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“The More Things Change”

What Happens Now After the U.S. Supreme Court in Loper Bright Has Turned Back the Clock to 1984?

Richard A. Latta

Moderator

STAFFORD ROSENBAUM LLP

Madison, WI

rlatta@staffordlaw.com

Byrona J. Maule

Moderator

PHILLIPS MURRAH P.C.

Oklahoma City, OK

bjmaule@phillipsmurrah.com

Edward T. Hayes

LEAKE ANDERSSON

New Orleans, LA

ehayes@leakeandersson.com

Antwan Phillips

WRIGHT LINDSEY JENNINGS

Little Rock, AR

aphillips@wlj.com

James Kezele

KEATING MUETHING & KLEKAMP PLL

Cincinnati, OH

jkezele@kmklaw.com

Introduction

“The stability and success of the National Government... depend in a considerable degree on the interpretation and execution of its laws.” George Washington, Letter to the US Supreme Court (1790).¹ No less a historical figure than George Washington admonished the U.S. Supreme Court to contemplate the judiciary’s role in our new democratic nation. Consistent judicial interpretation and execution of the laws is vital to the preservation of our constitutional republic. For forty years our Judicial and Executive branches utilized the *Chevron* standard for court review of an agency’s interpretation of statutory text.²

“*Chevron is overruled.*” U.S. Supreme Court in *Loper Bright*.³ With those simple words Chief Justice Roberts ended *Chevron*’s legacy. The U.S. judiciary no longer defers to a federal agency’s reasonable interpretation of the law. The *Loper Bright* ruling, in conjunction with the Court’s subsequent clarification in *Corner Post* that the six (6) year statute of limitations to challenge agency action runs from the date plaintiff suffers harm and not the date of the agency ruling, will increase the number of judicial challenges to agency action.⁴

Chevron v. NRDC – Establishing *Chevron* Deference

In 1984, the Supreme Court, in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*,⁵ held that a governmental agency, in interpreting and applying the law, must conform to any *clear* legislative statement, but, *Chevron* cautioned, courts must give an agency deference in *ambiguous situations*, so long as such agency’s interpretation of the law being applied was reasonable. Importantly, *Chevron* involved the Reagan-era interpretation of the Clean Air Act. Specifically, the issue in *Chevron* was whether a court could adopt a static definition of a statutory term, in that case “source”, when Congress had not provided a definition by statute.

The *Chevron* Court created a two-pronged test to evaluate whether a federal agency acted within the scope of its authority. First, a reviewing court would determine whether the statute spoke unambiguously on the specific issue. If so, no further analysis would be required. However, if the statute was silent or ambiguous as to the issue in question, and therefore required interpretation, the court would consider whether the agency’s interpretation was a reasonable construction of the statute.⁶ Typically, courts would defer to the agency charged by Congress with implementing the statute at issue – not substitute the court’s judgment for that of the agency – so long as the agency’s interpretation was plausible. *Chevron*, therefore, established the practice of affording “*Chevron* Deference” to administrative agency interpretations of statutes that a given agency administers.

Chevron, cited in over 18,000 federal court cases, was unquestionably one of the most important decisions in administrative law, and has shaped nearly forty years of administrative law and policy-making in the United States.

Loper Bright - Agencies Have the Power to *Persuade*, not *Control*

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.⁷

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.”⁸ According to Justice Roberts, there

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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.”⁹

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,”¹⁰ but instead had become a “decaying husk” of “crumbling precedents.”¹¹

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.”¹² 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.’”¹³ 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 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*.”¹⁴ Put differently, if there is no statutory ambiguity, then agency deference is still 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 Administrative Procedure Act (“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.

The Impact of Loper Bright

In its short time of existence, *Loper Bright* has already had a profound impact on many areas of the law. In the six months since the decision in *Loper Bright* it has already been cited 2,796 times, 418 of these being case citations and 34 being administrative decisions and guidance. What follows is a summary of four of the key areas *Loper Bright* has impacted. However, this list is by no means exhaustive, and it is reasonable to expect that *Loper Bright* will continue to impact all areas of law which are subject to regulatory oversight. First, the article touches on the impact of the Court’s decision on International Trade and Customs, next the article addresses the impact to Environmental Law, then looks at how *Loper Bright* will affect transportation, reviews the impact on Employment Law, and finally assesses the impact on federal tax laws.

International Trade and Customs

This section of our paper outlines the U.S. agencies and courts with jurisdiction over international trade and customs laws and examines how *Loper Bright* changes the landscape.

U.S. International Trade and Customs Structure

The U.S. Constitution grants authority over international trade and customs matters to the Legislative branch, specifically the “Power To lay and collect Taxes, Duties . . .” and “To regulate Commerce with foreign Nations. . .”¹⁵ The U.S. Congress delegates much of this power to the Executive branch and numerous federal agencies that administer our trade and customs laws.¹⁶

The Department of Homeland Security, through U.S. Customs and Border Protection, enforces our import and export laws, including tariff issues related to classification, origination, and valuation.¹⁷ The U.S. Department of

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Commerce and U.S. International Trade Commission jointly execute our antidumping and countervailing duty laws.¹⁸ The Office of the U.S. Trade Representative issues tariff and trade policy recommendations to the President and represents the United States at the World Trade Organization.¹⁹ Numerous other federal agencies have overlapping or supplemental jurisdiction in various areas of expertise impacting trade and customs issues, including the U.S. Department of Agriculture, U.S. Department of State, U.S. Department of the Treasury, and the U.S. Food and Drug Administration.

Regulatory activity in this sphere is judicially reviewed by the U.S. Court of International Trade (CIT) in New York, NY. The CIT is an Article III Court with special and exclusive jurisdiction over trade and customs matters.²⁰ Appeals from the CIT are taken to the U.S. Court of Appeals for the Federal Circuit (CAFC) in Washington, DC.²¹

Standard of Review in International Trade and Customs Cases

The CIT and CAFC utilized the *Chevron* two-step process to review trade and custom agency’s interpretation of legal text. The first *Chevron* step examines whether Congress addressed the precise question at issue. If so, the inquiry ends. The second *Chevron* step applies when Congress was silent or the statute ambiguous. In that situation, a court must determine if the agency’s interpretation was reasonably based on a permissible construction of the text.²²

The second *Chevron* step requires that “a reasonable interpretation and implementation of an ambiguous statutory provision . . . must be given judicial deference.”²³ This step rested on “a presumption that Congress, when it left ambiguity on a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.”²⁴

Loper Bright eliminates *Chevron* judicial deference to reasonable agency interpretation. The Court’s holding is rooted in the Administrative Procedure Act’s (APA) standard of review, which requires the reviewing court to decide all “relevant questions of law, [and to] interpret constitutional and statutory provisions.”²⁵ Affording deference to an agency’s interpretation of ambiguous text conflicts with the judicial review standard articulated in the APA.²⁶ Justice Thomas’ concurring opinion asserts further that *Chevron* “compromises the separation of powers” by curbing judicial authority delegated by the U.S. Constitution and impermissibly expands agency executive power beyond constitutional limits.²⁷

Post-Loper Bright International Trade and Customs Cases Landscape

Trade and customs cases frequently involve challenges to agency action implicating questions of statutory construction. Even when challenges involve mixed questions of law and fact, practitioners may now artfully frame challenges in terms of statutory analysis to avoid deference still afforded to factual conclusions. *Loper Bright* will likely generate an increased number of judicial challenges to agency action, especially since the U.S. Supreme Court clarified that the APA six (6) year statute of limitations runs from the date of harm, not the date of agency ruling.²⁸

The CIT issued a notable opinion rejecting a U.S. Department of Commerce antidumping statute interpretation under *Loper Bright*. In *Ventura Coastal v. U.S.*, the CIT rejected Commerce’s narrow definition of the term “partner” under part of the U.S. antidumping statute.²⁹ The case involves a petition filed by Ventura Coastal seeking antidumping duties on certain lemon juice imported from Brazil and South Africa. Commerce entered a negative final determination (no dumping) and ruled that respondent Louis Dreyfus Company was not affiliated with a particular supplier as a “partner” for purposes of calculating dumping margins under the statute.³⁰

Commerce viewed the statutory term “partner” narrowly to only include entities engaged in joint selling or joint ownership through a contractual relationship.³¹ Commerce deemed the respondent’s relationship market-based, with arm’s length transactions not relevant to its dumping calculation. As such, Commerce concluded Louis Dreyfus Company was not engaged in a contractual joint selling or joint ownership agreement and excluded its transactions from the dumping calculation. Ventura Coastal appealed Commerce’s final determination, challenging Commerce’s

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interpretation of the term “partner” under the antidumping statute as impermissibly narrow.

The CIT notes that *Loper Bright* requires courts to interpose their independent judgment in deciding statutory meaning, using traditional tools of statutory interpretation like “text, structure, and legislative history.”³² The Court doesn’t discard Commerce’s interpretation completely, finding it helpful “but inadequate.”³³ Reviewing the legislative history and language of the statute, the CIT finds that Congress intended to identify all affiliate relationships that impact price when examining dumping. Commerce’s view that only includes those who jointly own things or engage in joint selling activities impermissibly limits the types of relationships that might impact price.

The CIT expands the definition of “partner” to include entities that form cooperative endeavors sharing risk and reward. “The plain meaning of the word partners requires Commerce to analyze not only whether entities are involved in joint selling or joint ownership but also whether they more generally form a cooperative endeavor in which they share risk and reward.”³⁴ The CIT remanded the case for reconsideration consistent with the opinion and expanded definition of “partner.”

Conclusion

A comprehensive analysis of new cases post-*Loper Bright* is beyond the scope of this paper. However, *Ventura Coastal* illustrates that trade and customs lawyers may encounter new statutory interpretations that were buried for over four decades due to *Chevron* deference. Practitioners in the trade and customs world should sharpen their tools of statutory construction and dig deeper into the depths of legislative history to see what emerges.

Environmental Law in the Wake of Loper Bright

The Supreme Court’s June 2024 decision in *Loper Bright Enterprises v. Raimondo Relentless, Inc.*³⁵ introduced significant uncertainty into the legal field, especially concerning interpretation and application of environmental law and environmental regulation. To appreciate the myriad effects of *Loper Bright* on the legal/environmental landscape, it is helpful to first understand the regulatory lay-of-the-land prior to June 2024.

