldrow alleged—did not inflict a sufficiently significant change in the terms of her employment to allow her to sue under Title VII, primarily because her pay and police department rank remained the same.

The Supreme Court rejected this "heightened injury standard." The Court explained that Title VII requires an employee to show that any discriminatory change in employment terms or conditions is "disadvantageous" to the employee. But nothing more than that is necessary. In other words, the statute requires a showing of "some harm" to the employee, but not harm that is significant, substantial, or serious—all words that various lower courts had previously used to reject certain Title VII suits.

Muldrow *holds that an employee must suffer some harm because of discriminatory employer action to bring a claim under Title VII, but the harm need not be significant.*

Muldrow changes the law in the six circuits that had imposed a significant-harm test. The question remains whether the change is more formal than practical. Justice Thomas and Justice Alito wrote separately to suggest that there is little practical difference between the Court's interpretation of Title VII and the now-rejected significant-harm test. The majority disagreed, instead stating that "many cases will come out differently" without a significant-harm threshold.

Notably, while *Muldrow* is a sex-discrimination case, its reasoning will apply to actions taken because of any protected characteristic in Title VII, including race, color, religion, or national origin. That may include actions challenging certain workplace diversity programs.

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Murray v. *UBS Securities, LLC*

Labor & Employment – Whistleblower Protections

The Sarbanes-Oxley Act bars publicly traded companies from retaliating against employees who report violations of federal securities laws and regulations. Specifically, covered employers 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" protected whistleblowing activity. If an employee believes that her employer has violated that provision, the employee can file a complaint with the Department of Labor seeking a number of remedies, including reinstatement, back pay, and compensation. In *Murray*, the Supreme Court considered whether an employee asserting unlawful retaliation under Sarbanes-Oxley must prove that her employer acted with "retaliatory intent."

No. 22-660

Opinion Date: 2/8/2024

Vote: 9-0

Author: Sotomayor, J.

Lower Court: 2d Cir.

Murray *holds that Sarbanes-Oxley does not require plaintiffs asserting unlawful retaliation for protected whistleblowing activity to prove that their employer acted with retaliatory intent.*

Reversing the Second Circuit and resolving a circuit split, the Court unanimously held that Sarbanes-Oxley does not require an employee to show "animus-like retaliatory intent" in order to prove that her employer acted "because of" the protected whistleblowing activity. Instead, the employee must prove only that the protected whistleblowing activity was a "contributing factor" to the "unfavorable personnel action"—*i.e.*, "firing them, demoting them, or imposing some other unfavorable change." If an employee makes that "contributing factor" showing, the burden shifts to the employer. To avoid liability, the employer must prove that it would have made the same adverse employment decision if the employee had not engaged in the protected whistleblowing activity.

After *Murray*, employers cannot rely on the absence of "retaliatory intent" as a defense in a Sarbanes-Oxley whistleblower action. Employees, however, must still show that the adverse employment action occurred "because of" their whistleblowing activity. Accordingly, *Murray* underscores the importance of documenting the legitimate reasons for adverse employment actions.

Starbucks Corp. v. *McKinney*

Labor & Employment – Preliminary Injunctions

No. 23-367

Opinion Date: 6/13/2024

Vote: 9-0

Author: Thomas, J.

Lower Court: 6th Cir.

Section 10(j) of the National Labor Relations Act (NLRA) authorizes the National Labor Relations Board to seek a preliminary injunction from a federal court while pursuing its own administrative enforcement proceedings for alleged unfair labor practices. Such a preliminary injunction may direct a company to take (or cease) certain actions while the Board adjudicates the charge, and Section 10(j) allows a court to grant such temporary relief if it "deem[s]" it "just and proper" to do so.

The question in *Starbucks* was whether the NLRA requires the Board to satisfy the same four traditional factors that govern other preliminary-injunction applications—including that it is likely to succeed on the ultimate merits of the case and would be irreparably harmed without preliminary relief—or whether, as some courts had held, the statute allows the Board to obtain relief on some lower showing.

Here, the Board sought a preliminary injunction reinstating terminated Starbucks employees while the Board pursued administrative charges against Starbucks in connection with the terminations. Applying Sixth Circuit precedent, the district court granted the injunction based on its finding that there was "reasonable cause" to believe Starbucks had engaged in unfair labor practices—essentially, that the Board's legal theory was "substantial and not frivolous."

The Supreme Court rejected this more lenient standard. It held that nothing in Section 10(j) replaces the traditional test for preliminary injunctive relief. To secure such temporary relief, the Board must show a *likelihood* of success—on both the law *and* the facts—rather than merely that its legal theory is not frivolous. More broadly, the decision makes clear that the Court will require clear statutory direction before altering the traditional four-factor test for preliminary injunctive relief in any other context.

Starbucks *clarifies that when the National Labor Relations Board seeks a preliminary injunction in federal court, it must meet the same demanding standard that governs any other party's request for an injunction.*

Macquarie Infrastructure Corp. v. *Moab Partners, L.P.*

Securities Litigation – Omissions Liability

No. 22-1165

Opinion Date: 4/12/24

Vote: 9-0

Author: Sotomayor, J.

Lower Court: 2d Cir.

