THE NEGATIVE IMPLICATIONS OF OVERTURNING THE *CHEVRON* DOCTRINE

Michaela Brunnabend, Staff Editor, Vol. 31[1]

On June 28, 2024, the Supreme Court of the United States issued its decision in *Loper Bright Enter. v. Raimondo*, where the Court overturned the 40-year-old *Chevron* doctrine.[2] The central question considered was how much deference should be given to a federal agency's interpretation of a statute.[3] Pursuant to *Chevron v. NLRB*, federal courts were originally required to confront two questions when a statute was ambiguous.[4] First, "[] whether Congress has directly spoken to the precise question at issue."[5] When Congress's intent is clear, the court and agency must effectuate Congress's "unambiguous expressed intent."[6] However, if a court finds "Congress has not directly addressed the precise question at issue," then the court looks to see if the agency's interpretation is based on a "permissible construction of the statute."[7] In other words, federal courts will defer to the agency's interpretation, so long as it is a reasonable construction of a statute.[8] In all, federal courts have cited Chevron nearly 18,000 times, making it one of the most pivotal decisions instructing modern administrative law practice.[9]

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[2] Loper Bright Enters., et. al. v. Raimondo Sec'y of Com., 144 S. Ct. 2244 (2024); Amy Howe, *Supreme Court Strikes Down Chevron, Curtailing Power of Federal Agencies*, SCOTUSBLOG (June 28, 2024), https://www.scotusblog.com/2024/06/supreme-court-strikes-down-chevron-curtailing-power-of-federal-agencies/.

[3] *Loper Bright Enters.*, 144 S. Ct. at 2254.

[4] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

[5] *Id.*

[6] *Id.* at 842–43.

[7] *Id.* at 843.

[8] Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075, 1079 (Aug. 2019).

[9] Howe, *supra* note 2.

The Court's decision in *Loper* declared that if a statute is found to be ambiguous, federal courts no longer are required to defer to agency interpretation; instead, "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority."[10] Given this independent judgment, courts must determine what the "best reading" of the statute is—that is, "'the reading the court would have reached' if no agency were involved."[11] The Court added that executive branch decisions may aid in determining whether an agency has acted within its authority.[12]

I. WHAT ARE FEDERAL ADMINISTRATIVE AGENCIES?

Federal agencies are congressionally created organizations providing rules and guidance to clarify and effectuate statutory goals.[13] Federal agencies gain authority when Congress enacts a statute delegating legislative or executive authority to address a specific area of activity or address a particular problem.[14] Congress has delegated its authority for nearly 100 years, establishing over 400 different agencies.[15] These agencies are subject to the rules outlined in the 1946 Administrative Procedure Act ("APA").[16] The Act defines two core agency actions: rulemaking and adjudication.[17] Federal agencies are subject to rules that govern rulemaking and adjudication including undergoing an open, public process prior to issuing a final rule.[18]

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[10] Loper Bright Enters. et al. v. Raimondo Secretary of Commerce, 144 S. Ct. 2244, 2273 (2024).
[11] *Id.* at 2266 (quoting *Chevron*, 467 U.S. at 843 n.11).
[12] *Id.* at 2273.
[13] Office of the Federal Register, *A Guide to the Rulemaking* Process, FEDERAL REGISTER, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last visited July 18, 2024).
[14] *Id.*
[15] Christina Pazzanese, *'Chevron Deference' Faces Existential Test*, THE HARVARD GAZZETTE (Jan. 16, 2024), https://news.harvard.edu/gazette/story/2024/01/chevron-deference-faces-existential-test/.
[16] Symposium, *The Lost World of the Administrative Procedure Act: A Literature Review*, 28 GEO. MASON. L. REV. 733, 733 (2021).
[17] *Id.*
[18] Pazzanese, *supra* note 15.

Judicial review is also detailed in the APA.[19] Under the APA, federal courts have the authority to review an agency's action if Congress made the action "reviewable by statute" or if it is a "final agency action for which there is no adequate remedy in a court."[20] Judicial review is only precluded if a statute bars judicial review or "agency action is committed to agency discretion by law."[21]

II. NEGATIVE IMPACTS OF THE LOPER DECISION

In the wake of the *Loper* decision, the question now is what are the implications of *Loper*? The majority opinion stated that overturning *Chevron* will not affect previous cases that relied on the framework.[22] However, the decision drastically alters how federal agencies interpret statutes and promulgate rules.

