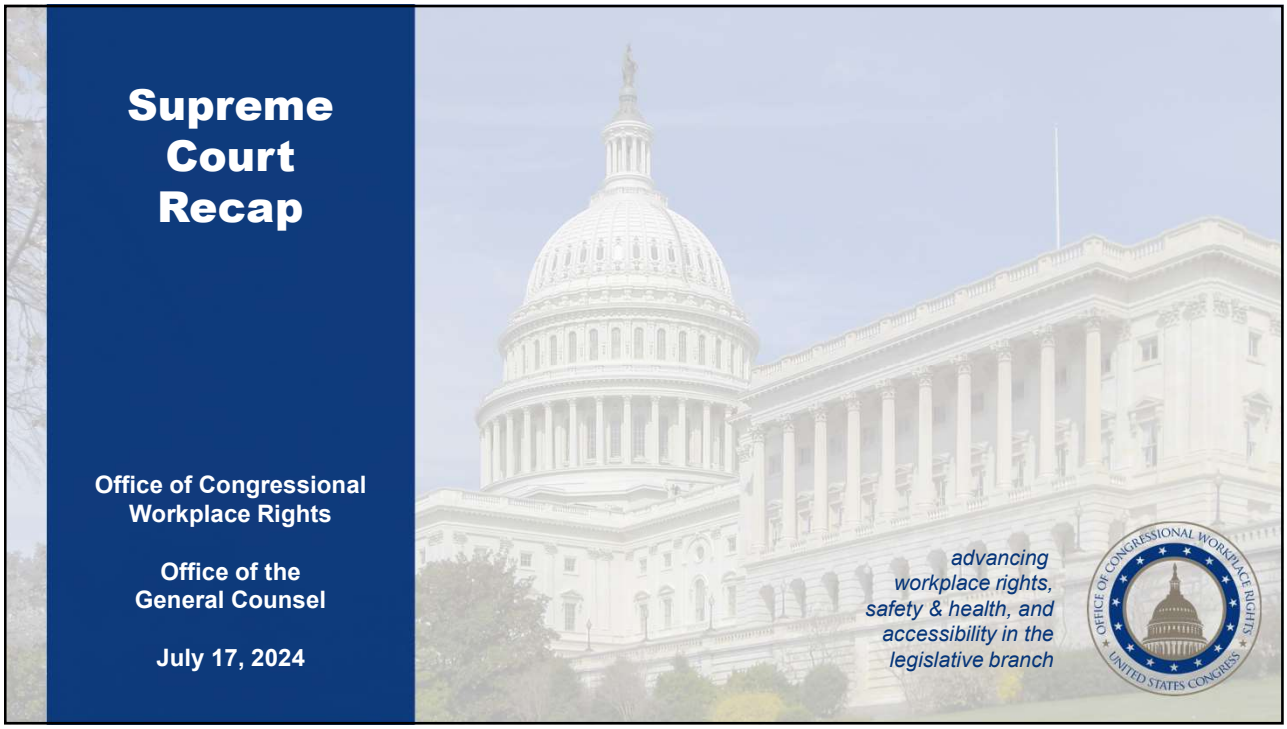

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Most Relevant SCOTUS Cases from OT 23

- *Muldrow v. City of St. Louis, Missouri* – Title VII
- *Murray v. UBS Securities, LLC* – Retaliation
- *Lindke v. Freed* and *O'Connor-Ratcliff v. Garnier* – First Amendment
- *Harrow v. Department of Defense* – Civil Procedure
- *Acheson Hotels, LLC v. Laufer* and *FBI v. Fikre* – Mootness
- *Loper Bright Enterprises v. Raimondo* – Administrative Law

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Presenters

- Hillary Benson, Deputy General Counsel
- Dynah Haubert, Associate General Counsel
- John Mickley, Associate General Counsel
- Alexandra Marsh, Law Clerk

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Muldrow v. City of St. Louis, Missouri

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Muldrow v. City of St. Louis, Missouri, 144 S. Ct. 967 (2024)

- Decided April 17, 2024
- Majority opinion authored by Justice Elena Kagan
- Concurrences by Justices Clarence Thomas, Samuel Alito, and Brett Kavanaugh
- Appeal from *Muldrow v. City of St. Louis, Missouri*, 30 F.4th 680 (8th Cir. 2022)

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Muldrow v. City of St. Louis, Missouri – Background

- Sergeant Jatonya Muldrow served in the Intelligence Division of the St. Louis Police Department, where she was deputized to serve on an FBI Task Force. This was considered a prestigious position and came with numerous privileges.
- When a new commander was hired, he transferred Muldrow out of the police headquarters to a uniformed job in the Fifth District. She maintained her rank and level of pay, but she was removed from the FBI Task Force and lost all of its associated privileges, along with her access to high-ranking department officials, and she was no longer able to work a regular schedule.
- Muldrow was replaced in the Intelligence Division by a male police officer, who the new commander said seemed a better fit for the Division's "very dangerous" work.

