BETTER MARKETS

SPECIAL REPORT

October 2, 2023

The Supreme Court and Your Wallet

Cases and Trends That Define the Ability of the Wall Street Cops to Protect Every American from Financial Predators

- Key Decisions from Last Term
- What Lies Ahead on the Court's Docket
- A Closer Look at the Assault on the Regulatory Agencies
- Overview of the Ethics Concerns

The Supreme Court as composed June 30, 2022 to present.

Front row, left to right: Associate Justice Sonia Sotomayor, Associate Justice Clarence Thomas, Chief Justice John G. Roberts, Jr., Associate Justice Samuel A. Alito, Jr., and Associate Justice Elena Kagan.

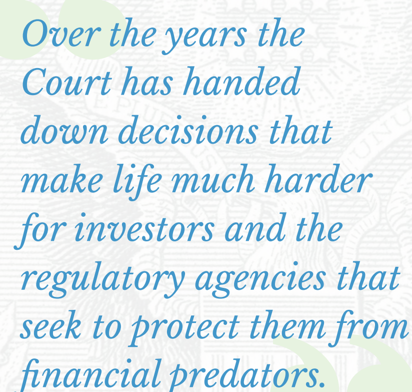
Back row, left to right: Associate Justice Amy Coney Barrett, Associate Justice Neil M. Gorsuch, Associate Justice Brett M. Kavanaugh, and Associate Justice Ketanji Brown Jackson.

Credit: Fred Schilling, Collection of the Supreme Court of the United States

INTRODUCTION

Each term, the U.S. Supreme Court decides cases that have a profound impact on the financial well-being of every American who is working, saving, and investing for a better standard of living and a decent retirement. Those decisions tend to be overshadowed by the Court's more headline-grabbing pronouncements that address controversial social policy questions surrounding abortion, gun control, and others. But the bottom line is that anyone who relies on a financial product or service—a checking account, credit card, mortgage, student loan, car loan, retirement plan, college savings fund, or brokerage account—has a stake in the Supreme Court's decisions.

A prime example is the Court's forthcoming decision on the fate of the Consumer Financial Protection Bureau (CFPB), one of the most effective agencies in the history of financial regulation. It has written strong rules against unfair and abusive financial conduct, established a robust enforcement program, and put over $17 billion back in the pockets of victimized financial consumers.[1] However, as we detail below, its future is on the line before the Court. A payday lender is seeking to challenge a CFPB rule protecting borrowers from abusive practices by attacking the way the agency is funded, alleging that it violates the Appropriations Clause of the U.S. Constitution. How the Court rules, and what remedy it sees fit to order, will have enormous implications for the future of the agency, the validity of its past rules and enforcement actions, and its ability to continue protecting consumers against fraud and abuse in the sale of a broad range of financial products and services, from payday loans to mortgages and credit cards. Even some sectors of the financial services industry are deeply concerned about the prospect of the Court's possibly upending the CFPB's rules, including the safe harbors on which they rely. The case also threatens the viability of other critically important agencies that have the same funding model, including the Federal Reserve and the other bank regulators.



The Court's impact on financial regulation and ultimately Americans' economic prosperity has a long history. Consider the Court's ruling seventy-five years ago in the landmark *Howey* case.[2] The Court broadly and flexibly defined a class of securities called "investment contracts." The Court wisely anticipated the need for a definition that could evolve over time and keep pace as the nature of securities offerings—and the imaginative schemes of the con artist—evolved. Today, that legal concept serves as the single most important tool in the Securities and Exchange Commission's (SEC) ongoing battle against fraud and manipulation in the cryptocurrency markets. As a direct result, the SEC has the authority—the "jurisdiction"—to regulate most cryptocurrency offerings, punish and deter cryptocurrency fraud, and even seek the return of ill-gotten gains for the benefit of the millions of investors who have sustained, and continue to sustain, losses.

Over the years, however, the Court has handed down decisions that make life much *harder* for investors and the regulatory agencies that seek to protect them from financial predators. For example, over 30 years ago, the Court legitimized the now widespread practice among brokers of including fine-print clauses in account agreements that force their clients out of court and into arbitration. Arbitration

[1] Consumer Financial Protection Bureau, *Twelve Years of Protecting Consumers and Honest Businesses* (July 20, 2023), https://www.consumerfinance.gov/about-us/blog/twelve-years-of-protecting-consumers-and-honest-businesses/.

[2] *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).

is a biased, secretive, and industry-run dispute resolution process that gives investors dim hope of recovering their losses from dishonest financial practices. The toll on everyday American investors has been enormous. The Court's cases on financial regulation also have the potential either to protect or weaken the regulatory framework that helps stabilize our financial system and prevent crises like the one that overwhelmed our economy in 2008 and inflicted hardship unlike anything seen since the Great Depression.

Even cases that lie outside the immediate realm of financial regulation, such as those addressing questions of administrative law, can have a huge impact on the financial lives of Americans. A prime example, also discussed below, is *West Virginia v. EPA*,[3] a major environmental decision issued in 2022. The Court established a rule of law that will hinder the ability of regulatory agencies to address some of the gravest threats Americans face, from climate change to deeply embedded and unscrupulous financial practices. The Court gave the so-called "major questions" doctrine its unqualified approval. That principle is now firmly entrenched as the basis for judicial nullification of an agency's rule whenever a court believes that the rule has vast economic and political significance but lacks sufficiently clear congressional authorization—regardless of how beneficial the rule may be. And the Court based this rule of law on a meager legal foundation indeed, as Justice Kagan demonstrated in a powerful dissent.

More troubling still, the decision in *West Virginia v. EPA* is part of a larger agenda shared by some of the Justices, as well as many federal judges, to scale back the administrative state, the network of agencies and rules that has protected Americans from environmental pollution, unsafe products, and financial predators for over a century. Unfortunately, these trends in administrative law appear likely to play an increasingly prominent role as the Court's conservative majority takes aim at our national regulatory framework. They threaten significant harm to consumers, investors, and the public interest generally. As a result, Americans are faced with fewer protections against fraud and abuse at the hands of banks, brokers, and other financial firms; the cops policing the financial markets become weaker as rules are nullified and the agencies themselves face existential challenges; and the victims of shady financial practices have fewer remedies at their disposal when they seek to recover their losses and hold wrongdoers accountable.

SUMMARY

These cases and trends have been the focus of a series of reports on the Court that Better Markets has issued over the last several years.[4] In this Report, we continue that tradition, in four sections.

In the first section, we examine five noteworthy decisions from the last term, in which the Court addressed, among other topics, remedies available under the securities laws, the rules governing

[3] 142 S. Ct. 2587 (2022).

[4] Better Markets, *Special Report: The Supreme Court's Decisions on Financial Regulation and the Growing Threat to the Administrative State* (Sept. 22, 2022), https://bettermarkets.org/wp-content/uploads/2022/09/BetterMarkets_Supreme_Court_Upcoming_Term_2022-2023.pdf; Better Markets, *Special Report: If Confirmed to the Supreme Court, Judge Ketanji Brown Jackson Will Help Improve the Financial Lives of American Consumers and Investors* (Mar. 15, 2022), https://bettermarkets.org/analysis/better-markets-releases-supreme-court-report-if-confirmed-to-the-supreme-court-judge-ketanji-brown-jackson-will-help-improve-the-financial-lives-of-american-consumers-and-investors/; Better Markets, *Special Report: The Supreme Court's 2020–2021 Term* (July 30, 2021), https://bettermarkets.org/wp-content/uploads/2021/09/BetterMarkets_Supreme_Court_Review_July2021.pdf; Better Markets, *Special Report: Economic and Financial Issues Before the Supreme Court and the Impact of Judge Amy Coney Barrett* (Oct. 8, 2020), https://bettermarkets.org/sites/default/files/images/BetterMarkets_Supreme_Court_Review_Oct2020.pdf; Better Markets, *Special Report: An Update on Supreme Court Cases Involving the Financial and Economic Security and Prosperity of the American People* (Oct. 4, 2019), https://bettermarkets.org/wp-content/uploads/2021/07/Better_Markets-Brett_Kavanaugh_Report_Oct-2019-003.pdf; Better Markets, *Judge Kavanaugh: Good for Corporations, Bad for Your Wallet* (Aug. 28, 2018), https://bettermarkets.org/analysis/kavanaugh-report/.

arbitration, and the doctrine of standing—whether a plaintiff has a sufficient stake in the outcome of a dispute to allow them even to be heard in federal court. In each instance, we set forth the background, the major elements of the Court's decision, and some observations about why it matters. On that issue, the Supreme Court's decisions almost always prove important on multiple levels: They affect the parties before the Court, whose interests are at stake; they establish new rules that will apply going forward, often reshaping financial regulation and investor remedies; and they sometimes foreshadow broader trends in the Court's approach to the law that have long-term consequences. Here's an overview of those decisions.

- In ***Axon Enterprise, Inc. v. FTC*** and ***SEC v. Cochran*****, 143 S. Ct. 890 (Apr. 14, 2023)**, the Court essentially overrode Congress's explicit provisions in the Securities Exchange Act and the Federal Trade Commission Act providing for appellate court review of agency enforcement proceedings only after the proceedings are final and only in the federal circuit courts. The Court concluded that those review mechanisms do not displace a district court's authority to entertain certain types of preemptive challenges to the constitutional structure of the SEC or FTC. This ruling will allow those charged with violating the law and defrauding investors and consumers to mire the agencies' enforcement actions in years of protracted litigation, allowing them to delay and potentially evade accountability.
- In ***Slack Technologies v. Pirani*****, 143 S. Ct. 1433 (June 1, 2023)**, the Court held that a false or misleading registration statement is only actionable if a shareholder is able to trace the shares he purchased to the challenged statement. Without a persuasive rationale, the decision deprived investors of the opportunity to recover for fraud in a direct listing unless they can prove that the shares they bought were among the subset of shares that happen to have been registered with the SEC. The decision weakens if not eliminates liability under Section 11 of the Securities Act for misleading registration statements, at least in direct listings.
- In ***Coinbase v. Bielski*****, 143 S. Ct. 1915 (June 23, 2023)**, the Court held that a district court must stay and delay its proceedings while an interlocutory appeal is taken on the question of arbitrability. The decision favors those industry defendants and others who desperately prefer arbitration over litigation in court when investors or consumers seek to recover damages for fraud or other forms of financial abuse. The result in this case was that a lawsuit to hold a crypto firm accountable for fraud and unlawful retention of funds must grind to a halt until the appellate court ultimately decides if arbitration is required.
- In ***Bittner v. United States*****, 143 S. Ct. 713 (Feb. 28, 2023)**, the Court held that monetary penalties for violations of the Bank Secrecy Act must be calculated only on a per report basis, not on the basis of the number of accounts that the defendant actually failed to disclose. Congress enacted the Bank Secrecy Act to help the government uncover tax evasion, terrorism, and other illegal activity involving the use of foreign financial accounts. The decision will weaken the punitive and deterrent impact against those who fail to report foreign bank accounts and thus obstruct the government's attempts to ferret out violations of the law.
- In ***United States v. Texas*****, 143 S. Ct. 1964 (June 23, 2023)**, the Court held that Texas and Louisianna lacked "standing" under Article III of the Constitution to challenge what they viewed as weak immigration enforcement guidance issued by the Department of Homeland Security (DHS). While the case presented an unusual set of circumstances, the outcome is consistent with the Court's often strict interpretation of the standing requirements—the showing of concrete injury necessary to seek relief in federal court. But the unfortunate reality is that the "standing" playing field is not level. More often than not, regulated industries, including the financial services industry, will have an

easy time establishing standing as they claim injury from the costs of regulatory compliance or the prospect of enforcement. That affords them ready access to federal court to lodge their complaints. In contrast, public interest organizations and other parties seeking to advance the public good have a much harder time under the Court's stringent approach—even though they too have a real stake in disputes over financial regulation, enforcement, and related matters of enormous public interest.

In the second section, we examine several cases with potentially seismic impact that the Court will decide during the upcoming term, which begins on Monday, October 2. And we list some of the pending requests for review, or "petitions for cert.," which the Court may or may not accept.

