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Supreme Court Overturning Chevron Leaves a Wake of Regulatory Uncertainty for Employment and Energy Agency Actions

Summary of Supreme Court opinion in *Loper Bright Enterprises v. Raimondo* and *Relentless v. Department of Commerce*:[1]

On June 28, the Supreme Court overruled its landmark 1984 decision that created the *Chevron* deference doctrine, a precedent that guided how courts have interpreted ambiguity in federal statutes for the past 40 years.[2] By way of background, the Administrative Procedure Act (APA) empowers courts to review federal agencies' actions and invalidate agency actions that are either "arbitrary or capricious" or beyond an agency's "statutory jurisdiction, authority or limitations." The central question in *Chevron* was whether agencies or the courts should have the authority to resolve ambiguity created by statutory language. In that case, the Natural Resources Defense Council challenged how the Environmental Protection Agency (EPA) chose to define "stationary source" in creating a permit program under the Clean Air Act. The Supreme Court chose to defer to the EPA's definition of "stationary source" because, although the term was not explicitly defined in the statute, Congress had delegated authority to the EPA to implement the Clean Air Act. The Court determined that sometimes "legislative delegation to an agency is implicit rather than explicit" so the courts should not substitute their own construction of a statutory provision in place of a reasonable interpretation made by the agency. The *Chevron* Court reasoned that it was the role of agencies to make policy choices that Congress intentionally left to the agency or inadvertently did not resolve by legislation. The Court further reasoned that agencies were better suited than the courts to deal with statutory interpretation because agencies have specialized subject matter expertise and experience in weighing competing interests within a technical and complex regulatory field. *Chevron* established a two-step framework for courts to address ambiguity and gaps in statutes. In step one, courts were required to determine whether Congress had "directly spoken to the precise question at issue"[3] using "traditional tools of statutory construction."[4] If the courts could not determine a clear congressional intent, in step two, the court was required to assess whether the agency's interpretation was a "permissible construction of the statute,"[5] giving deference to reasonable agency interpretations. In recent years, *Chevron* deference had become more controversial and certain federal courts have issued opinions that weaken its framework. Last month, the Supreme Court ended *Chevron* deference in its entirety. The elimination of *Chevron* deference results from two cases, *Loper Bright* and *Relentless*, where commercial herring fisherman challenged a National Marine Fisheries Service (NMFS) rule that required herring fishing operators to have a government-certified observer onboard their vessels to monitor data related to the conservation and management of herring fishing and also required that the fisherman pay for the observers. The Magnuson-Stevens Fishery Conservation and Management Act (MSA) grants the NMFS authority to implement a fishery management program with rules that are "necessary and appropriate" for the conservation and management of herring fisheries. Fishing operators argued that while the MSA provides that the NMFS may require herring fishing vessels to carry government-certified observers, the statute did not authorize the NMFS to establish a rule that the observers be paid for by the operators of those vessels. Relying on the *Chevron* doctrine, the district court granted summary judgment in both cases in favor of the government because the MSA did not mandate who is required to bear the cost of the observers and the NMFS's interpretation of its authority was reasonable given the MSA mandate to implement the observers. The appellate courts upheld the lower courts' decision under the *Chevron* doctrine. Afterward, the Supreme Court granted certiorari on the issue of whether *Chevron* should be overruled or clarified. Writing for the majority, Chief Justice Roberts held that courts must

