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Loper Bright 2.0

(Revisiting the impact of the Supreme Court's decision, one year later)

James Kezele
Moderator
KEATING MUETHING & KLEKAMP PLL
Cincinnati, OH
jkezele@kmklaw.com

Byrona J. Maule
Moderator
PHILLIPS MURRAH P.C.
Oklahoma City, OK
bjmaule@phillipsmurrah.com

Richard A. Latta
STAFFFORD ROSENBLUM LLP
Madison, WI
rlatta@staffordlaw.com

Introduction

The Supreme Court's decision in *Loper Bright Enterprises v. Raimondo,*[1] significantly reshaped the administrative law landscape by ending the long-standing practice of *Chevron* deference. Agencies can no longer rely on courts to defer to their reasonable interpretations of ambiguous statutes, which shifts more interpretive authority back to the judiciary. As a result, courts now are expected to engage directly with statutory text rather than defaulting to agency expertise. Although this change is only a year and a half old, it already has invited increased challenges to agency action and led to less regulatory flexibility and more judicial involvement in questions that were once primarily resolved by those not long ago deemed by the Supreme Court to be "experts" in their various fields, administrative agencies.

In a year and a half, *Loper Bright* has already been cited 1,996 times in cases, 3,005 times in various appellate court documents, and 935 times in various trial court documents. In the environmental context, Clean Air Act and Clean Water Act interpretation, NEPA, and permitting matters are at the forefront of *Loper Bright* challenges. In the employment context, employment related regulations promulgated by the Department of Labor and National Labor Relations Board are amongst many of those rules now targeted and facing increased legal challenges. Regarding federal taxes (meaning taxes administrated by the United States IRS), if there is a tax regulation that impacts your business in an unacceptable manner, *Loper Bright* provides an effective way to challenge the regulation. Except for a notable exception (see below regarding *Varian Medical Systems*), when it comes to challenging federal tax regulations it may require litigating until one is in the Article III federal courts (that is, the U.S. District Court, U.S. Court of Appeal or the U.S. Supreme Court) to hear meaningfully a *Loper Bright* challenge to a federal tax regulation. In bringing challenges, plaintiffs are relying on the Supreme Court's decision in *Loper Bright* to argue that courts may not defer to an agency's interpretation of ambiguous statutory provisions. As a result, agency interpretations that in the past received *Chevron* deference, are now subject to more searching judicial review based on the statutory text.

Loper Bright Enterprises v. Raimondo, explained.

"Chevron is overruled." U.S. Supreme Court in Loper Bright.[2] *Loper Bright* involved a challenge to a decision by the New England Fishery Management Council and the National Marine Fisheries Service (NMFS) to use at-sea observers to gather data about the Atlantic herring fishery. Under this data gathering plan, the largest fishing vessels in the fishery were required to bear some of the costs of obtaining that data. The fishing companies affected by this rule sued the NMFS arguing that the Magnuson-Stevens Act did not give NMFS the authority to require fishermen to pay for observers to monitor their use of public waters.[3]

In *Loper Bright*, the Supreme Court finally overruled the *Chevron* doctrine, holding that it was inconsistent with the Administrative Procedure Act (APA). This decision reclaimed interpretive control for the judicial branch. Writing for the majority, Chief Justice Roberts held that "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority," and "courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."[4] According to Justice Roberts, there is a *best reading* of every statute, which is the reading that the court would have reached if there were no agency involved. Per Justice Roberts, it "makes no sense to speak of a 'permissible' interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible; no other reading is permissible."[5]

In his majority opinion, Chief Justice Roberts did not pull punches, declaring that *Chevron* had not "been the sort of 'stable background' rule that fosters meaningful reliance,"[6] but instead had become a "decaying husk" of "crumbling precedents."[7]

Despite those criticisms, the Supreme Court *did* preserve the *option* for courts to consider agencies' views

in determining the "best reading" of a statute. The *Loper Bright* majority affirmed the Supreme Court's 1944 decision in *Skidmore v. Swift* , explaining that the "'interpretations and opinions' of the relevant agency, 'made in pursuance of official duty' and 'based upon . . . specialized experience,' 'constitute[d] a body of experience and informed judgment to which courts and litigants [could] properly resort for guidance,' even on legal questions."[8] Therefore, "'[th]e weight of such a judgment in a particular case,' the Court observed, would 'depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'"[9] In other words, courts may - but are not required to – consider an agency's interpretation.