- In ***Murray v. UBS Securities, LLC*****, No. 22-660; 43 F.4th 254 (2d Cir. 2022) (argument scheduled for Oct. 10, 2023)**, the issue is whether whistleblowers must prove discriminatory intent to recover for retaliation by their employers under the Sarbanes-Oxley Act. If the Court sustains such a higher burden of proof, the decision can be expected to discourage whistleblowers from coming forward with evidence of wrongdoing at their companies.
- In ***Loper Bright Enterprises v. Raimondo*****, No. 22-451; 45 F.4th 359 (D.C. Cir. Aug. 12, 2022) (argument not yet scheduled)**, the issue is whether the Court should abolish judicial deference to reasonable agency interpretations of the laws they administer, a principle known as the *Chevron* doctrine. Deference to an expert agency's interpretation of the law can make a huge difference, often allowing important rules to survive challenges at the hands of the regulated industry. It ensures that judges, with less expertise in the regulated field, do not have unfettered discretion to override the considered judgment of an agency that its rules protecting the public are written in accordance with Congress's language and intent.
- In ***Jarkesy v. SEC*****, No. 22-99; 34 F.4th 446 (5th Cir., May 18, 2022) (argument not yet scheduled)**, the Court is confronted with a multi-pronged assault on the SEC's administrative enforcement mechanism, raising a series of issues: (1) whether statutory provisions that empower the SEC to initiate and adjudicate administrative enforcement proceedings seeking civil penalties violate the Seventh Amendment right to a jury trial; (2) whether statutory provisions that authorize the SEC to choose to enforce the securities laws through an agency adjudication instead of filing a district court action violate the nondelegation doctrine; and (3) whether Congress violated Article II by granting for-cause removal protection to administrative law judges in agencies whose heads in turn enjoy for-cause removal protection. The Court's decision will have a huge impact on the ability of the SEC to police fraud and bad actors in the securities markets, as it relies heavily on its administrative law judges (ALJs) and the administrative enforcement process to hold wrongdoers accountable.
- In ***Consumer Financial Protection Bureau v. Community Financial Services Assoc. of Am., Ltd.*****, No. 22-448; 51 F.4th 616 (5th Cir., Oct. 9, 2022) (argument scheduled for Oct. 3, 2023)**, the issue is whether the CFPB's funding mechanism violates the Appropriations Clause in the Constitution. The Fifth Circuit held that it does. If confirmed, the decision will undermine, if not halt, the critical work carried out by the CFPB in protecting consumers and enforcing regulations against unfair and deceptive practices by banks and other financial firms. Some in the financial services industry also fear that if the agency rules were to be invalidated, the markets would experience significant disruption and uncertainty, since the CFPB's rules provide valuable guidelines and safe harbors that facilitate orderly markets, especially in mortgage financing. An adverse ruling would also jeopardize numerous other financial regulators with similar funding structures, including the Federal Reserve, casting a huge cloud over the regulatory framework governing finance.

- In ***Acheson Hotels, LLC v. Laufer*, No. 22-429; 50 F.4th 259 (1st Cir. Oct. 05, 2022) (argument scheduled for Oct. 4, 2023),** the issue is whether a denial of information about a business, which is required to be made available by statute (in this case, the Americans with Disabilities Act), confers "standing" on a plaintiff, even if the plaintiff never intends to actually patronize the business. The doctrine of standing requires plaintiffs to show that they are threatened with concrete injury before they can sue in federal court. An adverse ruling here would continue to narrow the types of injuries that satisfy the standing requirement. That will prove especially burdensome to plaintiffs who seek to enforce rights, or challenge agency behavior, to advance the public interest.

Third, we take a closer look at the assault on the financial regulatory agencies and the administrative state more broadly. We examine the considerable influence of the *West Virginia* case in just the past 15 months since the Court issued the decision in June of 2022. We also look further at the related *Chevron* doctrine, which for decades has required judges to defer to agency interpretations of ambiguous statutory provisions. We assess the Court's current inclination to abolish or marginalize it and how its demise would make agency rules more vulnerable to attack by members of the financial services industry seeking to avoid regulation. Here are some key takeaways:

- As Justice Kagan emphasized this past term, the "major questions" doctrine that the Court articulated in *West Virginia* is an effort to restrict the regulatory actions that Congress thought appropriate and necessary to protect the public. The doctrine, as Justice Kagan said, allows the Supreme Court to appoint itself as the national decision-maker on important policy matters. *West Virginia* permits the Court to substitute its ideas about policymaking for Congress's.
- A review of Supreme Court and circuit court decisions since *West Virginia* was decided shows that the courts are readily invoking *West Virginia* to invalidate agency action. These decisions show that there are few limits to when cases may be considered "extraordinary" enough to justify applying the major questions doctrine. Rather, judges seem to find a case "extraordinary" whenever they wish to set aside agency action.
- *West Virginia* appears to have been just the precursor to overturning *Chevron*. Now that the Court has granted certiorari to consider whether to overturn *Chevron*, its prospects for survival appear dim. Overruling *Chevron* would allow courts to substitute their views for those of expert administrative agencies, would curtail the ability of agencies to adopt rules beneficial to the public, and would ultimately have significant policy ramifications that would lead to fewer protections for the American people.

In our fourth and concluding section, we briefly describe the reports of potentially unethical conduct by some of the Justices and where the Court may be headed as it seeks to address the concerns raised.

The bottom line is that the Supreme Court makes a huge difference in the financial lives of almost all Americans. And the Court's conservative majority now firmly in place may issue decisions that imperil agency rules and even the agencies themselves, exposing everyday consumers and investors to fraud and abuse, with fewer options to recover for the harms they suffer at the hands of the financial services industry.

ANALYSIS

– I –

IMPORTANT CASES IN FINANCIAL REGULATION AND ADMINISTRATIVE LAW DECIDED DURING THE 2022-2023 TERM

1. **THE COURT DELIVERS ANOTHER BLOW TO THE SEC'S ABILITY TO HOLD WRONGDOERS ACCOUNTABLE IN AGENCY ENFORCEMENT PROCEEDINGS. *Axon Enterprise, Inc. v. FTC* and *SEC v. Cochran*, 143 S. Ct. 890 (Apr. 14, 2023). The Court holds that respondents can side-track administrative enforcement actions in district court instead of following the review process in the appellate courts that Congress chose.**

Background. Michelle Cochran was a respondent in an administrative enforcement action initiated by the SEC.[5] She was fined over $20,000, suspended for five years, and ordered to cease and desist from future violations of federal accounting standards. After the Supreme Court ruled in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), that the SEC's group of ALJs had been appointed in violation of the Constitution, the SEC sent Cochran's case back for rehearing before a properly appointed ALJ.

However, in a bid to avoid liability for her alleged violations of the law, Cochran challenged the second enforcement action on yet additional constitutional grounds. She asserted that the restrictions on the removal of ALJs violated Article II of the Constitution (a separation of powers argument) by rendering the ALJ's insufficiently accountable to the President and hampering his ability to see that the law was faithfully executed. Rather than defending the case on the merits and then challenging any adverse outcome in the appellate court, as prescribed in the securities laws, Cochran short-circuited the process and asked a federal *district* court to block the case. She asserted the right to seek relief under 28 U.S.C. § 1331, which generally confers jurisdiction on district courts as to claims arising under federal law. Yet the applicable statutes clearly provide that judicial review of such administrative enforcement actions is properly brought in a *court of appeals* once the case is *final*. *See*, *e.g.*, 15 U.S.C. § 78y(a)(1). The issue thus presented was not the merits of Cochran's constitutional assault on the ALJs, but rather, where and when her arguments could be heard in court.

The district court appropriately held that the Exchange Act requires all challenges to the SEC's adjudications to be brought only after they are final and only in the courts of appeals. It further held that the Act's review framework encompasses even the types of constitutional claims that Cochran had raised. However, in an *en banc* opinion, the Fifth Circuit reversed in relevant part, holding that the district court *did* have jurisdiction over Cochran's removal claim.

In their brief to the Supreme Court on the merits, the Solicitor General and the SEC argued persuasively that Cochran's bid to short-circuit the enforcement case was premature and literally misplaced—in the wrong court. They pointed out that the Exchange Act includes detailed provisions for judicial review

[5] *Axon Enterprise, Inc. v. FTC*, No. 21-86, was the companion case to *Cochran*, presenting similar legal issues. *Cochran* is the principal focus of this analysis. Axon also attacked as unconstitutional the combination of prosecutorial and adjudicatory functions in the FTC.

of orders issued by the SEC during administrative adjudications. They authorize review only at the end of the administrative proceedings, after the Commission issues its final order, and only in courts of appeals, not in district courts. Moreover, they argued, Cochran's attempt to seek review violates the Administrative Procedure Act (APA) as the APA generally authorizes judicial review only of "final agency action." 5 U.S.C. § 704. And neither the Exchange Act nor the APA contains any exceptions for constitutional claims, Article II claims, or removal-power claims. To the contrary, the APA explicitly "encompasses suits alleging that an agency has acted 'contrary to *constitutional* right, power, privilege, or immunity.'" Brief for the Federal Parties at 11, *SEC v. Cochran*, Nos. 21-86, 21-1239 (Aug. 8, 2022) (quoting 5 U.S.C. § 706(2)(B)) (emphasis added). On each point, the agency cited ample precedent to the effect that the Congressionally chosen review process need not and should not be second-guessed.

The Decision. The Supreme Court disagreed and held that the statutory review process set out in the Exchange Act (and Federal Trade Commission Act) does not displace a district court's general federal-question jurisdiction over extraordinary claims challenging as unconstitutional the structure or existence of the agencies. The respondents were thus allowed to sidestep the ordinary, congressionally stipulated method for judicial review of the agencies' administrative enforcement process.

In a unanimous decision written by Justice Kagan, the court held that while the statutory review process generally divests district courts of their ordinary jurisdiction to hear all cases arising under federal law, some cases, including challenges to the constitutionality of an agency's structure or function, may be heard in a district court and before the administrative process has run its course. The Court applied the cumbersome three-part test established in a case known as *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). First, it concluded that Cochran's removal power claim would not receive meaningful judicial review in a court of appeals at the conclusion of her case because the essence of her claims was that she should not be subjected at all to an unconstitutional proceeding overseen by an unaccountable ALJ. The Court conceded that such a harm "may sound a bit abstract," but it nevertheless accepted the notion it was a "a here-and-now injury" that could not be remedied after the hearing, regardless of what the appellate court might eventually rule. Second, the Court held that the constitutional claim was wholly collateral to the enforcement action review process. In other words, Cochran was challenging the constitutionality of the entire administrative enforcement proceeding, not some specific action taken in the proceeding relating to the alleged violations of the auditing standards. Finally, the Court ruled that Cochran's constitutional claims lay outside the SEC's expertise, as they were detached from considerations of agency policy or the substance of the securities laws.

While Justices Thomas and Gorsuch agreed with the outcome, they wrote separate concurrences to air their own distinct grievances. Justice Thomas revealed more of his hostility to the administrative state by questioning, on separation of powers grounds, the legitimacy of giving agencies, rather than Article III courts, the authority to adjudicate private rights, including cases involving monetary fines. He also foreshadowed his likely stance in the *Jarkesy* case, now pending before the Court, by observing that allowing an administrative agency to adjudicate core private rights without a jury raises serious constitutional concerns.

Justice Gorsuch complained that district court review was appropriate simply by virtue of Congress's general grant of jurisdiction to federal district courts to hear cases arising under federal law, combined with his view that nothing in the Exchange Act reflected a Congressional decision to create an exception to that rule. He also lamented that the unclear and difficult to apply *Thunder Basin* three-part test tends to protract litigation and impose costs and delays on parties as well as the courts.

Why It Matters. First, the Court's holding will allow premature challenges to administrative enforcement proceedings, thus disrupting the enforcement of the securities laws against those who commit fraud, manipulation, and a myriad of other violations. The ruling will undoubtedly encourage other respondents to file district court cases seeking to derail administrative enforcement actions against them, at least where they can contrive a constitutionally based challenge to the proceedings. That, in turn, will further disrupt the agency's administrative enforcement mechanism on which it heavily relies to police fraud and bad actors in the securities markets. Each year, the SEC files hundreds of enforcement actions in district court and roughly the same number of stand-alone actions before ALJs. In addition, the SEC files a substantial number of additional "follow-on" administrative proceedings "seeking to bar or suspend individuals from certain functions in the securities markets based on criminal convictions, civil injunctions, or other orders."[6] The administrative enforcement mechanism has stood the test of time and serves as a pillar of the SEC's enforcement program.

Second, the ruling will have disruptive legal and judicial consequences. It "turns constitutional avoidance upside down," accelerating judicial consideration of weighty constitutional claims that federal courts generally avoid if possible while deferring consideration of non-constitutional claims. It also promises to generate judicial inefficiency, producing "parallel litigation by bifurcating judicial review, with a district court and a court of appeals (perhaps in another circuit) reviewing different claims arising out of the same agency proceeding." In addition, Cochran's theory will likely prove difficult to administer consistently, as judges in the circuit courts will disagree about which constitutional claims satisfy the multi-part *Thunder Basin* test and can therefore be heard immediately in the district courts.

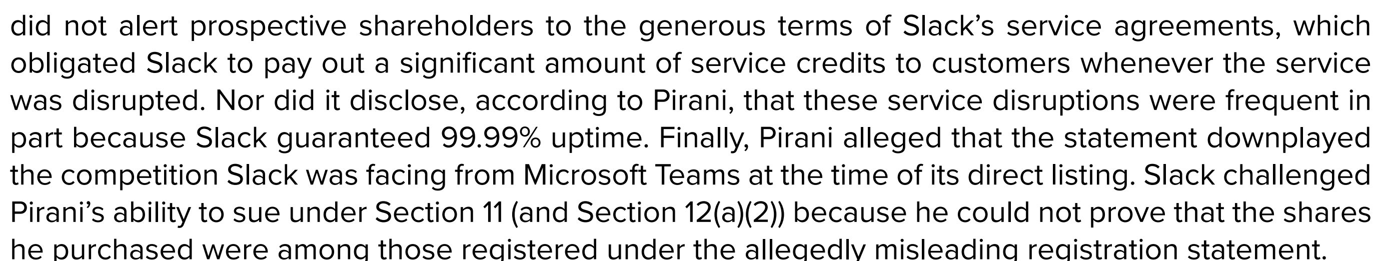
Finally, it signifies the Court's increasing willingness to entertain attacks on one important component of the administrative state: the administrative enforcement mechanism that is crucial to combatting misconduct. This hostility to the agencies starkly conflicts with the unquestionably successful and longstanding role that they have played in implementing and enforcing federal statutes and rules designed to protect the public from a wide range of threats to their health, safety, and financial well-being.