exercise independent judgment in interpreting statutes and may not defer to an agency's interpretation of a statute simply because the statute is ambiguous. The Court stated that the *Chevron* doctrine is inconsistent with the court's role to "say what the law is,"[6] and with the APA, which requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority.[7] The Court concluded that the *Chevron* doctrine prevents judges from exercising their constitutional duty to adjudicate cases and controversies.[8] Consequently, the Judiciary is prohibited from serving as a constitutional check on the Executive Branch.[9] The Court characterized the doctrine as calling for the views of the Executive Branch to supersede the Judiciary's judgment.[10] Additionally, the Supreme Court determined that the *Chevron* doctrine was completely "unworkable" because the first step of the framework requires an analysis of whether the issue involves a statutory ambiguity, and the term "ambiguous" had never been meaningfully defined.[11] The Court was not persuaded by arguments that federal agencies have special subject matter expertise concerning the statutes they administer and, thus, agencies' interpretations should be given deference. Chief Justice Roberts explained that the "[f]ramers anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by exercising independent legal judgment."[12] Elaborating, the majority explained that Congress also expects courts to handle technical statutory questions, with information from the parties and friends of the court, along with the agency's experience and informed judgment.[13] Justice Kagan dissented, referring to the *Chevron* doctrine as a longstanding cornerstone of administrative law that allowed the agency with the relevant expertise to interpret the statute and make policy choices as Congress had intended.[14] Her dissent, joined by two justices,[15] warned that this ruling gives the Judiciary power over every open issue, no matter how expertise-driven or policy-laden[16] and will cause a massive shock to the legal system.[17] The Supreme Court vacated the lower court decisions and remanded the judgments in the *Loper Bright* and *Relentless* proceedings.

Impact of Loper Bright and Relentless Decisions:

Without *Chevron*, regulatory uncertainty in many regulated industries will increase significantly. Although Chief Justice Roberts noted that prior cases that relied on *Chevron* will remain in place, [18] federal courts are no longer bound to defer to an agency's statutory interpretations. The following analysis focuses on the particular impact on the federal agencies that regulate labor and employment and energy laws.

Impact on Labor and Employment Agencies:

The end of *Chevron* deference has significant implications for various federal employment and labor agencies such as the Equal Employment Opportunity Commission ("EEOC"), National Labor Relations Board ("NLRB"), the United States Department of Labor ("USDOL") and Occupational Safety and Health Administration ("OSHA"). Federal employment and labor agencies have, for decades, promulgated expansive regulations and guidance to advance their interpretation of laws that oftentimes contain ambiguous and unclear mandates. Those regulations are sometimes intended to fill gaps in the laws Congress has passed, which in some cases appears to look more like legislation than enforcement guidelines. Now, as a result of *Loper Bright*, these agencies may publish fewer or less ambitious regulations. The *Loper Bright* decision may also affect ongoing challenges to recent controversial administrative regulations such as the Federal Trade Commission's rule banning non-compete agreements, EEOC's Final Rule regarding the Pregnant Workers Fairness Act, the USDOL's recently issued overtime rule, and OSHA's Walk Around Rule, which contains significant implications for union organizing efforts. The lack of *Chevron* deference will force employment and labor agencies to focus their arguments on the merits of their administrative rules, rather than rely on the deference previously provided to them under the *Chevron* doctrine. This, in turn, could change the outcome of these controversial rule challenges. Lastly, agency rules could conceivably receive inconsistent treatment based on the lack of deference now provided to such rules. As such, courts in one jurisdiction may reject an agency's interpretation of a rule while another jurisdiction may accept it. Employers should be aware of potential jurisdictional differences when they issue their policies to make sure they are in compliance with each Court's interpretation of such regulations. The overall impact of Court's decision is uncertain, but it is likely that there will be an increase in the number of challenges (and likely success rates of those challenges) to various rules and regulations issued by federal labor and employment agencies.

Impact on Energy Agencies:

