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WEIL'S SCOTUS TERM IN REVIEW

By Appeals & Strategic Counseling
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INTRODUCTION

Weil's Appellate & Strategic Counseling group welcomes you to **Weil's SCOTUS Term Review**. Here, we summarize and analyze the cases from the 2023 Supreme Court Term that are most germane to our clients' businesses.

This Term included a number of high profile and significant decisions in several areas of the law. Most notably, in the area of administrative law, the Court issued three decisions that may have major implications going forward. And in a closely watched case involving former President Trump, the Court for the first time afforded former Presidents at least partial immunity from criminal prosecution for official acts undertaken during office. In other areas of law, however, the Court was more restrained. Its decisions on arbitration, bankruptcy, and standing largely hewed to existing precedent, resolving relatively nuanced issues of disagreement among the lower courts and/or deferring difficult merits issues for later resolution. For example, the Court rejected challenges to government action involving abortion medication and speech on social media platforms by relying on principles of Article III standing. And the Court vacated and remanded another case involving State efforts to regulate speech on social media platforms without reaching the merits, instead directing the lower courts to reexamine the case under the proper legal rules.

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SEC v. Jarkesy

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CFPB v. Community Financial Services Ass'n of America

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NEXT TERM PREVIEW

ADMINISTRATIVE LAW

The Supreme Court's 2023 Term was a big one for administrative law. Four cases examined the relationship between Executive Branch agencies and the other branches of the tripartite federal system, all but one of which was decided against the government. The through line in these cases is the separation of powers—the Court's ongoing efforts to ensure that each branch exercises the functions, and only the functions, conferred on it by the Constitution.

Most significantly, in *Loper Bright*, the Court overturned the longstanding *Chevron* doctrine—which required courts to defer to an agency's reasonable interpretation of an ambiguous statute—and held that courts must instead independently interpret and apply the law. The elimination of *Chevron* is likely to tilt the scales in favor of plaintiffs challenging administrative action, but by how much remains to be seen.

Two other decisions—*Corner Post* and *Jarkesy*—also may have significant implications for administrative law. *Corner Post* holds that agency rules can in some circumstances be challenged more than six years after they have been promulgated, potentially subjecting longstanding agency regulations to new challenges. And *Jarkesy* holds that certain types of agency lawsuits must be brought in federal court with a jury, rather than in the agencies' home court where agencies are vastly more successful.

The last of the four— *Community Financial Services Association of America*—upheld the funding mechanisms of the Consumer Financial Protection Bureau. Although the Court's decision did not work any change in the law and was in line with what most Court watchers expected, the case exemplifies the new reality that agencies face constant structural and existential threats

Loper Bright Enterprises v. Raimondo: Chevron Deference Overruled

Held: Federal courts must exercise independent judgment when deciding whether an agency has acted within in its statutory authority, and may not defer to an agency's interpretation of the law simply because the statute is ambiguous. *Chevron* deference is overruled (Roberts, C.J.).

Loper Bright involved an obscure legal issue under the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"). The MSA allows the National Marine Fisheries Services ("NMFS") to require fishing vessels to carry federal observers, but it does not specify who bears the costs. The NMFS promulgated a rule forcing fishing vessels to pay for the observers in certain situations, and the plaintiff-fisheries challenged the rule. Two circuit courts rejected the challenges, deferring to the agency's interpretation of the MSA under the *Chevron* doctrine, which requires courts to defer to an agency's "permissible" interpretation of an ambiguous statute.

In a momentous 6-3 decision, the Supreme Court reversed and overruled *Chevron* deference as inconsistent with the Administrative Procedure Act ("APA"). Writing for the Court, Chief Justice Roberts explained that since the Founding, it has always been the duty of Article III courts to interpret the law. Courts have afforded "due respect" to Executive Branch interpretations of law, but that respect did not supersede a court's independent judgment. The APA gives courts the power to set aside agency action "not in accordance with law" and specifies that the courts must decide "all relevant questions of law," codifying the traditional understanding of the judicial function.

Decided in 1984, *Chevron* held that courts should defer to agency interpretations of an ambiguous statute, if the interpretation is "permissible." But, as Chief Justice Roberts explained, the Court has never reconciled *Chevron* with the APA's text or history. Instead, *Chevron* has survived based on a legal "fiction" regarding implied congressional delegation, and a series of "byzantine" doctrinal updates. Moreover, *stare decisis* did not require adherence to *Chevron*, the Court held, because it has undermined stability, reliance interests, and the rule of law. Notably, however, the Court held that prior cases that had relied on *Chevron* (and *Chevron* itself) are still entitled to *stare decisis*. The overruling of *Chevron* is prospective only.

Justice Kagan dissented, joined by Justices Sotomayor and Jackson. In Justice Kagan's view, *Chevron* is premised on a reasonable presumption that when Congress intends expert agencies to fill statutory gaps or ambiguities. Those gaps, she explains, are policy decisions that courts are ill-equipped to make. And, in her view, *stare decisis* warranted adherence to *Chevron* after forty years.

Loper Bright's overruling of *Chevron* deference could have significant and far-reaching consequences. *Chevron* was a staple of administrative law for forty years, guiding how courts addressed difficult statutory interpretation questions in the agency context. Now, under *Loper Bright*, courts cannot defer to an agency as a matter of course. Instead, they must interpret statutes independently, and make the final determination as to statutory meaning, even in the face of ambiguity.

