Labor and Employment LAW

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SECTION OF LABOR AND EMPLOYMENT LAW | AMERICAN BAR ASSOCIATION VOL. 52, NO. 2

With *Loper Bright*, the Supreme Court Guts the Administrative State and Shifts Power to the Courts

BY JASJIT K. MUNDH

PHOTO COURTESY OF CAUSE OF ACTION

In *Loper Bright Enterprises et al. v. Raimondo*, 603 U.S. ___ (June 28, 2024), a monumental decision released in late June, the Supreme Court forewent forty years of precedent to fundamentally disrupt how the government operates. Since the 1980s, federal administrative agencies have been afforded deference to reasonably interpret ambiguous statutes and promulgate within their areas of expertise under the *Chevron* doctrine, established in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The Supreme Court overturned the *Chevron* doctrine in *Loper Bright*, shifting power from administrative agencies to the courts in what may be the biggest power grab since *Marbury v. Madison*.

In its 1984 *Chevron* decision, the Supreme Court held that the Administrative Procedure Act (APA) required courts to defer to permissible agency interpretations of ambiguous statutes. To defeat an agency's action, opponents had to meet the high burden of first showing that the statute was unambiguous, and if not unambiguous, that the agency's interpretation was impermissible. The idea behind the *Chevron* doctrine was simple: the individuals who work for administrative agencies have the most expertise in specific fields, so they should be interpreting congressional statutes within their areas of expertise. If the people disagreed with the agency's interpretation, they could vote in an executive branch that supported their views and appointed like-minded agency heads. *Chevron* was established during the Reagan administration and gave conservatives a way to stave off the purview of courts and protect the administration's deregulatory goals. Since its inception, *Chevron* has gone on to be cited by the courts more than 18,000 times in the last 40 years.

However, since the Obama administration, the conservative movement has been actively trying to limit the administrative state, highlighting concerns with executive power overreach and agency flip-flop. With a majority stronghold at the Supreme Court, conservatives are now making their goals a reality. Since 2021, the Court has invoked the "major questions" doctrine four times, finding that it holds the final word on any agency decision that involves "vast economic and political significance."

Aligned with these goals, plaintiffs in *Loper Bright* brought the case to challenge the National Marine Fisheries Service's (NMFS) rule requiring fishers to pay some of the cost of having federal compliance monitors on their ships. Plaintiffs argued that the NMFS interpreted the Magnuson-Stevens Act too broadly in violation of the agency's authority granted by Congress. *Relentless, Inc., et al. v. Department of Commerce, et al.*, Case No. 22-1219, concerned the same rule and also asked the Court to overturn or limit *Chevron*.

In a 6-2 decision (Justice Jackson recused herself from *Loper Bright* due to her involvement in the matter as a judge at the D.C. Circuit, but dissented in the related *Relentless* case), Justice Roberts, writing for the majority, found that the APA requires courts to independently interpret ambiguities in statutes and "decide legal questions by applying their own judgment", thereby overturning the *Chevron* doctrine. Roberts highlighted that a court can consider an agency's interpretation under *Skidmore*

CONTINUED ON PAGE 12

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THE SECTION

BY JOSEPH J. TORRES, CHAIR

I'm extremely honored to be beginning my term as Chair of the Section. And I look forward to doing my best to continue the Section's mission of providing a welcoming, diverse and vibrant network for labor and employment attorneys across the globe.

When I first got involved in the ABA in the late 1990s, I figured it would be a great excuse for going to a warm place during the winter months. And I told my wife that we could just hang out by the pool each day after the programs ended.

As it turns out, I completely undersold how much the Section and my Section colleagues would become part of our lives. And over 25 years later, I am extremely thankful that I completely underestimated the amount of personal and professional value I have received from the Section and its members.

Among all the benefits I have received from my involvement in the Section, there are two I think are particularly relevant to my goals for the coming year.

First, was the opportunity to meet and develop relationships with attorneys from across the table, or from the courts or agencies where I practice, outside of the adversarial arenas where we practice. The ability to talk, listen and learn from these lawyers in a non-adversarial setting created not only personal connections, but invaluable professional insight and perspective. And in looking at the coming year, I think it's critical we continue to look for ways to support and promote the valuable benefit that comes from that opportunity.

Second, when I started attending Section meetings, I was pleasantly surprised by the number of Section members who went out of their way to approach me, welcome me, and invite my wife and I to join them, whether it was at a reception or a program.

And so the other area I'd like to focus on in the coming year is encouraging Section members to continue our long tradition of mentorship and inclusivity.

I think our Section can take advantage of the great position it finds itself in today to create a great future. Through the incredible hard work and sacrifice of many Section chairs and Council members over the last 10 years, we find ourselves financially sound.