The Slow Demise of the Chevron Doctrine in Environmental Law

Despite the significance of the *Chevron* decision, various authors have opined on the slow demise of *Chevron* deference in environmental matters, and also more broadly in areas of law heavily reliant upon administrative rulemaking. Although not in the context environmental law, in 2001, the Court in *United States v. Mead Corp.*, began to afford greater deference to decisions reached after application of “administrative formality.”³⁶ Then, in 2022³⁷, the Court announced the “major questions doctrine”, whereby it placed regulations that pertain to “major questions” of “vast economic and political significance” outside of the agency’s interpretative reach in the absence of clear congressional commands to the contrary.

Moreover, none of the recent Clean Air Act carbon and methane rules that have appeared in the *Federal Register* cite *Chevron*, nor has the Supreme Court upheld an EPA rule on the basis of *Chevron* since 2014 or relied on the doctrine in any decision since 2016.³⁸ Given these realities and the Court’s hostility to the doctrine, the EPA and the Department of Justice have curtailed reliance on the *Chevron* doctrine to support interpretation of administrative regulations, with the EPA more commonly setting forth its best interpretation of the implementing law in the preambles to its rulemakings. As such, it is possible that the reversal of *Chevron* has little practical impact on environmental regulations. Nonetheless, the Court’s express statement that agency legal interpretations are not controlling will necessarily impact environmental law and environmental rule-making.

Predicting the Effects of Loper Bright on Environmental Law and Environmental Regulation

The waning reliance on the *Chevron* doctrine by the Supreme Court and EPA, especially in an environmental context, may indicate that the demise of *Chevron* deference will have less of a practical impact on environmental law,

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environmental regulation, and environmental deregulation, than predicted. Nevertheless, on balance, there are predictable effects of the *Loper Bright* decision:

Agencies will retain persuasive authority and not all disputes will involve the interpretation of federal statutes.

Recall that while affirming *Skidmore*, the majority in *Loper Bright* expressly preserved the option for courts to consider agency views in determining the “best reading” of a statute.

In a July 2024 appeal involving the Clean Air Act, heard before the Sixth Circuit, the Justice Department agreed that “*Loper Bright* overrules the deference framework of *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).”³⁹ However, the Justice Department also stated that “*Loper Bright* recognizes the agency’s power to persuade, if not to control” and quoted to *Skidmore*’s recognition that “‘interpretations and opinions’ of the relevant agency, ‘made in pursuance of official duty’ and ‘based upon . . . specialized experience,’ ‘constitute[] a body of experience and informed judgment to which courts and litigants [could] properly resort for guidance,’ even on legal questions.”⁴⁰ At oral argument on December 12, 2024, U.S. Circuit Judge Cole noted that “[i]t seems like this is a debate over the science of it all. You’ve got one position, EPA has another position, and I don’t know that that speaks to EPA not acting within a zone of reasonableness[.]”⁴¹ At oral argument, the Justice Department argued that “[w]here those conclusions are scientific in nature, the agency is entitled to particular deference, especially where the area of science is within its expertise and its regulatory role, and that is precisely the case here[.]”⁴² The Sixth Circuit’s pending decision here will provide insight into how courts will resolve environmental cases where the EPA seeks deference following *Loper Bright*.

Even before the Court’s decision in *Loper Bright*, it was not at all uncommon for agencies to assist legislators in drafting legislation related to subjects of agency expertise. Therefore, I expect environmental agencies to more thoroughly develop their own interpretive bases in rules, regulations, and informal guidance during the drafting process. By doing so, the agency may still have meaningful and noticeable influence on a courts’ interpretive processes and can preempt certain scenarios that may have previously triggered *Chevron*. That said, recall that *Chevron* deference is not triggered by a dispute with an agency on the *application* of a regulation, an agency’s *factual determinations*, or the *terms* of a permit when the dispute does not *also* involve statutory *interpretation*. Consequently, a significant number of agency-focused interactions were beyond the reach of *Chevron* and will remain beyond the reach of *Loper Bright*.

Expect a reassertion of Congressional intent & impact on agency rulemaking.

Loper Bright unquestionably restricts agency discretion. In response, Congress will be encouraged (*perhaps even persuaded*) to pass more specific and detailed environmental laws in order to avoid ambiguity.

In spring 2023, the EPA announced the carbon sequestration technology (CCS) regulations, calling the CCS technology “the best system of emission reduction for the longest-running existing coal units.”⁴³ The CCS Rule, which was challenged by a number of states and industry organizations, address coal and gas power plants’ emissions of CO₂ and carbon sequestration technology. In August 2024, U.S. Solicitor General Elizabeth Prelogar, the Biden Administration’s top Supreme Court lawyer, relied on *Loper Bright* in briefing related to challenges to the EPA’s CCS Rule. In her briefing, Prelogar argued that a “court reviewing [agency] determinations...should apply the *deferential arbitrary-and-capricious standard*, asking whether [the agency’s] judgments on those points were reasonable and reasonably explained.”⁴⁴ Prelogar noted that Section 111 of the Clean Air Act, directs the EPA “to limit emissions of air pollutants by ‘stationary sources,’ including power plants. To do so, EPA first identifies the ‘best system of emission reduction’ that ‘the Administrator determines has been adequately demonstrated.’ EPA then quantifies the degree of emission reduction that is ‘achievable’ through application of that system.”⁴⁵ Therefore, Prelogar argued, “[b]ecause Section 111 ‘delegates authority to an agency,’ ‘courts must respect the delegation, while ensuring that the agency acts within it.’”⁴⁶ Like in *Sierra Club v. EPA* (Sixth Circuit), the Supreme Court’s decision in this case will be insightful.

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If the Supreme Court is persuaded by Prelogar’s *deferential arbitrary-and-capricious standard*, then Congress will be even more motivated to pass clearer environmental standards, with such delegation more clearly established. This would further slow the administrative process with all nuance in proposed regulations needing to be addressed. Overall, agencies will be less willing to issue broad, ambitious rules in the face of heightened judicial scrutiny.

Administrative flexibility – due to ambiguity in certain environmental statutes – will be lost.

Most environmental statutes are highly technical “and applying them to contemporary problems like climate change requires the exercise of expert judgment.”⁴⁷ As Professor Deborah A. Sivas, Stanford Law School, astutely summarizes when discussing climate policy:

Congress has never enacted climate legislation and ... is not likely to do so anytime in the near future. To address contemporary concerns, therefore, the EPA has turned largely to the Clean Air Act, which was enacted in 1970, long before climate change came onto the public radar. The Clean Air Act does not speak directly to greenhouse gas emissions or climate policy—that is, it is silent on those issues. So, the EPA has interpreted and applied various provisions of the statute to address climate issues. Courts will no longer be able to defer to the agency’s interpretation of the statute, setting the stage for the judiciary to more easily strike down climate regulations.⁴⁸

Professor Sivas relies on *Skidmore* in recognizing the “respect” afforded to an agency’s statutory interpretation, but concludes that “courts that want to uphold an agency regulation may rely on *Skidmore*, and courts that disagree with an agency won’t.”⁴⁹

Similarly, with the admirable goal of keeping the waters of the United States free of dangerous pollutants, Congress passed the Clean Water Act in 1972. The Clean Water Act, like the Clean Air Act, has certain *purposeful ambiguities*. These ambiguities have allowed flexibility to address new and emerging toxic chemicals (like PFAS). The idea that ambiguity is *always bad*, may be misplaced, especially when considering that *Loper Bright* will likely curtail an agency’s ability to respond with haste and flexibility to emerging environmental challenges like climate change and PFAS.

Conclusion

The dearth of codified interpretative guidance requires a level predicative analysis, and the Sixth Circuit’s and Supreme Court’s responses to post-*Loper Bright* briefing will undoubtedly prove instructive and insightful. Despite the lack of established judicial guidance, I, and others to opine on *Loper Bright* presume the following to be true: (1) industries subject to environmental regulations will gain more opportunities to challenge environmental rules; (2) in order to avoid *Loper Bright* challenges to its regulations, Congress may pass clearer, though more rigid environmental standards and agency-delegation may be more clearly established therein (with these rulemaking changes potentially further slowing the administrative process); (3) agency and industry experts, will play an (even more) critical role in environmental regulatory, policy, and enforcement matters; (4) Courts wishing to uphold agency regulations will be persuaded by agency experts and those disagreeing, will not be; and (5) it is too early to fully predict or appreciate the impact of *Loper Bright* on environmental law and environmental regulation.

Loper Bright’s Impact on the Transportation Industry

For the commercial transportation sector, *Loper Bright* affects substantive rules issued by agencies such as the Federal Motor Carrier Safety Administration (“FMSCA”), National Highway Traffic Safety Administration, Environmental Protection Agency, Federal Highway Administration, and others. These rules, when addressing statutory ambiguities, will no longer be entitled to judicial deference.

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For example, in 2016, the FMCSA – which is tasked with maintenance of motor carrier safety - benefited from *Chevron* deference when the Seventh Circuit Court of Appeals upheld FMCSA’s electronic logging device (“ELD”) mandate, despite opposition from the Owner-Operator Independent Drivers Association, which argued that ELDs could lead to driver harassment.⁵⁰ FMCSA countered by emphasizing its regulatory discretion, supported by *Chevron* deference. Ultimately, the Seventh Circuit agreed with the FMCSA stating that “Since Congress did not fill in the precise content, we assume that the ‘statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. At *Chevron’s* second step, the agency’s interpretation is reasonable.”⁵¹ In another example, the FMCSA benefited from *Chevron* deference when the First Circuit Court of Appeals upheld the FMCSA’s practice of disclosing non-serious driver related safety violations.⁵² In that case, a group of drivers alleged that the FMCSA exceeded its statutory authority by disclosing certain safety violations. While agreeing with the FMCSA, the First Circuit held that the FMCSA’s “interpretation is a reasonable and permissible construction of the statute and is entitled to *Chevron* deference.”⁵³ Without the *Chevron* deference, freight carriers and truck drivers may now have a stronger position when challenging regulations they deem unreasonable or overreaching. Agencies will need to provide more robust justifications for new rules, potentially slowing the regulatory process. However, changes will be very slow now that every challenge must be fully litigated.