> **"Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." (Roberts, C.J.)**

This new rule will therefore make it easier for litigants to offensively challenge and set aside agency rules. *Chevron* previously gave the government a substantial advantage in court, where all the agency needed to do was establish an ambiguity in the statute. Even if the private litigant had the *better* reading, courts were still required under *Chevron* to accept any *permissible* government reading. *Loper Bright* takes that edge from the government

To be sure, courts still can (and many will) afford agencies deference, proportionate to the agency's specialized expertise and the thoroughness with which it has examined an issue. There also remains the doctrine of *Skidmore* deference, which is less powerful than *Chevron* deference, but has not been formally overruled. And given the Court's increasing skepticism of *Chevron* over the past several years, agencies and lower courts had already reduced their reliance on the doctrine even before *Loper Bright*. Still, *Loper Bright* takes away one powerful tool agencies previously held, and it may cause agencies to tread more carefully to promulgate broad rules or take aggressive administrative action.

SEC v. Jarkesy: SEC Civil Penalties for Securities Fraud Require Jury

Held: Civil penalties for securities fraud require trial by jury under the Seventh Amendment because the claims require "suit at common law," and therefore the Securities and Exchange Commission ("SEC") cannot prosecute these claims through in-house agency adjudications (Roberts, C.J.).

Jarkesy involved a securities fraud lawsuit brought against a private litigant in front of an SEC Administrative Law Judge ("ALJ"). Under the federal securities laws, the SEC has the option to bring such enforcement actions against a defendant either by filing a lawsuit in federal court or by initiating an administrative enforcement proceeding in-house and in front an ALJ. Before 2010, the SEC could pursue only injunctive relief against individual defendants in its home forum, and seek civil penalties only in federal court. But in the Dodd-Frank Act of 2010, Congress gave the SEC the additional power to seek civil penalties in agency proceedings.

In a 6-3 opinion, the Court held that the Seventh Amendment's right to a jury trial for "suits at common law" prevents the SEC from seeking civil penalties for securities fraud claims before in-house administrative courts, where there are no juries. Writing for the majority, Chief Justice Roberts first reasoned that the Seventh Amendment's jury trial right applies to fraud claims for civil penalties under the federal securities laws, because of the close relationship between those claims and common law fraud. Second, the Court reasoned that such claims do not fall within the "public rights" exception that allows Congress to redirect certain claims to an agency without a jury. Chief Justice Roberts explained that the determination of whether a claim involves private rights or public rights turns on the "substance of the suit," and "not where it is brought, who brings it, or how it is labeled." And in substance, the Court concluded, these were common law fraud claims that must be brought before a jury.

While *Jarkesy* directs all securities fraud cases seeking civil penalties into federal court, the decision may have broader impact outside of the SEC. As the dissent highlights, the decision could open the door for challenges to enforcement actions brought by other agencies with the power to seek civil penalties, and perhaps encourage those agencies to bring more of their suits in federal court, where defendants have greater procedural protections. Indeed, agencies like the SEC and the Federal Trade Commission ("FTC") almost always win lawsuits in their home court.

The Court did not resolve several broader challenges to the SEC's authority that the respondent had raised. The respondent had also brought an Article II challenge to SEC ALJs' insulation from presidential removal and a non-delegation doctrine challenge to the SEC's discretion to choose which forum to bring suit. The Court declined to resolve either contention, which could have further restrained the power of the SEC or other agencies.

Corner Post v. Board of Governors: Agency Rules Not Safe from Challenge After Six Years

Held: The six-year statute of limitations for challenges to agency rules begins to run when a plaintiff is first injured by the rule and therefore when the claim "accrues," even if the rule was promulgated more than six years earlier (Barrett, J.).

Corner Post arises from a 2011 Federal Reserve rule capping the fees a merchant can charge the consumer's debit card issuer per transaction. The challenger was a truck stop convenience store that accepts debit-card payments and was subject to the rule, but was not incorporated until 2017—more than six years after the rule was promulgated. Following a majority of circuits holding that the statute of limitations under the APA begins to run for *all* plaintiffs on the date a rule is promulgated, the Eighth Circuit affirmed dismissal of the challenge as untimely.

The Supreme Court reversed and remanded, holding that the statute of limitations for APA claims starts to run on the date on which the challenged agency action first injures the plaintiff, rather than the date on which a rule or order was promulgated. The Court interpreted 28 U.S.C. § 2401, which sets a six-year time limit that starts when a claim "first accrues." The Court has long held that a claim "accrues" only after the plaintiff suffers the injury required to press her claim in court. This default meaning applies unless Congress has expressly indicated otherwise in the text of the statute, such as where Congress establishes a "repose" period tied to the date of the challenged action. The Court reasoned that this reading was strengthened by language in other statutes authorizing judicial review of administrative action, where Congress explicitly tied claim accrual to the promulgation of a final rule. Justice Barrett further rejected the government's policy arguments, concluding that the plain text controls and that the policy implications were overstated.

In dissent, Justice Jackson (joined by Justices Sotomayor and Kagan) wrote that the consequences of the decision will be "staggering," because the decision opens the door to myriad new challenges to old regulations. According to Justice Jackson, the text and context of the statute show that, for facial challenges to agency regulations, the six-year statute of limitations begins to run on the date of the regulation's promulgation.