However, and for clarity, the *Loper Bright* ruling has two (2) notable limitations: (1) the ruling is limited to agency actions/lawsuits premised on statutory ambiguity; and (2) the previous cases that were decided under the *Chevron* doctrine "are still subject to statutory *stare decisis*."[10] Put differently, if there is no statutory ambiguity, then agency deference still is applicable and previous *Chevron*-dependent cases are not subject to being overturned. Notwithstanding those limitations, the end of *Chevron* deference has significant implications for all agency rulemaking under the APA. Consequently, when crafting legislation, Congress will need to be more careful and explicit about what and how it's directing regulators to address an issue.

Environmental Law After Loper Bright: Establishing Doctrine Specific Strategy Across the Environmental Regulatory Landscape

Introduction

This paper analyzes the impact of the Supreme Court's decision *in Loper Bright Enterprises v. Raimondo* on environmental law and environmental rulemaking, with a focus on how courts now evaluate statutory interpretation, how other deference doctrines continue to operate, and where the near-term litigation and regulatory risks lie for environmental agencies and regulated entities. Here, we also synthesize Supreme Court and federal-court treatments that reference *Loper Bright* and distill practical implications for agency rulemaking and litigation strategy in the environmental domain.[11]

Loper Bright's Elimination of *Chevron* and the Shift to Independent Judicial Judgment

Loper Bright overruled *Chevron* deference and requires courts to exercise independent judgment in interpreting statutes administered by federal agencies, including cornerstone environmental statutes such as the Clean Air Act, the Clean Water Act, and the National Environmental Policy Act. Courts must apply the "traditional tools of statutory construction" and select the best reading of the statute without deferring to an agency's interpretation merely because the statute is ambiguous. This recalibration shifts interpretive primacy decisively to the judiciary, while still allowing agency views to play a persuasive—rather than controlling—role.[12]

Critically, *Loper Bright* does not displace all forms of deference. Deference to agency factfinding remains intact, and doctrinal space persists for deference frameworks distinct from *Chevron*, including *Skidmore*[13] (weight based on the power to persuade) and *Auer*[14] (deference to an agency's reading of its own regulations), subject to each doctrine's limits and prerequisites. This leaves a more nuanced, doctrine-specific landscape in which statutory interpretation is *de novo*, while other forms of agency expertise may still matter.[15]

Supreme Court References to *Loper Bright* in Environmental Cases

Since *Loper Bright*, Supreme Court environmental cases have referenced the decision primarily for general interpretive principles rather than as a controlling basis for outcomes. For example, in *Seven County Infrastructure Coalition v. Eagle County, Colorado*, which addressed NEPA compliance, the Court's analysis emphasized NEPA's deferential review of environmental impact statements rather than relying on *Loper Bright* to resolve statutory questions. The decision illustrates that while *Loper Bright* informs the interpretive frame, the operative standards of review embedded in specific environmental statutes or doctrines still may drive outcomes.[16]

Similarly, in *City & County of San Francisco v. Environmental Protection Agency*, a case involving Clean Water Act permitting issues, the Court referenced *Loper Bright* but did not ground its holding in the decision's rejection of *Chevron*.[17] The case signals that conventional environmental-law questions—such as programmatic permit conditions and remedial authorities—may turn on statute-specific structures and evidentiary records more than on global administrative law overhauls, even in the *Loper Bright* era.[18]

In *Diamond Alternative Energy v. Environmental Protection Agency*[19], the Court's resolution focused on standing rather than statutory interpretation, limiting the role that *Loper Bright* could play. This underscores that threshold justiciability questions, rather than interpretive conflicts, may still determine case outcomes independent of any deference regime.[20]

Federal Courts: De Novo Statutory Interpretation in Clean Air Act Litigation

Federal courts have actively implemented the *Loper Bright* mandate in Clean Air Act cases. In *U.S. Sugar Corp. v. EPA*, the D.C. Circuit articulated *Loper Bright*'s core rule: the APA requires courts to construe statutes *de novo*, without *Chevron*-style deference, and to determine the best reading using traditional interpretive tools. The court also emphasized that Clean Air Act judicial review is "essentially the same" as APA review, reinforcing that statutory-interpretation questions under the Clean Air Act are for the courts to decide independently.[21]

This shift has practical consequences for both EPA and litigants. Arguments must now engage the text, structure, context, and history of the statute at a granular level to persuade courts of the best reading, rather than asking courts to accept an agency's reasonable interpretation as sufficient. In turn, EPA preambles and response-to-comments documents must foreground statutory analysis that anticipates textual challenges and demonstrates why the agency's interpretation is the most persuasive, not simply a reasonable one.[22]