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Muldrow v. City of St. Louis, Missouri – Litigation History

- Muldrow sued, alleging that the transfer constituted discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964.
- The U.S. District Court for the Eastern District of Missouri granted summary judgment in favor of the City, explaining that Muldrow was required to show that her transfer caused a "significant" change in working conditions, but she could not meet this heightened-injury standard.
- The Eighth Circuit affirmed, holding that Muldrow's claim failed because she did not show a "materially significant disadvantage," and emphasizing that the transfer "did not result in a diminution to her title, salary, or benefits" and had caused "only minor changes in working conditions."

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Muldrow v. City of St. Louis, Missouri – SCOTUS opinion

- The Supreme Court granted certiorari "to resolve a circuit split over whether an employee challenging a transfer under Title VII must meet a heightened threshold of harm – be it dubbed significant, serious, or something similar."
- The Court held that an employee challenging a job transfer under Title VII must show that the transfer brought about some harm with respect to an identifiable term or condition of employment, but that the harm need not be significant.
- The decision relies primarily on a very straightforward textualist argument. The phrase "discriminate against" in §2000e-2(a)(1) means to treat worse. *Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644, 658 (2020). However, this phrase does not say anything about how much worse the treatment must be. To demand a showing of "significant" harm from a Title VII claimant would be asking more of them than the law requires.

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Muldrow v. City of St. Louis, Missouri – SCOTUS opinion (cont'd)

- The Court rejected the City's three main arguments:
  - The Court rejected the City's reliance on the *ejusdem generis* canon of statutory interpretation – "the idea that a general phrase following an enumeration of things should be read to encompass only things of the same basic kind" – which the City used to argue that the phrase "or otherwise discriminate against" refers to actions at the level of "discharge" or "fail or refuse to hire."
  - The City argued that harms must be "materially adverse" to violate Title VII, but the Court noted that this is the standard for retaliation claims, not discrimination claims.
  - Congress could have limited liability for job transfers but chose not to, and the Court does not get to impose its own policy considerations, so the City's concern over a flood of Title VII lawsuits does not change the Court's analysis of the statutory text.

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Muldrow v. City of St. Louis, Missouri – Concurrences

- Justice Thomas concurred in the judgment, but disagreed with the majority that the Eighth Circuit imposed a heightened standard of significant harm. Instead, he wrote, it used the "more than a trifling harm" standard, and Muldrow failed to prove that there was any non-trifling change in her job.
- Justice Alito agreed with the judgment, but wrote that he found the new standard to be unhelpful, and predicted that the result of the Court's decision will be that "careful lower court judges will mind the words they use but will continue to do pretty much just what they have done for years."
- Justice Kavanaugh wrote that *any* transfer constitutes a change in the terms or conditions of employment, and that based on the text of Title VII, a plaintiff should only be required to demonstrate that they were treated differently because of their protected status, not to make a separate showing of harm. However, he concurred because "some harm" is a low bar that can be shown in just about any transfer case.

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Muldrow v. City of St. Louis, Missouri – Significance

- This case will likely result in more Title VII transfer cases surviving summary judgment, because "some harm" is a lower bar than that which many courts have applied.
- Although the question presented was limited to the context of involuntary job transfers, and the decision also referred only to transfers, it is possible that the Court's reasoning in *Muldrow* could be applied to other types of employment actions in Title VII cases.
- Courts that have required a showing of economic or tangible harm may need to reformulate their analysis.