2. **THE COURT NARROWS LIABILITY FOR FALSE OR MISLEADING REGISTRATION STATEMENTS. *Slack Technologies v. Pirani*, 143 S. Ct. 1433 (June 1, 2023). The Court holds that a false or misleading registration statement is only actionable if a shareholder is able to trace the shares he purchased to the challenged statement.**

Background. Traditionally, the process of going public for a young company involves filing a registration statement with the SEC that describes shares that the company will issue and sell in an initial public offering (IPO) on the public securities markets. In recent years, some companies (including Slack Technologies, the defendant in this case) have used a different and recently approved process known as a "direct listing." In a direct listing, preexisting shares are sold by shareholders without the help of an underwriter. Some of those shares are required to be registered and some may not be, by virtue of certain legal exemptions. In this case, Slack offered 118 million registered shares and 165 million unregistered shares to the public. Pirani purchased 250,000 shares over several months.

After the stock price fell, Pirani brought a class action alleging that Slack's registration statement filed for the registered shares was materially false or misleading in violation of Section 11(a) of the Securities Act of 1933. Pirani alleged that the registration statement was inaccurate and misleading because it

[6] Press Release, SEC, *SEC Announces Enforcement Results for FY 2022* (Nov. 15, 2022), https://www.sec.gov/news/press-release/2022-206.



did not alert prospective shareholders to the generous terms of Slack's service agreements, which obligated Slack to pay out a significant amount of service credits to customers whenever the service was disrupted. Nor did it disclose, according to Pirani, that these service disruptions were frequent in part because Slack guaranteed 99.99% uptime. Finally, Pirani alleged that the statement downplayed the competition Slack was facing from Microsoft Teams at the time of its direct listing. Slack challenged Pirani's ability to sue under Section 11 (and Section 12(a)(2)) because he could not prove that the shares he purchased were among those registered under the allegedly misleading registration statement.

The district court denied Slack's motion to dismiss for failure to state a claim, thus preserving potential liability under Section 11(a), but certified the ruling for interlocutory appeal. On appeal, the Ninth Circuit agreed with the lower court and affirmed the decision.

The Decision. The Supreme Court, however, took a difference view. Justice Gorsuch wrote for a unanimous Court and held that Section 11(a) liability is available only for purchasers who can demonstrate that their shares were the subject of the allegedly misleading registration statement. Instead of taking a broader view as the district court and the Ninth Circuit had, Justice Gorsuch adopted a technical analysis of the statutory language. He focused on a number of words and phrases, as well as other sections of the law, to construe which securities are subject to the misrepresentation provision in Section 11. He also observed that the appellate courts had uniformly rejected Pirani's theory.

The Court also flatly rejected Piriani's arguments based on "policy and purpose." Pirani had argued that adopting a broader reading of the key phrase "such security" would expand liability for falsehoods and misleading omissions and thus better accomplish the purposes of the 1933 Act. But the Court refused to endorse that line of reasoning. The Court, wrote Justice Gorsuch, does not "presume … that any result consistent with [one party's] account of the statute's overarching goal must be the law." And Justice Gorsuch fell back on the familiar salve for defeated litigants that "[n]aturally, Congress remains free to revise the securities laws at any time, whether to address the rise of direct listings or any other development."

The analysis provided by Justice Gorsuch stands in contrast with that of the Ninth Circuit, which adopted a broader reading of Section 11 and took into account the realities of the situation. It concluded that Slack's unregistered shares were "such securities" within the meaning of Section 11 because their public sale could not occur without the only operative registration in existence, the one filed for the registered shares. Any person who acquired Slack shares, whether registered or not, could do so only because of the effectiveness of the registration statement. In short, the Ninth Circuit said, "all of Slack's shares sold in this direct listing, whether labeled as registered or unregistered, can be traced to that one registration." And it is also fair to assume that all of the purchasers, including Pirani, had to consult and rely on the registration statement to learn more about the securities being offered, both registered and unregistered alike, since that was the only publicly available SEC filing in connection with the offering.

Why It Matters. Disclosures to investors, and the rights of investors to seek relief when they have been wronged, are the foundation of securities regulation in the United States. Accordingly, disclosures by publicly traded companies should be mandatory, uniform, easy to find, and comparable. The public should be given the greatest amount of transparency possible, and all investors should be able to rely upon a public company's statements equally. The courts should encourage rules that allow all investors to make informed investment decisions rather than creating asymmetries between classes of investors. There should not be "haves" and "have nots" when it comes to transparency in our capital markets.

Yet the Court's decision establishes disparate protections for investors in the stock market, without a compelling rationale and in conflict with the overarching purposes of the securities laws. The Court's decision also creates perverse and potentially damaging incentives among companies seeking to offer their shares to the public. As the Ninth Circuit observed:

> [I]nterpreting Section 11 to apply only to registered shares in a direct listing context would essentially eliminate Section 11 liability for misleading or false statements made in a registration statement in a direct listing for both registered and unregistered shares. From a liability standpoint it is unclear why any company, even one acting in good faith, would choose to go public through a traditional IPO if it could avoid any risk of Section 11 liability by choosing a direct listing. Moreover, companies would be incentivized to file overly optimistic registration statements accompanying their direct listings in order to increase their share price, knowing that they would face no shareholder liability under Section 11 for any arguably false or misleading statements. This interpretation of Section 11 would create a loophole large enough to undermine the purpose of Section 11 as it has been understood since its inception.

3. **THE COURT FAVORS PARTIES SEEKING TO COMPEL ARBITRATION OVER PLAINTIFFS SEEKING ACCOUNTABILITY IN COURT. *Coinbase v. Bielski*, 143 S. Ct. 1915 (June 23, 2023). The Court holds that a district court must stay its proceedings while an interlocutory appeal is taken on the question of arbitrability.**

Background: Abraham Bielski was an investor through Coinbase, an online platform that allows users to buy and sell cryptocurrencies and government-issued currencies. He brought a class action alleging that Coinbase had failed to replace funds fraudulently taken from users' accounts. Coinbase moved to compel arbitration under the user agreement, but the district court denied that attempt to take the case out of court. Coinbase filed an interlocutory or "interim" appeal and moved to stay the district court proceedings pending resolution of the arbitrability issue on appeal.

The case arose by virtue of a 1988 amendment to the Federal Arbitration Act (FAA). Section 16(a) of the FAA authorizes a party seeking arbitration to lodge an interlocutory appeal of an order denying arbitration. (Section 16(a) provides no such appeal for a party opposing arbitration.) However, Section 16(a) does not specify what should happen to the district court case while the appeal of a denial of arbitration is litigated in the Circuit Court, a potentially costly and time-consuming process. Naturally, the plaintiff/investors wanted to proceed with their action against Coinbase in the district court pending appeal, while Coinbase was intent on staying that proceeding and moving the dispute to the more industry-friendly arbitration forum. The district court and the Ninth Circuit believed the case should proceed in court while the appeal on arbitrability played out.

The Decision: However, the Supreme Court reversed in a 5-4 opinion authored by Justice Kavanaugh. It held that the district court must stay its entire proceeding, including discovery and consideration of the merits, while an interlocutory appeal on the issue of arbitrability was ongoing. In his opinion, Justice Kavanaugh cited a 1982 Supreme Court precedent, *Griggs v. Provident Consumer Discount Co.*, for the "longstanding tenet of American procedure" that an appeal "divests" a federal trial court of control "over those aspects of the case involved in the appeal." Justice Kavanaugh wrote that when "the question on appeal is whether the case belongs in arbitration or instead in the district court, the entire case is essentially 'involved in the appeal.'" Justice Kavannaugh also recited a number of practical concerns centered on the potential waste of party and judicial resources if such cases go forward in district court but the appellate court ultimately forces the case into arbitration.

Justice Jackson, joined by Justices Sotomayer, Kagan, and Thomas (in part), wrote a compelling dissent. She criticized the decision as "coming out of nowhere." She pointed out that Congress chose in the FAA not to impose a mandatory stay pending the appeal of arbitrability, that no Supreme Court decision requires the majority's holding, and that the *Griggs* case on which the majority principally relied actually stands for the far more narrow proposition that the appeal divests the district court of its control *only over those aspects of the case involved in the appeal*. That encompasses arbitrability but not the merits, which are distinct. She further highlighted the majority's departure from the longstanding general principle that whether to stay a case pending appeal is left to the discretion of the trial judge on a case-by-case basis, under the usual criteria governing stays: likelihood of success on the merits, irreparable harm, favorable balance of equities, and alignment with the public interest.

Justice Jackson also pointed out the flaws in each of the practical or policy arguments relied upon by the majority. For example, a stay that halts a court action burdens the party seeking to litigate with delay pending the appeal; it threatens the loss of crucial evidence during the delay; and it imposes these burdens "incongruously" on the party that won the arbitrability issue before the district court and is thus presumptively entitled to proceed. The Court, she notes, hands pro-arbitration parties a decided advantage: "Now, any defendant that devises a non-frivolous argument for arbitration can not only appeal, but also press pause on the case—leaving plaintiffs to suffer harm, lose evidence, and bleed dry their patience and funding in the meantime." This "windfall" to defendants seeking arbitration, "preferencing their interests over all others, is entirely unwarranted." She went further to cite the dangerous direction that the Court's holding might take if it were applied more broadly to any interlocutory appeal on a dispositive issue:

> Taken that broadly, the mandatory-general-stay rule the Court adopts today would upend federal litigation as we know it. Aware that any interlocutory appeal on a dispositive issue grinds the plaintiff's case to a halt, defendants would presumably pursue that tactic at every opportunity. . . . Any defense lawyer worth her salt would invoke the right to take that appeal and throw up some objection—to venue, jurisdiction, or a dispositive element of the merits—to trigger a mandatory stay.

Why It Matters: The Court's decision in this case is significant for at least two reasons. First, at its core, it favors those industry defendants and others who desperately prefer the generally more pro-business arbitration forum over a court. The result of the Supreme Court's decision here is that the proceedings in the federal district court—in this case to hold a crypto purveyor accountable for fraud and unlawful retention of funds—will come to a complete halt until the appellate court ultimately decides if arbitration is required.

Better Markets has frequently sounded the alarm on the proliferation of mandatory or forced arbitration clauses that take away the rights of consumers and investors to seek relief in open court before unbiased judges when they have been ripped off by banks and corporations. These often fine-print clauses force defrauded investors and other victims into secret, unfair, and biased arbitrations. Those proceedings are generally run by an industry self-regulatory organization that consistently favors the industry. As a result, investors and consumers rarely obtain meaningful recovery. Nonetheless, the Supreme Court has for decades constructed a legal edifice that favors arbitration at the expense of those who seek relief in court. Justice Kavannaugh's opinion reflects this bias in its holding and in its references to the presumed benefits of arbitration—"efficiency, less expense, less intrusive discovery, and the like." We can expect the Court's pro-arbitration decisions to continue.

4. **THE COURT WEAKENS THE BANK SECRECY ACT, AIMED AT COMBATTTING TAX EVASION, MONEY LAUNDERING, AND TERRORISM. *Bittner v. United States*, 143 S. Ct. 713 (Feb. 28, 2023). The Court interprets the monetary penalty provisions narrowly, thus minimizing their punitive and deterrent impact against those who fail to report foreign bank accounts.**

Background. Congress enacted the Bank Secrecy Act to help the government uncover tax evasion, terrorism, and other illegal conduct involving the use of foreign financial accounts. That law requires U.S. citizens, residents, and other entities doing business in the U.S. to report certain foreign financial "transactions" or "relation[s]" involving a variety of financial accounts, as specified by Treasury Department regulations.[7] Those reports are made on an IRS form, filed annually and enumerating all foreign bank, securities, or other financial accounts. Violating the Act's reporting requirement triggers civil penalties up to $10,000 for a non-willful violation or $100,000 or more for willful violations.

The petitioner, Alexandru Bittner, held a substantial number of bank accounts in Romania, Switzerland, and Liechtenstein. He did not report his foreign accounts for five successive years, until he hired an American accountant in 2012. Even then, his accountant reported only his single largest account, an error later corrected after he hired a new accountant. He ultimately failed to report roughly 40–60 foreign accounts each year between 2007 and 2011. The IRS assessed a penalty of $10,000 for each unreported account, ultimately totaling over $2.7 million. Bittner contested this number in federal court under the theory that the Bank Secrecy Act's penalty provisions define a violation in terms of each annual report not filed (the IRS form), not each account failing to appear in the reports.

After Bittner prevailed on that issue in the district court, the U.S. Court of Appeals for the Fifth Circuit reversed. In its view, the Bank Secrecy Act required reporting of individual transactions, including accounts, and this meant that failing to report a given transaction or account was thus a separate violation. Bittner successfully petitioned for review by the Supreme Court, and a decision was issued in February 2023.

The Decision. A divided Court ruled 5-4 in favor of Bittner, holding that the maximum $10,000 penalty applies to each non-willful failure to make the annual filing. In other words, the penalty accrues on a per-report, not a per-account, basis. In this case, then, there were five such annual failures, each with a fine of $10,000, for a maximum fine of $50,000, not $2.72 million.

