UNITED STATES OF AMERICA

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DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW IN THE UNITED STATES

I - UNITED STATES SUPREME COURT'S REJECTION OF DEFERENCE TO FEDERAL ADMINISTRATIVE AGENCIES

During its past term, the US Supreme Court's conservative majority issued a 6-3 decision that has the potential to severely weaken federal administrative agencies' power to enforce federal laws that protect health, safety, and labor rights. In *Loper Bright Enterprises v. Raimondo*[1], the Supreme Court overruled its 40 years old precedent of *Chevron v. National Resources Defense Council*[2]. That precedent had established what has come to be known as the « *Chevron* doctrine », which required federal courts to defer to federal administrative agencies' permissible or reasonable interpretations of ambiguous language in statutes that fall within an agency's jurisdiction. The six-member majority in *Loper Bright* rejected the *Chevron* doctrine as being an unjustified usurpation of judicial role under the federal Administrative Procedure Act to review agencies' interpretations of federal law. The *Loper Bright* Court concluded that there was no justification for the lower federal court's deference to agency interpretations because under the Administrative Procedure Act, « "the reviewing court" - not the agency whose action it reviews - is to « decide *all* relevant questions of law » and « interpret (...) statutory provisions »[3].

The three dissenting Supreme Court justices noted the essential nature of the *Chevron* doctrine to the competent enforcement of the statutes that Congress has placed under the authority of federal administrative agencies to administer, which entails « regulation - over the provision of health care, the protection of the environment, the safety of consumer products, the efficacy of transportation systems, and so on »[4]. For example, in the *Chevron* case, the Supreme Court held that the courts should have deferred to an Environmental Protection Agency regulation that interpreted the federal Clean Air Act. In their dissenting opinion in *Loper Bright*, Justices Kagan, Sotomayor, and Jackson describe the role of the *Chevron* doctrine as « part of the warp and woof of modern government, supporting regulatory efforts of all kinds - to name a few, keeping air and water clean, food and drugs safe, and financial markets honest »[5]. The dissent criticizes the Court's overruling of *Chevron*

1 144 S.Ct. 2244 (2024).
2 Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837 (1984).
3 144 S.Ct. at 2265.
4 S.Ct. 2295.
5 S.Ct. 2294.

as being « [a] rule of judicial humility giv[ing] way to a rule of judicial hubris (...). In one fell swoop, the majority today gives itself exclusive power over every open issue - no matter how expertise-driven or policy-laden - involving the meaning of regulatory law »[6].

The Court's decision in *Loper Bright* is built on the foundation of the same majority's recent narrowing of the scope of federal agencies' regulatory power to use their expertise in enforcing federal statutes in the public interest. In 2022, the same conservative six-justice majority created a « major questions doctrine » under which judges may conclude that a federal agency did not have sufficiently « clear ». Congressional authorization to issue a government regulation that is of « vast economic and political significance »[7]. In that case, *West Virginia v. EPA*[8], the Court struck down the Environmental Protection Agency's regulation of carbon dioxide emissions at power plants as part of the efforts to fight global warming. With *Loper Bright*, the Court has provided businesses and employers an even more powerful weapon to file legal challenges against federal agency regulations and decisions enforcing health, safety, labor, and environmental protections.

The impact of *Loper Bright* will be grave, both in terms of increased litigation from challenges to federal agency regulations and adjudications and in terms of the potential outcomes of such litigation. At the heart of the *Loper Bright* decision is the Court's skepticism about respecting federal agencies' expertise in interpreting ambiguous language in the statutes that those agencies have been empowered to enforce. Without the *Chevron* doctrine, federal courts will have the power to reject such expertise in favor of the judge's own interpretation of the law. While judicial review of agency decisions carries with it the power to reverse agency actions, the *Chevron* doctrine was important in establishing judicial deference to *reasonable* interpretations of the law by expert agencies concerning not only scientific and technical matters, but also expertise about policy matters related to the federal statute. Such deference respects the essential role of expert agencies to carry out Congressional intent to implement statutory protections in areas that rely on experts to adopt and apply regulations to protect the public from environmental dangers, health and safety hazards in the workplace, employee rights, and provisions for social and economic benefits. Judicial deference to agency expertise also limits incentives to bring challenges that would take years of litigation. Instead of finding ways to improve the administrative agencies' ability to serve the public interest through regulatory protections, the *Loper Bright* decision will encourage businesses and employers to engage in litigation to stymie Congressional intent to protect the public.

There is some debate about the extent of the impact of *Loper Bright* on the National Labor Relations Board (NLRB or Board), which enforces the National Labor Relations Act[9] (NLRA) - the 1935 federal law creating statutory rights of private sector employees to unionize, collectively bargain, strike, and engage in other protected

6 Id. at 2294-95.

7 *Id*. at 2605.

8 142 S. Ct. 2587 (2022).

9 29 U.S.C. §151 et seq.

concerted activity. As some commentators have noted, judicial deference by the Supreme Court to the NLRB pre-dated the *Chevron* doctrine and has continued to be recognized by the courts without relying on *Chevron*[10]. Further, the Board has traditionally interpreted the NLRA through case-by-case adjudication rather than through the adoption of regulations. However, other commentators predict that the demise of the *Chevron* doctrine will influence the courts to defer less to federal agency interpretations of law, in general, including the Board's interpretations of the NLRA[11].