The majority and dissent disagreed about the practical significance of the holding. On the one hand, *Corner Post* allows rules to be challenged long after they are promulgated. Regulated entities that are formed (or become subject to a rule) years after a rule's promulgation may be able to launch fresh challenges. Paired with *Loper Bright*'s overruling on *Chevron*, those old rules become even more vulnerable to attack.

On the other hand, many agency regulations are governed by more specific statutes of limitations that expressly run from the date of promulgation. Additionally, challengers will still need to confront *stare decisis* when courts have already upheld the rules on the merits. That said, most agency challenges do not reach the Supreme Court, and even when there is circuit precedent on point, plaintiffs may be able to bring fresh challenges to old rules in other circuits, create circuit splits and put even more litigation pressure on the government. Together, *Loper Bright* and *Corner Post* could spur a new wave of challenges under administrative law.

CFPB v. Community Financial Services Ass'n of America: CFPB's Funding Mechanism Safe From Appropriations Clause Challenge

Held: The funding mechanism of the Consumer Financial Protection Bureau ("CFPB") that allows the CFPB Director to draw from the Treasury up to a cap without annual appropriation authorization by Congress does not violate the Appropriations Clause (Thomas, J.).

Congress created the CFPB in 2010, under the Dodd-Frank Wall Street Reform and Consumer Protection Act, in response to the 2008 financial crisis. To maximize the agency's independence, Congress authorized the CFPB to draw money from the revenues of the Federal Reserve System, subject to an annual cap, without having to return to Congress annually for appropriations legislation. The challengers in this case argued that this mechanism violated the Appropriations Clause of the Constitution, which provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

In a 7-2 ruling penned by Justice Thomas, the Court held that the CFPB's funding mechanism is constitutional, because the Dodd-Frank Act serves as the "appropriation" required by the Constitution. "[A]n appropriation is simply a law that authorizes expenditures from a specified source of public money for designated purposes." That remains true even though the Dodd-Frank Act does not require the CFPB to obtain annual appropriations. According to the Court, Congress has broad discretion to enact laws that determine how and when agencies can be funded. Pointing to early American federal agencies, the Court explained that Congress has historically provided agencies with open-ended funding mechanisms, without time limits, evincing the original understanding of the Appropriations Clause.

This decision confirms that Congress retains substantial discretion to insulate agencies from political forces by using creative funding processes. The decision also allows the CFPB to continue operating in its current form—which was in question after the lower court ruling under review found the agency's funding structure to be unconstitutional. Although in recent years the Court's decisions have tended to limit agency power and jurisdiction—and have specifically reined in the powers of independent executive agencies—this decision suggests a somewhat more deferential approach to the way in which Congress structures federal agencies, at least with respect to the Appropriations Clause.

ARBITRATION

Bissonnette v. LePage Bakeries Park St. LLC: Supreme Court Clarifies Scope of FAA's Transportation Worker Exemption

Held: A worker need not work for a company in the transportation industry to fall within the "transportation worker" exemption under Section 1 of the Federal Arbitration Act ("FAA") (Robert, C.J.).

The FAA generally requires federal courts to enforce arbitration agreements, but Section 1 excludes from that requirement all "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The sole question before the Court in this case was whether to be exempt from arbitration under Section 1, "a transportation worker must work for a company in the transportation industry."

The case involved deliveries for Flower Foods, Inc., the maker of Wonder Bread and other baked goods. The plaintiffs owned the right to distribute Flowers products in certain parts of Connecticut. The plaintiffs spent about forty hours a week distributing baked goods in their territory, but also had other responsibilities, including finding new retail outlets, advertising the products, and stocking shelves. The Second Circuit held that the plaintiffs' claims against Flowers were not exempt from arbitration because Section 1 exempts only "workers involved in the transportation industries" and the plaintiffs worked in the "bakery industry."

A unanimous Supreme Court reversed. Focusing on the statutory text and precedent, the Court observed that Section 1 "refers [only] to 'workers' who are 'engaged' in commerce," which "focuses on 'the performance of work' rather than the industry of the employer." The test for determining whether a worker is exempt from the FAA, the Court explained, is whether the worker at least "play[s] a direct

and 'necessary role in the free flow of goods' across borders."

The decision brings further clarity to the scope of Section 1 following the Court's decision two years ago in *Southwest Airlines Co. v. Saxon*, where the Court held that an airline ramp agent supervisor who occasionally loaded and unloaded baggage from airplanes was sufficiently engaged in foreign or interstate commerce to qualify for the Section 1 exemption. *Saxon* did not settle the question whether, to be exempt, an employee must work in the transportation industry, and the courts of appeals had divided on that question.

Although the Court's decision removes one line of argument that companies could previously make in a motion to compel arbitration, the decision also reinforced that Section 1's scope is "appropriately narrow," and companies may still have a variety of other arguments for why Section 1 does not apply. Among the key questions left unresolved after *Bissonnette* are just how much of an employee's responsibilities the interstate transportation of goods must be to qualify for the exemption, and whether the worker must actually be engaged in the transportation of goods across state lines (as opposed to transporting goods that are in the flow of interstate commerce more generally).

