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# Client Alert

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# Loper Bright Enterprises v. Raimondo

## U.S. Supreme Court overrules Chevron and restores courts' obligation to exercise independent judgment

On June 28, 2024, in one of the last decisions of the Term, the U.S. Supreme Court issued its long-awaited decision in *Loper Bright Enterprises v. Raimondo*. The majority opinion is authored by Chief Justice Roberts and joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett. Justices Thomas and Gorsuch also filed separate concurring opinions. The dissent is authored by Justice Kagan and joined by Justices Sotomayor and Jackson.

**The Majority Opinion.** The Court's decision overrules the doctrine adopted in 1984 in *Chevron USA Inc. v. NRDC*, which held that courts should defer to an executive agency's reasonable interpretation of ambiguous statutory language. *Loper Bright* rejects that approach, finding that *Chevron* has "proved to be fundamentally misguided" and "unworkable." Op. 29-30. *Loper Bright* instead reverts to the understanding—dating back to the Constitution's Framers and reflected in the 1946 Administrative Procedure Act's bedrock requirements—that questions of statutory interpretation are issues of law that are properly decided by courts using "traditional tools of statutory construction," with no thumb on the scale in favor of the interpretive preferences of executive agencies. Op. 26, 35.

The majority decision grounds its analysis in the Constitution's separation of powers and the judiciary's obligation to exercise independent "judgment" in the impartial administration of the nation's laws. The Court's decision emphasizes the text of the Administrative Procedure Act, which is designed to impose a "check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in the legislation creating their offices." Op. 13 (citations omitted). In addition to prescribing procedures that agencies must follow, the Administrative

Procedure Act "delineates the basic contours of judicial review," with the understanding that reviewing courts "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. As the Court explains, the Administrative Procedure Act codifies the "unremarkable, yet elemental proposition dating back to *Marbury [v. Madison]*: that courts decide legal questions by applying their own judgment." Op. 14.

The obligation for a court to exercise independent judgment when interpreting a statute does not mean that the agency's views are irrelevant. Courts may "seek aid from the interpretations of those responsible for implementing particular statutes," as those interpretations can reflect "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Op. 16. But the *Loper Bright* majority emphasizes that more weight should be given to agency interpretations "issued contemporaneously with the statute at issue," which "have remained consistent over time," and which therefore reflect the agency's "longstanding practice." Op. 8, 16-17. In all events, it remains the judiciary's obligation to "use every tool at [its] disposal to determine the best reading of the statute and resolve the ambiguity," rather than blindly defer to the agency. Op. 23. According to the Court, in the "business of statutory interpretation, if it is not the best [interpretation], it is not permissible." *Id.* An administrative agency has no "special competence" in resolving statutory ambiguities and, as a result, courts should resolve questions of statutory interpretation without deferring to the preferences of executive branch officials. *Id.*

The Court's conclusion summarizes the case's essential holding:

*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the [Administrative Procedure Act] may not defer to an agency interpretation of the law simply because a statute is ambiguous.

Op. 35.

**The Concurrences.** In addition to joining the majority opinion, Justice Thomas and Justice Gorsuch both authored separate concurring opinions. Justice Thomas's concurrence emphasizes that *Chevron* deference violates the Constitution's separation of powers, because it both "curbs the judicial power afforded to courts" and "simultaneously expands agencies' executive power beyond constitutional limits." Op. 2. Justice Gorsuch's concurrence notes that, before *Chevron,* courts traditionally served in a neutral role, offering "independent judgments about 'what the law is' without favor to either side." Op. 1. His concurrence explains why overturning *Chevron* and returning "judges to interpretive rules that have guided federal courts since the Nation's founding" represents a "proper application" of the doctrine of stare decisis. Op. 2. According to Justice Gorsuch, "[s]tare decisis's true lesson today is not that we are bound to respect *Chevron*'s 'startling development,' but bound to inter it." Op. 34.