SIPs Nonattainment Designations, and Reframed Litigation Theories

The *Loper Bright* framework is also shaping litigation over State Implementation Plans (SIPs) and NAAQS-related designations. In *Tex. v. EPA*, the Fifth Circuit's discussion reflects a post-*Loper* realignment in which arguments formerly cast as "plain language" claims are being recentered on true statutory interpretation disputes rather than on evidentiary quarrels about EPA's record treatment. The lesson is that parties challenging (and defending) EPA decisions must reposition their advocacy to foreground statutory meaning, with evidentiary issues taking a supporting rather than lead role.[23]

What Survives *Loper Bright*: *Skidmore* and *Auer*

Even as *Chevron* is gone, courts have clarified that *Skidmore* deference remains available. Under *Skidmore*, the weight accorded to an agency's view turns on its thoroughness, consistency, and the quality of its reasoning. Environmental agencies therefore still benefit when they demonstrate technical expertise and provide transparent, well-reasoned interpretations that earn persuasive weight. Skidmore can play a consequential role in complex environmental programs where specialized knowledge informs the statutory context.[24]

Courts also continue to apply *Auer* (or *Seminole Rock*) deference when agencies interpret their own regulations, rather than statutes. In environmental enforcement and permitting contexts—where compliance determinations often hinge on an agency's reading of its regulations—*Auer* can remain outcome-determinative if the regulation is genuinely ambiguous, the agency's interpretation is authoritative and reasonable, and the interpretation reflects the agency's fair and considered judgment. These conditions—and the Supreme Court's refinement of *Auer* in other cases—mean *Auer* is neither automatic nor universal, but it survives *Loper Bright*.[25]

Retroactivity and Case Posture

Courts are parsing the retroactive reach of *Loper Bright*. In *Compass Laboratory Services v. Kennedy*, the district court held that *Loper Bright* does not retroactively undermine earlier decisions that never engaged in a

Chevron analysis to start. By contrast, where *Chevron* was explicitly applied and an appeal was pending when *Loper Bright* issued, the posture may be different. The key is whether *Chevron* was material to the original ruling and whether the case remains open to reconsideration of interpretive methodology.[26]

Implications for Environmental Rulemaking

For environmental rulemaking, *Loper Bright* recalibrates both drafting and litigation risk:

- Agencies must build rules on statutory interpretations that can withstand *de novo* judicial review, anchoring rationales in text, structure, and history and explicitly addressing competing readings. Preambles should articulate why the agency's reading is the best construction, not just a reasonable choice among many.[27]
- Technical and scientific expertise still matters—substantially—for *Skidmore* weight and for sustaining factfinding, but expertise must be mobilized within a persuasive statutory analysis rather than as a substitute for it. Agencies should leverage their technical record to illuminate statutory terms, context, and policy fit in service of the best-reading argument.[28]
- Where regulations—not statutes—carry the load (e.g., program implementation and compliance determinations), agencies should consider whether *Auer* is available and ensure that any interpretive positions satisfy prerequisites for deference, including consistency, authoritativeness, and reasonableness.[29]
- Program-specific review standards, such as NEPA's approach to environmental impact statements, continue to shape outcomes and can coexist with *Loper Bright*'s global interpretive mandate. Agencies should calibrate their records and explanations to the statute-specific standards that courts apply, even as statutory interpretation proceeds *de novo*.[30]

Implications for Litigation Strategy

For petitioners challenging environmental rules or permitting actions, the most effective arguments will be structured as rigorous textual and structural analyses, supported by legislative history and statutory purpose as appropriate, and attentive to the Supreme Court's and circuits' evolving canons of interpretation. Demonstrating that the agency's reading is not just suboptimal, but also contrary to the best reading would now be the central goal.[31]

For agencies and respondents, success will turn on presenting a comprehensive statutory case for the agency's position, channeling expertise into persuasive reasoning and addressing alternative readings offensively. Where appropriate, litigants also should preserve and brief *Skidmore* and *Auer* pathways, including demonstrating why the agency's position warrants persuasive weight or qualifies for deference to regulatory interpretation.

Conclusion

Loper Bright's elimination of *Chevron* deference reorients environmental law toward judicially controlled statutory interpretation, while preserving meaningful roles for agency expertise under *Skidmore* and for regulatory-interpretation deference under *Auer*. Supreme Court environmental decisions have so far cited *Loper Bright* for interpretive framing rather than as the fulcrum of outcomes, while federal appellate and district courts—especially in Clean Air Act disputes—are operationalizing *de novo* interpretation in ways that reshape both rulemaking and litigation. The medium-term result is a premium on textual rigor, transparent reasoning, and doctrine-specific strategy across the environmental regulatory landscape.[32]

Employment Law After Loper Bright: A Changing Landscape

The Supreme Court's decision in *Loper Bright* has fundamentally altered the employment law landscape by dismantling long-standing deference to administrative agencies. As a result, regulations that for decades governed everything from the EEOC right to sue letters, to how tipped employees are paid, are now vulnerable to being challenged and, in some cases, invalidated, making it harder for employers to plan with certainty. At the same time, the overturning of certain regulations has shifted aspects of the landscape in a more employer-friendly direction.