Obviously, we cannot be complacent and need to be fiscally prudent in mapping our future.

But given our good fortune, I think our Section has an opportunity to use our resources to grow by continuing to focus on the principles of civility, inclusiveness, diversity and mentoring that have long been the hallmark of our organization.

And by encouraging existing members to contribute some of their personal capital to identifying, supporting and promoting the future members and leaders of our Section.

I look forward to doing what I can over the coming year to help us meet those objectives and doing as much as I can do over the coming year to help the Section fulfill our collective mission.

Thanks again for the opportunity to be of service. •

Joseph J. Torres is a Partner at Jenner & Block LLP in Chicago, Illinois, where he serves as Co-Chair of the firm's ERISA Litigation, Business Litigation, and Labor and Employment practices.

Labor and Employment LAW

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The Starbucks Labor Relations Board

BY MATT BRUENIG

In December of 2021, nineteen employees at a Starbucks store in Buffalo, New York voted to unionize, setting off a wave of Starbucks worker organizing unlike anything we've seen in recent times. The Starbucks unionization effort has generated considerable media coverage over the last few years, but relatively little attention has been paid to the tremendous strain it has put on the primary federal agency responsible for administering the nation's labor law, the National Labor Relations Board (NLRB).

In this article, I provide some quantification of the Starbucks-related workload that the NLRB has taken on in the last few years and make some observations about what that workload suggests about the efficiency of the current labor law regime. Overall, I think the numbers show that the country's current system of labor relations is very inefficient in that it requires the movement of vast amounts of government resources in order to administer relatively small amounts of unionization.

By the end of June 2024, the NLRB had administered 566 Starbucks union elections. The union won 465 (82 percent) of those elections, resulting in a total unionized workforce of 10,916 Starbucks employees.

Administering 566 elections in less than three years is, by itself, a tremendous undertaking. In the three years prior to the Starbucks campaign, the NLRB administered an annual average of just 1,156 union elections for the entire country.

Running these elections was just a small fraction of the workload that was thrust upon the NLRB by the Starbucks unionization effort. In addition to these 566 elections, the NLRB:

1. Processed 1,096 unfair labor practice charges.
2. Issued 17 published board decisions.
3. Issued 96 unpublished board decisions.
4. Issued 74 administrative law judge decisions.
5. Issued 106 regional election decisions.
6. Filed 6 appellate court briefs in 5 different federal circuit courts.
7. Sought 12 preliminary injunctions in federal district court.
8. Appealed 2 of those injunction requests into circuit court.
9. Litigated 1 preliminary injunction request to the Supreme Court.

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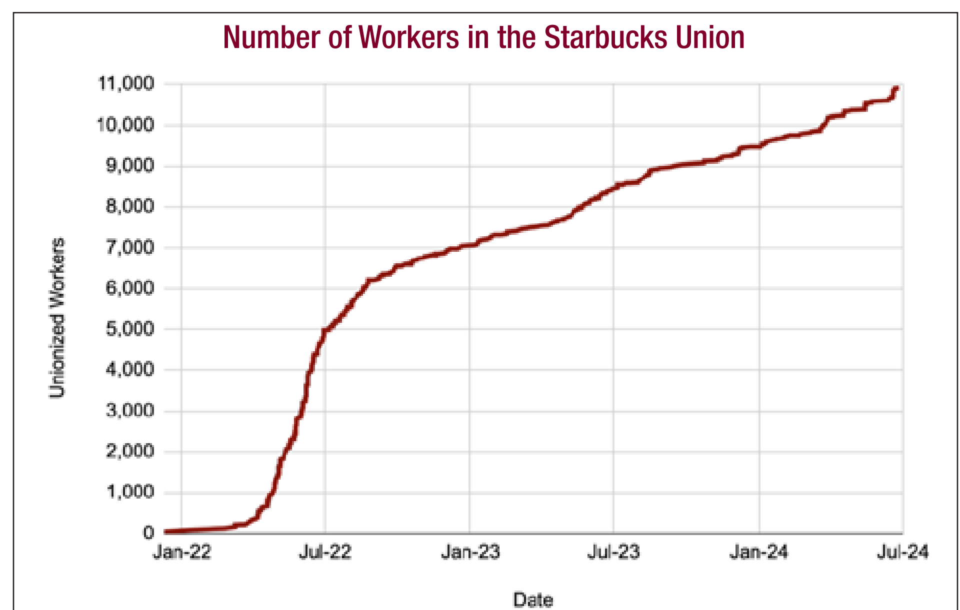
These NLRB processes also involved a huge number of outside lawyers. Across all of the unfair labor practice charges and representation petitions filed as part of the Starbucks organizing campaign, there were 7,438 notices of appearance from 390 different legal representatives, with the majority of those appearances coming from Littler Mendelson attorneys.

