Office of Congressional Workplace Rights

Office of the General Counsel

SUPREME COURT RECAP
JULY 17, 2024

Introduction

The Congressional Accountability Act (CAA) applies more than a dozen employee protection statutes to the legislative branch. The Office of Congressional Workplace Rights (OCWR) administers a dispute resolution process for legislative branch employees who believe their rights under the CAA have been violated, and the OCWR General Counsel is tasked with enforcement of three of the CAA-applied statutes.

In its most recent term the Supreme Court issued several opinions that are particularly relevant to legislative branch employing offices and employees. Some of these cases directly affect employee rights and employing office obligations, while others have indirect or uncertain implications for OCWR administrative matters.

Table of Contents

Muldrow v. City of St. Louis, Missouri

On April 17, 2024, the Court issued its decision in *Muldrow v. City of St. Louis, Missouri*, 601 U.S. —, 144 S. Ct. 967 (2024). The opinion, authored by Justice Kagan, clarifies the standard for

demonstrating that an involuntary transfer was discriminatory under Title VII of the Civil Rights Act of 1964.

- **Facts and History –** From 2008 through 2017, Sergeant Jatonya Muldrow worked as a plainclothes officer in the Intelligence Division of the St. Louis Police Department. She held a number of different positions, eventually becoming deputized as a Task Force Officer with the FBI. This status came with FBI credentials, a take-home vehicle, and the authority to pursue investigations outside St. Louis, among other privileges. Muldrow was labeled a "workhorse" by the outgoing commander of the Intelligence Division: "If there was one sergeant that he could count on," it was Muldrow. 144 S. Ct. at 972.

  When a new commander was hired, Muldrow was transferred out of the Intelligence Division against her wishes. She was replaced by a male police officer, who the new commander said seemed a better fit for the Division's "very dangerous" work. *Id.* The new commander had also sometimes referred to Muldrow as "Mrs." rather than the customary "Sergeant". *Id.* She was reassigned to the Fifth District to a uniformed job with less schedule regularity. While her rank and pay remained the same, she lost her FBI status and car. She was now tasked with supervising neighborhood patrol officers rather than working with high-ranking officials on departmental priorities.

  Muldrow brought this Title VII suit to challenge the transfer, alleging that the City had "discriminated against" her based on sex "with respect to" the "terms [or] conditions" of her employment. 42 U.S.C. §2000e-2(a)(1). She claimed that she had been moved out of a premier position into a less prestigious administrative role. The District Court granted summary judgment in favor of the City, explaining that Eighth Circuit precedent required Muldrow to show that her transfer caused a "significant" change in working conditions, but she could not meet the heightened-injury standard. *Id.* at 973. The Eighth Circuit affirmed, concluding that Muldrow did not show that the transfer caused a "materially significant disadvantage." *Id.* Like the District Court, the Eighth Circuit emphasized that the transfer "did not result in a diminution to her title, salary, or benefits," and she had faced "only minor changes in working conditions. *Id.*

  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." *Id.* It is important to note that that the Supreme Court explicitly limited the question to decisions regarding transfers.

- **Holding** – The Supreme Court, in a decision authored by Justice Kagan, 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.

- **Reasoning** – 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.*, 590 U.S. 644, 658 (2020). However, this phrase does not say anything about how much worse the treatment must be in order to be actionable. To demand a showing of "significant" harm from the Title VII claimant would be asking more of them

than the law requires.

The Supreme Court refuted the City's three main arguments. First, the City argued that the textual claim invokes 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." 144 S. Ct. at 975. Here, the statute dictates that an employer may not, based on sex, "fail or refuse to hire" or "discharge" any person or "otherwise . . . discriminate against [her] with respect to [her] compensation, terms, conditions, or privileges of employment." §2000e-2(a)(1). The City suggested that the "otherwise discriminate" option must involve harm that is equal to failure or refusal to hire or discharge, based on *ejusdem generis*. The Court, however, said that the common denominator among the listed items does not need to be significance-related. The shared trait here is that each kind of prohibited discrimination occurs by way of an employment action. Thus, this canon does not justify imposing a significance requirement.