Coinbase v. Suski: Courts Must Resolve Conflicts in Arbitration Agreements

Held: Where parties have agreed to two contracts—one sending arbitrability disputes to arbitration and the other sending arbitrability disputes to the courts—a court must decide which contract governs (Jackson, J.).

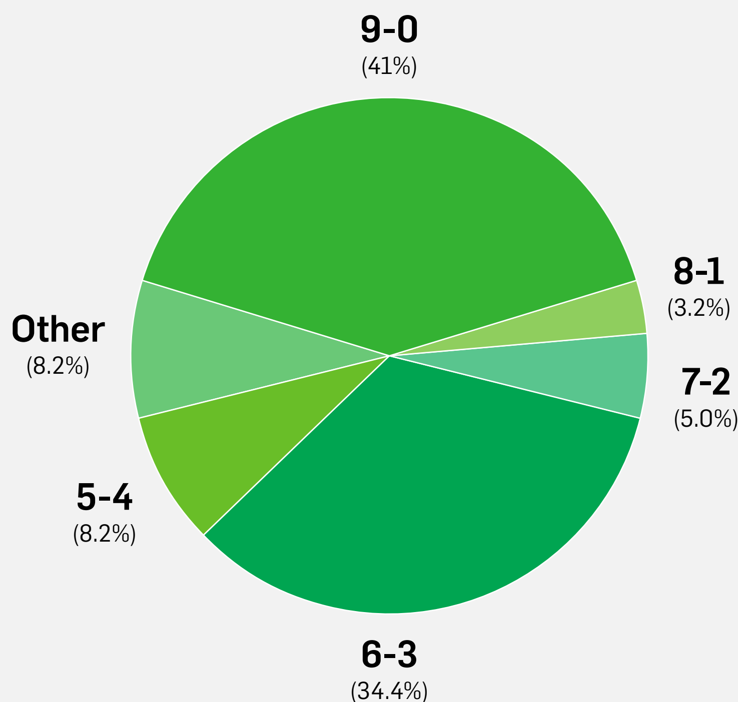
The FAA mandates courts to send to arbitrators any dispute covered by a valid agreement to arbitrate. Depending on the scope of the arbitration clause, this can include not only the ultimate merits dispute on a relevant claim, but also threshold questions of "arbitrability"—that is, whether a claim is "arbitrable" because it is covered by an arbitration clause and, relatedly, a "third-order question" of whether a court or arbitrator decides this gating question of arbitrability. The Supreme Court in *Suski* addressed a fourth-order arbitration question: "What happens if parties have multiple agreements that conflict as to the third-order question of who decides arbitrability?"

In a unanimous opinion written by Justice Jackson, the Court turned to "basic legal principles" to answer this question. The FAA's fundamental principle, Justice Jackson explained, is that "arbitration is a

BY THE NUMBERS

When Justice Barrett was confirmed to the former seat of Justice Ginsburg, commentators expected a relative surge in 6-3 decisions, with the three Democrat-appointed Justices in dissent. That trend has been slow to emerge, but this Term saw a noticeable uptick: There were almost twice as many 6-3 decisions this Term compared to the previous Term (21 vs. 11), with the three Democrat-appointed Justices dissenting from the remainder of the Court in 11 cases (compared to 5 in the previous Term). Neither Justice Alito nor Justice Thomas ever joined a Democrat-appointed Justice in dissent.

VOTE SPLIT BY CASE



matter of contract and consent." As a result, courts can send disputes to arbitration if—and only if—the parties actually agreed to arbitrate those disputes. When parties have conflicting agreements on who decides arbitrability, the threshold question of consent—whether the parties agreed to arbitrate the given dispute—"must be answered by a court."

The lesson of *Coinbase* is that a court, not an arbitrator, is the proper decider of which of two conflicting contracts should apply. But one practical takeaway is that businesses that have multiple contracts with the same counterparties should ensure their contracts are consistent with respect to the arbitrability of any disputes. This is particularly critical for businesses with consumer-facing online agreements, which often include additional promotions or sweepstakes with unique terms. As this case shows, inconsistency between contracts on the question of arbitrability can result in protracted litigation on threshold procedural issues—thwarting arbitration's core goal of providing a streamlined, expeditious alternative to traditional litigation.

Smith v. Spizzirri: Courts Must Stay, Not Dismiss, Cases Pending Arbitration

Held: Upon application of one of the parties, a trial court must stay (and cannot dismiss) a case that is subject to arbitration (Sotomayor, J.).

Section 3 of the Federal Arbitration Act ("FAA") provides that when any issue in a suit is subject to arbitration, the court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." Notwithstanding the statutory text, Respondents had argued that district courts had discretion to dismiss, instead of stay, a case after sending the parties to arbitration.

Relying on the "text, structure, and purpose" of Section 3, the Court unanimously rejected Respondents' interpretation. The word "stay" means "stay," the Court explained, just as "shall" means "shall." In neighboring provisions of the FAA, the Court has found "shall" creates a "mandatory obligation" that leaves the district court without discretion.