Prichard v. Long Island University [33]

In *Prichard v. Long Island University,* Cecilia Prichard ("Prichard"), the plaintiff, was employed by Long Island University as a financial aid counselor and was terminated after exhausting her available Family Medical Leave Act ("FMLA") leave following a kidney transplant. She filed a disability discrimination charge with the Equal Employment Opportunity Commission ("EEOC") under the Americans with Disabilities Act ("ADA"). At her request, pursuant to 29 C.F.R. § 1601.28(a)(2), the EEOC issued a right to sue letter only fifty-seven (57) days after the charge was filed, stating that it was unlikely to complete its investigation within 180 days.[34] Prichard then filed suit alleging violations of the ADA, as well as various state and city human rights laws.

The University moved to dismiss, arguing that the right to sue letter was invalid because Title VII, which supplies the ADA's procedural requirements, only authorizes such letters after the EEOC dismisses a charge or after 180 days have passed.[35] The court agreed, holding that the EEOC exceeded its statutory authority by issuing a premature right to sue letter.

The court declined to defer to the EEOC's regulation permitting early right to sue letters and concluded that the statutory text unambiguously requires a 180-day waiting period unless the charge is dismissed.[36] Central to the court's reasoning was the Supreme Court's decision in *Loper Bright,* which reaffirmed that courts, not agencies, are responsible for determining the meaning of statutes. The court explained that earlier decisions upholding the EEOC's regulation allowing early right to sue letters relied on *Chevron* deference. In those previous decisions, the courts deferred to the agency's interpretation of their enabling statute, as was required by *Chevron.* These interpretations are no longer influential after *Loper Bright*. Applying its independent textual analysis, the court concluded that the statute's text unambiguously limits the issuance of right to sue notices to the circumstances expressly identified by Congress, and that the EEOC's regulation conflicts with that text.[37]

Accordingly, the court dismissed Prichard's ADA claim without prejudice, directed the EEOC to reopen the charge, and dismissed the state and city law claims without prejudice as well, allowing Prichard to refile once a statutorily valid right to sue notice is issued.

Hiran Management, Inc. v. National Labor Relations Board [38]

Niroj Hiransomboon and his wife, acting through Hiran Management, purchased Hungry Like the Wolf, a struggling karaoke restaurant in Houston, Texas, in July 2022. The restaurant was a non-union business that employed around twenty (20) employees. Hiran Management hired a new manager to oversee eight (8) "front of house" employees. These employees alleged that the manager required them to do extra work, with no additional pay, and that the manager promised additional compensation for these "shift-supervisor duties," but did not provide such compensation. After a contentious meeting with management, the employees walked out, later decided to strike, and presented a list of demands. When discussions failed, Hiran informed the employees that they were no longer employed with Hiran Management.

The National Labor Relations Board ("NLRB") brought an unfair labor practice complaint alleging that Hiran discharged the employees for engaging in protected concerted activity in violation of the National Labor Relations Act ("NLRA"). An administrative law judge ("ALJ") ruled in the NLRB's favor, Hiran appealed to the Board. The Board adopted the ALJ's rulings and conclusions with some minor adjustments. The Board's order mandated that Hiran cease and desist from its unfair labor practices, reinstate the discharged Employees, and make the Employees whole "for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result" of the unfair labor practices.

Hiran then appealed, arguing that some of the employees were supervisors not covered by the NLRA and that the NLRB lacked statutory authority to award compensatory damages. The court rejected the supervisory argument, finding Hiran the affirmative defense was waived because Hiran failed to raise it before filing its post-hearing brief to the ALJ.[39] However, the court agreed that the NLRB exceeded its authority.

In reaching that conclusion, the court relied heavily on *Loper Bright*. Applying *Loper Bright*, the court declined to defer to the NLRB's interpretation of Section 10(c) of the NLRA, which authorizes the NLRB to issue orders requiring an employer "to cease and desist from [an] unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter." 29 U.S.C. § 160(c).[40] The court conducted its own textual, historical, and structural analysis of the statute. The court explained that Section 10(c) authorizes equitable remedies such as cease-and-desist orders, reinstatement, and backpay, but does not permit legal remedies in the form of compensatory or consequential damages. The court greatly emphasized that it took nearly ninety (90) years for the NLRB to claim such authority. It furthered that when Congress intended to expand remedies in comparable statutory schemes, such as Title VII, it did so expressly through legislative amendment.[41] Because the Board's *Thryv* framework[42] represented a significant expansion of its remedial power without statutory support, the court held that it was invalid under the NLRA.