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Murray v. UBS Securities, LLC

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Murray v. UBS Securities, LLC, 601 U.S. 23 (2024)

- Decided February 8, 2024
- Unanimous opinion authored by Justice Sonia Sotomayor
- Concurrence by Justice Samuel Alito, joined by Justice Amy Coney Barrett
- Appeal from *Murray v. UBS Securities, LLC*, 43 F.4th 254 (2d Cir. 2022)

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Murray v. UBS Securities, LLC – Background

- A UBS employee was terminated shortly after reporting unethical and illegal behavior. He sued alleging UBS violated the whistleblower protections of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A.
- This provision provides that 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.
- In the District Court for the Southern District of New York, the jury found that Murray had established his claim by showing that his protected activity was a contributing factor in his termination, and that UBS had failed to prove that would have fired him even if he had not engaged in protected activity.
- The Second Circuit vacated and remanded, holding that retaliatory intent was an element of a section 1514A claim.

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Murray v. UBS Securities, LLC – SCOTUS opinion

- Holding: A whistleblower bringing a claim under the whistleblower-protection provision of the Sarbanes-Oxley Act must prove that his protected activity was a contributing factor in the unfavorable personnel action, but need not also prove that his employer acted with "retaliatory intent."
- SCOTUS treats "retaliatory intent" like animus.
- Section 1514A's text does not include a "retaliatory intent" requirement.
  - Drawing meaning from the terms preceding "discrimination" and looking at the word's definition, it is clear that an employer's lack of animosity is irrelevant.
- Section 1514A contains a mandatory burden shifting framework, which a "retaliatory intent" requirement would ignore.
  - Showing that an employer acted with retaliatory animus is just one way a plaintiff can prove that protected activity was a contributing factor in the adverse employment action.

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Murray v. UBS Securities, LLC – Concurrence

- Justice Alito, joined by Justice Barrett, reiterated that SCOTUS's rejection of an "animus" requirement in Sarbanes-Oxley whistleblower cases does not eliminate the requirement for a plaintiff to show intent to discriminate.

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Murray v. UBS Securities, LLC – Significance in the CAA Context

- The Sarbanes-Oxley Act does not apply through the CAA, but the *Murray* decision may be instructive to the OCWR Board and to federal courts interpreting the CAA's prohibition on intimidation or reprisal.
- Section 208 of the CAA, 2 U.S.C. § 1317, provides that employing offices may not "intimidate, take reprisal against, or otherwise discriminate against" a covered employee because the employee has opposed practices prohibited by the CAA or participated in proceedings under the CAA.
- *Murray* instructs that "discriminate" in the anti-reprisal context may not include a "retaliatory intent" requirement – meaning a covered employee would not need to prove that a covered office acted with retaliatory intent to establish a violation of CAA section 208.

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Lindke v. Freed

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***Lindke v. Freed*, 601 U.S. 187 (2024)**

- Decided March 15, 2024
- Unanimous opinion authored by Justice Amy Coney Barrett
- On appeal from *Lindke v. Freed*, 37 F.4th 1199 (6th Cir. 2022)

19

***Lindke v. Freed* – Background**

- After being appointed city manager of Port Huron, Michigan, James Freed updated his Facebook profile to reflect the new position. He added links to the city's website and his work email address.
- He posted about personal topics, like his wife and daughter, and official topics, like public projects and services and budget decisions.
- He also posted about updates about COVID-19 and the city's response, including case counts and press releases.
- Kevin Lindke, a Port Huron resident, began commenting on Freed's page about how he was unhappy with Freed's handling of the pandemic.
- Freed deleted Lindke's comments. When the comments continued, Freed blocked Lindke, which allowed Lindke to view the page but not to comment.

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***Lindke v. Freed* – Background (cont'd)**

- Lindke sued, alleging that Freed violated his First Amendment rights when he deleted the comments and blocked him from commenting.
- The District Court for the Eastern District of Michigan granted Freed's motion for summary judgment, finding that Freed's management of his Facebook page did not amount to state action. The Sixth Circuit affirmed.

21

***Lindke v. Freed* – SCOTUS**

- Establishing a new standard, the Supreme Court held that a public official preventing someone from commenting on the official's social media page engages in state action if the official:
    1. Possessed the actual authority to speak on the State's behalf, and
    2. Purported to exercise that authority when speaking in the relevant social media posts.
- The Court vacated and remanded for a decision consistent with the new standard.