Second, the City argued that Title VII's retaliation provision requires the retaliatory action to be "materially adverse," meaning that it causes significant harm. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). However, the Court responded that this standard is specific to the retaliation context. The employer's action needs to be significant enough to deter Title VII enforcement; if not significant, then that would fall outside the purposes of the ban on retaliation. This does not have any relevance to the standard of harm at issue here.

Third, the City argued that the heightened requirement of "significant harm" is needed to prevent transferred employees from flooding the courts with insubstantial lawsuits. However, the Court argued that this would be a result of the text itself. Congress could have limited liability for job transfers if they wanted to, but they did not, and the Court does not get to impose its own policy considerations.

- **Concurrences** – In the first of three concurring opinions, Justice Thomas disagreed with the majority that the that Eighth Circuit imposed a heightened standard of significant harm. Instead, it used the "more than a trifling harm" standard, and Muldrow failed to prove that there was any non-trifling change in her job. He reluctantly concurred because he recognized that it was possible that the Eighth Circuit did, in fact, have such a heightened test in mind, but he found this to be unlikely.

  In the second concurrence, Justice Alito agreed with the majority, but simply chimed in to say that he found their new standard to be confusing and unhelpful. He argued that the definition of the word "harm" itself requires some degree of significance. He also predicted that the "some harm" requirement will not have any practical impact on lower court judges, and they will continue to decide cases in the same manner: "The predictable result of today's decision is 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." 144 S. Ct. at 979.

  Finally, in the third concurrence, Justice Kavanaugh wrote that *any* transfer constitutes a change in the terms or conditions of employment, and 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. This proposed standard is less ambiguous than what the majority offers: if a transfer has occurred, then the case can be brought under Title VII. However, he concurred in the judgment because the majority's "some harm" standard is a low bar that can be shown in almost any transfer case, so the result likely will not be practically different.

- **Significance** – This decision will likely lead to more Title VII transfer cases surviving summary judgment, since "some harm" is a relatively low bar for claimants.

  It is worth noting that although the Supreme Court did not explicitly state whether the change to terms or conditions of employment needs to result in monetary or tangible harm in order to be actionable – a requirement that some courts have imposed when evaluating Title VII claims – it did cite *Oncale v. Sundowner Offshore Services, Inc*. for the principle that the phrase "terms [or] conditions" in Title VII "is not used 'in the narrow contractual sense'; it covers more than the 'economic or tangible.'" *Id*. at 974 (citing 523 U.S. 75, 78 (1998)).

  Although the Supreme Court explicitly limited the question presented to decisions regarding involuntary transfers, it is possible that the Court's reasoning articulated in the *Muldrow* decision could be applied to other types of employment actions that are sometimes challenged in Title VII claims. Indeed, some Courts of Appeals have already applied the "some harm" standard from *Muldrow* in cases that do not involve transfers. *See*, *e.g.*, *Blick v. Ann Arbor Pub. Sch. Dist.*, — F.4th —, No. 23-1523, 2024 WL 3199222, at *11 (6th Cir. June 27, 2024) ("[O]ne might reasonably argue that a temporary suspension (even with pay) causes 'some harm' and also concerns a 'term or condition' of the job—all that *Muldrow* now requires under Title VII."); *Peifer v. Bd. of Prob. & Parole*, — F.4th —, No. 23-1081, 2024 WL 3283569, at *4–5 (3d Cir. July 3, 2024) (applying the *Muldrow* standard in a pregnancy accommodation case); *Cole v. Grp. Health Plan, Inc.*, — F.4th —, No. 23-3050, 2024 WL 3217580, at *2–3 (8th Cir. June 28, 2024) (applying the *Muldrow* standard in a religious discrimination case).

  Additionally, *Muldrow*'s "some harm" standard has already been applied by at least two Circuit Courts in cases under the Age Discrimination in Employment Act (ADEA), which the courts analyze under the same analytical framework as Title VII. *See Milczak v. Gen. Motors, LLC*, 102 F.4th 772, 786-87 (6th Cir. 2024); *Van Horn v. Del Toro*, No. 23-5169, 2024 WL 3083365, at *2-3 (D.C. Cir. June 21, 2024) (applying *Muldrow* and explaining that "It is of no consequence that *Muldrow* was a private-sector Title VII case whereas this is a federal-sector ADEA case. We have always interpreted Title VII and the ADEA identically as far as adverse actions go, and we have likewise always treated the private-sector and federal-sector provisions of those statutes alike in that respect.").

