SPIEGEL & MCDIARMID LLP JULY 2, 2024

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SUPREME COURT

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CLIENT ALERT: SUPREME COURT OVERTURNS *CHEVRON* DEFERENCE IN *LOPER BRIGHT ENTERPRISES V. RAIMONDO*

On June 28, 2024, the Supreme Court issued its decision in *Loper Bright Enterprises v. Raimondo*.[1] The decision overturns decades-old precedent and alters a foundational principle of the law governing federal court review of decisions by federal administrative agencies by eliminating the interpretive doctrine of *Chevron* deference.[2] Under *Chevron*, reviewing courts must defer to—in other words, uphold—a federal administrative agency's interpretation of ambiguous federal statutes. *Loper Bright* shifts the authority to interpret such statutory language, in many instances, from the federal agency in charge of administering the statute to the federal courts. It is too soon to know how the federal courts will apply *Loper Bright*, but the decision will likely narrow the ability of all federal agencies, including the Federal Energy Regulatory Commission (FERC) and the Federal Communications Commission (FCC), to do their jobs. We provide an overview of *Loper Bright* and its potential ramifications—please reach out to firm attorneys with any questions or for more information.

Loper Bright and the Future of Federal Administrative Law

Decisions made by federal administrative agencies impact nearly every aspect of modern life. Federal agencies are particularly influential in the regulated industries, such as electricity, natural gas, and telecommunications, in which many of Spiegel's clients participate.

For 40 years, the governmental bodies responsible for regulating these industries—entities such as FERC, the FCC, and others—and the federal courts charged with reviewing agency decisions—operated within a legal framework called *Chevron* deference that required federal judges, in many circumstances, to uphold agency interpretations of statutory language that the court concluded was non-specific or ambiguous. This framework

[1] *Loper Bright Enterprises v. Raimondo*, Case No. 22–451, 2024 WL 3208360 (2024), https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf (*Loper Bright*, Op., or Opinion).

[2] *Chevron* deference was adopted in *Chevron v. Nat. Res. Defense Council*, 467 U.S. 837 (1984) (*Chevron*).

allowed these agencies flexibility to interpret and apply the statutes they are charged with administering—in part due to the subject matter expertise that agencies have when compared with generalist federal courts.

In *Loper Bright*, the Court rejects *Chevron's* framework of judicial deference in favor of a rule that primarily tasks federal judges, not agency officials, with resolving statutory ambiguities or uncertainties. Instead of affirming an agency's reasonable reading of an unclear statute, *Loper Bright* requires reviewing courts to decide the statute's meaning based on the court's independent assessment of the "best reading" of the statute. Op. at 23.

Agency Orders and Regulations that Relied on *Chevron* Deference

While it is too soon to understand the impact of the Supreme Court's new "best reading" statutory interpretation standard, one immediate question is how *Loper Bright* may impact the many agency orders and regulations that have previously been upheld by the courts under the now-overruled *Chevron* standard. Courts reviewing FERC decisions have relied on *Chevron* deference to affirm FERC's interpretations of the major statutes it administers, including the Federal Power Act (FPA),[3] the Public Utility Regulatory Policies Act (PURPA),[4] and the Natural Gas Act.[5]

While *Loper Bright* does not automatically overturn all previous court decisions upholding orders and regulations under *Chevron*, those orders and regulations could be systematically dismantled by future federal court decisions. The justices in the majority state that prior reliance on *Chevron* does not constitute the "special justification" that is necessary to overrule a prior court decision. Op. at 34. But the dissenting justices are not convinced that the "thousands" of court decisions affirming agency decisions under *Chevron* will remain untouched because "[c]ourts motivated to overrule an old *Chevron*-based decision can always come up with something to label a 'special justification.'" Dissent at 30-31.