22

***Lindke v. Freed* – Practical Tips**

The decision offers a few hints at how public officials can avoid litigation by establishing boundaries between personal and official social media pages, including:

1. Mark and identify official social media accounts
2. Appoint certain officials with the duty to speak on official social media pages
3. Instruct lower-level employees to only work on posts for official pages
4. Issue urgent announcements and press releases only on the official accounts

23

O'Connor-Ratcliff v. Garnier

24

***O'Connor-Ratcliff v. Garnier*, 601 U.S. 205 (2024)**

- Decided March 15, 2024
- Per curiam opinion
- On appeal from *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158 (9th Cir. 2022)

25

***O'Connor-Ratcliff v. Garnier* – Background**

- Michelle O'Connor-Ratcliff and T.J. Zane created public Facebook and Twitter pages to promote their runs for school board in San Diego.
- They both won their elections and began using their pages to update the public on school board matters like inviting the public to meetings, soliciting input about important decisions, and sharing safety and security issues. O'Connor-Ratcliff's Facebook page described her as a "Government Official" and linked to her government email address. Zane's titled his page "the official page for T.J. Zane, School District Board Member, to promote public and political information."
- Christopher and Kimberly Garnier, parents of children in the district, began commenting repeatedly on O'Connor-Ratcliff and Zane's pages. They often posted the same long comments many times in response to different posts. O'Connor-Ratcliff and Zane deleted the comments and then blocked the Garniers from commenting.

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***O'Connor-Ratcliff v. Garnier* – Litigation and SCOTUS action**

- The Garniers sued, alleging that the deletion and blocking violated their First Amendment rights.
- After a trial, the U.S. District Court for the Southern District of California found that the school board members engaged in state action when they blocked the Garniers from commenting and deleted their comments.
- The Ninth Circuit applied a "state action nexus," asking whether (1) the school board members purported to act under color of law, (2) their action had the purpose and effect of influencing the behavior of others, and (3) the harm inflicted on the plaintiff related in some way to the officials' status or performance of duties. Finding all elements satisfied, the court affirmed the district court's judgment.
- The Supreme Court vacated and remanded for further proceedings consistent with the decision in *Lindke v. Freed*.

27

Harrow v. Department of Defense

28

Harrow v. Department of Defense, 601 U.S. 480 (2024)

- Decided May 16, 2024
- Unanimous opinion authored by Justice Elena Kagan
- Appeal from *Harrow v. Department of Defense,* No. 2022-2254, 2023 WL 1987934 (Fed. Cir. Feb. 14, 2023)

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Harrow v. Department of Defense – Background

- Stuart Harrow, a DOD employee, filed a claim with the Merit Systems Protection Board (MSPB) in 2013, objecting to a six-day furlough. In 2016 an ALJ upheld the furlough, and Harrow appealed to the Board, but the Board lost its quorum in 2017 and did not decide cases for the next five years.
- The Board finally reviewed Harrow's case and issued a decision affirming the ALJ in May 2022, but because his email had changed in the intervening five years, Harrow did not receive notice of the Board's decision, and did not learn about it until several months later.
- Statutorily, a petition for review to the U.S. Court of Appeals for the Federal Circuit "shall be filed" within 60 days of an MSPB decision. 5 U.S.C. § 7703(b)(1). However, Harrow did not learn of the Board's decision until after that deadline had passed, and did not appeal to the Federal Circuit until September 2022, more than 120 days after the Board's final order.
- The Federal Circuit declined to waive the deadline for Harrow, believing that the 60-day statutory deadline was "jurisdictional" and therefore "not subject to equitable tolling."

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Harrow v. Department of Defense – SCOTUS opinion

- The Court held that the 60-day deadline for filing petitions for review of MSPB decisions is not jurisdictional, and therefore does not preclude equitable exceptions.
- The Supreme Court will only treat a procedural requirement as jurisdictional if Congress "clearly states" that it is. Although there are no specific "magic words" that the Court requires, the demand for a clear statement is a high bar. Under this approach, most time bars are nonjurisdictional, regardless of whether the bar is "framed in mandatory terms" such as "shall be filed."
- Because 5 U.S.C. § 7703(b)(1) does not speak to the Federal Circuit's jurisdiction, the 60-day filing deadline for MSPB appeals is not jurisdictional, despite the mandatory "shall be filed" language.

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Harrow v. Department of Defense – SCOTUS opinion (cont'd)

- The Court rejected the Government's argument that 28 U.S.C. § 1295, which grants the Federal Circuit subject-matter jurisdiction over appeals "pursuant to section[ ] 7703(b)(1)", makes the deadline jurisdictional. The Government maintained that the term "pursuant to" can only mean in "conformance to" or "compliance with." However, the Court rejected this interpretation and found that "pursuant to" often functions as a synonym for "under."
- The Court noted that there is one exception to the clear-statement rule: Deadlines to appeal from one Article III court to another are jurisdictional. *See Bowles v. Russell*, 551 U.S. 205 (2007). However, *Harrow* falls outside of the *Bowles* exception and therefore demands a clear statement that the procedural requirement is jurisdictional.