**The Dissent.** Justice Kagan's dissent, joined by Justices Sotomayor and Jackson, disagrees with most of the majority's analysis and rejects the view that courts should not defer to agencies when resolving interpretive disputes between those agencies and the parties they regulate. Unlike the majority opinion, the dissent expresses concern that judges will interfere with the work of executive agencies in circumstances where Congress intends them to fill in any gaps in statutes that exist or may arise in the future. Justice Kagan asserts that *Chevron* has "served as a cornerstone of administrative law" that allows executive agencies, instead of courts, to "give content to a statute when Congress's instructions have run out." Op. 1-2. According to the dissent, understanding what Congress would want is not merely a

question of interpreting statutory language, but also often an exercise of "scientific or technical subject matter" expertise. Op. 2. The dissent suggests that agencies are accountable to the President and thus, unlike courts, more responsive to the views of democratically elected majorities. It laments that the Supreme Court has turned "itself into the country's administrative czar." Op. 3.

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For those familiar with the Supreme Court and recent trends in constitutional and administrative law, the decision is neither surprising nor an existential threat to the modern administrative state as some commentators have suggested. Faced with expansive assertions of administrative power, the Justices have expressed concern that executive agencies are allowing regulation to be driven by politics, changing their interpretation of statutory requirements whenever there is a new President. Against that destabilizing trend, *Loper Bright* reaffirms the constitutional principle that, while Congress has authority to delegate rulemaking powers to executive branch agencies, those powers must be limited and expressly conferred and that Congress, not agencies, should decide when statutes should be updated to grant agencies new or expanded regulatory authority. In many of the cases that make their way to the Supreme Court, executive agencies are less likely to be performing the function of a neutral administrator that exercises expertise to balance competing interests in an even-handed fashion. Instead, rulemaking is increasingly used to accomplish broader policy and political objectives that both intrude on private rights and arise in circumstances where those objectives have failed to gain the support of Congress through the legislative process.

Some commentators have reacted to *Loper Bright* with the catastrophizing claim that it could eliminate or weaken thousands of regulations on the environment, healthcare, worker protection, telecommunications, the financial sector, and more. Those concerns appear to be exaggerated. The majority made clear that although courts are not to apply *Chevron* going forward, past decisions where courts have deferred to agency interpretations under *Chevron* will retain their precedential status, meaning that challenging those interpretations will require developing a careful legal strategy in a post-*Chevron* world. Moreover, the Supreme Court has not relied on *Chevron* for almost a decade, and experienced advocates turn to a broad range of canons and interpretive principles that apply before asking a court to weigh the reasonableness of an agency's interpretive position. While the Supreme Court's failure to rely on *Chevron* over the past several years has led to reduced emphasis on *Chevron* in lower courts, as Chief Justice Roberts noted, "because Chevron remains on the books ... lower courts—bound by even the Court's crumbling precedents—understandably continue to apply it." How much *Chevron* has been driving the outcome of cases before the lower courts is therefore unclear. The *Loper Bright* majority may have been exaggerating when it described *Chevron* as merely a "decaying husk with bold pretensions," but perhaps only slightly.

Nor is it accurate to suggest that *Loper Bright* will prevent administrative agencies from doing the work that Congress has tasked them to perform. *Loper Bright* does not purport to change the principle—set forth in *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983)—that an agency's factual determinations and applications of law to fact are entitled to respect when an agency is applying its technical expertise in making reasoned and non-arbitrary decisions. *State Farm* emphasizes that arbitrary-and-capricious review is "narrow" and "a court is not to substitute its judgment for that of the agency." *Id.* at 43. *Loper Bright* could be much more significant if some judges on lower courts were to see the decision as an invitation to revisit the deference that is applied to agency fact-finding during routine arbitrary-and-capricious review.

Rather than heralding that type of sea change in judicial review across all industries and sectors, however, *Loper Bright* is best viewed—at least in the short term—as providing a shift in emphasis that will be most relevant when agencies

seek to rely on novel or expansive interpretations of statutory language to exercise new authority that goes beyond Congress's intent. The longer-term consequences of the decision are more difficult to predict. *Chevron* came into being in a different era, at a time when courts were less textualist in their approach, not as many legal issues were as politicized as they are today, and regulatory agencies had a less prominent role in overseeing the economy and society as a whole. In contrast, *Chevron*'s demise comes at a time when the nation has experienced across recent administrations an unprecedented expansion in far-reaching assertions of regulatory authority over ever-larger swathes of society that is shaped significantly by which political party occupies The White House. *Loper Bright* is neither the first nor the last decision that will consider how courts should balance, on one hand, their constitutional obligations to protect private rights and exercise independent judgment and, on the other hand, the political and public demands of modern administrative government.