Murray v. UBS Securities, LLC

On February 8, 2024, the Supreme Court issued its decision in *Murray v. UBS Securities, LLC*, 601 U.S. 23 (2024), which held that a whistleblower bringing a claim under the whistleblower-protection provision of the Sarbanes-Oxley Act must prove that their protected activity was a

contributing factor in the unfavorable personnel action, but need not also prove that their employer acted with retaliatory intent.

Although the Sarbanes-Oxley Act does not apply through the CAA, the Court's decision in *Murray* 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.

- **Facts and history** – Trevor Murray worked for UBS as a research strategist. This role required him to certify, in accordance with Securities and Exchange Commission regulations, that his reports on UBS's securities business were independently produced and reflected his own views. He reported to his supervisor that leaders of the trading desk engaged in unethical and illegal behavior by improperly pressuring him to skew his reports in their favor. He was terminated shortly thereafter.

  He sued, alleging UBS violated the whistleblower protections of the Sarbanes-Oxley Act 18 U.S.C. § 1514A(a), enacted to prohibit publicly traded companies from retaliating against employees who report what they reasonably believe to be criminal fraud or securities law violations. Section 1514A(a) specifically 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.

  The district court denied UBS's motion for judgment as a matter of law, to which UBS argued it was entitled because Murray "failed to produce any evidence that [his supervisor] possessed any sort of retaliatory animus toward him." 601 U.S. at 23. The jury found that Murray had established his section 1514A claim by establishing by a preponderance of evidence that his protected activity was a contributing factor in his termination, and that UBS had failed to prove that it 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, and that the trial court erred by not instructing the jury on Murray's burden to prove UBS's retaliatory intent. This placed the Second Circuit in conflict with the Fifth and Ninth Circuits, and the Supreme Court granted certiorari to resolve this split.

- **Holding** – In a unanimous opinion authored by Justice Sotomayor, the Supreme Court held that a whistleblower bringing a claim under the whistleblower-protection provision of the Sarbanes-Oxley Act must prove that their protected activity was a contributing factor in the unfavorable personnel action, but need not also prove that their employer acted with "retaliatory intent."

- **Reasoning** – Section 1514A's text does not include a "retaliatory intent" requirement. The Supreme Court first clarified that, consistent with the Second Circuit's opinion, it would treat "retaliatory intent" as "something akin to animus." *Id.* at 33.

  The Second Circuit and UBS both relied on the word "discriminate" to impose a retaliatory intent requirement, but the Supreme Court wrote that it "cannot bear that weight." *Id*. at 24. Its placement in the catchall provision suggests that it should draw meaning from the preceding terms, "discharge, demote, suspend, threaten, [and] harass". Further, "discrimination" simply means "differential treatment"; a lack of animosity is irrelevant. When an employer treats someone worse because of their protected whistleblowing activity, the employer violates section 1514A, regardless of the employer's motivation.

  Additionally, section 1514A contains a mandatory burden shifting framework, which a "retaliatory intent" requirement would ignore. Because discriminatory intent is difficult to prove, burden shifting provides a means of getting at intent. Section 1514A's burden shifting framework is incorporated from the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century and originated in the Whistleblower Protection Act of 1989, where it was meant to relieve whistleblowing employees of the heavy burden under then-existing law of showing that the protected activity was a significant, motivating, substantial, or predominant factor in the adverse action. Congress specified in Sarbanes-Oxley that a plaintiff's burden with regard to intent is only to show that the protected activity was a "contributing factor in the unfavorable personnel action." *Id.* at 24 (quoting 49 U.S.C. § 42121(b)(2)(B)(i)). Once the plaintiff employee makes that showing, the burden shifts to the employer to "demonstrat[e], by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. § 42121(b)(2)(B)(ii).

  Some employment discrimination statutes set a higher bar, requiring a plaintiff to show that their protected activity was a motivating or substantial factor in the adverse action. Showing that an employer acted with retaliatory animus is just one way a plaintiff can prove that the protected activity was a contributing factor in the adverse employment action.

  The contributing-factor burden shifting framework is not as protective of employers as a motivating-factor framework, and Congress made this choice purposefully. The Supreme Court cannot override that policy choice by giving employers greater protection than the statute provides.