Accordingly, the court granted Hiran's petition in part, denied enforcement of the portion of the Board's order awarding compensatory damages for foreseeable harms because it relied on agency interpretation that longer receives deference under *Loper Bright*, and remanded the matter for further proceedings consistent with its opinion.

Restaurant Law Center v. United States Department of Labor [43]

In *Restaurant Law Center v. United States Department of Labor,* the Restaurant Law Center and the Texas Restaurant Association challenged a 2021 Department of Labor final rule governing when employers may claim the tip credit for tipped employees under the Fair Labor Standards Act ("FLSA"). The FLSA allows employers to pay tipped employees a wage below the federal minimum wage, so long as tips make up the difference.[44] The FLSA defines a tipped employee as one engaged in an occupation that customarily and regularly receives more than thirty (30) dollars per month in tips.[45] For decades, DOL had regulated the tip credit through its dual jobs regulation and related guidance, including the so called 80/20 rule limiting how much non-tipped work a tipped employee may perform, while still allowing the employer to claim the credit.[46]

After several shifts in agency policy across administrations, the DOL issued the 2021 Final Rule, which formally adopted a detailed framework dividing work into tip producing work, directly supporting work, and non-tipped work.[47] The rule limited employers' ability to take the tip credit when supporting work exceeded twenty percent (20%) of the workweek or lasted more than thirty (30) consecutive minutes, and it barred the tip credit entirely for work deemed not part of a tipped occupation.

The associations sued in the Western District of Texas, seeking to enjoin enforcement of the rule. The district court ultimately granted summary judgment to DOL, holding that the statutory phrase "engaged in an occupation" was ambiguous and that the Final Rule was a permissible interpretation entitled to *Chevron* deference. The court also concluded that the rule was not arbitrary or capricious and rejected arguments based on the major questions doctrine.

The associations appealed.

While the appeal was pending, the Supreme Court decided *Loper Bright*. The court applied *Loper Bright* on rehearing, and the Fifth Circuit withdrew its prior opinion and reconsidered the Final Rule under the APA without *Chevron* deference.

The court explained that under *Loper Bright*, its task was to determine the best reading of the FLSA using traditional tools of statutory interpretation.[48] Conducting that analysis, the court concluded that "engaged in an occupation" refers to being employed in a job as a whole, not to the performance of discrete tasks moment by moment. The court rejected DOL's effort to redefine the statutory inquiry around whether particular duties directly produced or supported tips, noting that the statute focuses on occupations, not individual tasks or time increments.[49]

The court further emphasized that DOL's interpretation created conceptual and practical problems by fragmenting a single occupation into multiple sub-occupations based on percentages of time and thirty-minute intervals, a framework found nowhere in the statutory text.[50] Although the court acknowledged that longstanding agency interpretations may carry persuasive weight under *Skidmore*, but such interpretations cannot override clear statutory language, particularly now that *Chevron* deference is no longer due.

The Fifth Circuit reversed the district court, rendered judgment for the associations, and vacated the Final Rule insofar as it amended the longstanding dual jobs regulation.

Conclusion

In the wake of *Loper Bright*, employers and practitioners must navigate a more uncertain regulatory environment while reassessing both the risks and opportunities created by the erosion of long-standing agency rules. Careful monitoring of legal developments will be essential as courts, rather than agencies, increasingly define the contours of employment law.

Federal Taxation after Loper Bright

Loper Bright is making a significant difference in the world of federal taxation. Since last year, we have had a very significant case regarding 3M and its world-wide operations that effectively overturns a reallocation of income regulation under IRC § 482. We also have the *Varian Medical Systems* decision from the Tax Court addressing *Loper Bright*, which is interesting because the Tax Court is an Article I legislative court created by Congress. This is in comparison to the courts established under Article III of the U.S. Constitution, which are the U.S. District Courts, U.S. Court of Appeals, the U.S. Supreme Court and the Court of International Trade.

Typically, a challenge to a federal regulation will only be effectively heard by an Article III court where judges have lifetime tenure and other protections, so Article III court judges can rule as they see appropriate. During an IRS examination, the revenue agents and others in the IRS administration (for example, the IRS Office of Appeals) will not discuss *Loper Bright* other than to say consideration of *Loper Bright* is "above my pay grade." However, due to the doctrine of exhausting administrative remedies, even though revenue agents, appeals officers and others at the IRS may not be willing to discuss *Loper Bright*, it is important that *Loper Bright* arguments be made during an IRS exam and subsequent administrative appeals so that one can credibly go before an Article III court and say all administrative remedies have been exhausted.