Despite the risks of overstating *Loper Bright*'s immediate impact, it is also true that the decision is a landmark decision of historic importance. A few observations seem reasonably clear:

***First***, the decision is likely to constrain—at least to some extent—more aggressive assertions of regulatory authority by agencies that rely on novel and expansive interpretations of statutory language. Agencies sometimes seek to expand the applicability of statutory requirements and restrictions on the view that when Congress fails to act, agencies are entitled to step in and take action that Congress has been unable or unwilling to take. When courts are forced to exercise independent interpretive judgment, they may be less likely to countenance such agency efforts. The decision is also likely to result in more stability and certainty over time, as it should reduce the likelihood of agencies changing their statutory interpretations for political reasons and merely because there has been a change in presidential administrations. For those concerned about administrative overreach, *Loper Bright* could be an important step toward restoring Congress's primary role in shaping the nation's laws.

***Second***, although *Loper Bright* is unlikely to spur the broad revolution in administrative litigation that some fear and others welcome, there may be particular areas of regulation where *Chevron*'s demise will have more immediate consequences. For instance, in administering federal healthcare programs, executive agencies have often relied on the cover provided by *Chevron* deference, defending their position not as the best interpretation of a statute, but as one within a range of reasonable alternatives that best furthers the agency's preferred outcomes. Those interpretative choices have often been used by agencies to limit judicial review and channel disputes through time-consuming and one-sided administrative processes. In these and other contexts, *Loper Bright* may spur reform, and regulated parties would be well advised to consult with experienced counsel.

***Third,*** it is unclear how agencies are likely to react to *Loper Bright* and the expectation that they will adopt statutory interpretations that embody their best judgment of Congress's stated intent (and not merely a preferred interpretation that falls within the range of reasonable alternatives). In recent years, many agencies have tried to avoid judicial review by moving away from rulemaking under the Administrative Procedure Act, and it is possible that *Loper Bright* could accelerate that trend. For example, some agencies (like the Securities Exchange Commission) target regulated parties with threats of large civil and criminal penalties that force settlements and consent decrees designed to shape industry-wide behavior. Others (like the Environmental Protection Agency) propose regulations that they recognize may be unlikely to survive judicial scrutiny but which they know, because courts are often hesitant to grant stays, will force industry-wide changes in behavior that will last even if the regulations are ultimately struck down and vacated. And still others (like the Food and Drug Administration) try to force regulatory change through supposedly non-binding "guidance" documents and policy statements that agency officials insist are immune from judicial review even though, as a practical matter, regulated parties have little choice but to comply. These forms of agency action were increasingly common even

under *Chevron*, and it would be unsurprising to see agencies rely on them and other ways of avoiding judicial review—especially because agencies that choose to proceed through notice-and-comment rulemaking will no longer be rewarded with *Chevron* deference for their statutory interpretations.

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*Loper Bright* is an important decision that confirms the Supreme Court's commitment to textualism and to a robust role for the federal judiciary in overseeing and constraining the operations of the administrative state. As more and more parts of society and the economy are subject to far-reaching and often politically contested regulation, *Loper Bright* affirms the importance of the Constitution's separation of powers, the central role for Congress in shaping the nation's laws, and the judiciary's essential role in protecting constitutional rights. *Loper Bright* may present an opportunity for pushing back against executive overreach, but how it applies in particular cases and whether it augurs meaningful reform remains to be seen.

Litigating administrative law cases is rarely a straightforward proposition. Even putting aside questions of deference under *Chevron* and *Loper Bright*, litigating cases when government agencies are involved almost always requires a sophisticated litigation strategy that understands the nuanced and often underappreciated logical connections between constitutional principle and existing administrative law doctrine. Litigation involving executive agencies rarely occurs on an even playing field, as agencies are the beneficiaries of numerous informal and formal presumptions applied by courts in their favor. It is thus increasingly the case that when either seeking to challenge burdensome regulations, or seeking to support regulations that may be challenged by others, parties need to consult with a broad team of industry experts, experienced regulatory specialists, and strategic constitutional and appellate litigators. Bringing together these different areas of expertise is often essential to developing a successful litigation strategy, especially when landmark cases such as *Loper Bright* open new opportunities and arguments for challenging executive overreach.