One rough way to assess how significant this expenditure of agency



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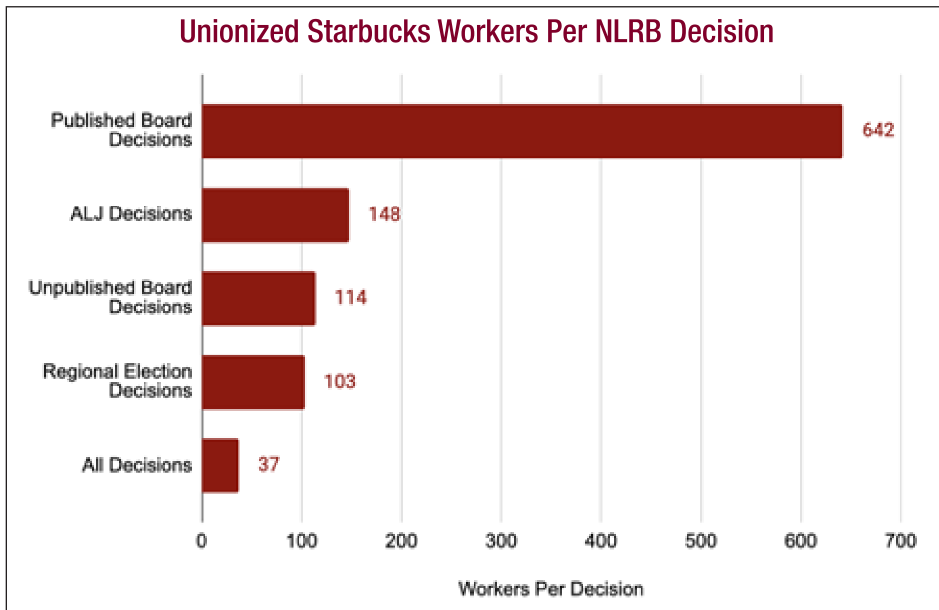
resources has been is to divide the 10,916 unionized workers by some of these figures, as I have done in the graph below.

For every published board decision related to Starbucks, there are 642 unionized Starbucks workers. For every unpublished board decision, ALJ decision, and regional election decision, there are between 100 and 150 unionized Starbucks employees. Combining all four decision types together reveals that there are 37 unionized Starbucks workers per NLRB decision. And these figures do not even include the agency time spent litigating against Starbucks in district courts, circuit courts, and the Supreme Court.

Analyzing the agency documents themselves reveals that the NLRB has produced at least 2.7 million words across 5,900 pages in Starbucks-related cases. These figures only include the words and pages contained in board decisions and federal court briefs. Adding in the words and pages contained in hearing transcripts, complaints, motions, exceptions, and the various briefs accompanying those things would at the very least double these figures, if not triple or quadruple them. This means that the NLRB has produced more pages of Starbucks legal documents than there are unionized Starbucks workers.



These rough figures illuminate the limits of the NLRB beyond the specific Starbucks context. If it takes this many government resources to unionize less than 11,000 workers, then it is inconceivable that the current NLRB model would ever be able to facilitate anything more than a small trickle of unionization.

This is especially true because the processing capacity of the NLRB is constrained both by the procedural demands of the law and by how much money Congress appropriates to it in a given year. If union activity increases but the NLRB's budget remains the same, the amount of unionization that actually results from the increased activity probably will not change much at all. Indeed, it is probably no coincidence that NLRB processing times dramatically increased around the same time that the agency began dealing with the massive Starbucks caseload.

For those opposed to unions, this state of affairs has some obvious appeal. With the NLRB acting as a bottleneck for unionization, there seems to be very little unions can do to quickly grow their membership. For those in favor of unionization, or in favor of government efficiency more generally, the current system is a disaster that can only be fixed through a radical legislative overhaul. •

Matt Bruenig is a solo labor lawyer. He publishes the NLRB Edge newsletter.

FY2024 Section Chair Denise Clark passes the gavel to Joe Torres, FY2025 Section Chair, during the recent ABA Annual Meeting in Chicago.

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AAA Employment Mass Arbitration Rules Update

BY ALEXANDER LINDENFELSER

On January 15, 2024, the American Arbitration Association and International Centre for Dispute Resolution (AAA-ICDR) amended its Mass Arbitration Supplementary Rules ("the Rules"). The Rules apply where there are 25 or more similar demands filed and where representation of all parties is consistent or coordinated across cases. Parties and their attorneys should be aware of the new challenges the Rules present in arbitrating mass employee claims, and in considering whether to file claims in mass arbitration.