Principal Take Aways from Loper Bright

Now, about twenty months after the U.S. Court's decision in *Loper Bright,* two (2) of the principal tax takeaways are:

1. Legislative Regulations. For regulations promulgated pursuant to a tax statute that calls for legislatively authorized regulations, the doctrine of deference to administrative agencies likely still applies where a statute is ambiguous. For example, IRC § 469 passive activity loss regulations (intended to significantly decrease the amount of tax shelter activity in the 1980s) contain at the end of the statutory language a subsection that says:

> (l) Regulations – The Secretary shall provide such regulations as may be necessary or appropriate to carry out provisions of this section, including regulations –
>
> (1) which specify what constitutes an activity, material participation, or active participation for purposes of this section,
>
> (2) which provide that certain items of gross income will not be taken into account in determining income or loss from any activity (and the treatment of expenses allocable to such income),
>
> (3) requiring net income or gain from a limited partnership or other passive activity to be treated not as from a passive activity,
>
> (4) which provide for the determination of the allocation of interest expense for purposes of this section, and
>
> (5) which deal with changes in marital status and changes between joint returns and separate returns.

The legislative regulations authorized by IRC § 469(l) are the type of statutorily authorized regulations that may be used by the IRS to promulgate regulations to clarify ambiguities. As to these types of legislative regulations, it is this author's view that the U.S. courts will provide the IRS with a significant amount of deference when administering IRC § 469. With regard to § 469, the voluminous regulations promulgated by the IRS show the IRS has exercised this congressional delegation of statutorily authorized regulation to its fullest extent.

2. Interpretive Regulations. For regulations where there is no statutory provision calling for legislative regulations the post-*Loper Bright* world is very different. For example, the net investment income tax imposed under IRC § 1411 (NIIT), which applies a 3.8% tax on "unearned income," falls into this category. For purposes of the NIIT, net investment income includes dividends, annuities, royalties and rents, as well as gross income derived from a trade or business in which a taxpayer would be considered to be in a passive activity within the meaning of § 469. *See* IRC §§ 1411(c)(1) and (2).

One interesting aspect of the NIIT is that the NIIT statute cross references to the IRC § 469 statute in two places, which statutory cross-reference was enacted about two decades after the principal legislative regulations for IRC § 469 were promulgated. This raises the interesting question of does *Loper Bright* apply to the NIIT regulations so that the courts will apply a test of "best reading" of the NIIT statute? Or, will the statutory delegation to the IRS to interpret IRC § 469 be controlling?

The court guidance on the NIIT is meager due to the NIIT being enacted in 2010 along with the fact that the NIIT tax is 3.8% and so small dollar amounts are typically at issue (the exception being how the NIIT interacts with the U.S. foreign tax credit). It will be interesting to see whether the courts the view the NIIT regulations as being "interpretive" regulations under IRC § 7805 (which is the general authorization to the secretary to promulgate regulations pursuant to provisions of the Internal Revenue Code) or, since the NIIT statute cross-references the IRC § 469 passive activity statute in two places, whether the legislatively authorized regulations under IRC § 469 trump the APA and *Skidmore* interpretation of regulations post-*Loper Bright*.

3M Company v. Commissioner

The most significant tax decision after *Loper Bright* has been the 8th Circuit's October 1, 2025 decision in

3M Company v. Commissioner.[51] *3M* involved the question of whether the IRS could reallocate to the 3M parent company $23.7 million of royalty income that was blocked by Brazilian law from being paid by a subsidiary to 3M. The first paragraph sets the tone for the remainder of the 8th Circuit's decision, which overrules a regulation about how to allocate – or more specifically reallocate – income between business units of a business that file a consolidated tax return. The first paragraph of the 8th Circuit's decision says:

> Statutes trump regulations. Over three decades ago, another court decided that the IRS could not tax a domestic parent company on royalties it could not legally receive from a foreign subsidiary. *See Proctor & Gamble Co. v. Comm'r*, 961 F.2d 1255, 1259 (6th Cir. 1992). The IRS then authorized by regulation what a statute had not. That strategy might have worked before . . . but not now. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024), so we reverse [the U.S. Tax Court].