The Court went on to explain that even if there were any ambiguity in the text, the structure and purpose of the FAA confirms that dismissal is not proper: To move arbitrable cases out of court and into arbitration as easily as possible, the FAA provides "for immediate interlocutory appeal of orders *denying*—but not orders *granting*—motions to compel arbitration." Dismissal of a suit subject to arbitration even when a party requests a stay "triggers the right to an immediate appeal where congress sought to forbid [one]."

Spizzirri resolves a deep circuit split and lingering ambiguity regarding the proper disposition of a district court case pending arbitration, and it is a positive development for parties seeking to enforce arbitration provisions as quickly as possible. A stay ensures that a plaintiff cannot disrupt the arbitration process by appealing an order compelling arbitration, and it eliminates the administrative hassle of having to reopen a district court case for any post-arbitration proceedings that may be necessary, such as arbitral award confirmation.

BANKRUPTCY

Harrington v. Purdue Pharma L.P.: No Discharge Without the Consent of Claimants

Held: The Bankruptcy Code does not authorize bankruptcy courts to confirm a Chapter 11 bankruptcy plan that discharges creditors' claims against third parties without the consent of the affected claimants (Gorsuch, J.).

The bankruptcy of Purdue Pharmaceutical made its way to the Supreme Court for review of the reorganization plan, which had released members of the Sackler family from liability for their role in the opioid crisis without the consent of all potential plaintiffs with claims against the Sackler family. Rejecting the debtor's arguments in support of the plan, the Court ruled that Section 1123(b)(6) of the Code does not permit a plan to include terms that address only third parties simply because "a bankruptcy judge deems" that term "'appropriate' and consistent with the broad purposes of bankruptcy." The Court emphasized that the Bankruptcy Code provides substantial benefits to debtors—most notably a discharge—but only if they file for bankruptcy and put all of their assets on the table. The Sacklers had not done so, and thus could not effectively obtain a discharge.

The decision does not impact the ability of third parties to obtain releases in asbestos cases, which the Bankruptcy Code explicitly permits. The decision also should not impact the ability of third parties to settle and receive the benefit of so-called "debtor releases"—releases of claims held by the debtor against such parties. These typically include claims such as fraudulent transfer, breach of fiduciary duties, and veil piercing. Additionally, third parties seeking broad releases can still use the Chapter 11 process as a settlement mechanism, but will have to allow individual creditors to opt out of any release of direct (non-debtor) claims individual creditors may hold (or they will have to file Chapter 11 themselves to obtain the benefit of the discharge).

Truck Insurance Exchange v. Kaiser Gypsum Co.: A "Direct Financial Stake" Is Enough for Bankruptcy Standing

Held: Any party with a "direct financial stake in the outcome" of a reorganization has standing as a "party in interest" to object to a Chapter 11 plan (Sotomayor, J.).

This case concerned a Chapter 11 reorganization plan of Kaiser Gypsum, a company that manufactures asbestos-containing products. Truck Insurance Exchange ("Truck") is the primary insurer for Kaiser, and Kaiser's plan proposed to create a personal injury trust to pay individual tort

claims, many of which Truck was obligated to insure. The plan included "insurance neutrality" language providing that the plan did not alter Truck's legal obligations, but Truck sought to object on the ground that the plan lacked adequate protections against the filing of fraudulent claims.

The Supreme Court held that Truck was a "party in interest" and could therefore object, because it was "[a]n insurer with financial responsibility for bankruptcy claims." The Court explained that insurers can have a "direct financial stake in the outcome" of a reorganization insofar as the reorganization can "affect an insurer's interests in myriad ways," including by leaving the insurer as the only party with the responsibility to cover many claims. This broad interpretation, the Supreme Court held, coheres with the purposes of the Bankruptcy Code and the "party in interest" provision, which promote both "greater participation in reorganization proceedings" and a "fair and equitable reorganization process."

The Supreme Court's decision establishes that "insurance neutrality" language will not deprive an insurer of standing to object to a bankruptcy plan. By putting an end to that common practice, the Court strengthened insurers' ability to have their rights and interests fully considered in Chapter 11. More broadly, the Court also made clear that any party with a financial interest in the overall outcome of a reorganization has a right to object.

Office of the United States Trustee v. John Q. Hammons Fall 2006, LLC: No Payback for Aggrieved Debtors

Held: Debtors who were overcharged pursuant to an unconstitutional statute permitting different fees for Chapter 11 debtors in different States are not entitled to a refund from the government (Jackson, J.).

Two Terms ago, in *Siegel v. Fitzgerald*, the Supreme Court held that a statute that permitted different fees for Chapter 11 debtors depending on the district where the case was filed violated the Bankruptcy Clause's uniformity requirement. This Term, the Court held that debtors adversely affected by that statute could not recover damages from the Office of the U.S. Trustee for that overpayment.

Writing for the Court, Justice Jackson reasoned that Congress would not have wanted to provide a refund. Rather, Congress was committed to *higher* fees for Chapter 11 bankruptcy filings and had already remedied the wrong going forward by imposing equal fees across all districts. The Court also reasoned that a potential refund of all unconstitutionally collected fees would cost approximately $326 million and thus cause an extreme disruption to the bankruptcy system. Going forward, debtors around the country thus will pay equivalent fees, no matter in which judicial district they file Chapter 11 cases, but the previous lack of uniformity held unconstitutional in *Siegel* will not be redressed through refunds.