Justice Gorsuch, joined by Chief Justice Roberts and Justices Alito, Kavanaugh, and Jackson, offered an analysis of the statute that seemed to go out of its way to arrive at a result in favor of Bittner. The Court focused on the fact that the word "account" does not appear in the relevant statutory provisions. Although the majority acknowledged that other provisions of the relevant statute do "tailor penalties to accounts," those provisions supposedly cut against the government because of the principle that "[w]hen Congress includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning." Cutting further against the government, the majority reasoned, was the so-called Rule of Lenity, which holds that "statutes imposing penalties are to be 'construed strictly' against the government and in favor of individuals." The Court thus reversed the Fifth Circuit's judgment. The Court concluded that "the relevant legal duty is the duty to file *reports*."

[7] 31 U.S.C. § 5314(a)–(b).

Apart from statutory construction, the Court cited to a number of anomalies or potential inequities in the treatment of violators under the government's interpretation. But the Court gave little weight to the underlying purpose of the law and the growing challenge of policing international financial transactions, as evidenced in Congress's decision to significantly strengthen the penalty framework in a series of amendments over the years. The Court thus reversed the Fifth Circuit's judgment.

The dissent, written by Justice Barret and joined by Justices Thomas, Kagan, and Sotomayor, agreed with the IRS's position that "the $10,000 penalty applies for each specific non-willful failure to disclose an *account*." According to the dissent, the majority misread the governing statutes and misapplied principles of statutory interpretation in arriving at its view that the violations accrue on a per-report and not a per-account basis. The dissent addressed each of the majority's points, and it demonstrated that the majority's interpretation would create even more troubling anomalies in the treatment of violators. Finally, the dissent explained why their reading of the law also made more sense in light of the statute's purpose:

> [T]he BSA is designed to "require certain reports or records" that assist the Government in "criminal, tax, or regulatory investigations" and in "intelligence or counterintelligence activities, including analysis, to protect against terrorism." 31 U.S.C. § 5311. When analyzing complex webs of money laundering or funding for international terrorism, knowing about every account matters—and lacking information about 15 accounts is certainly more harmful to law enforcement than lacking information about 1 account. *See* Brief for United States 38. Given the stated purpose, authorizing a penalty for each undisclosed account makes sense.

The dissent concluded that "in the end, "the applicable statute and regulations make clear that any failure to report a foreign account is an independent violation, subject to independent penalties."

Why It Matters. This victory for Bittner threatens to weaken the deterrent effect of the Bank Secrecy Act's penalty provisions. If the fines for non-willful violations are effectively capped at $10,000 per year—without regard to the potential impact on U.S. tax revenues or the harm caused by financial crimes or regulatory violations—wealthy individuals or large businesses will have a far weaker incentive to comply with the reporting requirement by faithfully reporting all of their accounts or at least investing in adequate compliance measures. It is easy to imagine that Bittner himself might have shrugged off a $10,000 or even a $50,000 fine given his scores of foreign accounts across three countries. The differences between the two approaches here — a $50,000 maximum fine under the majority's approach versus a $2.72 million fine under the dissent's — is stark in terms of the incentives it provides for compliance with the reporting requirements.

Compliance with the law is clearly important, as it was intended to shed light on financial activity relevant to "criminal, tax, or regulatory investigations or proceedings."[8] The scale of potential sanctions reinforces this view: The law provides for the imposition of significant civil penalties for non-willful violations, with substantially greater amounts for willful violations, including potentially 50 percent of the amount of the transaction or even the entire balance of an account at the time of the violation. And Bittner's own cert. petition noted that "the sheer number of cases potentially affected by this issue is stunning," applying to a wide variety of persons and foreign accounts, including citizens, residents, corporations, partnerships, estates, and trusts, and their interests in checking accounts, savings accounts, brokerage accounts, mutual funds, commodity-futures accounts, and certain life insurance

[8] *United States v. Bittner*, 19 F.4th 734, 738 (2021) (internal quotation marks omitted).

policies.[9] More generally, however, the issue of how to define the number of statutory violations is one that recurs under many other laws in addition to the Bank Secrecy Act, with similar implications for deterring misconduct. Unfortunately, this decision may embolden those who wish to circumvent the law and hide their assets by failing to comply with reporting requirements.

5. **THE COURT INVOKES THE STANDING DOCTRINE TO REJECT STATE CHALLENGES TO IMMIGRATION ENFORCEMENT. *United States v. Texas*, 143 S. Ct. 1964 (June 23, 2023). The Court rejects a Texas and Louisiana suit challenging the Department of Homeland Security's (DHS) immigration enforcement guidance, finding the States failed to demonstrate a "judicially cognizable" injury and therefore lacked Article III standing.**

Background. In September 2021, DHS issued guidance on the implementation of statutory provisions governing the apprehension and removal of certain aliens, including those convicted of certain crimes. Texas and Louisiana sued to vacate those guidelines for alleged failure to comply with the APA and federal immigration law. In the states' view, the guidelines ignored statutory directives to detain aliens convicted of certain crimes when released from state or local custody and those aliens subject to a removal order; that it was in fact a binding rule that should have gone through notice-and-comment procedures; and that the guidelines arbitrarily failed to consider impacts on the states caused by recidivism. They asserted injury from the supposedly lenient policy since they must continue to incarcerate or supply social services such as healthcare and education to noncitizens who should be (but are not being) arrested by the Federal Government. DHS denied these claims and also argued that the states lacked standing to sue because they suffered no concrete injury traceable to the guidance.

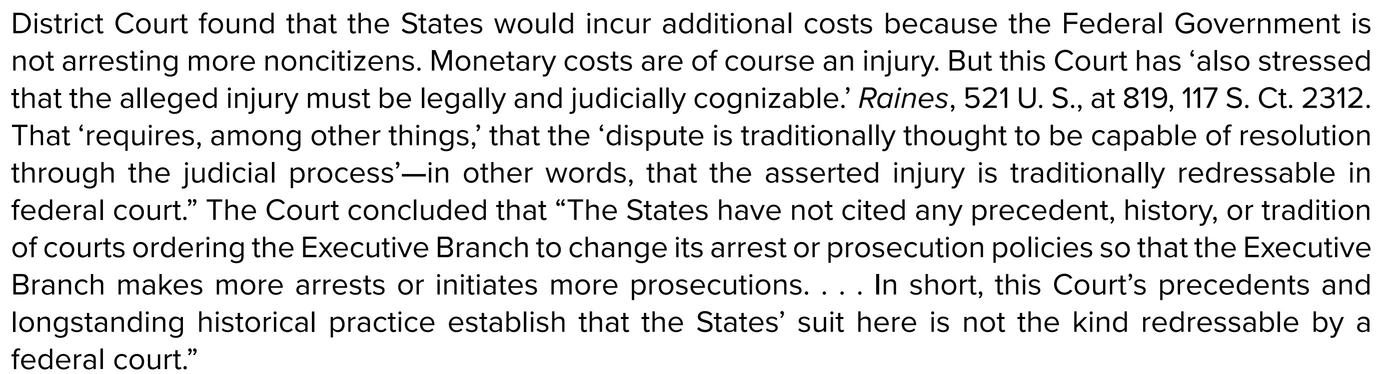
After a bench trial, the district court sided with the states on each of these issues, both standing and the merits, and vacated the guidelines nationally. The Fifth Circuit affirmed. Two of the Fifth Circuit's holdings were especially noteworthy. First, on standing, the Fifth Circuit held that Texas would incur costs from the recidivism or additional use of public services attributable to an increase in the number of aliens who were not detained. Second, the Fifth Circuit accepted the states' various claims on the merits, including the assertion that the guidelines were a legislative rule, not a statement of policy, which dictated DHS decisions and therefore should have been subject to notice and comment rulemaking. Both of these holdings conflicted with the holdings of the U.S. Court of Appeals for the Sixth Circuit in a similar suit brought by other states.

DHS applied to the Supreme Court for a stay of the district court's judgment, raising many of the same arguments it did below but emphasizing the highly indirect nature of any downstream impact on the states. As the Solicitor General put it, "[v]irtually any federal action—from prosecuting crimes, to imposing taxes, to managing property—could be said to have some incidental effect on a State's population . . . ."[10] The Court construed the application for a stay as a petition for certiorari, which it granted, and it issued its opinion on June 23, 2023.

The Decision. In an 8-1 decision written by Justice Kavanaugh, the Court ruled that Texas and Louisiana lacked Article III standing to challenge the DHS immigration enforcement policy. The Court framed its holding in terms of the standing doctrine, comingled with principles governing prosecutorial discretion and separation of powers. "To establish standing, a plaintiff must show an injury in fact caused by the defendant and redressable by a court order. *See Lujan*, 504 U. S., at 560–561, 112 S. Ct. 2130. The

[9] Petition for Writ of Certiorari at 25, *Bittner v. United States*, No. 21-1195 (Feb. 28, 2022).

[10] Application for a Stay of the Judgment Entered by the United States District Court for the Eastern District of Texas at 18, *United States v. Texas*, No. 22-58 (July 8, 2022).



District Court found that the States would incur additional costs because the Federal Government is not arresting more noncitizens. Monetary costs are of course an injury. But this Court has 'also stressed that the alleged injury must be legally and judicially cognizable.' *Raines*, 521 U. S., at 819, 117 S. Ct. 2312. That 'requires, among other things,' that the 'dispute is traditionally thought to be capable of resolution through the judicial process'—in other words, that the asserted injury is traditionally redressable in federal court." The Court concluded that "The States have not cited any precedent, history, or tradition of courts ordering the Executive Branch to change its arrest or prosecution policies so that the Executive Branch makes more arrests or initiates more prosecutions. . . . In short, this Court's precedents and longstanding historical practice establish that the States' suit here is not the kind redressable by a federal court."

The Court portrayed the States as "essentially want[ing] the Federal Judiciary to order the Executive Branch to alter its arrest policy so as to make more arrests" or bring more prosecutions. Drawing on the Court's prior standing case law, the Court wrote that it is not the proper rule of the federal Judiciary under Article III to second-guess such prosecutorial decisions from the executive branch. Such an undertaking, Justice Kavanaugh wrote, "would run up against the Executive's Article II authority to enforce federal law." In any event, the Court notes, "courts generally lack meaningful standards for assessing the propriety" of such enforcement choices. The majority viewed these concerns as especially acute in the immigration context, citing evidence that for almost 30 years, the Executive Branch has lacked the resources to fully enforce the arrest or removal requirements in the law and thus must balance many factors when devising arrest and prosecution policies. The Court reinforced its conclusion by observing that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution."

In what appears to be a comforting gesture for the losing side, the Court offered the assurance that if the executive branch had "wholly abandoned its statutory responsibilities to make arrests or bring prosecutions," for example, the Court may well be willing to consider such a case. Similarly, Justice Kavanaugh wrote, "the standing analysis might differ when Congress elevates de facto injuries to the status of legally cognizable injuries redressable by a federal court." In addition, the Court suggested other avenues of redress for those aggrieved by the arrest policies. "Congress possesses an array of tools to analyze and influence those policies—oversight, appropriations, the legislative process, and Senate confirmations, to name a few. Cf. *Raines*, 521 U. S., at 829, 117 S. Ct. 2312; *Lincoln*, 508 U. S., at 193, 113 S. Ct. 2024. And through elections, American voters can both influence Executive Branch policies and hold elected officials to account for enforcement decisions. In any event, those are political checks for the political process. We do not opine on whether any such actions are appropriate in this instance." And the Court made clear that it took no position on the merits i.e. the validity of the guidance itself: "We hold only that the federal courts are not the proper forum to resolve this dispute."

In a separate concurrence, Justice Gorsuch agreed that the states lacked standing but for a different reason than that offered by the majority. Joined by Justices Thomas and Barrett, Justice Gorsuch wrote that the actual standing defect was redressability, not the lack of a "judicially cognizable" interest or injury, as the majority held. And in a lone dissent, Justice Alito wrote that the States should in fact be allowed to proceed with their suit. According to Justice Alito, the majority "brushes aside a major precedent that directly controls the standing question, refuses to apply [the] established test for standing, [and] disregards factual findings made by the District Court," among suffering from other shortcomings. Under the longstanding three-prong test set forth in *Lujan v. Defenders of Wildlife*, Alito argued, Texas indisputably satisfies the requirements for Article III standing. In Alito's view, rather than uphold our constitutional system of separation of powers, the majority's view actually damages the

separation of powers by "improperly inflating" executive power at the expense of Congress and the Judiciary.

Why It Matters. Standing is a critically important and pervasive issue whenever litigants seek remedies in federal court, including when they challenge agency action. In *Lujan v. Defenders of Wildlife*,[11] the Supreme Court famously articulated the three hurdles that litigants must overcome to establish a constitutionally sufficient case or controversy and to press their claims in court: concrete injury, a causal connection between the injury and the challenged conduct, and a likelihood that the injury will be redressed by a favorable court decision. Due to that decision and others that have followed, countless parties, including organizations seeking to defend and promote the public interest, have been thrown out of court and left with no judicial recourse. Standing is, in short, an indispensable ticket to the courthouse.

Although the Court described its decision as narrow in scope, arising from an "extraordinarily unusual lawsuit," and as simply a restatement of "the longstanding jurisprudential status quo," the Court's disposition of the standing claim in this case tends to align with its pattern of applying a stringent view of standing. It therefore may appear to reflect an even-handed approach to standing. But the unfortunate reality is that under the status quo, more often than not, regulated industries including the financial services industry, have a relatively easy time establishing standing as they claim injury from the costs of compliance with rules or the threat of enforcement action. In contrast, public interest organizations and other parties seeking to advance the public good have a much harder time—even though they too have a real stake in disputes over important public policy questions that affect those seeking relief and the broader public interest.