- **Concurrence** – Justice Alito authored a concurrence, in which Justice Barrett joined, reiterating that the Supreme Court's rejection of an "animus" requirement in Sarbanes-Oxley does not eliminate an intent requirement.

Lindke v. Freed

On March 15, 2024, the Supreme Court issued its unanimous decision in *Lindke v. Freed*, 601 U.S. 187 (2024), holding that a public official's social media activity constitutes state action under 42 U.S.C. § 1983 if the official (1) possessed actual authority to speak on the State's behalf and (2) purported to exercise that authority when speaking on social media.

- **Facts and history** – James Freed was appointed the city manager of Port Huron, Michigan in 2014. After the appointment, he updated his Facebook profile to reflect the new position and began to acquire more Facebook friends. He converted his Facebook profile to a public "page," added his title, and included links to the city's website and his official email address. He posted about personal topics, like his wife, daughter, and dog. He also posted about issues related to his job, like public projects, updates about services, and budget decisions. Freed posted updates about the COVID-19 pandemic, like case counts in the city and a press release about a relief package.

  Kevin Lindke, a Port Huron resident, was unhappy with the city's pandemic response and began commenting accordingly on Freed's Facebook page. Freed deleted the comments. When Lindke continued commenting, Freed blocked Lindke. Blocking allowed Lindke to see Freed's posts but prohibited Lindke from commenting on them. Lindke sued, alleging that Freed violated his First Amendment rights when he deleted the comments and blocked Lindke from his Facebook page.

  The District Court granted Freed's motion for summary judgment, finding that the "prevailing personal quality" of Freed's posts meant that he was not engaged in state action on the Facebook page. The Sixth Circuit affirmed, holding that social media activity is state action when the state requires the official to operate the account, when the state funds the account, or when the account belongs to the office and not the individual.

- **Holding** – The Supreme Court established a new test: a public official engages in state action on social media only if (1) they possessed actual authority to speak on the State's behalf and (2) they purported to exercise that authority when speaking on social media. The Court remanded the case for proceedings consistent with this opinion.

  - **For the first prong**, the Court placed the burden on Lindke to show "more than that Freed had *some* authority to communicate with residents on behalf of Port Huron." This authority could derive directly from the law or from his predecessor's actions, but the conclusion would depend on the statute and customs in each jurisdiction.

  - **For the second prong**, the Court explained that exercising state authority requires more than sharing otherwise-available information. The content and function of the post must demonstrate that the official speaks "in furtherance of his official responsibilities." The Court emphasized that on "mixed use" social media pages like Freed's, the official has the right to speak about public affairs in his personal capacity. To meet their burden, plaintiffs must show that the official was exercising state authority in specific posts.

- **Practice tips** – In general, "mixed use" social media accounts like Freed's Facebook page, which blend personal and official content, are more likely to generate confusion and litigation. The Court hinted at the following ways to create a boundary between personal and official accounts:

    - Mark and identify official social media accounts.

    - Entrust certain officials with the responsibility to speak on social media on official accounts.

    - Instruct subordinate staff to only prepare and post on official social media accounts and not on the personal accounts of higher-ranking officials.

    - Issue important announcements and urgent releases on the official account.

O'Connor-Ratcliff v. Garnier

Along with *Lindke v. Freed*, summarized above, the Supreme Court had granted certiorari in *O'Connor-Ratcliff v. Garnier*, in which two public officials repeatedly deleted critical comments on their social media pages and eventually blocked the commenters. The Ninth Circuit held that the public officials' actions violated the commenters' First Amendment rights, and the public officials appealed.

On March 15, 2024, the Supreme Court issued a *per curiam* decision vacating and remanding *O'Connor-Ratcliff* for further proceedings consistent with the new standard articulated in *Lindke*. 601 U.S. 205 (2024).

Harrow v. Department of Defense

On May 16, 2024, the Court issued its decision in *Harrow v. Department of Defense*, 601 U.S. 480 (2024), in which it held that the 60-day deadline for filing petitions for review of Merit Systems Protection Board (MSPB) decisions with the Federal Circuit is not jurisdictional, and therefore equitable principles such as equitable tolling may apply. The case may have broader implications for whether other procedural requirements are jurisdictional, including potentially those contained in the CAA.