STANDING

Murthy v. Missouri: Court Dismisses Claims of Government Censorship on Social Media

Held: States and social media users lack Article III standing to sue government officials for allegedly pressuring social media platforms to censor speech (Barrett, J.).

The Court reaffirmed well-established standing principles in a hot-button case about social media platforms. Two States and five social media users sued various Executive Branch officials and agencies, claiming they violated the plaintiffs' free speech rights by allegedly pressuring social media platforms to remove or demote social media posts containing misinformation about the COVID-19 pandemic and the 2020 election.

Writing for the majority, Justice Barrett concluded that the plaintiffs lacked Article III standing because they were unable to establish a sufficient connection between the alleged pressure campaigns and the third-party social media platforms' removal or demotion of the plaintiffs' posts. The social media platforms had removed and demoted similar content long before the government officials began communicating with the platforms. And the platforms continued to make their own decisions about content moderation after communicating with government officials. Thus, it was unclear that the platforms removed the plaintiffs' posts because of the government officials' communications—let alone that the platforms would restrict the plaintiffs' speech in the future in response to the actions of these government officials.

The Court's fact-intensive ruling did not delve into difficult questions about whether the government is permitted coordinate with social media companies to moderate content on their platforms. But the decision is at least a partial win for government officials and agencies seeking to do just that. The case could also have ripple effects by tightening the requirements for plaintiffs seeking injunctive relief in claims where the injury depends on the conduct of third parties.

FDA v. Alliance for Hippocratic Medicine: Physicians Lack Standing to Challenge Drug Regulations

Held: Plaintiffs must be directly affected by government regulations to challenge those regulations in federal court (Kavanaugh, J.).

In this highly anticipated decision, a unanimous Supreme Court rejected an attempt by pro-life physicians and associations to sue the FDA over its decision to relax regulatory requirements for mifepristone, an abortion drug.

The Court concluded the plaintiffs lacked Article III standing to challenge the FDA's action. The physicians did not prescribe or use mifepristone, and the FDA regulations did not require them to do or refrain from

doing anything. Rather, the plaintiffs wanted the FDA to make mifepristone more difficult for other doctors to prescribe and for pregnant women to obtain. But as Justice Kavanaugh explained, "a plaintiff's desire to make a drug less available *for others* does not establish standing to sue."

The decision signals that the Justices are highly skeptical of physicians' efforts to challenge government regulation of pharmaceuticals. That is welcome news for pharmaceutical companies developing new medical treatments, as the decision likely insulates their FDA drug approvals from attacks by physicians and other trade groups. In fact, numerous pharmaceutical companies and executives filed an *amicus* brief in support of the FDA.

At the same time, the Court's ruling makes standing requirements more strenuous in ways that may limit plaintiffs' abilities to bring lawsuits in other contexts. In particular, the Court narrowed the ability of organizations to assert standing when they are forced to divert resources in response to a defendant's actions.

OTHER CASES OF INTEREST

Trump v. United States: Partial Immunity for Official Acts Taken by President

Held: A former President is absolutely immune from criminal prosecution for official acts within his exclusive sphere of constitutional authority, and presumptively immune from criminal prosecution for official acts within the outer perimeter of the President's official responsibility. A former President lacks any immunity for his private acts (Roberts, C.J.).

In arguably the most watched case of this Term, the Court evaluated former President Trump's claim for absolute immunity from criminal prosecution for acts taken while in office. The case arose from a criminal indictment filed against President Trump for his efforts to overturn the results of the 2020 presidential election.

The Court held 6-3 that because separation of powers prohibits the legislative or judiciary branches from scrutinizing the President's execution of the duties constitutionally entrusted to him or her, the "President is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority." The Court went on to hold that the President enjoys "at least a *presumptive* immunity from criminal prosecution for a President's acts within the outer perimeter of his official responsibility," with the government able to overcome that presumption if it shows that "applying a criminal prohibition to that act would pose no dangers of intrusion on the authority and functions of the Executive Branch."

The Court then examined the allegations in the indictment to assess whether President Trump is immune from criminal prosecution for the charged conduct or whether further analysis is needed. The Court concluded that President Trump is absolutely immune from claims arising out of his interactions with and directions to the Department of Justice, which fall within his "conclusive and preclusive" authority. For all other allegations in the indictment, the Court remanded to allow the lower courts to determine in the first instance whether those acts were private or official in nature, and/or (if official) whether any presumption of immunity could be rebutted. The Court rejected the categorical rules of immunity advocated for by President Trump and the dissent, and rejected the government's contention suggestion that a former President's amenability to criminal prosecution can be evaluated at the end of trial, rather than in a pretrial motion for immunity. Significantly for this and other prosecutions against President Trump, the Court further held that acts for which a President is immune cannot be offered as evidence against the President at trial.

Justice Sotomayor dissented, joined by Justices Kagan and Jackson. Justice Sotomayor described the majority's ruling as "deeply wrong" and as creating a "law-free zone around the President." She observed that under the ruling, the President would be "[i]mmune, immune, immune" from prosecution for a range of unlawful conduct, including using the military branches for his own personal ends. Justice Barrett also dissented from the majority's ruling regarding evidentiary immunity.

"[W]e conclude that the separation of powers principles explicated in our precedent necessitate at least a *presumptive* immunity from criminal prosecution for a President's acts within the outer perimeter of his official responsibility." (Roberts, C.J.)