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Changes to Fee Schedule

There are now three different fee schedules for mass arbitrations in employment, consumer, and B2B and construction disputes. The updated employment fee schedule provides for a flat initiation fee. American Arbitration Association, *Employment/Workplace Mass Arbitration and Mediation Fee Schedule: Costs of Arbitration and Mediation*, 1 (Jan. 15, 2024). The fee is $3,125 for individuals and $8,125 for the company, which must be paid when an individual files a mass arbitration. *Id*. For cases that proceed with administration beyond the initial fee, parties are responsible based on AAA's fee schedule, which starts at $125 for individuals and $325 for the company. *Id.* at 2.

The costs of Merits Arbitrators are now borne by both parties. If Merits Arbitrators are directly appointed, the fee is $150 per case for individuals and $1,100 per case for the company. *Id*. The final fee is $750 per case and billed to the company when the evidentiary hearing is scheduled. *Id*. Unless the individual voluntarily pays a portion of the compensation post-dispute, the company is to pay the compensation for the Merits Arbitrator, Process Arbitrator, and Mediator. *Id.* at 3. That is similar to the rule requiring the company to pay all arbitrator compensation, expenses, and fees, unless the parties have a separate agreement. *Id*. The arbitrator may not reallocate the arbitrator's fees, unless otherwise required by law or if the arbitrator determines that a claim or counterclaim was filed for purposes of harassment or is patently frivolous. *Id*. If cases are stayed for any reason, the company shall pay a $2,500 fee every six months. *Id*. Where a third-party neutral is required, the company is responsible for $3,250 in fees plus $2,500 every six months and the neutral's compensation. *Id.*

Changes to the Powers of the Process Arbitrator

The most significant changes to the Rules expand the Process Arbitrator's powers. The appointment of a Process Arbitrator may be done either administratively by the AAA-ICDR or—at the discretion of the AAA-ICDR—by mutual agreement of the parties. American Arbitration Association, *Mass Arbitration Supplementary Rules* at MA-6 (Jan. 15, 2024); *Id.* at MA-7. The Process Arbitrator may be appointed prior to the completion of the filing requirements by the parties. *Id.* at MA-6. The Process Arbitrator has authority to decide conditions precedent, payment of required costs, and the location of Merits hearings. *Id*. The Process Arbitrator also has the power to decide which demands should be included in or excluded from the mass arbitration, whether cases should be heard on an individual or group basis, whether subsequently filed cases can be included in the same mass arbitration, whether the rulings of the Process Arbitrator are binding on subsequent cases, and the process for selecting a Merits Arbitrator. *Id*. The Process Arbitrator also has the residual power to resolve non-merits disputes or any other issue the parties agree in writing to submit to the Process Arbitrator. *Id*.

The Process Arbitrator's administrative involvement ceases when a Merits Arbitrator is appointed to a specific case, unless the parties agree otherwise. *Id*. However, the rules now allow the Merits Arbitrator to review the decisions of the Process Arbitrator for abuse of discretion. *Id*. Additionally, the Rules now empower the AAA-ICDR with the discretion to appoint a Mediator. *Id*. at MA-9. Once at the hearing stage, the Rules now state a preference for virtual hearings. *Id.* at MA-5.

Changes to Filing Requirements

The Mass Arbitration rules now require a representative to certify that the information contained in each demand,

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answer, counterclaim, and any amended claim is true and correct to the best of the representative's knowledge. *Id.* at MA-2; *id.* at MA-4. Claimant's representatives must affirm the truth of each case filed. *Id.* at MA-2; *id.* at MA-3. Like Rule 11 in the Federal Rules of Civil Procedure, the representative must certify the truth of their filing. FED. R. CIV. P. 11(b). Unlike Rule 11, however, the Mass Arbitration rules are silent as to whether a representative has an affirmative duty to conduct a reasonable inquiry into the filing and the thoroughness of such an inquiry. *Compare id., with* Mass Arbitration Supplementary Rules, *supra*.

Conclusion

In preparing to file mass arbitration actions, advocates must account for greater fees, develop arbitration strategies flexible enough to respond to weighty decisions made by Process Arbitrators, and stay vigilant of developments in the ethical implications of the certification requirement. •

Alexander Lindenfelser is a summer law clerk at Nichols Kaster, PLLP, and University of Minnesota Law School Class of 2025. In his free time, he enjoys baking, painting and writing short stories.

College of Labor and Employment Lawyers

New Inductees

The following distinguished lawyers were elected Fellows of the College of Labor and Employment Lawyers in the Class of 2024:

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G. Micah Wissinger, New York, NY
Bettina Yip, San Francisco, CA

In addition, the Board of Governors elected two Honorary Fellows: The Honorable J. Michelle Childs, U.S. Court of Appeals for the DC Circuit, and Javier Ramirez, Deputy Director, Field Operations, Federal Mediation & Conciliation Service.