Industry experts foresee notable impacts on agency regulations within the trucking industry. The American Trucking Associations (“ATA”) expressed cautious optimism, anticipating clearer and more stable regulations. “With *Chevron* overturned, courts will be less inclined to defer to agencies’ interpretations of the broad and sometimes ambiguous statutes authorizing their regulations,” said Rich Pianka, ATA’s General Counsel.⁵⁴ “This should empower courts to check agencies when they exceed their authority and, importantly, lead to more consistent regulatory stability for the trucking sector, reducing the policy shifts that often accompany changes in presidential administrations.”⁵⁵

It has only been a few months since the *Loper Bright* opinion was delivered. So far, there have not been any major decisions by any of the federal district or circuit courts decided under *Loper Bright* that directly impacts the trucking industry. However, in August 2024, the Eighth Circuit invalidated several Dept. of Transportation and Surface Transportation Board (“Transportation Board”) rules relating to railroads.⁵⁶ Congress charged the Transportation Board with resolving rate disputes between rail carriers and shippers when rates are not set by private contract.⁵⁷ To execute this task, the Transportation Board issued a final rule adopting the Final Offer Rate Review (“FORR”), which allowed the Transportation Board to select on its own which party’s rate would be used.⁵⁸ Because the court was not obligated to defer to the agency’s interpretation of the statute to determine the validity of this rule, it instead focused on the plain language of the APA and 49 U.S.C. § 10704(a)(1).⁵⁹ The court found that the Transportation Board’s interpretation of the statute that it relied on to formulate the FORR was not the “best” interpretation. Instead, the court determined that the statute required the Transportation Board to hold a “full hearing” before determining a rate’s reasonableness.⁶⁰ The court vacated the entire rule. In so doing, the court significantly usurped the Transportation Board’s authority to prescribe rates when it reviews these disputes.⁶¹

Going forward, the trucking industry can anticipate a period of adjustment as courts, agencies, and regulated parties navigate this new framework. Legal challenges may increase, leading to more frequent litigation over the scope of agency powers. Ultimately, the *Loper Bright* decision compels agencies to engage in more precise rulemaking grounded in clear statutory mandates. For the trucking industry, this means more rigorous judicial review of agency actions and an opportunity to shape regulatory interpretations that align more closely with legislative intent.

Whenever an United States Supreme Court Case is overturned, there will be far-reaching implications. It is anticipated that *Loper Bright* decision will be no different. The most immediate implications will likely come in the form of future agency rulemaking. It is anticipated that federal agencies will become more conservative in this arena due to the fact that those agencies know that they are no longer entitled to judicial deference. Relatedly, the rulemaking process will likely include more reasoning and commentary in an attempt to avoid ambiguity. Conversely, federal agencies may call on Congress to provide even broader authority to avoid ambiguity determinations.

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All of these potential changes will inevitably further slow down the rulemaking process and therefore, the impact of the *Loper Bright* decision will be felt in the halls of Congress and cubicles of administrative agencies before it has a significant impact on the transportation industry. For example, we can reasonably expect changes to the rules issued by FMSCA, but it will could take years before those changes are “clear enough” to avoid the now dreaded ambiguity determinations. In the interim, we can expect transportation companies to explore whether to file lawsuits challenging current agency rules that they would rather not follow.

The Employment Law Landscape in a Post-*Loper* World

For forty years courts have employed the *Chevron* standard, deferring to an agency’s interpretation of statutory text when that text was *ambiguous*.⁶² In *Loper Bright* the Supreme Court overruled this long-held precedent marking a seismic shift in the administrative state.⁶³ There has been an infusion of uncertainty in the legal landscape given that judges no longer defer to an agency’s interpretation and instead federal courts and judges may take a more active role in ascertaining and defining a statutes “best” reading. This section of our paper outlines the impact of *Loper Bright* overruling *Chevron* on U.S. employers and employment law alike.

Importantly, this ruling from the Court impacts an employer’s ability to plan for everyday business activities. This percolates into every bit of employment law from non-compete rules, to salary exemptions for overtime pay, to OSHA investigations, and it will continue to be felt. While uncertainty will remain as various regulations are promulgated and agencies take stock of the situation, it will also be a tool for employers to challenge regulations which it deems unfair or that it believes are an administrative overreach.

It appears lower courts were ready to act when the *Loper* decision came down as it took nearly no time for the impact of *Loper Bright* to be felt in the employment law world. Mere months after the decision in *Loper Bright* a District Court in the Northern District of Texas granted summary judgment to a Plaintiff challenging the Federal Trade Commission’s authority to issue a Non-Compete Rule and ultimately issued a nationwide injunction on the rule’s enforcement (more fully explained below).⁶⁴ The Department of Labor (“DOL”) has also faced post-*Loper Bright* challenges to its authority. In August, the Fifth Circuit struck down the DOL’s “so-called 80/20 tip-credit rule[.]”⁶⁵ The Fair Labor Standards Act allows employers to pay tipped employees only \$2.13 per hour in direct wages so long as the direct wages and tips combine to be at least the US minimum wage of \$7.25 per hour.⁶⁶ The DOL promulgated a rule which “attempted to limit employers’ ability to take this tip credit, excluding employees who spent more than 20% of their time on nontipped activities.”⁶⁷ It also excluded those employees who spent more than thirty minutes each “shift on side work that directly supports tip activity.”⁶⁸ Drawing on *Loper Bright* the Fifth Circuit invalidated the rule holding that no deference was owed to the DOL’s interpretation of the text of the statute.⁶⁹ Further, the Court held that the rule was arbitrary and capricious. These are just a few examples of the post-*Loper Right* decisions coming from federal courts.

A brief survey of the cases challenging agency action also highlights another factor in judicial challenges to such action—Forum. Many of the cases discussed in this section of the article come from the Fifth Circuit Court of Appeals or lower federal courts in Texas. This could be a strategic decision to get in front of judges that are averse to agency “overreach,” or one appointed by a President whose agencies did not promulgate the rule being challenged. Whatever the reason, we will likely see this continue and it will be another factor for employers to consider when thinking about challenging agency action.

The Federal Trade Commission and its Non-Compete Rule do not survive a post-*Loper* world.

In 2024, after a nearly fifty-year substantive-rule hiatus, the Federal Trade Commission (“FTC” or “Commission”) promulgated a Non-Compete Rule pursuant to section 6(g) of the Federal Trade Commission Act which made virtually all non-compete agreements unenforceable. 16 C.F.R. § 910.1-6. The rule was challenged in the District Court for the Northern District of Texas by Plaintiff, Ryan LLC, and the Plaintiff-Intervenors, the Chamber of

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Commerce of the United States, Business Roundtable, Texas Association of Business, and Longview Chamber of Commerce (referred to collectively as “Plaintiffs”). Plaintiffs asserted the rule violated section 706 of the Administrative Procedure Act because the FTC acted without statutory authority; the Rule was the product of an unconstitutional exercise of power; and the FTC’s acts, findings, and conclusions were arbitrary and capricious.⁷⁰ The FTC claimed, however, that non-compete clauses are “unfair methods of competition” under section 5 of the FTC Act and that the FTC has authority to promulgate the Rule based on authority granted to them in Section 6(g) of the FTC Act.^{71,72} The Court took up the parties’ Motions for Summary Judgment and agreed with the Plaintiffs, granting their motion for summary judgment and finding that the FTC lacked statutory authority to promulgate the non-compete Rule, the Rule was arbitrary and capricious, and it must be set aside under § 706 of the APA. It may come as no surprise to learn that the Court drew on the Supreme Court’s opinion in *Loper Bright* several times in its own analysis.

The Non-Compete Rule

A non-compete agreement is a restrictive covenant that prohibits an employee from competing against the employer.⁷³ The Parties’ joint appendix provided that “[t]he commission finds that non-competes are in widespread use throughout the economy.”⁷⁴ The commission estimated that approximately 30 million workers are subject to a non-compete.⁷⁵ Regulation of non-compete agreements has typically been within the States’ domain and no federal law “broadly addresses the enforceability of non-competes.”⁷⁶ The proposed rule was a culmination of years of investigations and studies of non-competes via public hearings and workshops; review of academic studies; and invitations for public comment.⁷⁷ In 2021, the FTC began an investigation “into the use of non-competes to determine whether they constitute unfair methods of competition.”⁷⁸ The final non-compete Rule asserted it was an “unfair method of competition” and thus prohibited employers from entering non-compete agreements with all employees and required employers to rescind existing non-compete agreements with certain employees.⁷⁹ Agreements entered before the rule’s effective date with employees considered “senior executives” were not rescinded.⁸⁰

Statutory Authority

The Administrative Procedures Act directs courts to “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,” “contrary to constitutional right, power, privilege, or immunity,” or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”⁸¹ Plaintiffs argue the FTC non-compete Rule violates these provisions ultimately requesting that the Court find the Rule unlawful.

The Court’s analysis drew on *Loper Bright* heavily, which makes sense given that the Court does not defer to the Agency’s interpretation of the Federal Trade Commission Act as it would have had the case been heard before *Chevron* was overruled. It noted that “Congress in 1946 enacted the APA ‘as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices.’”⁸² Relying on another quote from *Loper* it pointed out that the Administrative Procedure Act “delineates the basic contours of judicial review” of agency action.⁸³ In section 5 Congress vested the FTC with “the power to prevent unfair methods of competition.”⁸⁴ Congress expanded this power in 1938 to encompass the prevention of unfair deceptive acts or practices. However, section 5 describes the FTC’s enforcement power through administrative proceedings, including adjudications.⁸⁵ This includes language that the FTC will hold a hearing to determine whether a party is engaging in unfair methods of competition or deceptive acts or practices.⁸⁶ It is under this authority the FTC claims it promulgated the non-compete Rule. Plaintiffs disagree that authority for such Rule can be found there. Plaintiffs claim that the FTC does not authorize the Commission to issue substantive unfair-competition rules.⁸⁷

“The question to be answered is ‘not what the [Commission] thinks it should do but what Congress has said it can do.’”⁸⁸ The judiciary is the final authority when it comes to statutory construction and “must reject administrative agency actions which exceed the agency’s statutory mandate or frustrate congressional intent.”⁸⁹

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Importantly, section 5 of the FTC Act “creates a comprehensive scheme to prevent unfair methods of competition, while section 6 enumerates additional powers that generally aid in the administration of that adjudication-focused scheme.”⁹⁰ Plaintiffs questioned whether the FTC’s rulemaking authority under Section 6(g) includes substantive rulemaking, in addition to procedural rulemaking which generally includes rules governing agency organization, procedure, or practice. Thus, the Court had to address whether the FTC had the authority to promulgate substantive rules regarding unfair methods of competition or merely procedural rules.