In *3M*, the issue was whether 3M must include in its 2006 federal taxable income an additional $23.7 million of royalty income from its Brazilian subsidiary. In the IRS's view, 3M *should* be treated as having received this royalty income from its Brazilian subsidiary despite the royalty income being blocked by Brazilian law from being paid to 3M. And the IRS sought the additional royalty income despite the Brazilian subsidiary having already paid 3M $5.1 million in royalties in 2006.

The 8th Circuit's decision in *3M* is interesting in two respects. First, the 8th Circuit engaged in a word-by-word semantics lesson about IRC § 482's "true meaning." This semantics lesson included the use of the term "a" as compared to a subsequent use of the word "the" and the meanings of each in the English language.[52] Second, the 8th Circuit looked back to a 1972 U.S. Supreme Court case in *First Security Bank of Utah*[53] where the Supreme Court held that insurance commission fees – that a bank could not receive and was prohibited from receiving under federal law – could not be reallocated to the parent banks from the insurance subsidiary the banks had created. The 8th Circuit in *3M* viewed the Brazilian royalty that was blocked by Brazilian law from being paid to 3M, as being the comparable of the commission fees that the banks were prohibited from receiving as banks.

Armed with *Loper Bright* and the *First Security* precedent, the 8th Circuit held the IRS's proposed reallocation of income from the Brazilian subsidiary to the parent corporation of 3M was impermissible under *Loper Bright*.

Other Tax Decisions Since *Loper Bright*

Since the rendering of the *Loper Bright* decision, there have been few tax cases interpreting what *Loper Bright* means to federal tax laws. But one of the cases that does so is *Varian Medical Systems v. Comm'r*[54] where the IRS sought to enforce regulations about an effective date of a statute. The Tax Court in *Varian Medical Systems* did the unexpected by having thirteen (13) Tax Court judges sign onto the "best reading" of a statute to invalidate a regulation that attempted to fix an effective date in the favor of the IRS. Whether this was due to the decision being rendered on August 26, 2024, shortly after the U.S. Supreme Court's decision in *Loper Bright* was rendered, is an open question.

But what will be significantly more interesting in terms of the impact of *Loper Bright* under the general grant of rulemaking authority to the IRS[55], is the *Coca-Cola v. Comm'r* decision of the Tax Court[56], currently on appeal to the 11th Circuit Court of Appeals. Like *3M*, *Coca-Cola* pertains to a proposed IRC § 482 reallocation of income to overcome transfer pricing adjustments from the IRS.[57]

State Tax Laws

Loper Bright's reach goes beyond just federal taxes. Indeed, many states have adopted a *Chevron*-like doctrine deferring to the administrative actions of their state agencies. While a Supreme Court holding is not expressly precedent for state laws, it is inevitable that state supreme courts will look to *Loper Bright* for direction as to how much deference to provide to a state's administrative agency. For some states, this has already occurred.[58]

Where Do We Go From Here

It is possible that the 8th Circuit's decision in *3M* will set the tone and tenor of statutory text interpretation by the federal courts. However, within the next year, it is very possible that the 11th Circuit in *Coca-Cola* will render a decision either similar to the 8th Circuit or taking a different route. Historically, the U.S. Supreme Court will only accept cases for decision where there is a split in how decisions at the Circuit Courts have been decided. We will need to wait for a while to see if *Coca-Cola* follows the 8th Circuit or takes the *Loper Bright* decision in a different direction.