- **Facts and History** – In 2013, Stuart Harrow, an employee of the Department of Defense, filed a claim with the MSPB objecting to a six-day furlough. In 2016, the case went in front of an administrative judge who upheld the furlough, finding that it was "regrettable" but not "improper." 601 U.S. at 1182. Harrow then sought review before the full Board. However, the Board lost its quorum in early 2017 and was unable to resolve cases for the next five years. Once the quorum was restored, the Board finally reviewed Harrow's case and affirmed the administrative judge's decision in May 2022.

Under 5 U.S.C. § 7703(b)(1), a petition for review by the Federal Circuit "shall be filed" within 60 days of the Board's decision. However, Harrow did not submit his petition for review until September 2022, more than 120 days after the Board's final order. Harrow explained that he had missed the deadline because, during the five years that the Board's review was pending, his work email address had changed. His old email address stopped forwarding to the new one at some point, and so he never received the Board's decision. He only learned about the affirmance upon searching the Board's website, but the 60-day limit had already passed by then. Harrow urged the Federal Circuit to consider equitable exceptions and overlook his untimeliness. The Federal Circuit declined, believing that the 60-day statutory deadline was "jurisdictional" and therefore "not subject to equitable tolling." *Id.* The court stated that while Harrow's situation was "sympathetic," it was also irrelevant. *Id.* The Supreme Court granted certiorari to decide whether the 60-day deadline to appeal a Board decision is jurisdictional.

- **Holding** – The Supreme Court, in a unanimous decision authored by Justice Kagan, held that the 60-day filing deadline in Section 7703(b)(1) is not jurisdictional and therefore does not preclude equitable exceptions.

- **Reasoning** – The Supreme Court will only treat a procedural requirement as jurisdictional if Congress "clearly states" that it is. *Id.* at 1183. The demand for a clear statement is a high bar, although there are not any specific "magic words" that the Court requires from the statute. Under this approach, most time bars are nonjurisdictional, regardless of whether the bar is framed in mandatory terms. Section 7703(b)(1) states that an appeal "shall be filed" within 60 days; although the time bar is stated in mandatory terms, it does not speak to the court's jurisdiction. Therefore, it is nonjurisdictional and does not preclude equitable exceptions.

  The Government argued that the Court should look to 28 U.S.C. § 1295, which grants the Federal Circuit subject-matter jurisdiction over appeals "pursuant to section 7703(b)(1)." The Government maintained that the phrase "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 and Congress have both recently used this phrase to mean invoking a particular statute for the basis of appeal.

  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. Again, section 7703(b)(1) lacks a clear statement and thus was found to be nonjurisdictional.

- **Significance** – The Supreme Court's holding in *Harrow* will likely impact many more agencies than just 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. 601 U.S. at 485.

  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.

The decision in *Harrow* conforms to the OCWR Board of Directors' most recent decision on equitable tolling. In 2014, 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).

Acheson Hotels, LLC v. Laufer

On December 5, 2023, the Supreme Court issued its decision in *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1 (2023), holding that an ADA tester's suit was rendered moot by her voluntary dismissal of the suit with prejudice in district court.

- **Facts and History** – Deborah Laufer, a "public accommodations tester" who uses a wheelchair, has sued hundreds of hotels whose websites failed to state whether the hotels have accessible rooms, in violation of an ADA regulation requiring places of public lodging to make such information available on any reservation portal (the "Reservation Rule"). Similar to her other lawsuits, she had no intent to book a room or stay at Acheson Hotels' property. The district court granted Acheson's motion to dismiss for lack of subject matter jurisdiction. Laufer appealed, and the First Circuit reversed and remanded. The Supreme Court granted certiorari to consider whether Laufer had Article III standing to sue (and to resolve a circuit split that she single-handedly created).

  After the Supreme Court granted review, the case took an unusual turn. After a district court in Maryland suspended Laufer's attorney for fraud, Laufer voluntarily dismissed her pending lawsuits with prejudice, including her complaint against Acheson in the District of Maine. She filed a suggestion of mootness with the Supreme Court, which deferred a decision on mootness until after oral argument.