The College of Labor and Employment Lawyers

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Private Affirmative Action

Issues in Extending SFFA *to the Private Sector*

BY JOSEPH MCDONALD

The United States Supreme Court held that Harvard College and the University of North Carolina each violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and Title VI of the Civil Rights Act of 1964 in using race as a factor in their undergraduate admissions processes. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023) ("SFFA"). This spelled the end for state-funded affirmative action. Relying on *SFFA*, district courts have extended the decision ruling that similarly race-conscious programs violate the Fifth Amendment. The law is clear: State-funded affirmative action is unconstitutional. But what about affirmative action in the private sector under Title VII and 42 U.S.C. §1981? In this article, I will examine several cases attempting to extend *SFFA* into the private sector, Justice Gorsuch's theory supporting the strategy, and the standing issue that could result in widespread dismissals.

Title VII and § 1981: Government Officials Challenge Diversity Programs Without Success . . . So Far

SFFA stands for the proposition that state-funded affirmative action programs are unconstitutional. The decision has no legal effect on the private sector's diversity, equity, and inclusion (DEI) programs and policies. However, the decision is influential nonetheless. Just two weeks after the *SFFA* decision was published, thirteen state attorneys general signed and issued a warning to the CEOs of Fortune 100 companies, threatening "serious legal consequences" for continued race-based employment preferences and diversity policies." Specifically, the letter threatened litigation if companies employed racial quotas in hiring practices and preferences for contractors with diverse staff or minority leadership. The logic for the warning stemmed from Justice Gorsuch's concurrence in *SFFA* where he reasoned that principles of individual equality in Title VI are parallel to Title VII and other laws restricting race-based discrimination in employment and contracting.

Justice Gorsuch's theory is currently being litigated. In *Roberts & Freedom Truck Dispatch v. Progressive Preferred Ins. Co., et al.*, a plaintiff brought a class action suit against Progressive Insurance alleging that the company's grant program for Black entrepreneurs violates 42 U.S.C. § 1981. 1:23-cv-01597 (N.D. Ohio, 2024). At present, voluntary affirmative-action policies in the private sector are permissible under both Title VII and 42 U.S.C. § 1981. As the Equal Employment Opportunity Commission (EEOC) explained in its brief in *Roberts*, "Courts have interpreted section 1981 to allow voluntary race-based affirmative action as well, in employment and non-employment cases, guided by the framework established in the Supreme Court's Title VII affirmative-action caselaw. . . . Reasonableness governs the process: once a Title VII-covered employer concludes, through a reasonable self-assessment, that it has a reasonable basis to take affirmative action, it can then take action that is reasonable in relation to the problems disclosed by the self-analysis to address the effects of past discrimination."

Because the EEOC is charged by Congress to enforce Title VII and the agency maintains promulgated rules recognizing the reasonableness of affirmative action programs that remedy the effect of past racial discrimination, the EEOC's interpretation of voluntary affirmative action in the private sector is the guiding authority. However, the Supreme Court's several pending administrative law cases, including two consolidated cases whereby the Supreme Court could overturn the *Chevron* Doctrine, are all the more relevant to the future of affirmative action programs under Title VII and Section 1981.

Title VII and § 1981: Private Diversity Programs Remain Intact Despite Challenges

American Alliance for Equal Rights (AAER), an organization founded by Edward Blum who also founded SFFA, has spearheaded the effort to challenge diversity programs sponsored by law firms. AAER brought suit against Morisson & Foerster LLP, Perkins Coie LLP, and Winston & Strawn, alleging that each firm's diversity clerkship program violated 42 U.S.C.§ 1981. AAER voluntarily dismissed each case after each firm amended fellowship eligibility language to include race-neutral terms. Adams and Reese received a pre-litigation demand and ended their diversity fellowship program.

AAER is not alone in these challenges to legal institutions. The Wisconsin Institute for Law & Liberty brought suit against the State Bar of Wisconsin, alleging that their diversity clerkship program is unconstitutional and constituted compelled speech and compelled association. *Suhr v. Dietrich*, No. 2:23-cv-01697-SCD (E.D. Wis. 2023). The parties settled, with the State Bar of Wisconsin amending program eligibility to include race-neutral eligibility language. However, the State Bar released a statement assuring members that "the diversity clerkship program is continuing without any change in its operation." This appears to be the ongoing issue that conservative advocates face: The ongoing fear that even where eligibility language changes, DEI programs will remain race-conscious for the purpose of diversifying industry because affirmative action in the private sector is permissible.