Cases Pending Before the Federal Courts

Loper Bright's new standard will be tested soon enough—there are cases pending throughout the federal court system that involve *Chevron* deference. Where appeals are pending, the appellate courts are charged with applying the new standard of review. Where cases have been decided but are not yet final, they can be reconsidered consistent with *Loper Bright.* For example, the D.C. Circuit recently relied on *Chevron* to affirm a

[3] *See, e.g. N.Y. v. FERC*, 783 F.3d 946 (2d Cir. 2015); *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014); *Am. Rivers v. FERC*, 201 F.3d 1186 (9th Cir. 1999).

[4] *See e.g. Solar Energy Indus. Ass'n v. FERC*, 80 F.4th 956 (9th Cir. 2023); *Solar Energy Indus. Ass'n v. FERC*, 59 F.4th 1287 (D.C. Cir. 2023) (this decision was cited in Justice Kagan's dissent as an example of a recent *Chevron* decision).

[5] *See, e.g., N.Y. State Dept. of Env't Conservation v. FERC*, 991 F.3d 439 (2d Cir. 2021); *Assoc. Gas Distribs. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987); *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071 (D.C. Cir. 2002).

FERC decision as a reasonable interpretation of a statutory provision of PURPA.[6] FERC's decision involved a technical question of what it means to meet PURPA's megawatt threshold to be considered a qualifying small power production facility. The Supreme Court vacated and remanded the decision back to the D.C. Circuit for further consideration under *Loper Bright*.[7]

Surviving Deference Standards

The impact of *Loper Bright's* dismantling of *Chevron* deference may be muted by the deference standards that purport to survive the Opinion. For instance, *Loper Bright* allows courts to (1) find that Congress has intentionally delegated to an agency the discretion to determine the meaning of a statute and (2) look to an agency's statutory interpretation for guidance pursuant to so-called *Skidmore* deference.[8] Further, *Loper Bright* affects only an agency's interpretation of statutes—it does not affect the deferential standards under which federal courts review agency factfinding or policymaking.[9]

The Bottom Line

Although it is too early to assess the impact of the Court's decision with any certainty, it may well be profound. The overruling of *Chevron* deference removes one of the foundational principles of federal administrative law and one of the most-cited cases in American jurisprudence. Industry participants should expect a period of disruption and uncertainty as courts and agencies work out how to apply *Loper Bright*'s "best reading" standard in particular regulatory contexts and as challenges are brought against statutory interpretations that were previously considered settled.[10] At its heart, *Loper Bright* constitutes a powerful shift in authority from federal agencies to the federal courts.

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[6] *Solar Energy Industries Ass'n v. FERC*, 59 F.4th 1287 (D.C. Cir. 2023) (petition for writ of certiorari filed June 14, 2023).

[7] *Edison Elec. Institute v. FERC*, No. 22-1246 (S. Ct. July 2, 2024).

[8] Op. at 16 (*quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Under *Skidmore*, agency interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" and are given weight by a court based on multiple factors including "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." *Skidmore*, 323 U.S. at 140.

[9] Agency factfinding and policymaking are reviewed under the arbitrary, capricious, or abuse of discretion and substantial evidence standards.

[10] The first signs of potential impact are already appearing at FERC. Commissioner Christie issued a statement asking FERC to amend Order 1920 because it is "far more likely" to get struck down by a court without the benefit of *Chevron* deference. Chairman Phillips responded defending FERC's ability to regulate transmission planning and cost allocation pursuant to the "best reading" of the Federal Power Act. *Commissioner Mark Christie's Statement Concerning Order No. 1920 and U.S. Supreme Court's Overruling of Chevron Deference* (June 28, 2024), https://www.ferc.gov/news-events/news/commissioner-mark-christies-statement-concerning-order-no-1920-and-us-supreme#:~:text=The%20Commission%20still%20has%20an,of%20states%20throughout%20the%20process; *Chairman Willie Phillips' Statement Concerning Order No. 1920* (July 1, 2024) https://ferc.gov/news-events/news/chairman-willie-phillips-statement-concerning-order-no-1920-0.

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