– II –
A PREVIEW OF SOME CASES TO BE DECIDED DURING THE 2023-2024 TERM

A. Cases the Court Has Accepted for Decision

1. **WILL WHISTLEBLOWERS FACE A HEAVIER BURDEN OF PROOF WHEN CLAIMING EMPLOYER RETALIATION? *Murray v. UBS Securities, LLC*, No. 22-660 (argument scheduled for Oct. 10, 2023), 43 F.4th 254 (2d Cir. 2022). The issue is whether whistleblowers must prove discriminatory intent to recover for retaliation under the Sarbanes-Oxley Act.**

Background: Trevor Murray was a research strategist at UBS Securities. The bank hired him to analyze and report on the market for commercial mortgage-backed securities, a type of complex investment similar to the residential mortgage-backed securities that fueled the financial crisis of 2008. According to the allegations in the case, Murray was subjected to intense pressure at UBS to skew his research reports in support of UBS's business strategies—even though the law requires that such reports be independently prepared. Murray refused and was subsequently fired.

He filed an action for unlawful retaliation under the Sarbanes-Oxley Act of 2002, which bars publicly traded companies from discriminating against employees who report wrongdoing. Murray won and a jury awarded him back pay and compensatory damages. However, the Second Circuit reversed. It

[11] 504 U.S. 555 (1992).

held that plaintiffs who allege retaliation for whistleblowing activity must put forward specific proof of the employer's "retaliatory intent" to prevail, not just proof that the whistleblowing was a "contributing factor" in the employer's adverse action. In the Circuit Court's view, the jury should have been instructed that Murray had to prove that UBS fired him because it intended to retaliate against him, a difficult burden of proof and one not actually found in the statutory language. In addition to raising the bar for such lawsuits, the Second Circuit's decision also created a circuit split, pitting the Second Circuit against two other federal circuits that have specifically held retaliatory intent is not an element of a Sarbanes-Oxley retaliation claim.

Why It Matters: Better Markets, along with the Anti-Fraud Coalition and the National Employment Lawyers Association, filed an *amicus curiae* brief urging the Court to reverse the Second Circuit and remove the heightened burden of proof that whistleblowers alleging retaliation must carry. Whistleblowers play a vital role in exposing fraud and abuse, often involving complex financial crimes that are especially difficult to uncover and prove. And they have clearly demonstrated their value, as evidenced by the billions of dollars that the SEC has recovered in enforcement actions thanks to whistleblowers. But when whistleblowers come forward, they take huge professional, personal, and financial risks, often becoming the targets of bitter retaliation from their employers. That's why strong protections for whistleblowers are so important and why Congress prohibited public companies from retaliating against their employees who blow the whistle on illegal activity. Unfortunately, the Second Circuit's decision threatens to reduce the likelihood of whistleblowers coming forward to report misconduct. The more challenging it is for whistleblowers to prevail in a retaliation claim, the less likely they are to assume the risk of reporting illegal conduct.

The importance of this case is also heightened by the fact that Congress continues to prescribe the same "contributing factor" burden of proof, without a motive requirement, under newer statutes similarly designed to protect whistleblowers.[12] Numerous similar statutes set forth regimes where an employee must only demonstrate that protected activity (such as whistleblowing) was a "contributing factor" in an employment action. Thus, the Second Circuit's decision threatens to weaken statutory regimes beyond merely Sarbanes-Oxley. The Second Circuit's reasoning could thus make it difficult for whistleblowers to bring successful retaliation claims under a variety of statutes in which Congress has adopted the same burden of proof.

2. WILL THE COURT ABOLISH JUDICIAL DEFERENCE TO AGENCY INTERPRETATIONS OF THE LAWS THEY ADMINISTER? *Loper Bright Enterprises v. Raimondo*, No. 22-451 (argument not yet scheduled), 45 F.4th 359 (D.C. Cir. 2022). The issue is whether *Chevron* should be overruled.

Background. This term, the Supreme Court will consider whether to overrule the landmark decision in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In that watershed opinion, the Supreme Court held that courts should defer to a federal agency's interpretation of an ambiguous statute, as long as that interpretation is reasonable. In the decades since, this principle of deference has given agencies room to apply their expertise and issue rules and regulations that protect the public, without undue fear that courts will override their judgments about how best to implement the law.

However, the principle of deference to agencies articulated in *Chevron* has come under renewed attack in recent years, including from some conservative members of the Court who contend that *Chevron* gives agencies too much power to interpret the law, a responsibility they say must rest with

[12] Stephen Hall & Jason Grimes, *Special Report: SEC's Whistleblower Program: A $5 Billion Success Story With a Bright Future*, Better Markets (Jan. 20, 2022), https://bettermarkets.org/wp-content/uploads/2022/01/BetterMarkets_Report_SECs_Whistleblower_Program_January_2022.pdf.

the courts. Justice Thomas has been among the doctrine's most vocal critics, writing that *Chevron* deference "wrests from courts the ultimate interpretative authority 'to say what the law is,' and hands it over to" the executive branch.[13] Thomas has been joined by Justice Gorsuch, who in a dissent last fall argued that the Court "should acknowledge forthrightly that *Chevron* did not undo, and could not have undone, the judicial duty to provide an independent judgment of the law's meaning in the cases that come before the Nation's courts."[14] In *Loper v. Raimondo*, this principle of judicial deference is squarely in the crosshairs as the Court will consider whether to overrule, further restrict, or leave *Chevron* intact.

In *Loper*, a group of commercial fishing companies challenged a rule issued by the National Marine Fisheries Service (NMFS) that requires the fishing industry to pay for the costs of observers who monitor companies' compliance with fishery requirements. According to the fishing companies, the NMFS exceeded its statutory authority when it issued these rules. Moreover, the plaintiffs contended that because the rules stood to generate a significant economic impact, Congress would not have granted authority for such significant measures through an implicit delegation of authority.

In June 2021, the U.S. District Court for the District of Columbia rejected the fishing companies' arguments, holding that the agencies had "acted within the bounds of their statutory authority in promulgating" the rules. The fishing companies then appealed to the D.C. Circuit. Relying on *Chevron*, a divided panel of the D.C. Circuit similarly rejected the companies' challenge to the rule. The court explained that although federal fishery law makes clear that the government can require fishing boats to carry monitors, it does not specifically address who must pay for the monitors. Because the agency's interpretation of federal fishery law as authorizing industry-funded monitors was a reasonable one, the court deferred to that interpretation.

The plaintiffs appealed to the Supreme Court, asking the Justices both to weigh in on their challenge to the rule and to overrule or otherwise further clarify *Chevron*. After considering the case at five consecutive conferences, the Justices agreed to take up the question on the *Chevron* doctrine.

Why It Matters: The principle of *Chevron* deference has been an important and positive feature of the modern administrative state for decades, giving regulatory agencies the leeway they need to fashion effective rules that protect Americans from a host of threats to health, safety, and economic prosperity. But it has also been a primary target of many business interests that view government regulation simply as an impediment that stands in the way of their quest to maximize profits, and they see *Chevron* as an obstacle when they seek to challenge regulations in court. Moreover, some Justices and judges object to the principle as intruding on their role as the ultimate arbiters of what the law means. *Loper* presents a singular opportunity for the conservative Justices of the Court to press their attack on the modern administrative state and reshape or abolish the *Chevron* doctrine.

Whatever the Court decides, the decision is sure to have far-reaching consequences for the lives of all Americans. If the Court abolishes or pares back *Chevron*, we can expect more successful challenges to agency rules, as courts will have the unfettered discretion to reject agency interpretations of the statutes they administer and vacate rules that rest on those interpretations. The implications of upending *Chevron* would be vast, potentially limiting agencies' ability to fully and effectively regulate everything from food and drugs to the environment and the financial markets.

[13] *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).

[14] *Buffington v. McDonough*, 143 S. Ct. 14, 21 (2022) (Gorsuch, J., dissenting from denial of certiorari).

3. **WILL THE COURT STRIKE DOWN THE SEC'S ADMINISTRATIVE ENFORCEMENT PROCESS? *Jarkesy v. SEC*, No. 22-991 (argument not yet scheduled), 34 F.4th 446 (5th Cir. 2022). The core issue is whether enforcement proceedings before ALJs violate the 7th Amendment right to a jury trial.**

Background. The SEC brought an administrative enforcement action against George Jarkesy for misrepresentations to investors in two hedge funds. The agency sought fines and other penalties before an ALJ. Jarkesy defended by attacking the constitutionality of the ALJ forum, advancing his arguments in a U.S. District Court, in the D.C. Circuit, and even at the SEC itself. All of his challenges were rejected. His case finally ended with a cease-and-desist order along with an order imposing $300,000 in civil penalties, requiring him to disgorge unlawful profits, and barring him from a variety of investment activities.

He then pursued one final appeal before a three-judge panel of the Fifth Circuit, which ruled in his favor. The two-judge majority held first that ALJ adjudication of securities fraud claims involving civil penalties violated the Seventh Amendment right to a jury trial. Second, it held that Congress, through the Dodd-Frank Act, had unlawfully given the SEC the "legislative" power to choose between seeking civil penalties before an ALJ or seeking those penalties in federal court. It applied a concept known as the "non-delegation doctrine" widely thought to have died out after the 1930s. And for good measure, the majority found that the SEC's ALJs enjoyed too much protection from presidential removal thanks in part to the Merit Systems Protection Board. In the court's view, this meant that ALJs had too little accountability to the President, supposedly interfering with his ability to carry out the law under Article II. The third judge on the panel dissented with each of those holdings. The SEC petitioned for rehearing en banc, which the Fifth Circuit denied. The Supreme Court granted cert.

Why It Matters. The Fifth Circuit departed from precedents holding that when the government seeks to enforce statutory public rights, the Seventh Amendment does not preclude the case from being heard before an administrative tribunal without a jury. But if the Supreme Court affirms the decision, it is hard to imagine a more fundamental assault on administrative enforcement. As explained above, the SEC relies heavily on administrative enforcement proceedings before ALJs in its always challenging effort to keep up with fraudsters, hold them accountable, and enforce the law. And the case has implications far beyond the SEC's enforcement mechanism under the federal securities laws, since other federal agencies also rely on administrative enforcement. Worse still, the majority tried to breathe life into the non-delegation doctrine. Though long-defunct, the doctrine seems to appeal to some members of the Supreme Court. If revived, that doctrine might be used to challenge any number of rules or other agency actions, not just the SEC's administrative enforcement methods. The third and final holding suggests that basic civil service protections might later be seen in other cases as constitutionally suspect.

4. **WILL THE COURT STRIKE DOWN THE FUNDING MECHANISM FOR THE CFPB? *Consumer Financial Protection Bureau v. Community Financial Services Assoc. of Am., Ltd.*, No. 22-448 (argument scheduled for Oct. 3, 2023), 51 F.4th 616 (5th Cir. 2022). The issue is whether the CFPB's direct funding from the Federal Reserve violates the Appropriations Clause of the Constitution, and if so, what remedy is appropriate.**

Background. This case is part of the relentless and ongoing assault on one of the most effective consumer protection agencies in the history of financial regulation. In 2018, an organization representing the payday lending industry filed suit in federal district court in Texas challenging the CFPB's 2017 rule that strengthened protections for consumers often trapped in predatory payday loans. Specifically at

issue were the "Payment Provisions" that prohibit lenders from initiating additional payment transfers from consumers' accounts after two consecutive attempts have failed for insufficient funds, unless "the additional payment transfers are authorized by the consumer." The industry launched a series of attacks against the rule as well as the agency, including the argument that the CFPB's funding, which is provided from the Federal Reserve, violated the Appropriations Clause of the U.S. Constitution.

The district court granted summary judgment for the Bureau on each of the plaintiffs' claims.[15] The court concluded that the Director's insulation from removal did not render the payment provisions rule void; that the payment provisions were consistent with the Bureau's statutory authority and were not "arbitrary and capricious"; that the Bureau's self-funding mechanism did not violate the Appropriations Clause because it was expressly authorized by statute; and that there was no nondelegation issue because the CFPB was vested with an "intelligible principle" to guide its discretion in deciding whether to enforce the law administratively or in federal court.

On appeal, the Fifth Circuit ruled in favor of CFSA, holding that the Bureau's funding structure violated the Appropriations Clause. The Fifth Circuit's decision has been widely criticized because the court ignored the plain language of the Constitution, ample precedent, and Congress's long-established use of similar funding mechanisms for a host of other agencies, including the Federal Reserve and various banking regulators.

The challengers' core contention is that the CFPB's funding mechanism violates Article I, Section 9, of the Constitution, which states that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," because it is not subject to the annual appropriations process. However, the CFPB contends that although it does not undergo an annual congressional budget process, its funds are unambiguously distributed to the agency "in Consequence of Appropriations made by Law," namely the Dodd-Frank Act. In May 2023, Better Markets joined an *amicus curiae* brief with the Lawyers' Committee for Civil Rights Under Law and other prominent civil rights organizations urging the Supreme Court to uphold the constitutionality of the CFPB's funding mechanism.

Why It Matters. When Congress created the CFPB in the wake of the Great Recession, it knew the importance of ensuring that the agency was free from regulatory capture and undue political influence. By granting the agency an independent funding structure sourced from the Federal Reserve System, Congress sought to insulate the CFPB from potential budgetary constraints or partisan pressures that could compromise its ability to protect consumers. Thus, Congress set forth in the agency's authorizing statute that the CFPB was to receive a portion of the Federal Reserve's annual funding, rather than go through the traditional annual congressional appropriations process. With this independent funding structure, the CFPB joined several other banking regulators, including the Federal Reserve, who share similar autonomous funding structures.