Like the *Chevron* decision in 1984, *Loper* will redefine how the federal government tackles issues relating to environmental matters.[23] Rules recently promulgated will likely be challenged in the courts.[24] These include regulations addressing fossil fuel emissions for power plants, corporate fuel standards, Toxic Substances Control Act risk evaluations, and wildlife protections.[25] Moreover, because environmental protections are based on decades-old law, the *Loper* decision will make it harder for agencies to use older environmental laws to tackle modern-day problems such as climate change.[26]

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[19] 5 U.S.C. §§ 701–706.
[20] *Id.* at § 704.
[21] 5 U.S.C. §701(a).
[22] Loper Bright Enters., et al. v. Raimondo Secretary of Commerce, 144 S. Ct. 2244, 2253.
[23] Duke McCall et al., *After Chevron: Environmental Law May Face Hurdles*, LAW360 (July 9, 2024) https://www.law360.com/articles/1856014/after-chevron-environmental-law-may-face-hurdles.
[24] *Id.*
[25] *Id.*; Maxine Joselow, *What the Supreme Court Chevron Decision Means for Environmental Rules*, WASH. POST (June 28, 2024), https://www.washingtonpost.com/climate-environment/2024/06/28/supreme-court-chevron-environmental-rules/.
[26] McCall et al., *supra* note 23.

The *Loper* decision will also affect healthcare policies and the decisions made by agencies like the Food and Drug Administration (FDA), the Center for Disease Control (CDC), the U.S. Department of Health and Human Services (HHS), and the Centers for Medicare & Medicaid Services (CMS).[27] Every year these agencies promulgate rules addressing incredibly technical and scientific matters.[28] In their amicus brief to the Supreme Court, the American Cancer Society asserted, "the resulting uncertainty [of overturning *Chevron*] would be extraordinarily destabilizing . . . to the operational and financial stability of the country's health care system as a whole."[29] Specific healthcare regulations that may now be susceptible to legal challenges include the CMS's minimum nurse-staffing standards for long-term care facilities that participate in Medicare and Medicaid and the rule prohibiting disclosure of personal healthcare information relating to lawful reproductive healthcare.[30]

The *Loper* opinion will also affect civil rights.[31] Agencies benefited from the *Chevron* analysis as it provided the necessary flexibility to ensure agencies are able to "act nimbly in the face of evolving threats to civil rights crafted to avoid detection."[32] Challenges to protections have already begun. For example, the State of Florida challenged new rules to the Affordable Care Act ("ACA") prohibiting ACA coverage providers from denying gender-affirming care and procedures "if the denial or limitation is based on an individual's sex assigned at birth, gender identity, or

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[27] Miranda A. Franco & Robert H. Bradner, *What Does the Overturning of Chevron Mean for Healthcare?*, HOLLAND & KNIGHT (July 3, 2024), https://www.hklaw.com/en/insights/publications/2024/07/what-does-the-overturning-of-chevron-mean-for-healthcare.

[28] *Id.*

[29] Brief for American Cancer Society, et al. as Amici Curiae Supporting Respondents, Loper Bright Enters. v. Raimondo Sec'y of Com., 144 S. Ct. 2244 (2024) (No. 22-45), 2023 WL 6297549, at *22.

[30] *Medicare and Medicaid Programs: Minimum Standards for Long-Term Care Facilities and Medicaid Institutional Repayment Transparency Reporting Final Rule (CMS 3442-F)*, CMS: NEWSROOM (Apr. 22, 2024), https://www.cms.gov/newsroom/fact-sheets/medicare-and-medicaid-programs-minimum-staffing-standards-long-term-care-facilities-and-medicaid-0; *see also* Franco & Bradner, *supra* note 27.

[31] Brief for Lawyers' Committee for Civil Rights Under Law as Amici Curiae Supporting Respondents, Loper Bright Enters. v. Raimondo Sec'y of Com., 144 S. Ct. 2244 (2024) (No. 22-451) at *19.