Conservative groups have also challenged diversity programs outside of the legal industry. AAER brought suits against the Smithsonian Institute's Latino Museum Studies Program and Fearless Fund Management challenging private diversity programs. *E.g. American Alliance for Equal Rights v. Fearless Fund Management*, No. 23-13138 (11th Cir. 2023). In *Fearless Fund Management*, plaintiff's alleged that the defendant company's small business grant violated Title VII and § 1981 because it was only available to Black women. Plaintiff sought injunctive relief, which the

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district court granted reasoning that the § 1981 was not likely to succeed because the program constituted protected speech. However, the district court struggled to clarify the conflict of law created by *303 Creative* and *Runyon*. On appeal, the Eleventh Circuit reversed and granted AAER's motion for an injunction pending appeal, reasoning that the company did not provide expressive services and, "although the First Amendment protects the defendants' right to promote beliefs about race, it does not give the defendants the right to exclude persons from a contractual regime based on their race."

Do No Harm, a conservative medical advocacy group, has similarly filed suits against the National Association of Emergency Medical Technicians, the State of Montana, Vituity, and Pfizer.

Equal Protection Clause

Challenges under the Fifth and Fourteenth Amendment's Equal Protection Clause, while present, are outnumbered by the types of Title VII and Section 1981 challenges described above. AAER sued the Director of the National Museum of the American Latino, a part of the Smithsonian institute, alleging that the museum's internship program, in targeting Latino, Latina, and Latinx undergraduates, violates the Fifth Amendment's Equal Protection Clause. *American Alliance for Equal Rights v. Zamanillo*, No. 1:24-cv-509-JMC (D.D.C. 2024). The museum settled a month later and revised the eligibility requirements to include students of all races and ethnicities.

In *Mid-America Milling Company v. U.S. Department of Transportation*, the plaintiff alleged that the Department of Transportation's affirmative action program awarding contracts to minority-owned and woman-owned small businesses violates the Fifth Amendment's Equal Protection Clause. No. 3:23-cv-00072-GFVT (E.D. Ky. 2023). After initial litigation regarding a temporary restraining order and preliminary injunction, the case has reached briefing on a motion to dismiss for lack of standing.

In *Alliance for Fair Board Recruitment v. SEC*, the Fifth Circuit rejected a constitutional challenge to the SEC's approval of NASDAQ's Board Diversity Rules, which requires companies listed on Nasdaq's U.S. exchange to (1) publicly disclose board-level diversity statistics annually using a standardized template, and (2) have diverse directors or explain why they do not. 85 F.4th 226 (5th Cir. 2023). The plaintiff organization sought en banc review, after which 24 conservative state attorneys general filed amicus briefs supporting the request, arguing that the rule violates the Equal Protection Clause and states' rights.

Future Litigation May Be Limited Due To Standing

While *SFFA* created binding precedent overturning affirmative action under Title VI, the Court's discussion of membership organization standing appears to be a case-specific anomaly. The court found that SFFA had standing as an organization representative of its members for three reasons: (1) the members would otherwise have standing to sue in their own right; (2) the interests it sought to protect were germane to the organization's purpose; and (3) neither the claim nor the relief requested required the participation of individual members in the lawsuit. At the time of filing, SFFA identified itself as a non-profit organization with forty-seven members, but failed to identify a single member who would otherwise have standing to sue in their own right. Despite challenges to standing based on this failure to disclose a single qualified member at the time of filing, the Court chose not to further scrutinize or examine SFFA's membership or operations.

Conservative groups have relied upon this litigation strategy, often to their demise. For example, in *Do No Harm v. Pfizer*, a conservative medical advocacy group challenged Pfizer's diversity fellowship program, but the case was dismissed for lack of standing when the group failed to name at least one injured member. No. 1:22-cv-07908 (S.D.N.Y. 2022), *aff'd*, No. 23-15 (2d Cir. 2023). Plaintiff has petitioned for en banc review with four amicus briefs arguing that anonymity in sensitive cases with vulnerable plaintiffs is necessary and required disclosure violates the First Amendment. Dozens of live cases are addressing the issue of whether an anonymously or pseudonymously injured member can sufficiently establish an organization's standing. For example, in *American Alliance for Equal Rights v. Ivey*, the court ordered AAER to confidentially disclose the identity of "Member A," the alleged injured party, and submit briefing on why "Member A" should remain anonymous. No. 2:24-cv-00104-RAH-JTA (M.D. Ala. 2024).

Standing has taken center stage in challenges to affirmative action policies in the private sector and thus far, courts are more suspect of anonymous and pseudonymous members than the *SFFA* Court.