The Fifth Circuit's radical and unprecedented decision, if affirmed, will undermine the critical work carried out by the CFPB in protecting consumers and enforcing regulations against unfair and deceptive practices by banks and a wide range of other financial firms. Sidelining the CFPB entirely, invalidating its rules, or undermining its independence will sharply curtail if not eliminate protections for millions of Americans, harming all consumers but especially communities of color that are targeted by unscrupulous actors.

[15] *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 558 F. Supp. 3d 350 (W.D. Tex. 2021).

Concerns about the outcome of the case are shared across a broad spectrum of groups, including some in the financial services industry. For example, Farm Action[16] and other groups representing the "interests of farmers, ranchers, rural communities, food system workers, and anyone who eats" filed an *amicus* brief in support of the CFPB arguing that the agency "provides critical insight into the difficulties the agricultural sector faces in accessing credit, and it combats discrimination and a lack of transparency by regulating consumer financial products and collecting data regarding the availability of those products. The CFPB's activities are critical to the people Amici represent."[17]

Even the Chamber of Commerce,[18] the bulwark of anti-regulation industry groups, acknowledged the important role of the CFPB and cautioned against a drastic remedy. While the Chamber and its allies filed an amicus brief in support of the challengers to the CFPB's funding mechanism, they nevertheless recognized the "important role the [CFPB] has in setting and enforcing reasonable regulations in consumer financial markets" and that, "the [CFPB] promotes transparency and efficiency in the marketplace to the benefit of industry and consumers alike."[19] They accordingly argued that the Supreme Court should "mitigate disruptions in the marketplace by crafting a narrow remedy"[20] and only "sever[ing] the unconstitutional funding mechanism, leaving the rest of the [CFPB]'s enabling act in place."[21] The bottom line is that if the CFPB's funding structure were to be invalidated, not only American consumers and investors but also the financial markets would suffer, experiencing significant turmoil and uncertainty, since the CFPB's rules provide valuable guidelines and safe harbors that facilitate orderly financial markets. And an adverse ruling would also jeopardize numerous other financial regulators with similar funding structures, including the Federal Reserve, posing a clear risk to order, oversight, and stability in the financial markets.

5. **WILL THE COURT SIDE WITH A TESTER WHO CLAIMS INFORMATIONAL STANDING? *Acheson Hotels, LLC v. Laufer*, No. 22-429 (argument scheduled for Oct. 4, 2023); *Laufer v. Acheson Hotels, LLC*, 50 F. 4th 259 (1st Cir. Oct. 05, 2022). The issue is whether a denial of information about a business, which is required to be made available under the Americans with Disabilities Act (ADA), confers standing on a plaintiff, even if the plaintiff never intends to actually patronize the business.**

Background. The plaintiff in this case, Deborah Laufer, is a self-proclaimed ADA "tester" who has filed hundreds of ADA-related lawsuits in federal courts across the country. Prior to filing suit, Laufer visited the online website of the defendant, Acheson Hotels. Regulations promulgated under the ADA provide that a "public accommodation" operating a "place of lodging" must "with respect to reservations made by any means . . . [i]dentify and describe accessible features in the hotels and guest rooms offered through its reservations service in enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets his or her accessibility needs."[22]

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[16] Joined by fellow *amici* Heal Food Alliance, Institute for Agriculture and Trade Policy, Rural Coalition, and Partners for Rural Transformation.

[17] *Amicus* Brief of Farm Action et al., Supreme Court Docket No. 22-448, filed May 12, 2023, at 3.

[18] Joined by nine other industry groups and filed in support of Community Financial Services Assoc. of Am., Ltd.

[19] *Amicus* Brief of the Chamber of Commerce, Supreme Court Docket No. 22-448, filed July 10, 2023, at 26.

[20] *Id.*

[21] *Id.* at 27.

[22] 28 C.F.R. § 36.302(e)(1)(ii).

However, when plaintiff Laufer first visited the defendant's website, "she found that it didn't identify accessible rooms, didn't provide an option for booking an accessible room, and didn't give her sufficient information to determine whether the rooms and features of the Inn were accessible to her." As described by the First Circuit, "[w]hen a public accommodation violates the ADA and discriminates against a disabled person, the ADA and the regulations promulgated under it permit private individuals to bring enforcement actions in federal court."

Laufer availed herself of the ADA's provisions and filed suit in a federal district court in Maine. The defendant quickly moved to dismiss Laufer's claim, arguing she never intended to actually book a room at its Inn. The defendant pointed to Laufer's hundreds of ADA-suits across the country to bolster its claim that Laufer never intended to visit its establishment or even travel to Maine. According to Acheson Hotels, the plaintiff therefore lacked Article III standing to bring her lawsuit as she faced no injury. The district court sided with the defendant, and Laufer then appealed to the First Circuit.

The First Circuit reversed the district court, ruling that Laufer possessed Article III standing entitling her to sue in federal court. The First Circuit explained that "a plaintiff's deliberate choice to see if accommodations are obeying a statute doesn't mean that her injury in fact is any less real or concrete." Moreover, the First Circuit held that under prior precedent, "a denial of information that a plaintiff is statutorily entitled to have can make for a concrete injury in fact," and "the denial of information to a member of a protected class alone can suffice to make an injury in fact — that person's intended use of the information is not relevant." The court continued, explaining how Acheson's violation of Laufer's legal rights under the ADA conferred standing upon Laufer:

> Under Laufer's theory, she had a right to the information that she alleges Acheson didn't give her. And the statute makes that denial of information discrimination against disabled persons and gives Laufer the right to sue in response. That Laufer had no intent to use the information for anything but a lawsuit doesn't change things – she was still injured in precisely the way the statute was designed to protect.

In June of 2023, Acheson Hotels sought review in the Supreme Court. However, in the meantime, Laufer voluntarily dismissed her case in the district court after revelations came to light about alleged misconduct by her attorney. Laufer then asked the Supreme Court to dismiss the pending cert. petition as moot, as there was no longer an underlying controversy for the Supreme Court to decide. Acheron Hotels, however, insisted in a separate filing that the Court should nonetheless take up the case to resolve the legal questions implicated by the lawsuit. In a brief order issued August 10th, the Court denied Laufer's request to dismiss the case as moot, writing: "The question of mootness will be subject to further consideration at oral argument in addition to the question presented." Oral argument is scheduled for October 4, 2023.

Why It Matters. "Tester" cases brought against noncompliant businesses perform an important public good by resolving unanswered questions of law, clarifying rights and obligations, and enforcing civil law. Such cases incentivize compliance and deter wrongful business conduct. However, testers must have standing to be effective. Countless lawsuits have been turned away from federal courts "because the plaintiff, though able to demonstrate a violation of legal rights, lacked sufficiently 'imminent' or 'concrete' injury, or failed to convince the court that the requested relief would be sufficiently likely to remedy the alleged injury."[23]

[23] Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 171 (2012).

An adverse ruling by the Court in *Laufer* would further erode many plaintiffs' limited and unpredictable access to the courts and weaken deterrence against corporate wrongdoing. The consequences of such a ruling would extend well beyond the scope of the Americans with Disabilities Act, potentially affecting many other areas of the law where plaintiffs seek to vindicate legal rights and rely on information standing as the basis for access to the courts. That includes financial regulation, where informational standing can provide the basis for a court's jurisdiction to hear and resolve the claim.

B. Requests for Review with Implications for Financial Regulation and Administrative Law

1. ***Argent Trust Company v. Harrison*, No. 23-30.** Whether a participant in a plan governed by the Employee Retirement Income Security Act who asserts statutory claims under that statute can be compelled, pursuant to a binding arbitration provision, to submit his claims to individual arbitration.

2. ***Cantero v. Bank of America*, No. 22-529.** Whether the National Bank Act preempts the application of state escrow-interest laws to national banks.

3. ***City and County of San Francisco, California v. Kirola*, No. 23-35.** Whether a court may order injunctive relief in a case where the sole named plaintiff failed to prove she suffered any legal injury at trial but the trial record shows isolated injury to unnamed class members.

4. ***Coinbase v. Suski*, No. 23-3.** Whether, where parties enter into an arbitration agreement with a delegation clause, an arbitrator or a court should decide whether that arbitration agreement is narrowed by a later contract that is silent as to arbitration and delegation.

5. ***Corner Post v. Board of Governors of the Federal Reserve System*, No. 22-1008.** Whether a plaintiff's Administrative Procedure Act claim "first accrues" under 28 U.S.C. § 2401(a) when an agency issues a rule—regardless of whether that rule injures the plaintiff on that date — or when the rule first causes a plaintiff to "suffer[] legal wrong" or be "adversely affected or aggrieved." (Cert. granted Sept. 29, 2023)

6. ***Flagstar Bank v. Kivett*, No. 22-349.** Whether the National Bank Act preempts state laws that, like California Civil Code § 2954.8(a), attempt to set the terms on which federally chartered banks may offer mortgage escrow accounts authorized by federal law.

7. ***Gomez-Vargas v. Garland*, No. 22-734 and *Wilkinson v. Garland*, No. 22-666.** Whether an agency determination that a given set of established facts does not rise to the statutory standard of "exceptional and extremely unusual hardship" is a mixed question of law and fact reviewable under 8 U.S.C. § 1252(a)(2)(D), or whether this determination is a discretionary judgment call unreviewable under Section 1252(a)(2)(B)(i).

8. ***Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, No. 22-1165.** Whether the U.S. Court of Appeals for the Second Circuit erred in holding that a failure to make a disclosure required under Item 303 of SEC Regulation S-K can support a private claim under Section 10(b) of the Securities Exchange Act of 1934, even in the absence of an otherwise misleading statement. (Cert. granted Sept. 29, 2023)

9. ***Relentless v. Department of Commerce*, No. 22-1219.** (1) Whether the court should overrule *Chevron v. Natural Resources Defense Council*, or at least clarify that statutory silence concerning

controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency; and (2) whether the phrase "necessary and appropriate" in the Magnuson-Stevens Act augments agency power to force domestic fishing vessels to contract with and pay the salaries of federal observers they must carry.

10. ***Smith v. Spirrizzi*, No. 22-1218.** Whether Section 3 of the Federal Arbitration Act requires district courts to stay a lawsuit pending arbitration, or whether district courts have discretion to dismiss when all claims are subject to arbitration.

– III –

THE "MAJOR QUESTIONS" DOCTRINE AND THE CONTINUED ASSAULT ON THE ADMINISTRATIVE STATE

The legal assault on the administrative state continues to gather momentum, and it threatens the health, safety, and financial prosperity of all Americans. Americans rely on administrative agencies to adopt rules that implement the laws Congress passes. Those rules help safeguard consumers and investors from defective products, environmental pollutants, unfair employment practices, and reckless and predatory behavior by banks and brokers. As a result, the "regulatory powers given to the administrative state are an essential component of our country's prosperity."[24]

Nonetheless, critics maintain that the administrative state is an unaccountable bureaucracy that must be curtailed.[25] Those subject to regulation have always attempted to avoid regulation, and attacking the legitimacy of agency rules or agencies themselves is a way to nullify existing rules and preclude new ones.[26] These critics have now found a powerful ally in the Supreme Court.

Chief Justice Roberts has long viewed the administrative state with skepticism. With respect to the ability of agencies to implement laws through the rulemaking process, Chief Justice Roberts once said that "the danger posed by the growing power of the administrative state cannot be dismissed."[27] Now that a majority of the justices share his conservative views, the Roberts Court has set about dramatically limiting the ability of agencies to issue and defend new rules, thus depriving the public of important protections.

The most important recent salvo in the battle over the administrative state and the rules that administrative agencies promulgate is the Supreme Court's decision in *West Virginia v. EPA*.[28] In that decision, the Court announced the "major questions" doctrine. The Court recognized that, in most cases involving agency action, there is little reason to question whether Congress in fact meant to confer on the agency the authority to take the relevant action. But the court announced that "'extraordinary cases'" required a different approach. These cases, in the court's view, were ones where "the 'history and breadth of the authority [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such

[24] Christina Fuleihan, *Shattering the Mirage: The FDA's Early COVID-19 Pandemic Response Demonstrates a Need for Reform to Restore Agency Credibility*, 48 AM. J. L. & MED. 307, 328 (2023).

[25] Gillian E. Metzger, Foreword: 1930s Redux: The Administrative State under Siege, 131 HARV. L. REV. 1, 7 (2017).

[26] *See William Funk, The Attack on Administrative Regulation*, 42 Vt. L. Rev. 427, 427-28 (2018).