On the heels of its *Loper Bright* decision, the Supreme Court's six-justice majority exacerbated its impact in *Corner Post Inc. v. Board of Governors of the Federal Reserve System*[12], which expands the time period for legal challenges to federal agency regulations. In *Corner Post*, the Court held that the six-year statute of limitations for challenges to federal regulations does not start running at the time the federal agency regulation goes into effect. Instead the limitations period starts running when a plaintiff is injured by the federal agency's action. The impact of this Supreme Court decision is narrowed somewhat, as the *Corner Post* holding applies only to cases brought under the federal Administrative Procedure Act.

II- U.S. SUPREME COURT DECISION CHANGES THE LEGAL TEST FOR NLRA SECTION 10(J) INJUNCTIONS

The NLRB, with its majority - hree of five - now being Democratic appointments under the Biden administration, has been more protective of employee rights under the NLRA than the prior Board under the Trump administration[13]. This is also the case for the Biden-appointed General Counsel of the NLRB, who has engaged in rigorous enforcement of the NLRA[14]. These enforcement measures have included the General Counsel's active use of a legal tool under the NLRA to deter employer unlawful conduct, the Section 10(j) injunction, which permits the NLRB to seek an injunction from a federal court pending a trial and ruling on unfair labor practice complaints by an administrative law judge[15]. For example, the Board has authorized the NLRB General Counsel to file for ten federal court injunctions against Starbucks, asking the court to order Starbucks to reinstate employees alleged to have been

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10 T. Shahriari-Parsa, «How to Save the NLRA From Loper Bright,» *OnLabor* (July 12, 2024) : https://onlabor.org/how-to-save-the-nlra-from-loper-bright/

11 A. MacDonald, «Labor Relations, Practical Perspective - Après Moi, le Deluge»: Big Changes for Labor and Employment Law after Chevron, *Practical Guidance, Bloomberg Law* (March 2024).

12 144 S. Ct. 2440 (2024).

13 R. L. Lieberwitz, « Le renforcement de la syndicalisation et des droits des salariés aux Etats-Unis », *Revue de Droit Comparé du Travail et de la Sécurité Sociale*, vol. 2023/3, p. 144.

14 J. A. Abruzzo, General Counsel, *Mandatory Submissions to Advice*, Memorandum GC 21-04 (Aug. 12, 2021), https://www.nlrb.gov/guidance/memos-research/general-counsel-memos

15 J. A. Abruzzo, General Counsel, *Seeking 10(j) Injunctions in Response to Unlawful Threats or Other Coercion During Union Organizing Campaigns* 22-02 (Feb. 1, 2022). https://www.nlrb.gov/guidance/memos-research/general-counsel-memos

discharged for their union activities[16]. The U.S. Supreme Court granted review of one of those cases to consider the question of the appropriate legal test for issuing a federal court injunction under Section 10(j).

In *Starbucks Corp., v. McKinney*[17], a unanimous Supreme Court held that the federal courts must apply a four-factor test that is traditionally used to analyze a request for a preliminary injunction, whether or not under the NLRA. The four factors, which some federal courts had already used in Section 10(j) cases are: the petitioner is likely to succeed on the merits of the case; there is a likelihood of irreparable harm in the absence of an injunction; balancing the parties' interests and harms favors injunctive relief; and the public interest supports the injunction. Other federal courts used a two-factor test in considering whether to grant a request for a Section 10(j) injunction. The two factors considered whether there was reasonable cause to believe that a violation occurred, and whether injunctive relief was just and proper. Although the Supreme Court's decision appears to increase the stringency of the legal test, there is reason to believe that the use of the four-factor test is unlikely to make a difference in the outcome of petitions for a Section 10(j) injunction. As the General Counsel explained after the Supreme Court issued its *Starbucks* decision, the success rate in petitioning for 10(j) injunctions was similar under both the four-part and two-part tests[18].

III - SUPREME COURT EXPANDS THE SCOPE OF EMPLOYMENT ACTIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

In *Muldrow v. City of St. Louis*[19], the Supreme Court expanded the scope of discrimination claims under Title VII of the Civil Rights Act[20], which prohibits employment discrimination based on race, sex, national origin or religion. The Court held, in a unamimous decision, that plaintiffs are not required to prove that an employer's discrimination caused the employee to suffer significant financial or other harm. This holding clears the way for claims of discrimination in employment actions such as employee job transfers, as occurred in the *Muldrow* case, where the plaintiff alleged sex discrimination in the employer's transfer of the plaintiff to a different workplace unit. Although the Supreme Court held that the plaintiff must prove some harm resulting from the employment actin, it need not be evidence of significant harm or economic impact or tangible harm.

16 R. Iafolloa, «Starbucks on Verge of Beating NLRB Injunction Bid in N.Y. (1),» Bloomberg Law News (Aug. 23, 2023).

17 144 S. Ct. 1570 (2024).

18 J. A. Abruzzo, General Counsel, Section 10(j) Injunctive Relief and the U.S. Supreme Court's Decision in *Starbucks Corp. v. McKinney* 24-05 (July 16, 2024) : https://www.nlrb.gov/guidance/memos-research/general-counsel-memos

19 144 S. Ct. 967 (2024).

20 42 U.S.C. §2000e, et seq.