Conclusion

Challenges to diversity programs in all of their iterations are in limbo. Affirmative action programs under Title VII and Section § 1981 currently remain permissible, but circuit splits are bound to appear. Underneath these Title VII challenges is a tenuous future for *Chevron* and the EEOC's continued authority to promulgate rules permitting voluntary affirmative action programs in the private sector. And at the heart of these political efforts is a standing analysis suspicious of opaque advocacy organizations who bring suit under confidential pseudonyms. •

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The #MeToo Movement in Chess

The Battle is Now in Court

BY ALIAKSANDRA JAIN

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Chess is a sport recognized by the International Olympic Committee. Unfortunately, like many other sports, it suffers from insidious sexual harassment of female players and employees in the industry by their coaches, employers, and fellow players.

I should know. I first began competing in major chess tournaments at 9 years old. I hold a Woman FIDE Master title. As a child, I traveled to tournaments in different cities around the world, without parental supervision and with a group of 10-12 other players and our coach. I also happen to be an employment discrimination attorney.

The chess world is intense. A typical tournament lasts between one and two weeks. You stay in hotels filled with other chess players. You compete for long hours during the day, and in the evenings you study for the next game. You analyze other players' games and begin to idolize the really strong ones. You form deep bonds with other players and your chess community often becomes closer than your relatives or classmates at school.

Unfortunately, there was a dark side to these tournaments. There was little supervision between the games and at the hotels. Players were strongly motivated to excel in the sport, and some male players and coaches would use this dynamic to take advantage of young female players who looked up to them. When harassment did occur, there were few clear reporting channels.

While harassment has been a pervasive issue in chess for decades, only recently this behavior started to capture the public's attention.

Chess's version of the #MeToo movement peaked last year after Jennifer Shahade, a Woman Grandmaster and two-time U.S. Women's Chess Champion (among other impressive achievements, including hosting the chess category on *Jeopardy!*), tweeted allegations that Grandmaster Alejandro Ramirez sexually abused her and other female chess players, including at least one minor. The following month, *The Wall Street Journal* published a report describing eight women's allegations of abuse by Ramirez. More than a hundred female chess players have since spoken out or signed an open letter stating that they, too had experienced sexism or sexual violence by various actors in the world of chess.

After Shahade's viral tweet, the U.S. Chess Federation ("US Chess") permanently revoked Ramirez's membership in the federation. However, according to Shahade's lawsuit against US Chess (filed in July 2024 in New Jersey state court, later removed by defendants to the U.S. District Court for the District of New Jersey, 3:24-cv-07909-MAS-TJB), the organization was aware for years of Ramirez's misconduct yet failed to act. Shahade's complaint states that, "[a]s a result of [the] worship of the male Grand Masters and monetary big-name donors over those victimized, US Chess enabled the violent assaults on victim Shahade and others in the first instances[.]" The lawsuit also alleges US Chess, where Shahade was employed from 2006 to September 2023, most recently as an Officer and Director of Women's Programs, discriminated against her on the basis of gender and retaliated against her for her sexual assault complaints in violation of New Jersey Law Against Discrimination. After Shahade's tweet about Ramirez's assaults, she alleges US Chess retaliated against her through several tactics.

First, Shahade says she was lured into a "sham" mediation in order to get her to sign a non-disparagement agreement and an NDA, but, once she secured legal counsel, US Chess chose not to proceed with the mediation. In addition, Shahade claims US Chess's Board President at the time posted victim-blaming social media posts (one of which stated in relevant part: "Why didn't you file a formal complaint? … [I]if you were so certain about [Ramirez's] conduct, and you were one of those he had abused, isn't it on you to step up?"), and that the US Chess furthermore solicited, approved and republished an *American Chess Magazine* article rife with "intentional mistakes and reckless errors" to undermine Shahade and exonerate US Chess. According to the Complaint, the author of the article (who is one of the defendants in the lawsuit), at one point posted on his Facebook page: "Nothing like analysis to shut a feminist up."

Through her lawsuit, Shahade "seeks to stop the willful, wanton, reckless,

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intentional and gross conduct against Shahade, restore her public self-worth and her reputation [,and] hopes that in the future US Chess will right itself by finally and appropriately by responding to her victimization; and remedy and remediate its conduct that enabled women and minors to be assaulted." On August 20, 2024, Defendants US Chess and its former Board President answered Shahade's complaint largely denying the allegations and moved to dismiss one of Shahade's six causes of action.

As the chess community continues to follow Shahade's legal battle, her courage in coming forward has already reaped significant benefits as many female chess players have subsequently spoken up about their own heartbreaking experiences and demanded change. On January 1, 2024, US Chess adopted its Safe Play Policy, which, inter alia, requires tournament directors to undergo a mandatory core training from the U.S. Center for SafeSport as well as annual refresher trainings, and outlines procedures for reporting sexual and emotional misconduct and other violations.