[27] *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

[28] 142 S. Ct. 2587 (2022).

authority."[29] Whereas usually an agency must only identify a plausible reading of a statute to justify its authority to act to implement a law that Congress passed, in these "extraordinary cases" the Court held that an agency "must point to 'clear congressional authorization' for the power it claims."[30] This insistence on a "clear congressional authorization" for agency action is a "judge-made doctrine with no predicate in the Constitution or any statute" and a harmful judicial limitation on Congress's power "to address dynamic situations by employing broad statutory language to allow agencies to adapt to changing circumstances."[31]

Although, as discussed below, the courts have already invoked the major questions doctrine to curtail the ability of agencies to solve important problems, the Supreme Court may be poised to go even further. The Court established the principle that an agency need only identify a plausible reading of a statute to justify its authority to implement a law Congress passed in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[32] In that decision, the Court held that if a statute is silent or ambiguous with respect to the specific issue before the agency, a court must defer to the agency's permissible construction of the statute.[33] *Chevron* has been described as "perhaps the most important case in American administrative law" for its requirement that courts must defer to agencies when agencies implement a statute by resolving ambiguities and filling statutory gaps.[34]

But commenters recognized that *West Virginia* was "yet another prominent example of the Court's repeated and consistent refusal to apply *Chevron*" in recent years.[35] Indeed, they asked "whether *Chevron* can survive while *West Virginia* lives" since "*Chevron* and the major questions doctrine 'work entirely at cross-purposes" because *Chevron* says that statutory silence authorizes agency action and *West Virginia* says that statutory silence precludes it.[36] The Court appears poised to answer this question next term, as it granted certiorari in *Loper Bright Enterprises, Inc. v. Raimondo* to answer the question of whether it should overrule *Chevron*.

Below, we explore the ramifications of the major questions doctrine that the Court articulated in *West Virginia* and the importance of the fate of *Chevron* in more detail.

I. *West Virginia* is a license for courts to limit the power of administrative agencies.

The major questions doctrine suffers from serious flaws. It provides courts with license to invalidate agency actions so long as the court arrives at two essentially subjective determinations: first, that the agency action is "extraordinary," implicates a "major" issue, or involves a subject of exceptional economic or political significance, and second, that Congress has not given the agency sufficiently clear authority to undertake the reform in question. Courts have already used these loose standards to invalidate agency actions with which they disagree.

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[29] *Id*. at 2608 (citation omitted) (alteration in original).

[30] *Id*. at 2609 (citation omitted).

[31] Thomas O. McGarity, *The Major Questions Wrecking Ball*, 41 VA. ENVTL. L.J. 1, 2 (1993).

[32] 467 U.S. 837 (1984).

[33] *Id*. at 843-45.

[34] Kurt Eggert, *Deference and Fiction: Reforming Chevron's Legal Fictions After King v. Burwell*, 95 NEB. L. REV. 702, 718 (2017).

[35] Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 224 (2023).

[36] *Id*. at 225.

A. *West Virginia* imperils the ability of agencies to respond to the nation's problems.

The major questions doctrine that the Court articulated in *West Virginia* is a limitation on Congress's power to delegate to agencies the authority to regulate private sector activities.[37] Although the doctrine is supposedly limited to "major" regulations, the Court has provided little guidance on how to determine whether a regulation attempts to answer a "major question."[38] As a result, the doctrine is a "powerful but indiscriminate tool" in the hands of judges, and may be used by judges selected for their antipathy to government to undermine the ability of agencies to protect consumers, workers, communities, and the planet from unregulated markets.[39]

In addition to allowing judges to apply the doctrine whenever they believe the case involves an important issue, the need for clear congressional authorization to justify agency action is no less problematic. This requirement prevents agencies from advancing their statutory missions to respond to challenges that have significant implications for the economy, absent crystal clear Congressional authorization that is often lacking where Congress has delegated general authority to an agency to implement its statutory framework.[40] This bias against new federal regulation may be highly desirable to judges who oppose administrative agencies' attempts to curb abuses in private behavior, but it frustrates Congress's efforts through the laws that it passes to empower agencies to protect the public health, safety, and welfare.[41]

The ramifications for Congress's ability to use legislation to address the nation's problems should not be underestimated. For decades, Congress has passed laws that attempt to address those problems by providing administrative agencies with broad authority to enact regulatory programs. The major questions doctrine allows the judiciary to say that laws enacted and implemented to address the nation's most pressing problems may not be used by agencies to do so.[42]

The major questions doctrine is especially problematic for agencies' ability to respond to new challenges. Congress passes statutes that employ broad language to allow implementing agencies to address new problems as they arise in ways that fulfill their statutory mission.[43] Without regulatory flexibility, changing circumstances would quickly render a statute "'obsolete.''[44] The major questions doctrine prevents agencies "from relying on broad statutory language in existing statutes to address newly arising problems."[45] It thus inhibits Congress from delegating to agencies the flexibility needed to react to changing circumstances.[46] This means that the doctrine "may render federal regulators incapable of protecting the public from serious threats like climate disruption and deadly pandemics."[47] And the consequence is that the public must then wait for Congress to act where the agency has been sidelined. But given the extraordinary difficulty Congress has in arriving at consensus in the legislative process, that means endless delay in addressing pressing threats to public health, safety, and financial security.

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[37] McGarity, *supra*, 41 VA. ENVTL. L. J. at 2.

[38] *Id*.

[39] *Id*. at 2-3.

[40] *Id*. at 22.

[41] *Id*. at 23.

[42] *Id*. at 24.

[43] *Id*. at 36.

[44] *Id*. (quoting *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007)).

[45] *Id*.

[46] *Id*.

[47] *Id*. at 37-38.

With respect to both existing and new challenges, the major questions doctrine impedes agencies from bringing their expertise to bear on important issues. The doctrine allows courts to "substitute their judgment about the wisdom of policy choices for that of the agencies and Congress in areas of the greatest economic and political importance."[48] The result is that the major questions doctrine "gives courts a veto over new initiatives and a tool to roll back existing protections."[49]

As Justice Kagan expressed in her concurrence this past term in *Sackett v. EPA*, the doctrine "is explicable only as a reflexive response to Congress's enactment of an ambitious" regulatory scheme and as an "effort to cabin" the regulatory actions "Congress thought appropriate."[50] Justice Kagan remarked on the non-textual origins of the doctrine.[51] She described the doctrine as "'magically appearing'" in the Court's jurisprudence as a way to avoid the statutory authority Congress gives agencies to enact regulatory programs.[52] The consequence, Justice Kagan noted, is to allow the Supreme Court to "appoint[] itself as the national decision-maker" on important policy matters.[53] The Court may substitute "'its own ideas about policymaking for Congress's,'" and "[t]he Court, rather than Congress, will decide how much regulation is too much."[54]

Justice Kagan expressed her views tactfully. But the same point may be made quite bluntly. "The Roberts Court's assault on the modern administrative state through . . . its new super-strong clear statement rule trumping agency rules having a large social or economic impact is judicial lawmaking on steroids."[55] The text and structure of the Administrative Procedure Act (APA) "impose on agencies no special burden for demonstrating authority when they issue rules having wide socio-economic effects."[56] The APA does not withdraw from agencies the authority to adopt rules having large socio-economic effects, and it "makes no mention of any clear statement requirement for certain issues."[57] It does not say agencies may promulgate rules concerning small issues but not big ones. Yet that, in effect, is what the major questions doctrine says.

B. Courts are already invoking West Virginia to invalidate agency action.

The problems with the major questions doctrine are not theoretical. It did not take long for the Supreme Court to provide a real-life example of how it could invoke *West Virginia* to justify overturning administrative action designed to help ordinary Americans. In *Biden v. Nebraska*, 143 S. Ct. 2355 (2023), the Court invalidated the comprehensive student loan forgiveness plan that the Secretary of Education established under the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act). The Secretary's plan canceled roughly $430 billion of federal student loan balances, completely erasing the debts of 20 million borrowers and lowering the median amount owed by another 23 million borrowers from $29,400 to $13,600. The Court held that the HEROES Act did not authorize the Secretary's plan, despite the act's provisions authorizing the Secretary to "waive or modify any statutory or regulatory

[48] *Id*. at 51.

[49] *Id*.

[50] 143 S. Ct. at 1362.

[51] *Id*.

[52] *Id*. (quoting *West Virginia*, 142 S. Ct. at 2641-42 (Kagan, J., dissenting)).

[53] *Id*.

[54] *Id*. (quoting *West Virginia*, 142 S. Ct. at 2643).

[55] William N. Eskridge Jr. & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 98 NOTRE DAME L. REV. 1893, 1906 (2023).

[56] *Id*. at 1950.

[57] *Id*.

provision" applying to federal student loan programs, because the Secretary could not point to "'clear congressional authorization'" to justify the plan as the major questions doctrine required. So the major questions doctrine prevented the Secretary from acting on a question of "deep economic and political significance."

The lower courts have followed suit. In *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022), the Fifth Circuit relied on the major questions doctrine to enjoin an executive order requiring that federal contractors ensure that their employees become fully vaccinated against COVID-19. The President issued the executive order pursuant to a statute that authorized him to prescribe policies and directives necessary to provide the federal government with an economical and efficient system for procurement, contracting, and other related activities. Nonetheless, the court held that the major questions doctrine "serves as a bound on the President's authority." Because the mandate in the executive order would, according to the court, effect an enormous and transformative expansion of the president's power under the statute, it could not permit the mandate to remain in place absent a clear statement by Congress that it wished to confer such power on the President. Unsurprisingly, since the statute pursuant to which the President acted was enacted in 1949, the court did not find a clear statement of congressional authority in the act.[58]

In *West Virginia by and through Morrisey v. U.S. Dep't of the Treasury*, 59 F.4th 1124 (11th Cir. 2023), the court held that the major questions doctrine prevented the Secretary of the Treasury from clarifying through a rule the conditions under which the states could receive federal funds under a statute. The statute appropriated almost $200 billion to make payments to the states that they could use to relieve the economic effects of the COVID-19 pandemic, but it provided that the states could not use the funds to offset a reduction in their net tax revenue. The Secretary, acting pursuant to authority in the statute to issue rules necessary to implement the relief plan, then adopted a rule that created a framework for deciding whether a state had improperly offset a reduction in net tax revenue with the relief plan funds. The court held that the rule could not clarify the conditions for when a state had used the funds improperly because the offset provision in the statute implicated questions of deep economic and political significance, Congress could not have delegated the authority to answer those questions to the Secretary without a clear statement of its intention to do so, and the statute contained no such statement. As a result, the court held that the offset provision in the statute was unconstitutional because it did not provide ascertainable conditions.

In her dissent from the court's denial of rehearing en banc, Judge Rosenbaum recognized the court's troubling extension of the major questions doctrine to a situation where the Secretary did not repurpose the statutory relief plan but rather implemented regulations consistent with Congress's command that relief funds not be used to fund state tax cuts; did not rely on an old statute to promulgate the rule but rather promulgated the rule mere months after Congress passed the relief plan; and did not take unprecedented action affecting a large swath of the American economy but rather adopted a rule that affected only states that voluntarily agreed to take the relief funds.

In *North Carolina Coastal Fisheries Reform Group v. Captain Gaston LLC*, 76 F.4th 291 (4th Cir. 2023), the court held that the major questions doctrine precluded an interpretation of the Clear Water Act that would bring within the meaning of "the discharge of any pollutant" the actions of shrimp trawlers to throw bycatch overboard. The court held that whether returning bycatch to the water qualifies as the

[58] The Ninth Circuit reached the opposite conclusion in *Mayes v. Biden*, 67 F.4th 921 (9th Cir. 2023). There, the court held that the major questions doctrine did not apply to the executive order because the order was a presidential decree and not agency action, and that, even if the doctrine applied, it would not bar the order because the order was not a transformative expansion of the President's authority under the statute.

discharge of a pollutant was a major question because it would have significant political and economic consequences. In the court's view, interpreting the act to allow the EPA to regulate bycatch would give it power over a significant portion of the American economy since fishing generates hundreds of billions of dollars, employs millions of people, and provides recreational sport for millions more. The court concluded that the EPA could not regulate bycatch without clear congressional authorization to do so, and it found that the act contained no such clear congressional authorization. The court did not explain what agencies could do that would be significant enough to be worth doing but not so significant as to run afoul of its view of the major questions doctrine, or how regulating the way shrimp trawlers return to the ocean the fish and marine organisms that they catch along with shrimp is equivalent to the transformative expansion of regulatory authority that would have resulted from the EPA's restructuring of the American energy market through the clean power plan at issue in *West Virginia*.

Similarly, in *Texas v. Nuclear Regulatory Commission*, 78 F.4th 827 (5th Cir. Aug. 25, 2023), the Fifth Circuit invalidated a license to operate a nuclear waste storage facility that the Nuclear Regulatory Commission granted. The court held that how to dispose of nuclear waste was an issue of great economic and political significance that had been hotly contested for over a half-century and was a major subject of public concern. In the court's view, a decision of such magnitude and consequence rested with Congress unless Congress clearly delegated that decision to an agency. The court found no such clear delegation in either the Atomic Energy Act or the Nuclear Waste Policy Act. The court did not explain what actions agencies could take on hotly contested subjects of public concern without implicating the major questions doctrine or what subjects of public concern are not hotly contested in today's political environment.

Fortunately, some courts have recognized limits to the major questions doctrine. In *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), the Court rejected a challenge under the major questions doctrine to a rule promulgated by the National Marine Fisheries Service. The service promulgated the rule pursuant to a statute giving it the authority to promulgate and enforce fishery management plans, and the rule required industry to fund at-sea monitoring programs. The court rejected the application of the major questions doctrine to the rule on the ground that the doctrine applies only in those extraordinary cases where the history and breadth of the authority the agency has asserted and the economic and political significance of that assertion provide a reason to hesitate before concluding that Congress meant to confer such authority. The major questions doctrine did not apply to the rule at issue because Congress had delegated broad authority to an agency with expertise and experience within a specific industry, and the agency did not assert the broad power to regulate the national economy.