The Court starts with the language of the statute which the FTC relies on for such substantive rulemaking authority. Section 6(g) provides the FTC has the power to “classify corporations and . . . to make rules and regulations for the purpose of carrying out the provisions of this subchapter.”⁹¹ The Court pointed out that by a plain reading, section 6(g) did not expressly confer on the Commission the authority to promulgate substantive rules regarding unfair competition.⁹²

The Court also looked at 15 U.S.C. § 57a which empowers the FTC to prescribe “interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce.”⁹³ While the Court acknowledged the FTC does have some authority to promulgate rules to prevent unfair methods of competition, it concluded that the FTC lacked the authority to create *substantive rules* via this method, instead finding that section 6(g) is a “housekeeping statute” authorizing “‘rules of agency organization procedure or practice’ as opposed to ‘substantive rules.’”⁹⁴

Plaintiffs also pointed out that section 6(g) lacked any statutory penalty for violating rules promulgated pursuant to it, furthering the idea that section 6(g) lacks substantive rulemaking authority.⁹⁵ The plaintiffs asserted, and the Court agreed, that the lack of any such grant means that Congress intended for the FTC to promulgate only procedural rules. The Court pointed out that historically prescribed sanctions for violations of an agency’s rules come along with a grant of legislative rulemaking authority.⁹⁶

The location of section 6(g) was also suspect. The Court took the location of the provision as yet another sign that Congress did not confer substantive rulemaking authority with section 6(g). Not only was the alleged grant of authority in the latter part of the statute, but section 6(g) can be found as the seventh in a list of twelve “almost entirely investigative powers.”⁹⁷ The Court insinuates that if Congress intended the agency to draw substantive rulemaking authority from this provision it would not be buried in a list of investigatory powers at the end of the statutory provision.

History and amendments

The Court next turned to the history and amendments of the FTC Act. The Court noted that for the first forty-eight years of the FTC it disclaimed substantive rulemaking authority.⁹⁸ However, the FTC announced in 1962 that it would rely on section 6(g) to issue rules that would have the force of law.⁹⁹ It continued to do so for several years with these rules being upheld by the Circuit Courts.¹⁰⁰ However, after 1978 and until the pronouncement of the non-compete rule, the FTC did not issue any substantive rules under section 6(g).¹⁰¹

The Court then addressed amendments to the FTC that included express grants of substantive rulemaking authority. The Court noted that any additions of substantive rulemaking authority would have been *superfluous* if section 6(g) already granted such authority.¹⁰² Given that courts must interpret a statute to effectuate all its provisions so that no part is rendered superfluous, the Court here found that such amendments were adding this authority because it did not previously exist.¹⁰³ However, the FTC argued that subsequent amendments confirmed the substantive rulemaking authority granted by section 6(g) as Congress did not amend the language of section 6(g), confirming or acquiescing to the FTC’s reading of such provision. However, the Court rejected this reasoning.

The Court concluded that “the text and the structure of the FTC Act reveal the FTC lacks substantive rulemaking authority with respect to unfair methods of competition, under Section 6(g).”¹⁰⁴

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Arbitrary and Capricious

Plaintiffs further asserted that the Court must hold unlawful and set aside the non-compete rule as arbitrary and capricious because “(i) the FTC offers no evidence to support its categorical ban on non-competes, (ii) the Commission unjustifiably dismissed alternatives that would have allowed the Commission to achieve its purported objectives at lower cost, and (iii) the Commission relied on a flawed cost-benefit analysis to prop up its rule.”¹⁰⁵

The Supreme Court explained that the arbitrary-and-capricious standard “requires that agency action be reasonably explained.”¹⁰⁶ And that judicial review under an arbitrary-and-capricious review is deferential furthering that “a court may not substitute its own policy judgment for that of the agency.”¹⁰⁷ The reviewing court merely “ensures that the agency acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.”¹⁰⁸ Generally, “[a] decision is arbitrary or capricious only when it is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”¹⁰⁹

The Court concluded that the non-compete rule failed this standard and was arbitrary and capricious “because it is unreasonably overbroad without a reasonable explanation.”¹¹⁰

The Court pointed out that the Commission relied on a handful of studies which looked at the economic effect of various state policies regarding non-compete agreements but the record shows no state had enacted a policy or rule as broad as that promulgated by the Commission furthering the idea that there is a lack of evidence as to why it chose to promulgate a rule with such broad implications.¹¹¹ The FTC failed to address why it chose to impose a sweeping prohibition which banned nearly all non-compete agreements as opposed to addressing specific, harmful non-competes. The Court concluded that this renders the rule arbitrary and capricious.

The FTC failed to consider alternatives to the sweeping non-compete rule, a fatal mistake pointed out by the Court. The FTC was required to consider less disruptive options while weighing any potential reliance interests against competing policy concerns.¹¹² This failure, the Court found, is further justification that the rule was arbitrary and capricious because it did not fall within a zone of reasonableness, nor was it reasonably explained.¹¹³

The Court’s Nationwide Remedy

Finding that the FTC lacked statutory authority to promulgate the non-compete rule and that the rule was arbitrary and capricious, the Court looked to the APA to discern the appropriate remedy and after having done so set aside the agency action under § 706 of the APA.¹¹⁴ This action had nationwide effect such that the rule did not take effect and is not currently in force. This means that for the time being the FTC will continue to look at these agreements and unfair methods of competition on a case-by-case basis in an adjudicatory fashion.

The Department of Labors Minimum Salary Rule Stands, For Now

The Fair Labor Standards Act (the “FLSA”) sets out a variety of standards and protections governing labor conditions, including minimum wage standards and overtime requirements for work beyond forty hours.¹¹⁵ The FLSA applies broadly to employees which it defines as “any individual employed by an employer.”¹¹⁶ While the FLSA and its provisions cover a large swath of the American work force, it includes several exemptions to this wide coverage. One of these exemptions and a rule promulgated by the Department of Labor pursuant to it was the subject of litigation and review by the Fifth Circuit Court of Appeals.

The Minimum Salary Rule

In *Mayfield*, the Court took up a challenge to the 2019 Minimum Salary Rule, which was promulgated pursuant to what is known as the “EAP Exemption”¹¹⁷ or “White Collar Exemption.”¹¹⁸ This exempts “any employee employed in a bona fide executive, administrative, or professional capacity. . .” from the time and a half requirement for work performed over forty hours of § 207.¹¹⁹ It also gives the Secretary of the Department of Labor (the “DOL”) the power to “define[] and delimit[]” the terms of the exemption.¹²⁰ For over eighty years the DOL has defined the so-

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called EAP exemption “to include a minimum-salary requirement” that prevents workers from qualifying for the Exemption if their salary falls below a specified level.¹²¹ The “DOL has long justified its rules on the ground that the terms used in the EAP exemption connote a particular status and prestige that is inconsistent with low salaries.”¹²² It further asserts that “salary-level” is an effective screen for “an employee’s job duties.”¹²³

The rule challenged in *Mayfield* was promulgated in 2019 and raised the minimum salary required to qualify for the Exemption from \$455 per week to \$684 per week. 84 Fed. Reg. 51230, 51231. *Mayfield*, a small-business owner who runs thirteen fast-food restaurants, sued the DOL claiming that the rule exceeds DOL’s statutorily conferred authority.¹²⁴ He argued that the DOL lacked “the authority to define the EAP exemption in terms of salary level” and that it violates the non-delegation doctrine.¹²⁵

The Fifth Circuit’s Analysis

In determining the outcome, the Court looked first to two preliminary questions: whether precedent dictated the outcome in the case, and if not, whether the major questions doctrine applied.

Foreclosed by Prior Precedent

The DOL pointed to *Wirtz v. Mississippi Publishers Corp.*, as being on-point precedent.¹²⁶ However, as the Court pointed out, *Wirtz* did not govern the Court’s analysis because there, the Fifth Circuit looked at whether the Minimum Salary Rule promulgated by the DOL was *arbitrary and capricious*, not whether it exceeded the DOL’s statutory authority. Given that the Administrative Procedures Act clearly delineates between these two types of challenges, *Wirtz* was not on point.¹²⁷

Major Questions Doctrine

The Court next looked at whether the major questions doctrine applied. The major questions doctrine is a legal principle announced in *West Virginia v. EPA* that limits the power of administrative agencies to act on matters of significant political and economic importance without clear congressional authorization.¹²⁸ It is triggered by one of following: (1) the agency “claims the power to resolve a matter of great political significance”; (2) when the agency “seeks to regulate a significant portion of the American economy or require billions of dollars in spending by private persons or entities”; or (3) when it “seeks to intrude into an area that is the particular domain of state law.”¹²⁹

The Court went through each of these triggers in turn to determine if one would apply, ultimately finding that this doctrine did not apply. It first looked at what the threshold for “economic significance” was. While no case has articulated a precise threshold, most of the cases applying the doctrine based on this factor “involved hundreds of billions of dollars of impact.”¹³⁰ Whereas the impact of the 2019 Minimum Salary Rule was only around “\$472 million in the first year[.]”¹³¹ Neither did the Court find that the rule regulated a significant portion of the American economy. Given that the rule removed 1.2 million workers from the FLSA exemption, a “small percentage of the overall workforce,” the major questions doctrine was not triggered.¹³² When it came to the rule’s political significance, the Court noted that “whether to use salary level to determine which employees should be exempt from various FLSA protections is not in line with the type of issues that have been considered politically contentious enough to trigger the doctrine.”¹³³ Additionally, this power is not newly found by the DOL. It has been one in which it has promulgated this type of regulation for decades. The Court points out that the “DOL asserts an authority it has asserted continuously since 1938.”¹³⁴ The Court does note that “a particular minimum-salary rule could raise issues *because of its size*”¹³⁵ Which is interesting given that at the time of this ruling the DOL was considering a proposed Minimum Salary Rule which would increase the minimum salary roughly 55% from the 2019 rule.¹³⁶ However, the Court went on to explain that *Mayfield*’s argument was that any consideration of salary in defining and delimiting the exemption was improper because it was beyond the agency’s authority. The Court thus determined that the major questions doctrine did not apply.