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[1] *Loper Bright Enters. v. Raimondo,* 603 U.S. 369 (2024).
[2] *Id.* at 412.
[3] *Id.* at 382.
[4] *Id.* at 413.
[5] *Id.* at 400.
[6] *Id.* at 410 (Justice Roberts disagreeing with Justice Kagan's dissenting opinion) (citations omitted).
[7] *Id.* at 410, 375.
[8] *Id.* at 388 (citing *Skidmore v. Swift & Co.,* 323 U.S. 134, 139–140 (1944)).
[9] *Id.* (citing *Skidmore*, 323 U.S. at 140).
[10] *Id*. at 412.
[11] *Seven County Infrastructure Coalition v. Eagle County, Colo.*, 605 U.S. 168 (2025); *see also, City and County of San Francisco, California v. Environmental Protection Agency*, 604 U.S. 334 (2025).
[12] *See City and County of San Francisco, California*, 604 U.S. at 334, 355 (2025) (stating that the Court was "not obligated to accept administrative guidance that conflicts with the statutory language it purports to implement; *see also Diamond Alternative Energy, LLC v. Environmental Protection Agency*, 606 U.S. 100 (2025).
[13] *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944)
[14] *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997).
[15] *Seven County Infrastructure*, 605 U.S. at 168; *see also, U.S. Sugar Corp. v. Environmental Protection Agency*, 113 F.4th 984.
[16] *See Tex. v. U.S. Environmental Protection Agency*, 137 F.4th 353 (5th Cir. 2025); *see also New Mexico Cattle Growers' Association v. U.S. Forest Service*, 2025 WL 327265 (D.N.M. 2025); *and Aero Tech, Inc. v. U.S. Dep't of the Interior*, No. CIV 23-0726 JB/JHR, 2024 WL 4581545 (D.N.M. Oct. 25, 2024).
[17] *See City and County of San Francisco, California*, 604 U.S. at 355.
[18] *See Tex. v. U.S. Environmental Protection Agency*, 137 F.4th 353 (5th Cir. 2025); *see also New Mexico Cattle Growers' Association*, 2025 WL 327265 at *59 (D.N.M. 2025) (though also recognizing *Loper Bright* affirms that deference under *Skidmore v. Swift & Co.*, continues to apply). In *Texas v. U.S. Environmental Protection Agency*, the Court also determined that because the applicable CFR was not ambiguous, *Auer* or *Seminole Rock* deference to the agency's interpretation of the regulation was precluded. *Id.* at *79.
[19] *See Alternative Energy, LLC v. Environmental Protection Agency*, 606 U.S. 100 (2025).
[20] *See Tex. v. U.S. Environmental Protection Agency*, 137 F.4th 353.
[21] *See Compass Laboratory Services, LLC v. Kennedy*, 2025 WL 2724382 (2025)

[22] Clean Air Act Handbook § 11:61 (2025).
[23] 1 Pub. Nat. Resources L. § 8:47 (2d ed.).
[24] 1 State Environmental L. § 15:39 (2025–2026).
[25] *U.S. Sugar Corp. v. Environmental Protection Agency*, 113 F.4th 984 (D.C. Cir. 2024).
[26] *Compass Laboratory Services, LLC v. Kennedy*, 2025 WL 2724382 (2025).
[27] *See Id.*
[28] See *City and County of San Francisco, California*, 604 U.S. at 334.
[29] *See U.S. Sugar Corporation*, 113 F.4th 984.
[30] *See Compass Laboratory Service*, 2025 WL 2724382 (2025).
[31] *See Id.; see also* Clean Air Act Handbook § 11:61 (2025), *and* 1 Pub. Nat. Resources L. § 8:47 (2nd ed.).
[32] *See City and County of San Francisco, California*, 604 U.S. at 334.
[33] *Prichard v. Long Island Univ.,* No. 23-CV-09269(EK)(LB), 2025 WL 2163390, at *1 (E.D.N.Y. July 30, 2025)
[34] *Id.*
[35] *Id.*
[36] *Id.* at *2.
[37] *Id.*
[38] *Hiran Mgmt., Inc. v. Nat'l Lab. Rels. Bd.,* 157 F.4th 719 (5th Cir. 2025).
[39] *Id.* at 724
[40] *Id.* at 725
[41] *Id.* at 727
[42] In *Thryv, Inc.,* 372 NLRB No. 22 (2022), the NLRB expanded the scope of "make-whole" relief for employees injured by unfair labor practices. It is this framework that allowed the NLRB to issue expanded damages to the eight employees.
[43] *Rest. L. Ctr. v. U.S. Dep't of Lab.,* 120 F.4th 163 (5th Cir. 2024).
[44] *Id.* at 166.
[45] 29 U.S.C. § 203(t).
[46] *Id.* at 169.
[47] Tip Regulations Under the Fair Labor Standards Act (FLSA), 85 FR 86756-01.
[48] *Id.* at 171.
[49] *Id.* at 176.
[50] *Id.* at 173.
[51] *3M Company v. Comm'r*, 154 F.4th 574 (8th Cir. 2025), *rev'g* 160 T.C. 50 (2023).
[52] For a similar grammatical dissection of a statute, please see *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021).
[53] *See Comm'r v. First Sec. Bank of Utah, N.A.*, 405 U.S. 394, 403 (1972) (stating that "income" does not include what the taxpayer "did not receive and that he was prohibited from receiving").
[54] 163 T.C. No. 4 (2024).
[55] *See* IRC § 7805
[56] 155 T.C. 145 (2020).
[57] *See Greenwald* and *Rietveld*, *Loper Bright Defeats a Tax Regulation at the Circuit Court level*. Tax Notes (January 23, 2026) at fn. 33.
[58] *See Tetra Tech, Inc. v. Wisc. Dep't of Revenue*, 2018 WI 75 (the *Tetra Tech* decision marked a change in Wisconsin administrative law ending the great weight deference to agency interpretations of Wisconsin statutes).