As a result of the *Loper Bright* and *Relentless* decisions, the playing field between a federal agency and a party challenging that agency's action is likely to shift in favor of the challenging party. Given this shift, there could be a near-term uptick in regulatory litigation, with parties more willing to challenge an agency decision or action. Consequently, the current pace of energy project developments and investments may slow because energy project stakeholders and investors must now evaluate the increased risk of regulatory challenges to a rule or permit allowing a project to proceed and the time needed to navigate any such challenge. More generally, the increase in regulatory uncertainty could have a broader impact on the pace of rule promulgation by federal agencies. The potential for varied judicial interpretations across different circuits could lead to a patchwork of regulatory standards, while states may step in to fill regulatory gaps or assert their own rules. The United States Court of Appeals for the District of Columbia Circuit has historically been the forum in which petitioners have sought review of Federal Energy Regulatory Commission (FERC) orders and rulemakings–the end of *Chevron* deference could result in more parochial decisions on which petitioners will bring petitions for review in the first instance in different U.S. Circuit Courts of Appeals, hoping for a favorable result in their home circuit. This piecemeal approach could result in a lack of uniformity in the energy industry, making it more challenging for energy project stakeholders and investors to navigate the regulatory landscape. For instance, consider FERC's recent Order No. 1920, issued earlier this year,[19] which exemplifies the immediate impact of this regulatory landscape shift. Order No. 1920 introduced new requirements for how transmission providers plan, pay for, and design the nation's electric transmission grid. The recent rule has already been questioned in the wake of *Loper Bright*. Commissioner Mark Christie voiced skepticism about the Order's viability post-*Chevron* deference, arguing that FERC lacks congressional authority to make the reforms mandated in Order No. 1920. He stated that Order No. 1920 is almost certainly going to be struck down by courts now that the Supreme Court overturned *Chevron* because Order No. 1920 relies on legal authority that Congress never granted—and thus, Order No. 1920's "chances of surviving court challenges just shrank to slim to none."[20] Conversely, FERC Chairman Willie Phillips defended FERC's authority, asserting that the *Loper Bright* decision and the overruling of the *Chevron* doctrine do not affect FERC's authority to regulate regional transmission planning and cost allocation because those responsibilities fit squarely into the agency's authority under the Federal Power Act. Further, he noted that Order No. 1000, which itself was a landmark electric transmission planning and cost allocation rulemaking, is recognized as precedent through the *stare decisis* effect acknowledged in *Loper Bright*. One certain outcome of the *Loper Bright* and *Relentless* decisions is that federal agencies will need to be more disciplined in developing a record that supports their decision-making in all of their proceedings, particularly policy-oriented considerations, and in crafting orders that are more transparent and thoughtful than perhaps they have done in the past. The impact of the *Loper Bright* and *Relentless* decisions will continue to be felt across a number of regulated industries. Please contact our lawyers to discuss how that impact could affect your industry.

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[1] *Loper Bright Enterprises v. Raimondo*, No. 22-451 (June 28, 2024), argued together with *Relentless, Inc. v. Department of Commerce*, No. 22-1219 (June 28, 2024). [2] *See Loper Bright Enterprises v. Raimondo*, No. 22-451 at 1–2 (U.S. June 28, 2024) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984)). [3] *Id*. at 2 (citing *Chevron* at 842) [4] *Id*. at 19 (citing *Chevron* at 843, n.9) [5] *Id*. at 2 (citing *Chevron* at 843). [6] *Id*. at 7 (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)) [7] Section 706 of the APA requires courts reviewing agency actions to "decide all relevant questions of law and interpret constitutional and statutory provisions." *Id*. at 14 (quoting 5 U. S. C. § 706). [8] *Id*. at 7. [9] "The Framers structured the Constitution to allow judges to exercise that judgment independent of influence from the political branches." *Id*. at 7. [10] *Id*. at 9. [11] *Id* at 30. [12] *Id*. at 23. [13] *Id*. at 24. [14] *Id*. at 2 (Kagan, J., dissenting). [15] Justice Sotomayor joined and Justice Jackson joined as it applied to No. 22-1219. [16] *Id*. at 3 (Kagan, J. dissenting). [17] *Id*. at 24 (Kagan, J., dissenting). [18] *Id*. at 34. [19] *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation*, Order No. 1920, 187 FERC ¶ 61,068 (2024) [20] Statement, Commissioner Mark Christie's Statement Concerning Order No. 1920 and U.S. Supreme Court's Overruling of Chevron Deference (June 28, 2024), https://www.ferc.gov/news-events/news/commissioner-mark-christies-statement-concerning-order-no-1920-and-us-supreme

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