- **Holding and Reasoning:** The Supreme Court, in an opinion authored by Justice Barrett and joined by Chief Justice Roberts and Justices Alito, Sotomayor, Kagan, Gorsuch, and Kavanaugh, held that the case was vacated as moot, and the judgment of the Court of Appeals below would be vacated and the case remanded with instructions to dismiss the case as moot.

  The Court acknowledged the standing issue – whether Laufer is injured by the absence of information about rooms she has no plans to reserve – but did not further discuss this in the majority opinion. Laufer acknowledged the Court can address jurisdictional issues in any order it chooses, "But mootness is easy and standing is hard," so she urged the Court

"to refrain from resolving a difficult question in a case that is otherwise over." 601 U.S. at 4. Acheson argued that Laufer's district court case may have been dead, but the circuit split was still alive; the Supreme Court had already received briefs and heard oral argument, so it should settle the issue rather than repeating the work later; and that Laufer had abandoned her case in an effort to evade review. The Supreme Court was not convinced, and stressed that Laufer "represented to this Court that she will not file any others." *Id.* at 5. It dismissed the case as moot while emphasizing that it "might exercise our discretion differently in a future case." *Id.*

- **Concurrences** – Justice Thomas concurred, but said he would address Laufer's standing, rather than resolve the case on mootness. He concluded that "Laufer lacks standing because her claim does not assert a violation of a right under the ADA[,]" which "prohibits only discrimination based on disability – it does not create a right to information." 601 U.S. at 11. Even if the Reservation Rule created a right to accessibility information, Laufer was not injured by Acheson's failure to provide that information on its website, since she lacked any intent to visit the hotel. Laufer was acting as a "private attorney general" instead of asserting a violation of her own rights. Additionally, he wrote, "the circumstances strongly suggest strategic behavior on Laufer's part" since her attorney who was sanctioned was not involved in the present case. *Id.* at 9.

  Justice Jackson also concurred, agreeing with the Court that the case was moot and that it should be resolved on that basis, but noting that vacatur should not automatically follow from mootness; "when mootness ends an appeal, the question of what to do with the lower court's judgment, if anything, raises a separate issue that must be addressed separately." *Id.* at 14. "[T]here is no particular reason to assume that a decision, later mooted, is any less valid as precedent than any other opinion of a court." *Id.* at 18 (quoting *Mahoney v. Babbitt,* 113 F.3d 219, 222 (D.C. Cir. 1997)).

FBI v. Fikre

During this term the Supreme Court decided another mootness case, *FBI v. Fikre*, 601 U.S. 234 (2024), and although it did not arise in the context of any CAA-applied laws, it serves as an interesting contrast to *Acheson Hotels, LLC v. Laufer*, summarized above.

After Yonas Fikre was placed on the No Fly List, he brought suit alleging that the government failed to provide notice of his addition to the list or any way to secure redress, and that he was placed on the list for discriminatory reasons. The government then took him off the list and submitted a declaration that he "will not be placed on the No Fly List in the future based on the currently available information." The government sought dismissal of the case as moot. The district court agreed, but the Ninth Circuit reversed, since the declaration did not ensure that he would not be placed back on the list for engaging in similar conduct in the future.

In a unanimous opinion authored by Justice Gorsuch, the Supreme Court held that the government's declaration did not show that the challenged practice could not reasonably be expected to recur, and thus the case was not moot. The Court reasoned that a defendant may not automatically moot a case by simply suspending its challenged conduct after it is sued or by

repudiating its past behavior; rather, it must show that the conduct cannot reasonably be expected to recur. In this case, the government's declaration fell short of demonstrating that it cannot reasonably be expected to do again in the future what it is alleged to have done in the past.

Loper Bright Enterprises v. Raimondo

On June 28, 2024, the Court issued its decision in *Loper Bright Enterprises v. Raimondo*, — U.S. —, 144 S. Ct. 2244 (2024), which overturned the landmark 40-year-old precedent *Chevron v. Natural Resources Defense Council* and the associated administrative law principle known as "*Chevron* deference."

- **Chevron deference** – For the past 40 years, courts reviewing statutes administered by federal agencies have followed the two-step process set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). First, the reviewing court assessed "whether Congress has directly spoken to the precise question at issue"; if the congressional intent was clear, the inquiry ended there. However, if the court determined that "the statute is silent or ambiguous with respect to the specific issue," it was required to defer to the agency's interpretation as long as that interpretation was "based on a permissible construction of the statute."