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DOL Statutory Authority

The Court next looked at whether the 2019 Minimum Salary Rule exceeded the DOL’s statutory authority. Quoting *Loper Bright Enterprises v. Raimondo*, the Court noted that “‘courts decide legal questions by applying their own judgment,’ even in agency cases.”¹³⁷ The Court must “independently identify and respect [constitutional] delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA.”¹³⁸ Congress explicitly delegated the Secretary of the DOL the authority to define and delimit the terms of the FLSA exemption.¹³⁹ Thus, the Court needed to determine whether the rule fell within the “outer boundaries of that delegation.”¹⁴⁰

The Court set out to do this by looking at what the terms “define and delimit” included in the delegation meant and whether the rule could be squared with that delegation. Mayfield asserted that the power to “define and delimit” the terms of the exemption only allowed the agency to further specify duties that qualify an employee for the exemption (i.e. what duties qualify an employee as being an executive, administrator, or professional).¹⁴¹ Mayfield points out that some exemptions are defined in terms of duties and others reference salary level, pointing out that Congress included a salary requirement when it wanted one.¹⁴² The Court pointed out, however, that the question here is not “whether the Exemption’s terms should be interpreted to contain a salary requirement,” but rather “whether the power conferred by the explicit delegation to ‘define[] and delimit[]’ the terms of the statute allows DOL to impose a salary requirement.”¹⁴³ The DOL argued, and the Court agreed, that using salary level was a permissible criterion for EAP status. The terms in the exemption “connote a particular status or level for which salary may be a reasonably proxy.”¹⁴⁴ Moreover, “[d]istinctions based on salary level are also consistent with the FLSA’s broader structure, which sets out a series of salary protections for workers that common sense indicates are unnecessary for highly paid employees.”¹⁴⁵

Interestingly, the Court points out in dicta that “adding an additional characteristic is consistent with the power to define and delimit, but that power is not unbounded.”¹⁴⁶ It furthered, a characteristic that differed so broadly in scope from the original that it effectively replaces it would raise serious questions.¹⁴⁷ A proxy may not yield different results than the characteristic Congress originally chose because that proxy would be replacing the terms, as opposed to defining and delimiting them. This is important given the case *Texas v. Department of Labor* or “*Plano*,” which struck down the new rule that increased minimum salary level on a rolling basis and the court found the salary limit overcame the duties outlined in the exemption aka went beyond defining and delimiting.¹⁴⁸ It appears that the Fifth Circuit may have been communicating to the lower court in the Eastern District of Texas when this type of rule circumvents agency authority and the analysis to apply to such a situation. In *Plano*, the Court found that the proxy overcame the original characteristic.¹⁴⁹

The Court also included an interesting note regarding *Skidmore* deference which allows the court to defer to an agency’s interpretation of a statute.¹⁵⁰ The weight given to the agency’s interpretation “depends on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier pronouncements, and all those factors which give it power to persuade.”¹⁵¹ The Fifth Circuit seemed to question whether this deference still stands given the pronouncement in *Loper Bright* that “statutes have a ‘best reading . . . the reading the court would have reached if no agency were involved,’ and ‘in the business of statutory interpretation, if it is not the best, it is not permissible’”¹⁵² The Court pointed out that this essentially means that *Skidmore* deference no longer exists. If the agency’s interpretation is the best, then it needs no deference because it is the interpretation the Court would have come to. If it is not the best, it again gets no deference because if it is not the best it is not permissible. The Court did not address whether there can be multiple “best” readings of a statute, as reasonable minds can differ. Notwithstanding the questions it brought up, the Court left it for another day because it found that the DOL’s interpretation of the exemption is the “best.”¹⁵³ It went on to point out that whatever is left of *Skidmore* deference it would apply here. The DOL has consistently issued minimum salary rules to define and delimit the exemption and has done so since the FLSA was passed.¹⁵⁴ Moreover, Congress has amended the FLSA several times and not once questioned the Minimum Salary Rule.¹⁵⁵

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Non-delegation Doctrine

Mayfield also asserted that the EAP exemption violated the nondelegation doctrine because it lacked “an intelligible principle to guide the DOL’s power to define and delimit the EAP exemption’s terms.”¹⁵⁶ The nondelegation doctrine asks whether congress has impermissibly delegated its own power, or the power of another branch, to an agency. Power delegated to an agency violates the nondelegation doctrine when Congress delegates power which lacks an intelligible principle that constrains the delegation. The intelligible-principle test requires Congress “set out guidance that ‘delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.’”¹⁵⁷ This standard is not demanding.

The Court agreed with the District Court that there are at least two intelligible principles. The first of these is the “FLSA’s statutory directive to eliminate substandard labor conditions that are detrimental to the health, efficiency, and general wellbeing of workers.”¹⁵⁸ And the second is the language of the Exemption itself.¹⁵⁹ Each of these provisions provide guidance to the DOL on how it should exercise its authority. While these provisions are not straightforward, the existing standard is not demanding.¹⁶⁰ An intelligible principle need only be a guide for an agency, here that guide exists. Thus, the DOL’s authority to define and delimit the terms of the EAP exemption is guided by an intelligible principle.¹⁶¹

The 2019 Rule Stands

The Court affirmed the District Court’s ruling finding that the 2019 Minimum salary Requirement did not exceed the Department of Labor’s statutorily conferred authority. Nor did it violate the non-delegation doctrine. Thus, the rule was upheld.

Plano Chamber of Commerce, et. al. v. U.S. Department of Labor, et. al, Civil No. 4:24-CV-486 SDJ (USDC ED of TX. 2024)

After the 5th Circuit’s decision in *Mayfield*¹⁶², one might believe that the DOL’s authority to raise the salary basis for the EAP exemption was well established. However, such is not the case. Remember that dicta quote from *Mayfield*:

adding an additional characteristic is consistent with the power to define and delimit, but that power is not unbounded. A characteristic with no rational relationship to the text and structure of the statute would raise serious questions. And so would a characteristic that differs so broadly in scope from the original that it effectively replaces it.¹⁶³

This quote would become the basis upon which the Court in *Plano Chamber of Commerce, et. al. v. U.S. Department of Labor, et. al.*¹⁶⁴ would vacate the 2024 DOL regulations on the minimum salary for the EAP exemption.

Issues in Plano Chamber of Commerce

In *Plano Chamber of Commerce*¹⁶⁵ the Plano Chamber of Commerce (hereinafter the “Chamber”) was challenging the 2024 rule issued by the Department of Labor that raised the minimum salary for the EAP¹⁶⁶ exemption for overtime under the FLSA. The rule consisted of three distinct actions:

1. Effective July 1, 2024 the rule raised the minimum salary for the EAP exemption from \$684 a week to \$844 a week;
2. Effective January 1, 2025 the rule raised the minimum salary for the EAP exemption from \$844 a week to \$1,128 a week; and
3. The Rule implemented a mechanism for an automatic increase in the minimum salary level based on contemporary earnings data every three years.¹⁶⁷

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The Chamber argued that the 2024 Rule exceeded the DOL’s authority because it increased “the minimum salary for the EAP Exemption to a level that effectively displace[d] the duties-based inquiry required by the FLSA’s text with a predominant salary-level test.”¹⁶⁸ The Chamber noted three issues, the updating mechanisms were in excess of the statutory jurisdiction, authority or limitations granted to the DOL, the Rule was arbitrary, capricious, an abuse of discretion, and was not otherwise in accordance with the law.¹⁶⁹

The Court’s application of Loper Bright

The Court applied *Loper Bright*¹⁷⁰ noting that “[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority” and that the “exercise of such independent judgment, . . . is rooted in the ‘solemn duty’ imposed on courts under the Constitution.”¹⁷¹ The Court quoted *Loper Bright* at length, observing that 5 USC § 706 of the Administrative Procedure Act (“APA”) “directs that ‘[t]o the extent necessary to decision and when presented, [a] reviewing court 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.’”¹⁷²

The APA also requires a reviewing court to “hold unlawful and set aside agency action, findings and conclusions found to be . . . not in accordance with the law.”¹⁷³ “Courts decide legal questions by applying their own judgment.”¹⁷⁴ Even though a statute may authorize an agency to exercise a degree of discretion, or even expressly delegate authority to an agency, “the role of reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits.”¹⁷⁵ The court noted that this entailed three different aspects:

1. Recognizing constitution delegations;
2. Fixing boundaries of delegated authority; and
3. Ensuring that the agency has engaged in “reasoned decisionmaking,” within the established boundaries.¹⁷⁶

The Court noted that statutory interpretation starts with the text of the statute, but if there is an ambiguity, “about the scope of an agency’s own power . . . abdication in favor of the agency is least appropriate.”¹⁷⁷

Plano Chamber of Commerce Analysis and Holding

The Court did an exhaustive review of the DOL’s actions in regard to the EAP exemption and the setting of a minimum salary basis for the EAP exemption, reviewing all the salary bases from 1938 to the present. The Court found that the 2024 Rule was an unlawful exercise of the DOL’s power. Some of the key findings of the Court are:

The terms professional, executive, and administrative are defined based on their functions or duties, “It’s their duties and not their dollars that really matter.”¹⁷⁸ The DOL does have the power to define and delimit the terms of the EAP exemption, which does include the “creation of regulations imposing a minimum salary level for the [EAP] exemption.”¹⁷⁹ However, the DOL exceeded the authority delegated by Congress.¹⁸⁰ The DOL cannot enact rules that “replace or swallow” the meaning of the terms used in the statute, which focus on the functions or duties in determining an employee’s exempt status.¹⁸¹ Applying this analysis to the minimum salary level the Court found that the use of the new minimum salary level would yield different results than the characteristics that Congress chose – in other words, the minimum salary level was not defining and delimiting the exemption, but was replacing the original statutory terms related to functions or duties.¹⁸² “The Department’s authority to define and delimit the EAP Exemption’s terms through the addition of a proxy characteristic like salary, which is not included in the statutory text, ‘is not unbounded’.”¹⁸³ The Court found that the minimum salary level had swallowed or replaced the statutory test of functions or duties – replaced these with a proxy that “frequently yields different results than the characteristic Congress initially chose.”¹⁸⁴

To support its decision that the minimum salary level had swallowed the functions or duties test, the Court reviewed the DOL’s historical approach to the salary level. Historically the minimum salary test, since 1958, had been set so

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that “no more than about 10 percent of those in the lowest-wage region [the South], or in the smallest size establishment group, or in the smallest sized city group or in the lowest-wage industry of each of the [industry] categories would fail to meet the test.”¹⁸⁵ The idea was the minimum salary level should not disqualify more than 10% of EAP-exempt employees as determined by the long duties test.