SEC Rule 10b-5(b), a regulation that implements Section 10(b) of the Securities Exchange Act of 1934, makes it "unlawful" for a publicly traded issuer to make "any untrue statement of a material fact" or "omit to state a material fact necessary in order to make the statements made . . . not misleading." Item 303, another SEC regulation, requires public companies to identify certain "known trends or uncertainties" that could impact "revenues or income" in disclosures filed with the SEC.

The Supreme Court's decision resolved a circuit split on the question of whether a failure to disclose information required by Item 303, standing on its own, could form the basis of a private lawsuit brought under 10b-5. The Court held that such a violation cannot, in the absence of an otherwise misleading statement, support a private 10b-5 claim. The Court relied on Rule 10b-5's text—particularly its repeated references to "statements"—to conclude that 10b-5(b) "does not proscribe pure omissions," and instead covers only untrue statements and half-truths (*i.e.*, statements omitting material facts necessary to make them not misleading). The absence of mandatory disclosure language in 10b-5(b), such as is found in other securities laws, further supported the Court's conclusion.

Macquarie *clarifies that a securities issuer may not be held liable for "pure omissions" in a private lawsuit under Rule 10b-5.*

After *Macquarie*, a plaintiff will not be able to survive dismissal or summary judgment without identifying a "statement" rendered misleading by the alleged omission. But the Court declined to resolve questions about the scope of "statements" that could be rendered misleading by such an omission. As the Court noted, its decision does not affect the SEC's authority to bring enforcement actions for Item 303 violations.

Moore v. *United States*

Tax – Realization Requirement

No. 22-800

Opinion Date: 6/20/2024

Vote: 7-2

Author: Kavanaugh, J.

Lower Court: 9th Cir.

The Constitution requires all direct taxes to be apportioned among the states. Under the Sixteenth Amendment, however, income taxes are an exception. In 2017, Congress enacted the Mandatory Repatriation Tax (MRT), a one-time, backward-looking tax on accumulated, but undistributed, income from investments in American-controlled foreign corporations. In *Moore*, the Supreme Court considered whether the MRT is an income tax or an unconstitutional direct tax.

Charles and Kathleen Moore invested in an American-controlled foreign corporation called KisanKraft. The corporation never distributed income to its shareholders. However, the MRT required the Moores to pay taxes on their share of KisanKraft's accumulated income from 2006 to 2017. The Moores challenged the MRT, arguing that it was an unapportioned direct tax on property (their shares of stock), rather than an income tax. The Moores argued that, because they had never received a distribution, the MRT taxed unrealized gains—and unrealized gains are not income. If Congress may tax unrealized gains, the Moores warned, then it may enact a wealth tax too. The Ninth Circuit denied their challenge, rejecting a "realization" rule.

Moore concludes that the Mandatory Repatriation Tax is a constitutional tax on realized income, and avoids the thornier question of whether Congress may tax unrealized gains.

The Supreme Court affirmed, but under different reasoning. The Court explained that it did not need to decide whether unrealized gains may be taxed as income, because that is not how the MRT works. Instead, the MRT treats an American-owned foreign corporation as a pass-through, like a partnership. The MRT thus attributes the company's realized income—which is indisputably realized by the corporation—to its American shareholders. The Court saw no reason to distinguish the MRT from taxes on partnerships or S-Corp income, which the Moores conceded are constitutional.

Moore upholds the constitutionality of the MRT and minimizes any spillover effects for other portions of the Tax Code. The Court, however, avoided the most consequential issue: whether realization is a constitutional requirement for an income tax.

S&C's Supreme Court and Appellate Practice

Led by former Acting Solicitor General of the United States Jeff Wall—who has argued 31 times before the U.S. Supreme Court—and drawing on the experience of 18 former U.S. Supreme Court clerks and 85 former federal circuit court clerks, S&C's Supreme Court and Appellate Practice handles challenging and high-profile appeals around the country. Our Supreme Court and Appellate lawyers collectively have significant experience before the Supreme Court and scores of other federal and state courts of appeals.

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Judd Littleton is a partner in S&C's Litigation Group and co-head of the Firm's Supreme Court and Appellate Practice. His diverse practice focuses on Supreme Court and appellate work, complex commercial litigation, and criminal defense and investigations. Prior to joining the Firm, Judd served as a trial attorney in the Civil Division of the U.S. Department of Justice, where he litigated cases involving a wide range of constitutional and statutory issues and received the Attorney General's Distinguished Service Award, the Department's second-highest award for employee performance. Judd also previously served as a Bristow Fellow in the Office of the Solicitor General at the U.S. Department of Justice, where he worked on numerous cases before the U.S. Supreme Court and federal courts of appeals. He clerked for Chief Justice John G. Roberts, Jr. of the U.S. Supreme Court and for Judge A. Raymond Randolph of the U.S. Court of Appeals for the D.C. Circuit. Judd is a member of the Edward Coke Appellate Inn of Court and the Supreme Court Historical Society. He was recognized by *Lawdragon* as a 2023 and 2024 "Leading Litigator in America" (Appellate/Supreme Court) and by *The National Law Journal* as one of its 2019 D.C. Rising Stars.

Julia Malkina

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