- **Facts and history** – Several fishing businesses operating in the Atlantic herring fishery challenged a Rule promulgated by the National Marine Fisheries Service (NMFS), which administers the Magnuson-Stevens Fishery Conservation and Management Act (MSA). That Rule, in relevant part, required certain fishing businesses to pay for observers to be carried on board their vessels "for the purpose of collecting data necessary for the conservation and management of the fishery" as part of a comprehensive fishery management plan.

  One set of petitioners challenged the Rule in the U.S. District Court for the District of Columbia, which granted summary judgment to the government, concluding that the MSA authorized the Rule, but that even if the statute were ambiguous, *Chevron* would require deference to the agency's interpretation. A divided panel of the Court of Appeals for the D.C. Circuit affirmed, with the majority finding some ambiguity but deferring to the agency's interpretation. In dissent, Judge Walker noted that the statute was silent regarding observers for businesses operating in the Atlantic herring fishery, whereas it expressly provided for such observers in other fisheries and on foreign vessels, which Judge Walker believed unambiguously indicated that the NMFS lacked authority to require Atlantic herring fisherman to pay for such observers.

  The other set of petitioners challenged the Rule in the U.S. District Court for the District of Rhode Island, which also found for the government, and appealed to the U.S. Court of Appeals for the First Circuit, which affirmed. These courts also applied *Chevron*'s two-step analysis and determined that the agency's interpretation of its authority to require the fishermen to pay for the at-sea observers was owed deference.

The fishermen appealed, and the Supreme Court granted certiorari in both cases, limited to the question of whether *Chevron* should be overruled or clarified.

- **Holding** – In a 6-3 opinion authored by Chief Justice Roberts, the Court overruled *Chevron* and instructed that "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the [Administrative Procedure Act] requires. … [C]ourts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous." 144 S. Ct. at 2273. Accordingly, because the D.C. Circuit and First Circuit had relied on *Chevron* in order to uphold the agency rule in question, their judgments were vacated and the cases were remanded for further proceedings consistent with *Loper Bright*.

- **Reasoning** – Citing the Federalist Papers and precedents dating back to *Marbury v. Madison*, the Court explained that Article III of the Constitution clearly assigned to the Judicial Branch the responsibility and power of interpreting the laws passed by Congress. 144 S. Ct. at 2257. Although the courts may accord "respect" to Executive Branch agencies' interpretations of the laws as informative, they are not bound by those interpretations, but must rather exercise their own independent judgment. *Id*. at 2258. Further, sometimes Congress specifically grants Executive Branch agencies the authority to decide how a broad statutory term applies to specific facts found by the agency, and in such cases deference may be owed to the agency's interpretation, but it is for the courts to determine questions of law. *Id*. at 2259.

  The Court went on to discuss the enactment of the Administrative Procedure Act (APA), which directs in section 706 that "[t]o the extent necessary to decision and when presented, the reviewing court 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" and requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be… not in accordance with law." *Id*. at 2261 (quoting 5 U.S.C. §§ 706, 706(2)(A)). Although the APA mandates that judicial review of agency policymaking and factfinding must be deferential, it contains no such mandate requiring deference to interpretations of *legal* questions. *Id*. The Court reasoned that "Congress surely would have articulated a similarly deferential standard applicable to questions of law had it intended to depart from the settled pre-APA understanding that deciding such questions was 'exclusively a judicial function.'" *Id*. (internal citation omitted).

  In the exercise of their judgment, courts "may – as they have from the start – seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance' consistent with the APA.'" *Id*. at 2262 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). That said, however, "When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." *Id*. at 2263. Therefore, "The deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA." *Id*. *Chevron* goes too far beyond the "respect"

historically accorded to Executive Branch interpretations, and instead "demands that courts mechanically afford *binding* deference to agency interpretations, including those that have been inconsistent over time." *Id*. at 2265 (emphasis in original). The *Chevron* approach thus "is the antithesis of the time honored approach the APA prescribes" and "turns the statutory scheme for judicial review of agency action upside down." *Id*.