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Harrow v. Department of Defense – Significance

- The Supreme Court's holding in Harrow will likely impact other agencies besides the MSPB. The Court implied the general application of the clear-statement test by suggesting that its usage would lead to wide findings that most time bars are nonjurisdictional.
- Section 402(d) of the Congressional Accountability Act, 2 U.S.C. §1402(d), provides that "[a] covered employee may not file a claim under this section with respect to an allegation of a violation of law after the expiration of the 180-day period which begins on the date of the alleged violation."
  - The time bar is stated in mandatory terms ("may not file"), but the statute does not clearly indicate that it is jurisdictional. This is similar to the statute in *Harrow*.
  - Applying the clear-statement test to section 402(d) would likely lead to a finding that it is nonjurisdictional, and thus the filing deadline would be subject to equitable tolling.

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Harrow v. Department of Defense – Significance (cont'd)

- The decision in *Harrow* is consistent with the OCWR Board of Directors' most recent decision on equitable tolling, in which the Board found that the time limits for OCWR administrative proceedings are nonjurisdictional and the presumption of equitable tolling applies. *Simms v. Office of Congressman Raul Grijalva*, Case No. 13-HS-68 (CV), 2014 WL 3887570 (July 30, 2014).

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Acheson Hotels, LLC v. Laufer

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***Acheson Hotels, LLC v. Laufer*, 601 U.S. 1 (2023)**

- Decided December 15, 2023
- Majority opinion authored by Justice Amy Coney Barrett
- Concurrences by Justices Clarence Thomas and Ketanji Brown Jackson
- Appeal from *Laufer v. Acheson Hotels, LLC*, 50 F.4th 259 (1st Cir. 2022)

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Acheson Hotels, LLC v. Laufer – Background

- A "public accommodations tester" sued a hotel whose website failed to state whether it had accessible rooms. She had no intent to visit the hotel, and had filed hundreds of similar suits.
- The District Court for the District of Maine granted the hotel's motion to dismiss.
- The First Circuit reversed and remanded.
- After SCOTUS granted certiorari to resolve a circuit split single-handedly created by Laufer, she dismissed all her suits, including this one, with prejudice, and filed a suggestion of mootness.

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Acheson Hotels, LLC v. Laufer – SCOTUS opinion

- Holding: Laufer's case was vacated as moot.
- SCOTUS acknowledged the standing issue – i.e., whether Laufer was injured by the absence of information about rooms she had no plans to reserve – but did not further discuss this in the majority opinion.
- The Court rejected Acheson's arguments that the circuit split was still alive and that Laufer abandoned her case to evade review.
- The judgment of the Court of Appeals was vacated and the case was remanded with instructions to dismiss the case as moot.

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Acheson Hotels, LLC v. Laufer – Concurrences

- Justice Thomas wrote that he would resolve the case on standing rather than mootness. He believed that Laufer did not have standing because she was not injured, and the circumstances suggested strategic behavior on her part in dismissing her case.
- Justice Jackson agreed that the case was moot and that it should be resolved on that basis, but that vacatur should not automatically follow.

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Acheson Hotels, LLC v. Laufer – Significance

- The majority opinion is narrow and particular to the circumstances of the case.
- Justice Thomas' concurrence could be instructive regarding how SCOTUS might handle the tester standing issue in the future.

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FBI v. Fikre

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***FBI v. Fikre*, 601 U.S. 234 (2024)**

- Decided March 19, 2024
- Unanimous opinion authored by Justice Neil Gorsuch
- Concurrence by Justice Samuel Alito, joined by Justice Brett Kavanaugh
- Appeal from *Fikre v. FBI*, 35 F.4th 762 (9th Cir. 2022)

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FBI v. Fikre (cont'd)

- Did not arise in the context of any CAA-applied laws, but serves as an interesting contrast to *Laufer*.
- Fikre alleged he was impermissibly added to the government's No Fly List without notice or any way to secure redress.
- Government declared he would not be placed on the list in the future.
- Holding: the case was not moot because the government's declaration did not show that its challenged practice could not reasonably be expected to recur.