Despite some decisions declining to apply the major questions doctrine, there can be no dispute that the doctrine has provided courts with greater freedom to invalidate agency action.[59] The majority of the decisions outlined above "illustrate[] the serious flaws" with the doctrine as they involve courts using

[59] Although we have focused our discussion on Supreme Court and circuit court cases invoking the doctrine to invalidate agency action, the problems with the doctrine are no less pervasive at the district court level. For example, in *Chamber of Commerce of United States of America v. Consumer Financial Protection Bureau*, __ F. Supp. 3d __ (Sept. 8, 2023), the district court invalidated under the major questions doctrine the CFPB's determination that discrimination should be considered an unfair, deceptive, or abusive act or practice. The court held "whether the CFPB has authority to police the financial-services industry for discrimination . . . is a question of major economic and political significance" as "such an authority would have large implications" for the industry. As a result, the CFPB faced a "high burden" in arguing that Congress conferred on it the authority to regulate discrimination as an unfair practice. The court concluded that the CFPB did not meet this burden because its statutory authority "to regulate unfair acts or practices is not the sort of 'exceedingly clear language' that the major questions doctrine demands before finding a conferral of agency authority to regulate discrimination across the financial-services industry."

the doctrine's "vague, in-articulable standards" to cast "too much agency action into doubt."[60] Those decisions fortify the view that the doctrine is "'a powerful deregulatory tool that limits or substantially nullifies congressional delegations to agencies in the circumstances where delegations are more likely to be used, and more likely to be effective.'"[61]

II. *West Virginia* was a precursor to a challenge to *Chevron* itself.

In addition to enabling courts to more easily set aside administrative action, the major questions doctrine foreshadowed a broader challenge to administrative authority. For almost 40 years, the Supreme Court's decision in *Chevron* has authorized agencies to interpret statutes that entrust them with administering a regulatory program. This makes sense for several reasons.

First, agency personnel are subject matter experts, especially relative to judges.[62] That expertise allows them to better understand the real-world background assumptions behind a statute and how the technical aspects of a regulatory program can or should fit together.[63]

Second, agency leaders have more political accountability than judges.[64] We owe that in part to the President's oversight of those leaders; virtually no one receives more political heat from controversial regulatory actions than the President.[65] Agencies also interact much more directly with elected representatives in Congress, both through oversight and in the process of drafting legislation.[66] And when political responses give the agency some reason for regulatory change, it can arguably change course more easily than a precedent-bound court.[67]

Finally, agencies set nationally applicable rules; that helps establish uniformity where otherwise a patchwork of conflicting judicial decisions might exist.[68] That sort of national uniformity is often one reason why even heavily regulated industries prefer federal agency action. In a similar vein, *Chevron* even helps Congress legislate under a stable expectation that issues it assigns to an agency will be consistently, uniformly, and predictably applied.[69]

Unfortunately, the Supreme Court has been retreating from *Chevron* for years.[70] Rather than defer to agency interpretations of statutes, the Roberts Court largely conducts its own review of how the statute should be interpreted, and it tends to not find the ambiguity that would trigger deference to

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[60] *Administrative Law—Federal Reserve—U.S. Monetary Policy Shows the Major Issues with the Major Questions Doctrine*, 136 HARV. L. REV. 2028, 2035 (2023).

[61] Jodi L. Short, *In Search of the Public Interest*, 40 YALE J. ON REG. 759, 762 n.8 (2023).

[62] *See* Jonathan H. Adler, *Restoring Chevron's Domain*, 81 MO. L. REV. 983, 987–89 (2016).

[63] *See id*.

[64] *See, e.g., id*. at 988; *see also Chevron, U.S.A., Inc.*, 467 U.S. at 865–66.

[65] *See* Adler, *supra*, 81 MO. L. REV.. at 988.

[66] *See id*.

[67] *See id*. at 988-99, 988 n.30 (*citing* Yehonatan Givati & Matthew C. Stephenson, *Judicial Deference to Inconsistent Agency Statutory Interpretations*, 40 J. LEGAL STUD. 85, 91 (2011)); *see also United States v. Mead Corp*., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (arguing that the loss of *Chevron* would "lead to the ossification of large portions of our statutory law" through "judicial resolution").

[68] *See* Adler, *supra*, 81 MO. L. REV. at 989.

[69] *See City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296 (2012).

[70] Thomas A. Koenig & Benjamin R. Pontz, Note, *The Robert Courts' Functionalist Turn in Administrative Law*, 46 HARV. J. L. PUB. POL'Y 221, 235 (2023).

the agency's statutory interpretation.[71] Indeed, the Court has not actually applied *Chevron* deference in more than five years.[72] After this lengthy retreat from Chevron, the Court's decision in *West Virginia* appears to be the precursor to the Court reconsidering *Chevron* itself.

A. One year after *West Virginia*, the Court agreed to reconsider *Chevron*.

The major questions doctrine as articulated by the Supreme Court in *West Virginia* represented a further departure from *Chevron*. After all, *Chevron* did not exclude from its holding questions of economic and political significance with broad implications for the national economy. The major questions doctrine prevents *Chevron's* application to a whole category of cases, so it is unsurprising that the Court is now taking aim at *Chevron* itself.

Earlier this year, the Court granted certiorari in *Loper Bright Enterprises, Inc. v. Raimondo* to consider whether it should overrule *Chevron*. The prospects for *Chevron's* survival appear dim. As discussed above, Chief Justice Roberts has long voiced skepticism about *Chevron*. So has Justice *Thomas*. He has written that "*Chevron* deference raises serious separation-of-powers questions" and has criticized the "potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference."[73] While on the Tenth Circuit, Justice Gorsuch stated similarly that *Chevron* is "seemingly at odds with the separation of legislative and executive functions" and permits "executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution."[74] Justice Kavanaugh also previously expressed the view that *Chevron* "is an atextual invention by courts" and "nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch."[75] Assuming these past statements augur an appetite among these justices to overrule *Chevron*, they would need only one more vote to do so.

B. Overruling *Chevron* would harm the public by preventing agencies from invoking their broad statutory authority to respond to new challenges.

The consequences for the administrative state if the Court overrules *Chevron* cannot be overstated. Overruling *Chevron* "would transform the administrative state."[76] Abolishing judicial deference to administrative agencies would increase the authority of a generation of judges who are the most politically conservative since 1937.[77] Courts would be able to ignore agencies' view as to how to interpret key statutory terms.[78] As a result, statutory requirements throughout administrative law would become less flexible and be interpreted with less expertise.[79]

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[71] *Id.*

[72] *Id.*

[73] *Michigan v. EPA*, 576 U.S. 743, 761-62 (2015) (Thomas, J., concurring).

[74] *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149, 1154 (10th Cir. 2016) (Gorsuch, J., concurring).

[75] Brett M. Kavanaugh, Book Review, *Fixing Statutory Interpretation Judging Statutes*, 129 HARV. L. REV. 2118, 2150 (2016).

[76] Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 701 (2021).

[77] *Id.*

[78] *Id.*

[79] *Id.*

Overruling *Chevron* would also weaken existing administrative institutions, as agencies would have less freedom to invoke their statutory authority to adopt rules beneficial to the public. Future legislators would also be disinclined to create new agencies to confront new public needs. Although "[g]enerations of Americans have accepted agencies with interpretive authority as a tool for implementing diverse visions of expertise, political accountability, and the public good," overturning Chevron would devastate the ability of agencies to act in the public interest.[80]

Perhaps most importantly, overruling *Chevron* could have significant policy ramifications. Conservative judges might use their new interpretive authority unfettered by *Chevron's* mandate that agencies and not judges resolve statutory ambiguities when Congress delegates authority to an agency to act—to interpret statutes to increase flexibility and autonomy for private business and corporate power.[81] So public policy might see "a substantial shift to the right, incorporating the kind of pro-business deregulatory sentiments" that have united conservatives for years.[82]

– IV –
ETHICS CONCERNS THAT HAVE SURFACED THIS YEAR

This past year, news organizations uncovered and reported on several episodes of questionable ethical conduct by some of the Justices on the Supreme Court.[83] The accounts range from free rides on billionaires' private jets, to luxury travel accommodations, to preferential financing for the purchase of a motorhome and paying off a family member's mortgage.[84] Further ethical questions have arisen not only in light of the gifts, vacations, and fishing trips but also because several Justices have refused to recuse themselves from cases where they would appear to have accepted gifts from persons who have business before the Court, have submitted amicus briefs, or have particular interests in the outcome of cases before the Court.

These reports have highlighted an unusual feature of the Court as a government institution: It does not have a formal code of ethics that the Justices must adhere to, and some resist the notion that any governing body can force one upon them. While the lower federal courts do have a binding code of conduct, the Supreme Court has repeatedly taken the position that it is not subject to this congressionally mandated code of ethics. In other words, it would seem, "ethics for thee, but not for me."

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[80] *Id.* at 702.

[81] *Id.*

[82] *Id.*

[83] *See* Jodi Kantor, *Allegation of Supreme Court Breach Prompts Calls for Inquiry and Ethics Code*, N.Y. TIMES (Nov. 20, 2022), https://www.nytimes.com/2022/11/20/us/supreme-court-breach-alito.html; *see also* Joshua Kaplan, Justin Elliott, & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow; Justin Elliot, Joshua Kaplan, & Alex Mierjeski, *Justice Samuel Alito Took Luxury Fishing Vacation With GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023), https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court; Brett Murphy & Alex Mierjeski, *Clarence Thomas' 38 Vacations: The Other Billionaires Who Have Treated the Supreme Court Justice to Luxury Travel*, PROPUBLICA (Aug. 10, 2023), https://www.propublica.org/article/clarence-thomas-other-billionaires-sokol-huizenga-novelly-supreme-court.

[84] The list of gifts and benefits bestowed goes on. *See* Alison Durkee, *Here Are The Recent Controversies Supreme Court Justices Have Been Caught Up In—As Senate Committee Votes on Ethics Bill*, FORBES (July 17, 2023), https://www.forbes.com/sites/alisondurkee/2023/07/17/here-are-the-recent-controversies-supreme-court-justices-have-been-caught-up-in-as-senate-committee-votes-on-ethics-bill/?sh=47f0ed623954.

In 1922, Congress created the Judicial Conference of the United States to manage the lower federal courts, and in 1973 the Conference adopted a code of conduct binding on all lower court judges.[85] This code of conduct provides federal judges with guidance on "issues of judicial integrity and independence, judicial diligence and impartiality, permissible extra-judicial activities, and the avoidance of impropriety or even its appearance." In 1991, the Justices of the Supreme Court voluntarily adopted a resolution to follow the requirements in the Judicial Conference's code of conduct, including annual financial disclosures, restrictions on earned income and employment outside of their official duties, and limits on gifts.[86] While this sounds noble, they also recognize that the code of conduct is not binding and that the Judicial Conference has no authority to supervise the conduct of the Court. Thus, the Justices comply with the Judicial Conference's code of conduct essentially to the extent they wish to do so. And there is no institution in a position to police their compliance, short of impeachment by Congress.

In response to the stream of reports in the news raising questions about some Justices' conduct, Congress has displayed a renewed interest in passing legislation that binds members of the Supreme Court to an ethical code of conduct. Specifically, a bill passed the U.S. Senate Judiciary Committee this past July designed to establish a binding code of conduct, which includes ethics guidelines on gift limitations and a more transparent recusal process.[87] However, legislative efforts have failed to garner bipartisan support, casting doubt on whether a congressionally mandated code of conduct can become law. At least one Justice does not believe Congress actually has the power to impose a code of conduct on the Court at all, furthering complicating the prospects of congressionally mandated ethics reform at the Supreme Court.

In light of declining approval ratings from the American public, combined with the revelations of what appears to be questionable ethical conduct, some believe that the Supreme Court will move on its own initiative to strengthen its standards of conduct and the recusal process. The Chief Justice has publicly acknowledged that the Supreme Court and the Justices can do more to meet a higher standard of ethical behavior.[88] Another Justice has publicly expressed the hope that "concrete steps" will soon be taken by the court to increase confidence among members of the American public in the ethical conduct of the Court.[89] Time will tell how the Court addresses these concerns.

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[85] Code of Conduct for United States Judges, Judicial Conference of the United States (Mar. 12, 2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf.

[86] Resolution, SUPREME COURT of the UNITED STATES (Jan. 18, 1991), https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2012/02/21/National-Politics/Graphics/1991_Resolution.pdf.

[87] Press Release, Senate Judiciary Committee, Durbin, *Whitehouse Statement on Senate Judiciary Committee Advancing Supreme Court Ethics Reform Bill to Full Senate* (July 29, 2023), https://www.judiciary.senate.gov/press/releases/durbin-whitehouse-statement-on-senate-judiciary-committee-advancing-supreme-court-ethics-reform-bill-to-full-senate.

[88] Mark Sherman, *Chief Justice Roberts says Supreme Court looking at ethics standards, provides no specifics*, ASSOCIATED PRESS (May 24, 2023), https://www.pbs.org/newshour/politics/chief-justice-roberts-says-supreme-court-looking-at-ethics-standards-provides-no-specifics.

[89] Julie Carr Smyth, *Supreme Court Justice Brett Kavanaugh predicts 'concrete steps' to address ethics concerns*, ASSOCIATED PRESS (Sept. 7, 2023), https://www.pbs.org/newshour/politics/supreme-court-justice-brett-kavanaugh-predicts-concrete-steps-to-address-ethics-concerns.

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