Because no former President has ever before been the subject of criminal prosecution for acts undertaken during his time in office, the practical effects of the ruling—beyond the immediate effect on the pending cases against President Trump—remain uncertain. Armed with the certainty—rather than only the possibility—of absolute immunity from official acts, Presidents may be more emboldened to use their power in illegitimate or anti democratic ways. At the same time, however, officers and agents working at the direction of the President do not enjoy the same level of immunity, and so may be less willing to participate in conduct that may implicate their criminal liability.

BY THE NUMBERS

This Term marked a new high for the percentage of women advocates before the Court. Whereas past Terms have seen women advocates deliver only 12–24% of the arguments before the Court, this Term that number grew to **34.7%**.

The uptick is in part due to the fact that the U.S. Solicitor General—who argues several cases each year—is a woman (Elizabeth Prelogar). And as in past Terms, women advocates largely argued on behalf of the government and public interest groups, rather than private sector clients. Still, the growth is a notable step toward more diverse representation before the Court.

Macquarie Infrastructure Corp. v. Moab Partners: Pure Omissions Not Actionable as Securities Fraud

Held: Pure omissions are not actionable under Securities and Exchange Commission ("SEC") Rule 10b–5(b), which makes it unlawful to omit material facts in connection with buying or selling securities when that omission renders "statements made" misleading (Sotomayor, J.).

SEC Rule 10b-5(b) provides a private cause of action for investors to sue a public company if it "make[s] any untrue statement of a material fact or [ ] omit[s] to state a material fact necessary in order to make the statements … not misleading." Item 303 of the SEC's Regulation S-K requires issuers to disclose, in certain of their public filings, "known trends or uncertainties" that are "reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." The federal courts of appeals have long disagreed about whether a private plaintiff may bring a Section 10(b) claim based solely on a defendant's failure to make a required disclosure under Item 303, or whether a failure to make such a disclosure can form the basis of a Section 10(b) claim only when the omission renders misleading an issuer's affirmative statements.

In a unanimous opinion by Justice Sotomayor, the Court reversed the Second Circuit and held that a pure failure to make a required disclosure under Item 303 does not give rise to a Section 10(b) claim. Instead, the Court concluded, "[t]he failure to disclose information required by Item 303 can support a Rule 10b-5(b) claim only if the omission renders affirmative statements made misleading." The Court rejected the notion that a regulatory duty to disclose renders silence misleading. Such a rule, the Court explained, would "shift[] the focus of [Rule 10b-5(b)] and §10(b) from fraud to disclosure."

The Court's decision in *Moab* narrows the threat of liability to issuers for failure to disclose "known trends or uncertainties," exposing them to private liability under Section 10(b) only if the plaintiff is able to identify an affirmative statement rendered misleading by the failure to disclose. Violations of Item 303, however, may still lead to liability under Sections 11 and 12 of the Securities Act of 1933 (provided the other elements of those claims are met) and enforcement actions by the SEC.

Moody v. NetChoice, LLC: Court Leaves Constitutionality of Content Moderation Regulations for Another Day

Held: Neither the Eleventh Circuit nor the Fifth Circuit properly analyzed the plaintiffs' facial First Amendment challenges to the state laws regulating social media companies, but the Florida and Texas laws at issue likely are unconstitutional in many applications (Kagan, J.)

The Florida and Texas laws at issue restrict the ability of social media companies, such as Facebook and Twitter, to remove posts on the basis of the viewpoints expressed. The States enacted these laws in response to concerns that social media companies were effectively censoring conservative viewpoints. The Eleventh and Fifth Circuits split as to whether these laws violate the social media companies' First Amendment rights. A unanimous Supreme Court ruled that the lower courts misapplied the test for determining whether a law is facially unconstitutional, but only five Justices joined the majority opinion in full.

The majority expressed concern that these laws *might* violate the First Amendment as applied to decisions by social media platforms that serve an editorial function by curating third-party content. But the plaintiffs had pursued only *facial* challenges to the laws, seeking to invalidate the laws in their entirety in all applications. Because the lower courts failed properly to analyze the facial constitutionality of the laws, the Court vacated and remanded each of the cases for reconsideration. Nonetheless,

the Court's decision made clear that the First Amendment would provide some meaningful protection to content moderation decisions made by social media platforms, and thus the decision marks a significant practical win for them.

It is unclear at this stage whether the laws will ultimately be upheld, but language in the Court's decision is likely to aid social media companies and other sites seeking to moderate speech on their platforms. The Court emphasized that when social media companies "use their Standards and Guidelines to decide which third-party content [their] feeds will display, or how the display will be ordered and organized, they are making expressive choices. And because that is true, they receive First Amendment protection." Accordingly, on the current record, the Court suggested the "Texas law does regulate speech when applied in the way the parties focused on below" and Texas's justifications up to this point are "unlikely to withstand First Amendment scrutiny." But whether the entirety of the laws will be struck down remains unknown.

Warner Chappell Music v. Nealy: Copyright Damages Available Under the Discovery Rule

Held: A plaintiff suing under the Copyright Act can recover damages for any timely infringement claim, no matter when the infringement occurred (Kagan, J.).