But in 2004 the DOL moved away from the Kantor Report test, and only adopted some of the factors set forth in the Kantor Report – the rule adopted in 2004 selected a minimum salary level that was based on a wage distribution of all salaried employees – rather than on a distribution of exempt employees, and it accounted for some factors, such as region and industry, but not all four factors used under the Kantor method. Most importantly, in 2004 it moved the percentile of those disqualified from 10% to 20%. Interestingly, in 2004 the DOL considered and rejected the possibility that the minimum salary level could be automatically adjusted without going through the rule making process, stating, the Department found “nothing in the legislative or regulatory history [of the FLSA] that would support indexing or automatic increases.”¹⁸⁶

In 2016, the DOL attempted to move to a single test structure away from the long and short test, and increase the minimum salary level, moving the percentile from 20 to 40 of the weekly earnings of full time, salaried workers in the South, and implementing a mechanism to automatically update the salary level triennially.¹⁸⁷ Thus the DOL only used one of the Kantor’s four part test, focusing solely on the lowest wage census region, the South. Thus the 2016 rule did not consider the smallest size business establishment, the smallest size city group or the lowest wage industry, as used in the earlier rule making.¹⁸⁸ The Court noted that the 2016 Rule went beyond the DOL’s statutory authority and reflected a substantive change that only Congress could effectuate, and was stricken by the courts in *Nevada I* and *Nevada II*.¹⁸⁹ The *Nevada II* court held that the DOL was without power to displace the FLSA’s duties-based test with an exclusive or predominantly salary-level test and held that the automatic-update mechanism was invalid.¹⁹⁰ Interestingly, the DOL in 2019, in a turnabout from their position in 2016, stated that the 2016 final rule on the minimum salary increase was in tension with the FLSA and with the Departments’ longstanding policy of setting the salary level at a level that did not disqualify a substantial number of those exempt under the EPA exemption, and noted that a salary level set that high did not further the purposes of the FLSA.¹⁹¹

The Court relied heavily on the *Nevada II* decision and the DOL’s position in 2004 on automatic update mechanisms in holding that the automatic update mechanism in the 2024 Rule exceeded the DOL’s authority. Key to the Court’s analysis was that the regulations specifically restricted the DOL to defining and delimiting the EAP exemption through the active process of rulemaking – and the automatic update mechanism specifically circumvented the active process of rulemaking. There is no notice or comment period in the automatic update mechanism.¹⁹² The DOL is authorized to define and delimit the EAP Exemption only through the active, repeated process of passing regulation that comply procedurally and substantively with the APA – specifically the notice and comment process.

Further, the Court found that the 2024 Rule effectively displaced the FLSA’s duties test with a predominate if not exclusive salary level test, noting that the 2024 test took the minimum salary level from the 20th percentile in 2004 to the 35th percentile as of January 2025.¹⁹³ Because it displaced the duties test, it exceeded the DOL’s authority to define and delimit the relevant terms, and was in excess of the DOL’s statutory jurisdiction.¹⁹⁴

The Court ultimately vacated the 2024 Rule – even though effective July 1, 2024 the raised the minimum salary for the EAP exemption had been raised from \$684 a week to \$844 a week. The Court vacated all three portions of the 2024 Rule.

Tax Law in the Post-Loper World

After the Supreme Court’s 1984 decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁹⁵, those who follow tax law eagerly awaited to see to what extent *Chevron Deference* would be applied to the federal tax regulations. This is due to the federal tax laws being one of the most fertile grounds for administrative agency regulations.

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For example, in 1984 the tax laws of the United States fit into one book about 1-1/4 inches thick and the tax regulations comprised two books of the same thickness for a total of less than 4 inches. Forty years later in 2024, the tax statutes are now in two oversized books each about 2-1/2 inches thick and over 5,600 pages in length. The federal tax regulations comprise four different volumes of similar size containing over 93,900 pages.¹⁹⁶ The paper is now very thin and the type is small. What this indicates is that the primary body of law needed to follow tax regulations has expanded from less than 4 inches in 1984 to about 1-1/4 feet 40 years later. The volume of interpretative regulations for federal tax law is staggering.

And complicated.

For example, one of the more challenging set of tax regulations are the “material participation activity” regulations under Internal Revenue Code (“IRC”) § 469.¹⁹⁷ These regulations were drafted as “legislative regulations” in that Congress, in 1986 when enacting IRC § 469, knew the area would be complex, that the regulations would be following on after the 1984 decision in *Chevron*, and there would be a significant need for implementing regulations.¹⁹⁸

In contrast, a provision of the tax law that borrows heavily from the IRC § 469 material participation activity regulations is IRC § 1411 “net investment income tax” (a/k/a, the “NIIT”). The NIIT was part of a series of new laws to finance a national marketplace of insurance plans under the Affordable Care Act. For those with ample resources, they have the opportunity to pay out of pocket. For those without ample resources, the United States provides a series of mechanisms to fund the purchase of medical insurance. The IRC § 1411 NIIT was a part of the funding mechanism.

In contrast to the material participation activity regulations of IRC § 469, the IRC § 1411 statute did not call for legislative regulations.¹⁹⁹ Thus, the federal agency in control of interpreting the NIIT – that being the U.S. Treasury’s agency of the Internal Revenue Service (“IRS”) – was left with a choice about how to promulgate interpretative regulations that would be consistent with the statutory framework of IRC § 1411. The IRS could write new self-contained regulations, or the IRS could choose to adopt significant portions of the IRC § 469 legislative regulations. The IRS chose the path of using the IRC § 469 regulations consisting of 42 pages grafting them onto the 22 pages of new IRC § 1411 regulations in order to attempt to implement the NIIT.

Prior to *Loper Bright*, the interplay of IRC §§ 1411 and 469 made sense. That is, IRC § 1411 was and is an ambiguous statute as to which the *Chevron Deference* two part test was met, that being (1) whether Congress had spoken directly to the precise issue at question in the statute (as to which for IRC § 1411 most issues had not been spoken to directly by Congress), and (2) “whether the agency’s answer is based on a permissible construction of the statute”. In a world of *Chevron Deference*, the regulations implementing IRC § 1411 worked.

History of Chevron and the Mayo Foundation Decisions.

From 1984 until 2011 (yes, that is 27 years later), whether *Chevron Deference* applied to tax regulations was an open question. The federal agency at issue – the IRS – asserted that the *Chevron Deference* applied to tax regulations. Many practitioners, on the other hand, seeing a lack of enforcement activity by the United States courts, took the view based on prior Supreme Court decisions that *Chevron* did not apply to tax regulations.

This open question ended in 2011 by the Supreme Court’s decision in Mayo Foundation v. United States.²⁰⁰

In the *Mayo Foundation* decision, written by Chief Justice John Roberts (yes, the same Justice that authored the *Loper Bright* decision) held that under the Federal Insurance Contributions Act (“FICA”), medical residents (that is, physicians who had recently graduated) and their educational employers were liable for paying a combined 15.3% FICA tax on the payments made to medical residents who work more than full-time but are still considered a “trainee” by the medical profession.

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In finding that the educational employers of medical residents were liable to pay FICA, Chief Justice Roberts wrote that the Treasury Department’s authority regulation asserting that medical residents are subject to FICA was a reasonable construction of the FICA legislation. The basis of the ruling is that the *Chevron Deference* applied to the FICA regulation despite the Supreme Court’s prior precedent finding more stringent standards applied when determining if a tax regulation is valid.

Despite previously using more stringent procedures in reviewing tax regulations, in *Mayo Foundation* the Supreme Court clarified that the deferential standard of *Chevron Deference* applied to tax regulations. By doing so, the Supreme Court held that medical residents were subject to FICA with both the medical resident and their employing educational body being subject to FICA taxes.

The World Post-Loper Bright.

By overruling *Chevron*, the Supreme Court puts to the test of what is the standard of review that applies to tax regulations. One possible standard prior to *Mayo Foundation* was *National Muffler Dealers Assn., Inc. v. United States*.²⁰¹ *National Muffler* requires that reviewing courts take into account “whether the regulation harmonizes with the plain language of the statute, its origin and its purpose” and provides that a court may examine a statutory interpretation made over the years after the passage of the original act.²⁰² While the *Mayo Foundation*, represented by Attorney Ted Olson, requested that *National Muffler* apply to the regulatory interpretation of the FICA statutes, the Supreme Court declined to do so, stating that it would be not wise to “carve out an approach to administrative review good for tax law only”.²⁰³

After *Loper Bright*, the review of tax regulations will now be subject to the Administrative Procedures Act (the “APA”).²⁰⁴ Under § 706 of the APA, courts are required to exercise their independent judgment in deciding whether an agency, such as the IRS, has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous.

The result is we still have three types of regulations for tax laws – those being: (1) legislative regulations of the type requested by Congress in enacting IRC § 469, which legislative regulations are an open question as to what extent they are subject to the APA, (2) interpretative regulations now subject to review under the APA in the same manner as any other federal regulation, and (3) interpretative regulations that have minimal statutory basis at all (such as the “Cottage Savings” regulations under IRC § 1001), as to which the standard for review of these types of regulations is not determinable at this time due to the minimal nature of a statute to interpret.

Form 8275-R and Schedule UTP.

A discussion about federal tax regulations would not be complete without a discussion about Form 8275-R, captioned “Regulation Disclosure Statement.”²⁰⁵ The Form 8275-R and the instructions to Form 8275-R are available through the IRS website.²⁰⁶

The purpose of filing Form 8275-R is in the event a regulation impacts a taxpayer in an adverse manner to which the taxpayer takes objection, disclosure of not following the regulation on Form 8275-R can result in the taxpayer avoiding the 20% or 40% accuracy-related penalty. The rules for how to make the disclosure and, more importantly, how to make the disclosure adequately, are described in Part II of the instructions. Adequate disclosure is a necessary component of being able to avoid the penalties.