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Loper Bright Enterprises v. Raimondo

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Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244

- Decided June 28, 2024
- Majority Opinion authored by Chief Justice John Roberts
- Concurrences by Justices Clarence Thomas and Neil Gorsuch
- Dissent by Justice Elena Kagan, joined by Justices Sonia Sotomayor and Ketanji Brown Jackson
- Appeals from *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022) and *Relentless, Inc. v. U.S. Department of Commerce*, 62 F.4th 621 (1st Cir. 2023)

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Loper Bright Enterprises v. Raimondo – Background

- Two sets of fishing businesses challenged a rule promulgated by the National Marine Fisheries Service that required them to pay for at-sea observers on their vessels in the Atlantic herring fishery, for the purpose of collecting data relevant to conservation and management of the fishery.
- The fishermen challenged the rule in two district courts, which both found in favor of the government, and they appealed to the D.C. Circuit and First Circuit respectively, both of which affirmed.
- All of the courts followed the two-step framework established in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984) – i.e., "Chevron deference" – which required courts to determine (1) whether Congress had directly spoken to the precise question at issue, and (2) if the statute was silent or ambiguous as to that issue, whether the agency's interpretation was "based on a permissible construction of the statute."
- The Supreme Court granted certiorari to determine whether to overrule *Chevron*.

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Loper Bright Enterprises v. Raimondo – SCOTUS majority

- Holding: *Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous.
- The Constitution assigns to the courts the responsibility and power of interpreting the laws passed by Congress, and the Administrative Procedure Act (APA) provides that courts reviewing agency actions shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The majority wrote that *Chevron* could not be squared with these principles.
- Courts may accord agency interpretations respect, and consider them when deciding such cases, but they are not required to defer to the agency. It is the courts, not executive branch agencies, that are experts in statutory interpretation.
- *Stare decisis* does not require adherence to *Chevron* because that decision was misguided and has proved to be unworkable.

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Loper Bright Enterprises v. Raimondo – Concurrences

- Justice Thomas authored a relatively short concurrence, citing his own dissents in several previous cases, in which he argued that *Chevron* violated the Constitution's separation of powers, compelled judges to "abdicate" their Article III judicial power, and impermissibly expanded executive branch agencies' power beyond the bounds of Article II.
- Justice Gorsuch wrote a lengthy concurrence to explain why *stare decisis*, rather than requiring adherence to *Chevron*, actually supports overruling it. He wrote about the principle of judicial humility, and explained that the Court can and should correct past errors of constitutional interpretation when necessary. The weight due a precedent depends on factors such as the quality of its reasoning, its consistency with related decisions, its workability, and reliance interests that have formed around it; Justice Gorsuch analyzed each of these factors to demonstrate why he believed that *Chevron* should be overruled.

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Loper Bright Enterprises v. Raimondo – Dissent

- Justice Kagan, joined by Justices Sotomayor and Jackson, dissented. She wrote that "This Court has long understood Chevron deference to reflect what Congress would want, and so to be rooted in a presumption of legislative intent."
- Among the reasons Justice Kagan offered in support of adherence to *Chevron* were:
  - Administrative agencies have technical or scientific expertise that courts do not;
  - Agencies are much more familiar with regulatory programs than the courts are;
  - Agencies report to the President, who is responsible for policy decisions; and
  - Congress delegated to the agencies the authority to administer the statutes giving rise to the ambiguities or gaps at issue in these cases.
- "Put all that together and deference to the agency is the almost obvious choice, based on an implicit congressional delegation of interpretive authority."

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Loper Bright Enterprises v. Raimondo – Significance

- This case will change the framework that federal courts have used for 40 years to address challenges to agency rules and regulations. Instead of the two-step *Chevron* analysis, courts will have to review each challenge independently and determine whether the agency has exceeded its statutory authority. Courts may still consider and give weight to the judgment of administrative agencies in light of their subject matter expertise, but the agencies' interpretations will be persuasive rather than controlling.
- Past cases that relied on *Chevron* are not affected by *Loper Bright*.
- It is not clear whether or to what extent *Loper Bright* will apply to the OCWR, because:
  - We are not an executive branch agency;
  - Although our substantive regulations are based on the corresponding executive branch regulations, ours must be approved by Congress before taking effect; and
  - The OCWR Board looks to the federal courts for guidance in interpreting the statutes applied by the CAA.

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Questions?

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