[32] *Id.*

gender otherwise recorded."[33] In other words, the rule explicitly mandates that covered healthcare providers may not turn away patients from receiving emergency care, deny the coverage of hormone replacement therapy, and deny fertility care or coverage for same-sex couples based on the gender assigned at birth.[34]

Despite the historical and scientific evidence demonstrating the complexity of sex and gender, a federal district court applied its own interpretation and limited the reach of the protections.[35] Citing *Loper*, the Middle District of Florida granted the preliminary injunction and stopped the rule from going into effect in Florida.[36] The court stated the "whole point of having a written statute is 'every statute's meaning is fixed at the time of enactment[].'"[37] By the court's reasoning, "on the basis of sex" is a fixed meaning that strictly incorporates men and women, not the "interpretation of the federal mandate."[38]

Aside from regulations relating to the environment, health care, and civil rights, the *Loper* decision will also impact protections for workers. A recent example is the decision to halt the Federal Trade Commission's (FTC) ban on non-compete agreements.[39] In April 2024, the FTC announced a rule banning non-compete agreements except for individuals in senior executive positions.[40] The rule sought to address issues pertaining to the harmful effects of these agreements

[33] Florida v. HHS, No. 8:24-cv-1080-WFJ-TGW, 2024 U.S. Dist. LEXIS 117619, at *4 (M.D. Fla. July 3, 2024).
[34] Culleen Peele, *Biden-Harris Administration Finalize Rule to Strength Affordable Care Act Protections*, HUMAN RIGHTS CAMPAIGN (Apr. 26, 2024), https://www.hrc.org/press-releases/biden-harris-administration-finalizes-rule-to-strengthen-affordable-care-act-protections-including-health-coverage-for-lgbtq-americans.
[35] *See* Surya Monro, *Non-binary and Genderqueer: An Overview of the Field*, INT. J. TRANSGEND., 2019 Vol. 20 No. 2-3, 126–131 (Jan. 21, 2019).
[36] *HHS*, 2024 U.S. Dist. LEXIS 117619, at *52.
[37] *Id.* at *24.
[38] *Id.* at *23–24.
[39] *See* Ryan LLC v. FTC, 2024 U.S. Dist. LEXIS 148488 (N.D. Tex. July 3, 2024).
[40] *FTC Announces Rule Banning Noncompete*, FED. TRADE COMM'N. (Apr. 23, 2024) https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes.

on labor, product creation, and services.[41] Based on research and empirical evidence, non-compete agreements "negatively affect competition in labor markets, [suppress] earnings for workers across the labor force—including . . . workers not subject to non-competes."[42] Further, "research has also shown that non-competes tend to negatively affect competition in product and service markets, suppressing now business formation and innovation."[43]

In July of 2024, the United States District Court for the Northern District of Texas issued a memorandum opinion and order halting the enforcement of the FTC's regulation.[44] Citing *Loper*, the court stated the FTC regulation banning non-competes exceeded the agency's statutory authority and concluded the text and structure of the FTC's enabling statute does not allow for "substantive rulemaking with respect to unfair methods of competition[]"[45]

III. CONCLUSION

In all, the decision in *Loper* transforms the administrative landscape and enhances the power of the federal courts. Environment, healthcare, civil rights, and other protections are more vulnerable than ever before. Reasonable agency interpretation based on expertise and experience will no longer be the default. Instead, federal courts will be tasked with deciding what the best reading of the statute is without having to consider an agency's findings or conclusions. Though not perfect, *Chevron* deference provided agencies the necessary leeway to efficiently interpret congressional acts based on complex, technical knowledge, and experience. Overall, the *Loper*

[41] Non-Compete Clause Rule, 89 FED. REG. 38342, at 5 (proposed May 7, 2024) (to be codified at 16 C.F.R. pt. 910), https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete-rule.pdf.
[42] *Id.*
[43] *Id.* at 6.
[44] *Ryan LLC*, 2024 U.S. Dist. LEXIS 148488, at *13
[45] *Id.* at 19–20.

decision will negatively impact and weaken the regulatory process and ultimately hinder agency efforts to address the concerns of the American public.