One of the concerns with using Form 8275-R is the instructions about how to avoid accuracy related penalties, and in particular disclosures for transactions where there may not be economic substance under IRC. § 7701(o), is somewhat contradictory. As a result, even if a transaction violates a known regulation, some tax practitioners would argue the form is of limited value.

Second, there is the view of some practitioners that in light of the greater likelihood of detection by filing Form 8275-R, it is better to take the risk of the accuracy related penalty being asserted with regard to the ten types of

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transactions listed in the instructions to Form 8275-R. Experience among practitioners varies, with some practitioners having a high likelihood of detection by filing the Form 8275-R (for example, where a corporation is under continuous audit by the IRS or a state tax authority). However, some practitioners have found the risk of detection is low.

One of the areas in which the use of the Form 8275-R maybe helpful is where the income or gain is passing through to the taxpayer via a partnership, LLC or S corporation. Since the partnership or S corporation return may not be under the control of the taxpayer, but the tax consequences or decisions at the partnership, LLC or S corporation level impacts its partners, members or stockholders directly, the Form 8275-R may be very helpful. In these circumstances, it may be a very viable tool for taxpayers.

Finally, it should also be noted that a taxpayer can file with a corporate tax return (i.e., Form 1120) a “Schedule UTP, Uncertain Tax Position Statement”.²⁰⁷ In light of the holding of *Loper Bright*, the Schedule UTP may become more valuable than the Form 8275-R to corporate taxpayers.

Conclusion

Loper Bright will continue to have a lasting impact on all areas of the law governed by a regulatory agency. Given its impact, companies should closely monitor any challenges to regulations relevant to the company’s business. This is especially true when a Company is trying to decide whether and how, to comply with a regulation that is being challenged.

For instance, many companies complied with the 2024 Rule that revised the minimum wage for the EAP exemption to overtime. The 2024 Rule was in effect for months before the 2024 Rule was reversed. In the wake of *Plano Chamber of Commerce* companies are now faced with deciding do they withdraw raises that were given to employees to keep them exempt? Do they change the status of employees who were declared nonexempt and entitled to overtime, back to exempt now that the salary basis has rolled back to the 2019 Rule? This is only one example of how challenges to *Loper Bright* can impact the daily decisions and planning of a company.

Companies should also consider using *Loper Bright* as an offensive tool to challenge regulations that are overreaching, are based on statutory ambiguity, exceed the agency’s delegated authority and/or that were not the result of reasoned decision-making within the boundaries of the delegated authority. When considering the offensive use of *Loper Bright* several factors should be considered. First the cost-benefit analysis. Such challenges are not inexpensive. However, as in *Plano Chamber of Commerce*, it may be possible to join together with a group, such as the Chamber of Commerce, or perhaps a trade organization, or just several private companies all involved in the same industry and impacted by the same regulation.

If the benefit outweighs the cost, where the suit challenging *Loper Bright* is filed should be considered closely. The forum and the judge should be carefully considered and vetted, especially since these regulations are nationwide, and many courts will have jurisdiction over the agency at issue. This decision might also impact who joins together to bring the challenge. Industry organizations should be utilized where appropriate to assist in accessing the most favorable jurisdiction for a *Loper Bright* challenge.

As the song goes, “the more things change the more they stay the same, the same sunrise, it's just another day If you hang in long enough they say you're comin' back, just take a look, we're living proof and baby that's a fact.” We have seen *Chevron* come and go and the *Loper Bright* era begin. Whether it will usher in changes in the way agencies approach rulemaking and how courts will tackle the inevitable regulatory challenges, only time will tell.

¹ George Washington to the United States Supreme Court, April 3, 1790, Theodore J. Crackel, Ed., *The Papers of George Washington Digital Edition* (Charlottesville: University of Virginia Press, Rotunda, 2008).

² See *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council*, 467 U.S. 837 (1984).

³ *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___, Slip Op. at 35 (June 28, 2024).

⁴ See *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, 603 U.S. ___ (July 1, 2024).

⁵ 467 U.S. 837, 104 S. Ct. 2778 (1984).

⁶ *Id.* at 844-845.

⁷ *Loper Bright*, slip op. at 5.

⁸ *Loper Bright*, slip op. at 35.

⁹ *Loper Bright*, slip op. at 23.

¹⁰ *Loper Bright*, slip op. at 33 (Justice Roberts disagreeing with Justice Kagan’s dissenting opinion) (citations omitted).

¹¹ *Id.* at slip op. at 33, 29.

¹² *Id.* at slip op. at 10 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–140 (1944)).

¹³ *Id.* (citing *Skidmore*, 323 U.S. at 140).

¹⁴ *Id.* at 2273.

¹⁵ US Const. art. I, §8, cls. 1 & 3.

¹⁶ See generally, *Presidential Authority over Trade: Imposing Tariffs and Duties*, Congressional Research Service, (December 9, 2016), at p.2.

¹⁷ 19 U.S.C. §1592, et. seq. U.S. Customs and Border Protection administers approximately 500 trade laws on behalf of 49 government agencies.

¹⁸ 19 U.S.C. §1671, et. seq. Antidumping addresses imported goods that are sold in the U.S. market at less than normal value, which is the value at which the like products are sold on the home market. Countervailing duties address imported goods that are sold in the U.S. market at less than fair value due to actionable subsidies provided by a foreign government.

¹⁹ 19 U.S.C. §2171, et. seq.

²⁰ 19 U.S.C. §1581, et. seq.

²¹ 28 U.S.C. §1295(a)(5).

²² See *supra*, note 2 at 842-843.

²³ *United States v. Haggard Apparel Co.*, 526 U.S. 380, 383 (1999).

²⁴ *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-741 (1996).

²⁵ See 5 U.S.C. § 706.

²⁶ *Loper Bright*, Slip Op. at 16. Note that the APA substantial deference standard of review on agency policymaking and factfinding remains unchanged. *Id.* at 13-14

²⁷ *Id.* at p. 2 (Thomas, J., concurring).

²⁸ See *supra*, note 4.

²⁹ *Ventura Coastal, LLC v. United States*, ---F.Supp.3d---, 2024 WL 4799469 (CIT November 7, 2024).

³⁰ *Id.* at *3.

³¹ *Id.*

³² *Id.* at *8.

³³ *Id.* at *9.

³⁴ *Id.* at *10.

³⁵ *Loper Bright Enterprises v. Raimondo Relentless, Inc.*, 603 U.S. ___, 144 S. Ct. 2244 (2024).

³⁶ *United States v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164 (2001) (application of *Chevron* deference to the Harmonized Tariff Schedule of the United States).

³⁷ *West Virginia v. EPA*, 597 U.S. 697, 142 S. Ct. 2587 (2022).

³⁸ See Jean Chemnick, *What Chevron’s End Could Mean for EPA Climate Regulations*, E&E NEWS BY POLITICO, June 26, 2024, available at: <https://www.eenews.net/articles/what-chevrons-end-could-mean-for-epa-climate-regulations/#:~:text=EPA%20put%20the%20agency%20on,in%20any%20decision%20since%202016>. (Last accessed

____).

³⁹ Resp. in Opp. to Petitioner’s July 16, 2024, Rule 28(j) Letter, *Sierra Club v. EPA*, Nos. 23-3581, 23-3583 (6th Cir.), ECF Doc. No. 74 (July 24, 2024) (citing *Loper Bright*).

⁴⁰ *Id.* (citing *Loper Bright*, slip op. at 10 (citing *Skidmore*, 323 U.S. at 139-140)).

⁴¹ Carolyn Muyskens, *Sierra Club-EPA Row has 6th Cir. Debating Smog Data*, LAW360, Dec. 12, 2024).

⁴² *Id.*

⁴³ See <https://www.epa.gov/newsreleases/biden-harris-administration-finalizes-suite-standards-reduce-pollution-fossil-fuel> (accessed December 15, 2024).

⁴⁴ Resp. of Federal Respondents in Opposition to Applications for Stay, *State of Virginia, et al. v. EPA*, Nos. 24A95, 24A96, 24A97, 24A98, 24A105, 24A106, 24A116, 24A117 (S. Ct.), (August 2024). (Emphasis not in the original).

⁴⁵ *Id.*, citing 42 U.S.C. 7411(a)(1).

⁴⁶ *Id.*

⁴⁷ See Stanford Law School, SLS Blogs, Legal Aggregate, *Stanford’s Deborah Sivas on SCOTUS’ Loper Decision Overturning Chevron and the Impact on Environmental Law*, June 28, 2024, available at: [https://law.stanford.edu/2024/06/28/stanfords-deborah-sivas-on-scotus-loper-decision-overturning-chevrns-40-years-of-precedent-and-its-impact-on-environmental-law/](https://law.stanford.edu/2024/06/28/stanfords-deborah-sivas-on-scotus-loper-decision-overturning-chevrons-40-years-of-precedent-and-its-impact-on-environmental-law/) (referenced with permission; last accessed December 15, 2024).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Owner-Operator Indep. Drivers Ass’n, Inc. v. United States Dep’t of Transp.*, 840 F.3d 879 (C.A.7, 2016)

⁵¹ *Id.* at 889.

⁵² *Flock v. United States Dep’t of Transp.*, 840 F.3d 49 (C.A.1 (Mass.) 2016)

⁵³ *Id.* at 56.

⁵⁴ <https://www.overdriveonline.com/regulations/article/15678869/supreme-court-chevron-deference-comer-post-decisions-trucking-impact>

⁵⁵ *Id.*

⁵⁶ *Union Pac. R.R. Co. v. Surface Transp. Bd.*, 113 F.4th 823, 827 (8th Cir. 2024).

⁵⁷ See 49 U.S.C. §§ 10704(a)(1), 10709(c)(1).

⁵⁸ *Union Pac.*, 113 F.4th at 828.

⁵⁹ *Id.* at 833.

⁶⁰ *Id.* 834 – 838.

⁶¹ *Id.* at 839.

⁶² See *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council*, 467 U.S. 837 (1984).

⁶³ *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___, 144 S. Ct. 2244, 2247, Slip Op. at 35 (June 28, 2024).

