

The Supreme Court Update - May 1, 2023

by Brock Huebner

Today, the Supreme Court of the United States granted certiorari in two cases:

Loper Bright Enterprises v. Raimondo, No. 22-451: This case involves the level of deference courts must apply to administrative agency decision making. A federal law grants the National Marine Fisheries Service (“NMFS”) power to require fishing vessels to carry federal monitors onboard to enforce regulations. The NMFS interpreted the law as to also require the fishing industry to pay the salaries of those federal observers, despite the federal law’s silence on the issue. The D.C. Circuit held that this interpretation of the law was reasonable under *Chevron* deference, where courts defer to agency interpretations of ambiguous statutes. The question presented is: 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.

Murray v. UBS Securities, LLC, No. 22-660: This case involves a whistleblower retaliation claim under the Sarbanes-Oxley Act of 2002, which protects whistleblowers who report financial wrongdoing at publicly traded companies. Sarbanes-Oxley had a burden-shifting framework for such claims. Employees must first show their protected activity “was a contributing factor in the unfavorable personnel action alleged in the complaint,” and then the employer can prevail only if it “demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.” The question presented is: Whether, following the burden-shifting framework that governs cases under Sarbanes-Oxley Act, a whistleblower must prove his employer acted with a “retaliatory intent” as part of his case in chief, or whether the lack of “retaliatory intent” is part of the affirmative defense on which the employer bears the burden of proof.

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