While we still have a long way to go, I am heartened to see women like Shahade find the courage to speak out and create lasting change in sports and the workplace. •

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Calendar of Events

NOVEMBER 13–16 | 2024
18th Annual Section of Labor and Employment Law Conference
Marriott Marquis
New York, New York

OCTOBER/NOVEMBER | 2024
Trial Advocacy Competition
Brooklyn, Chicago and Los Angeles

JANUARY 25–26 | 2025 *(tentative)*
Law Student Trial Advocacy Competition Finals
New Orleans, Louisiana

JANUARY 30–FEBRUARY 1 | 2025
State and Local Government Bargaining and Employment Law Committee
MIDWINTER MEETING
Westin Resort
Puerto Vallarta, Mexico

FEBRUARY 5–8 | 2025
Employee Benefits Committee
MIDWINTER MEETING
Westin Savannah Harbor Resort
Savannah, Georgia

FEBRUARY 23–26 | 2025
Committee on Development of the Law Under the NLRA
MIDWINTER MEETING
Opal Sol
Clearwater Beach, Florida

FEBRUARY 25–28 | 2025
Committee on Practice and Procedure Under the NLRA
MIDWINTER MEETING
Opal Sol
Clearwater Beach, Florida

MARCH 4–7 | 2025
Workplace and Occupational Safety and Health Law Committee
MIDWINTER MEETING
Omni Rancho Las Palmas
Rancho Mirage, California

MARCH 5–7 | 2025
Railway and Airline Labor Law Committee
MIDWINTER MEETING
Royal Sonesta San Juan
San Juan, Puerto Rico

MARCH 18–21 | 2025
Employment Rights and Responsibilities Committee
MIDWINTER MEETING
Westin Resort
Puerto Vallarta, Mexico

MARCH 18–21 | 2025
National Symposium on Technology in Labor and Employment Law
Presented by the Technology in the Practice and Workplace Committee
Westin Resort
Puerto Vallarta, Mexico

MARCH 25–28 | 2025
National Conference on Equal Employment Opportunity Law
Presented by the Equal Employment Opportunity Committee
Fairmont San Francisco
San Francisco, California

MAY 4–8 | 2025
International Labor and Employment Law Committee
MIDYEAR MEETING
Westin Palace Madrid
Madrid, Spain

NOVEMBER 12–15 | 2025
19th Annual Section of Labor and Employment Law Conference
Hyatt Regency Denver at Colorado Convention Center
Denver, Colorado

NOVEMBER 4–7 | 2026
20th Annual Section of Labor and Employment Law Conference
Marriott Marquis
Washington, D.C.

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LOPER BRIGHT

CONTINUED FROM PAGE 1

deference. Justice Kagan dissented, joined by Justice Sotomayor and Justice Jackson.

The impact of this decision cannot be overstated. When Congress passes a statute, it unintentionally or intentionally leaves ambiguities within the law to allow for some room in its interpretation and implementation. Even if not gridlocked, Congress does not have the time or foresight to specify every possibility that may arise from the interpretation of a statute. The question is—who should decide what ambiguities mean: agencies, which are staffed by individuals who have years of expertise within their fields, or the courts? Do courts, for example, have the expertise and resources to determine how much nitrogen may be discharged by a wastewater treatment plant before it pollutes water to unsafe levels (*City of Taunton v. United States Environmental Protection Agency*, 895 F.3d 120 (1st Cir. 2018))?

Post-*Loper Bright*, court dockets will become heavier and more complicated. Judges and law clerks now regulate every issue that impacts Americans on a daily basis. *Chevron* opponents maintain that *Loper Bright* ensures less agency flip-flopping, but that cannot be accepted as true. Each administration will continue to implement its policy goals through its agencies, but now, every agency action will likely be stayed while it is litigated before different judges, resulting in different outcomes, and moves up to the Supreme Court for the final decision. This is not less flip-flopping—it is simply forced agency inaction until the next administration. The overturning of *Chevron* means less agency regulation for decades to come.

Loper Bright is not the only anti-administrative state decision released this term. On June 27, 2024, in *SEC v. Jarkesy*, the Supreme Court held securities cases involving civil penalties must be heard before a court that allows trial by jury, eliminating the possibility of bringing such cases before administrative tribunals. Days later on July 1st, in *Corner Post v. Board of Governors*, the Court expanded the ability of plaintiffs (*see* anti-regulation businesses) to sue agencies by finding that the 6-year statute of limitations for a claim under the APA does not begin to accrue until the plaintiff is injured by final agency action, not from the date of rule finalization. This means businesses can be created simply to dismantle decades-old agency regulations.

Although the public may not feel the influence of these decisions for years to come, the way the government operates has fundamentally changed. For employment lawyers, federal employment agencies impact much of the work we do. Consider every agency rule—from established rules such as the Department of Labor's white-collar exemption to newer regulations such as the NLRB's joint-employer rule—up for grabs. •

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