The Copyright Act limits civil actions to those "commenced within three years after the claim accrued." Most lower courts have adopted the so-called "discovery" rule, whereby a claim "accrues" when it is discovered or reasonably should have been discovered, rather than when the infringement occurs. In *Nealy*, the Supreme Court assumed without deciding that the discovery rule applies under the Copyright Act. The only question addressed was whether a copyright plaintiff bringing a timely infringement claim under the discovery rule can recover damages for acts that allegedly occurred more than three years before the plaintiff filed suit.

Relying on the plain text of the Copyright Act, the Court held that the statute of limitations in Section 507(b) addresses only the time to sue, so "[i]f any time limit on damages exists, it must come from the Act's remedial sections." And those provisions do not set any "time limit on monetary recovery." The Court reasoned that a contrary rule would be inconsistent with the Act's text and would "gut" the discovery rule by preventing a plaintiff from recovering for a timely infringement claim. The Court further explained that its earlier decision in *Petrella v. Metro-Goldwyn Mayer, Inc.* did not address the question presented, because the plaintiff there "sued only for infringements that occurred in the three years before her suit."

Justice Gorsuch dissented, joined by Justices Thomas and Alito, and would have dismissed the writ of certiorari as improvidently granted and waited for another case that squarely presents the question whether the discovery rule applies under the Copyright Act in the first place. In the dissenting Justices' view, it "almost certainly does not."

The majority's ruling restores uniformity in the lower courts, but leaves open the important question of whether the discovery rule applies under the Copyright Act at all. It may have seemed likely, based on the dissent, that the Court would take up this issue soon. The Court, however, recently denied a petition for certiorari in *Hearst Newspapers, LLC v. Martinelli*, which directly raised the discovery rule.

Trump v. Anderson: States Cannot Remove Presidential Candidates from the Ballot

Held: A State may not disqualify a candidate for federal office based on Section 3 of the Fourteenth Amendment to the U.S. Constitution (per curiam).

This case concerns a Colorado court's removal of former President Trump from the primary presidential ballot in Colorado based on the court's conclusion that President Trump "engaged in insurrection or rebellion" against the United States and therefore is disqualified from federal office pursuant to Section 3 of the Fourteenth Amendment. The key dispute between the parties was whether the office of the President is an "office . . . under the United States" as contemplated by Section 3. A unanimous Supreme Court reversed President Trump's disqualification in a per curiam holding, declining to weigh in on the meaning of "office . . . under the United States" and concluding instead that States lack the constitutional authority to disqualify a candidate from federal office.

Although the subject of public interest, the ruling likely is of relatively limited impact. The Court identified only one prior effort by a State to disqualify a federal candidate pursuant to Section 3, which was resolved without the need for litigation. Section 3 is a narrow and rarely used tool that was largely intended as a post Civil War protective measure against secessionists holding office, and so its interpretation here is not likely to have significant implications going forward.

NEXT TERM PREVIEW

The Supreme Court has begun to fill out its merits docket for the 2024 Term, having already agreed to hear 28 cases. In keeping with past practice, the Court is expected to accept an additional 30–40 cases.

The Court's docket includes several opportunities to interpret federal statutes touching on a number of issues, including (1) a bankruptcy trustee's avoidance powers under 11 U.S.C. § 544(b), (2) the meaning of "defendant's profits" under the Lanham Act, (3) whether a former employee is a "qualified individual" under the Americans with Disabilities Act, and (4) whether certain FCC reimbursement requests are "claims" under the False Claims Act. The criminal docket will bring the opportunity to resolve several circuit splits over the interpretation of the First Step Act, Armed Career Criminal Act, and the federal mail and wire fraud statutes—provisions that the Court has dealt with frequently over the past several years. And, after the Court's ruling overruling *Chevron* deference in *Loper Bright*, the Court will again examine agency actions by the EPA and FDA.

Among the most interesting cases:

- *Republic of Hungary v. Simon* makes its second trip to the Supreme Court, presenting a circuit conflict over whether pleading the historic commingling of assets is sufficient to plead a nexus of specific property in the United States under the Foreign Sovereign Immunity Act's expropriation exception.
- In *Facebook v. Amalgamated Bank*, the Court will resolve a three-way Circuit split over whether a public company's 10-K "risk factor" disclosures must disclose whether a risk materialized in the past, even if that past risk presents no known ongoing or future business harm.
- In *Royal Canin U.S.A. v. Wullschleger*, the Court will consider whether federal-question subject matter jurisdiction over a removed case can be defeated by post-removal amendment of the claim that omits federal questions, and whether nonetheless federal courts may exercise supplemental jurisdiction over the remaining claims.
- In *NVIDIA Corp. v. E.Ohman J:or Fonder AB*, the Court will resolve two important questions of a plaintiffs' burden to plead securities fraud claims under the Private Securities Litigation Reform Act. First, the Court will address a current 5-2 circuit split over whether plaintiffs must plead with particularity the content of internal company documents when those documents form the basis of alleged scienter. Second, the Court will consider whether the falsity requirement may be alleged by relying on an expert opinion rather than particular allegations of fact.
- In *FDA v. Wages & White Lion Investments, LLC*, the Court will review the Fifth Circuit's ruling that the FDA acted arbitrary and capriciously in denying marketing applications for Respondent's nicotine liquid products used in e-cigarettes.

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