⁶⁴ *Ryan, LLC v. Fed. Trade Comm’n*, No. 3:24-CV-00986-E, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024)

⁶⁵ Craig E. Leen and Michael A. Pavlick, *Loper bright’s Potential Effect on Federal Labor and Employment Law: Possible Consequences for Agencies and Practitioners*, K&L GATES, Oct. 1, 2024, available at: <https://www.klgates.com/Loper-Brights-Potential-Effect-on-Federal-Labor-and-Employment-Law-Possible-Consequences-for-Agencies-and-Practitioners-10-1-2024> (Last accessed Dec. 27, 2024); *Rest. L. Ctr. v. U.S. Dep’t of Lab.*, No. 23-50562, 2024 WL 3911308, at *4 (5th Cir. Aug. 23, 2024).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Ryan, LLC*, 2024 WL 3879954, at *7.

⁷¹ The parties and the Court refer to 15 U.S.C. § 45 colloquially as “Section 5” and 15 U.S.C. § 46(g) “Section 6(g).” This article does the same.

⁷² 15 U.S.C. §§ 45(a)(2), 46(g).

⁷³ *Ryan, LLC*, 2024 WL 3879954, at *2.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at *3.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ 16 C.F.R. § 910.

⁸⁰ *Id.* § 910.2(a).

⁸¹ 5 U.S.C. § 706(2)(A)–(C).

⁸² *Ryan, LLC*, 2024 WL 3879954, at *7 (quoting *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___, 144 S. Ct. 2244, 2247, Slip Op. at 3 (June 28, 2024) (citation omitted)).

⁸³ *Id.*

⁸⁴ 15 U.S.C. § 45.

⁸⁵ *Id.*

⁸⁶ *Id.* § 45(b).

⁸⁷ *Ryan, LLC v. Fed. Trade Comm’n*, No. 3:24-CV-00986-E, 2024 WL 3879954, at *7 (N.D. Tex. Aug. 20, 2024).

⁸⁸ *National Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672, 674 (D.C. Cir. 1973) (quoting *Civil Aeronautics Bd. V. Delta Air Lines Inc.*, 367 U.S. 316, 322, (1961)).

⁸⁹ *Am. Fin. Servs. Ass’n v. FTC*, 767 F.2d 957, 968 (D.C. Cir. 1985).

⁹⁰ See 15 U.S.C. §§ 45, 46.

⁹¹ 15 U.S.C. § 45(g).

⁹² *Ryan, LLC*, 2024 WL 3879954, at *9.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at *10.

⁹⁶ *Id.*

⁹⁷ 15 U.S.C. § 46; *Id.*

⁹⁸ *Ryan, LLC*, 2024 WL 3879954, at *11; *National Petroleum Refiners Ass’n* 482 F.2d at 693.

⁹⁹ *Id.* at *11.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Ryan, LLC*, 2024 WL 3879954, at *11.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at *12.

¹⁰⁵ *Id.* at *7.

¹⁰⁶ *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423, 141 S. Ct. 1150, 1158, 209 L. Ed. 2d 287 (2021).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Wilson v. U.S. Dep’t of Agric.*, 991 F.2d 1211, 1215 (5th Cir. 1993).

¹¹⁰ *Ryan, LLC*, 2024 WL 3879954, at *13.

¹¹¹ *Id.*

¹¹² *Id.* (quoting *Wages & White Lion Investments, L.L.C. v. United States Food and Drug Administration*, 16 F.4th 1130, 1139 (5th Cir. 2021) (citation omitted)).

¹¹³ *Id.* at *14.

¹¹⁴ 5 U.S.C. § 706(2).

¹¹⁵ 29 U.S.C. §§ 206, 207.

¹¹⁶ *Id.* § 203(e)(1).

¹¹⁷ The “EAP exemption” refers to the exemption under the Fair Labor Standards Act that exempts employees classified as “bona fide executive, administrative, or professional” from minimum wage and overtime requirements.

¹¹⁸ *Mayfield v. United States Dep’t of Lab.*, 117 F.4th 611, 614 (5th Cir. 2024)

¹¹⁹ 29 U.S.C. § 207, 213(a)(1).

¹²⁰ *Id.*

¹²¹ *Mayfield*, 117 F.4th at 614.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Mayfield*, 117 F.4th at 615.

¹²⁵ *Id.*

¹²⁶ 364 F.2d 603 (5th Cir. 1966)

¹²⁷ 5 U.S.C. § 706.

¹²⁸ 597 U.S. 697 (2022).

¹²⁹ *West Virginia v. EPA*, 597 U.S. 697, 743–44 (2022) (Gorsuch, J. concurring).

¹³⁰ *Mayfield*, 117 F.4th at 616 (Citation omitted).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* (citation omitted).

¹³⁴ *Id.*

¹³⁵ *Id.* (emphasis added).

¹³⁶ *Id.* at 615.

¹³⁷ *Id.* at 617 (quoting *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___, Slip Op. at 3 (June 28, 2024)).

¹³⁸ *Id.* at 2268.

¹³⁹ 29 U.S.C. 213(a)(1).

¹⁴⁰ *Mayfield v. United States Dep't of Lab.*, 117 F.4th 611, 617.

¹⁴¹ *Id.* at 618.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* (citation omitted).

¹⁴⁶ *Id.* at 618–19

¹⁴⁷ *Id.*

¹⁴⁸ *Texas v. United States Dep't of Lab.*, No. 4:24-CV-499-SDJ, 2024 WL 3240618 (E.D. Tex. June 28, 2024).

¹⁴⁹ *Id.*

¹⁵⁰ *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

¹⁵¹ *Id.* at 140.

¹⁵² *Id.* (quoting *Loper Bright*, Slip Op. at 23)

¹⁵³ *Id.* at 619.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 621.

¹⁵⁷ *Id.* at 620 (quoting *Mistretta v. United States*, 488 U.S. 361, 273–73 (1989) (citation omitted)).

¹⁵⁸ *Id.* at 621; 29 U.S.C. § 202(a), (b).

¹⁵⁹ *Id.* § 213(a)(1).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Supra.*

¹⁶³ *Id.* at 618–19

¹⁶⁴ Civil No. 4:24-CV-486 SDJ (USDC ED of TX. 2024).

¹⁶⁵ *Id.*

¹⁶⁶ Executive, Administrative and Professional exemption

¹⁶⁷ 89 Fed. Reg. 32842 (Apr. 26, 2024) 29 CFR § 541.0 – 541.710, hereinafter referenced as the “2024 Rule”

¹⁶⁸ *Plano Chamber of Commerce*, *supra.* at 4.

- ¹⁶⁹ *Id.* at 29 – 30.
- ¹⁷⁰ *Loper Bright*, *supra* at ____.
- ¹⁷¹ *Plano Chamber of Commerce*, at____, quoting *Loper Bright*, *supra*, at 2257, 2273.
- ¹⁷² *Id.* at 28, internal citations omitted.
- ¹⁷³ *Id.* at 29.
- ¹⁷⁴ *Plano Chamber of Commerce*, *supra* at 29, quoting *Loper Bright*, *supra*, at 2261.
- ¹⁷⁵ *Id.* at 29, quoting *Loper Bright*, *Supra* at 2263. (internal citations omitted.)
- ¹⁷⁶ *Id.* at 29.
- ¹⁷⁷*Id.* at 30, quoting *Loper Bright*, *supra* at 2266.
- ¹⁷⁸ *Id.* at 33.
- ¹⁷⁹ *Id.* at 35.
- ¹⁸⁰ *Id.* at 30.
- ¹⁸¹ *Id.* at 36
- ¹⁸² *Id.* at 36.
- ¹⁸³ *Id.* at 36, citing *Mayfield*, *supra* at 618 – 19.
- ¹⁸⁴ *Id.* at 36.
- ¹⁸⁵ *Id.* at 13 citing the Report and Recommendations on Proposed Revision of Regulations, Part 541, Harry S. Kantor, Presiding Officer 6 – 7 (Mar.3,1958) “Kantor Report”
- ¹⁸⁶ *Id.* at 18, citing 69 Fed. Reg. 22171.
- ¹⁸⁷ *Id.* at 17, citing 81 Fed. Reg. 32393,32440.
- ¹⁸⁸ *Id.* at 18.
- ¹⁸⁹ *Id.* at 19. See, *Nevada I*, 218 F. Supp3d at 526 – 33 and *Nevada II*, 275 F. Supp.3d at 805-08.
- ¹⁹⁰ *Nevada II*, *supra* at 807 – 08.
- ¹⁹¹ *Id.* at 45 – 46, citing 84 Fed. Reg. 51236. No doubt this change in position by the DOL was due to the change in administrations between 2016 and 2019.
- ¹⁹² *Id.* at 37.
- ¹⁹³ *Id.* at 38.
- ¹⁹⁴ *Id.* at 39.
- ¹⁹⁵ 467 U.S. 837 (1984).
- ¹⁹⁶ This lengths and page counts are from the readily available CCH reporting of the federal Internal Revenue Code (Summer 2024 version), and the federal Treasury Regulations (Summer 2024 version).
- ¹⁹⁷ 26 U.S.C. § 469.
- ¹⁹⁸ See 26 U.S.C. § 469(l) that authorized “legislative regulations” by the statement that “The Secretary [of the Treasury] shall provide such regulations as may be necessary or appropriate to carry out provisions of this section [469] ...” and 26 C.F.R. § 1.469-0, *et seq.*, which contain the 42 pages of regulations implementing 26 U.S.C. §469.
- ¹⁹⁹ See end of 26 U.S.C. § 1411 where there is no reference to the Secretary of the Treasury providing regulations.
- ²⁰⁰ 562 U.S. 44, 131 S. Ct. 704 (2011).
- ²⁰¹ 440 U.S. 472 (1979).
- ²⁰² *Id.* at 477.
- ²⁰³ *Mayo*, 131 S. Ct. at 713.
- ²⁰⁴ § 706 of the Administrative Procedures Act (1946).
- ²⁰⁵ A link to the form (site most recently accessed on January 6, 2025) is [Form 8275-R \(Rev. November 2024\)](#).
- ²⁰⁶ The instructions to Form 8275-R can be located (site most recently accessed on January 6, 2025) at [Instructions for Form 8275-R \(Rev. November 2024\)](#).
- ²⁰⁷ The schedule is available (site most recently accessed on January 6, 2025) at [Schedule UTP \(Form 1120\) \(Rev. December 2022\)](#) and the instructions thereto at [Instructions for Schedule UTP \(Form 1120\) \(Rev. December 2022\)](#).