The majority also pointed out that when courts face statutory ambiguities in other contexts unrelated to agency interpretations, "the ambiguity is not a delegation to anybody, and a court is not somehow relieved of its obligation to independently interpret the statute. … [I]nstead of declaring a particular party's reading 'permissible' in such a case, courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity." *Id*. at 2266. This should be no less true in an agency case than in any other. "Perhaps most fundamentally, *Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do." *Id*. "The very point of the traditional tools of statutory construction – the tools courts use every day – is to resolve statutory ambiguities. That is no less true when the ambiguity is about the scope of an agency's own power – perhaps the occasion on which abdication in favor of the agency is *least* appropriate." *Id*. (emphasis in original).

Ultimately, the Court explained that *stare decisis* did not require it to adhere to *Chevron*, because that precedent "has proved to be fundamentally misguided. … Experience has also shown that *Chevron* is unworkable" because "the concept of ambiguity has always evaded meaningful definition." *Id*. at 2270. "Four decades after its inception, *Chevron* has thus become an impediment, rather than an aid, to accomplishing the basic judicial task of 'say[ing] what the law is.'" *Id*. at 2271 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

- **Concurrences** – In a short concurrence, Justice Thomas joined the Court's opinion in full "because it correctly concludes that [Chevron] must finally be overruled" because it "does not comport with the Administrative Procedure Act, which requires judges to decide 'all relevant questions of law' and 'interpret constitutional and statutory provisions' when reviewing an agency action." 144 S. Ct. at 2273. Citing his own dissents in several previous cases, Justice Thomas explained 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 authored a much lengthier concurrence, expanding upon the idea that *stare decisis*, rather than requiring adherence to *Chevron*, actually supports overruling it. He stressed the principle of judicial humility, and noted that *stare decisis* is not an "inexorable command," so the Court can and should correct past errors of constitutional interpretation when necessary. 144 S. Ct. at 2279. He explained that "the weight due a precedent may depend on the quality of its reasoning, its consistency with related decisions, its workability, and reliance interests that have formed around it." *Id*. at 2280 (citing *Ramos v. Louisiana*, 590 U.S. 83, 106 (2020)). Justice Gorsuch then went on to apply these principles in discussing how *Chevron* deference contravened the APA; was inconsistent with the separation of powers and due process, as it transferred authority

from the judicial branch to the executive branch and allowed agencies to effectively judge the scope of their own powers; defied the precedents that came before it; proved unworkable, as evidenced by the many times the Court had been "forced to supplement and revise it"; and upset reliance interests by enabling different executive officials to replace one reasonable interpretation with another at any time, such that affected individuals could never be sure of their legal rights and duties.

- **Dissent** – Justice Kagan dissented, joined by Justices Sotomayor and Jackson. 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." 144 S. Ct. at 2294. She pointed out that administrative agencies have technical or scientific expertise that courts do not, are much more familiar with regulatory programs than the courts are, and report to the President, who is responsible for policy decisions; moreover, 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." *Id*. In overruling *Chevron*, "A rule of judicial humility gives way to a rule of judicial hubris. … In one fell swoop, the majority today gives itself exclusive power over every open issue – no matter how expertise-driven or policy-laden – involving the meaning of regulatory law." *Id*. at 2295.

  Discussing *stare decisis*, she wrote that "*Chevron* is entitled to the supercharged version of that doctrine because Congress could always overrule the decision, and because so many governmental and private actors have relied on it for so long." *Id*. Instead, "A longstanding precedent at the crux of administrative governance thus falls victim to a bald assertion of judicial authority. The majority disdains restraint, and grasps for power." *Id*. Later she went on to refute each point made by the majority regarding *stare decisis* in more detail. *See id*. at 2306-10.

  Justice Kagan also disputed the argument relied on heavily by the majority that section 706 of the APA is inconsistent with *Chevron* deference. *See id*. at 2301-06.

- **No effect on past decisions** – The court clearly stated that cases from the past 40 years in which the courts relied on the *Chevron* framework in reaching their decisions are still subject to *stare decisis*. "The holdings of those cases that specific agency actions are lawful – including the Clean Air Act holding of *Chevron* itself – are still subject to statutory *stare decisis* despite our change in interpretive methodology." 144 S. Ct. at 2273.