In *Loper Bright* and *Relentless,* Supreme Court returns to high-stakes question of viability of the *Chevron* doctrine

By James P. McLoughlin Jr., Esq., Mary Katherine Stukes, Esq., and Pierce Werner, Esq., Moore & Van Allen

NOVEMBER 7, 2023

On May 1, 2023, the Supreme Court granted *certiorari* in *Loper Bright Enterprises v. Raimondo,* Case No. 21-5166. The Supreme Court will decide "[w]hether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."

The *Chevron* doctrine has long been controversial with many judicial conservatives, who object that the doctrine is unconstitutional, both as a transfer of Article III judicial power and Article I legislative power to the Executive Branch and as a limit on the exclusive Article III power of the judicial branch to determine "what the law is." Further, antagonists object to its application without a clear framework to resolve statutory ambiguity, leaving too much discretion with the courts to engage in results-oriented decisioning.

First defined in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984), stated most succinctly, the doctrine provides that the federal courts will accept an agency's reasonable interpretation of an ambiguous statute that the agency administers — even if that court would choose an alternative interpretation. The original *Chevron* doctrine required a two-step analysis.

The first step: determine whether the statute was ambiguous, and if not, the analysis ends. If the statute is ambiguous or if in the text of the statute Congress has not directly addressed the question at issue, a federal court will assess whether the interpretation of the statute by the agency is reasonable — the second step — and defer to the agency's interpretation if so. In a now famous lecture at Duke Law School, in 1989, the late Justice Antonin Scalia characterized *Chevron* as the most important administrative law decision in the era of the modern administrative state.

The *Loper Bright* petitioners challenge regulations of the National Marine Fisheries Service (NMFS) which impose a per diem fee on vessels to pay for the individual they are required to carry on trips to monitor compliance with fisheries rules under the Magnuson-Stevens Act (MSA), but the case is intentionally about much more. One indicator of the case's importance across the federal landscape is apparent in the roughly 70 amicus briefs filed in the case.

Another indicator comes from the acts of the Court itself through the granting of *certiorari* on Oct. 13, 2023, in *Relentless, Inc. v. Department of Commerce* and consolidation with *Loper Bright*. Because Justice Ketanji Brown Jackson previously served on the panel that decided *Loper Bright* at the D.C. Circuit, she recused herself, leaving a reduced bench and risking a 4-4 tie, but the grant of *certiorari* in *Relentless, Inc.* obviates the concern.

> *The war over whether the* Chevron *doctrine should survive and, if so, in what form, has been fought in the federal circuit courts and the Supreme Court for decades.*

Relentless Inc. raises essentially the same issues as *Loper Bright* and is narrowed to the same question. It, too, is a challenge to the per diem fees imposed by the NMFS on vessels to pay the cost of the observers the NMFS sends out to monitor the health of fisheries. *Loper Bright* comes from the District of Columbia U.S. Circuit Court of Appeals; *Relentless Inc.* comes from the 1st U.S. Circuit Court of Appeals.

Both circuit courts upheld the regulation imposing the fees, but other courts of appeal have not held the NMFS to have such authority in similar factual contexts, including the 5th U.S. Circuit Court of Appeals in *Mexican Gulf Fishing Co. v. Department of Commerce*, 60 F.4th 956 (5th Cir. 2023). Some perspective on the competing camps is in the interpretation of the text of section 1853(c) of the statute, which authorizes proposed regulations a fisheries council "deems necessary or appropriate" for the listed purposes.

It is argued that courts favoring *Chevron* find in this language a grant of authority to the agency, resulting in the 1st and D.C. circuits giving leeway to the agency to write new law by regulation; whereas, it is argued, the 5th Circuit gave no such deference because it viewed "necessary or appropriate" not as grant of authority, but as a limitation authorizing only rules justified as strictly necessary or appropriate. Hence, two very different sides of the same coin.

The war over whether the *Chevron* doctrine should survive and, if so, in what form, has been fought in the federal circuit courts and the Supreme Court for decades. However, some read the Court's May 2023 decision in *Sackett v. EPA* — in which it rejected the EPA's definition of "waters of the United States," reciting a history of that much-litigated phrase that strongly implied longstanding regulatory overreach by the EPA, with no reference to *Chevron* in the opinion — as defining the Court's task to "ascertain whether clear congressional authorization exists for the EPA's claimed power." Some see this analysis as leaving no room for deference to an agency when the statute is silent on an agency's authority, potentially foreclosing deference based upon implied congressional authority.

The arguments presented by both sides are complex and both practical and theoretical. The ways the Court could choose to resolve the question presented are several. One is the question of the first step of the test: When is a statute truly ambiguous such that the *Chevron* Doctrine should apply?

The Court could guide that ambiguity is rare, and in this case, the fact the statute expressly authorizes *some* fees but not *these* is clear support for a finding these fees are not authorized. *Chevron* could then survive.

Another potential resolution could redefine whether the *Chevron* Doctrine applies when the statute is silent on the authority of the agency to fill the gaps on an issue. The Court could find silence evidences a lack of agency authority, so *Chevron* does not come into play. A third could expound or heighten the parameters around *Chevron* deference's two-part analysis, requiring convincing proof of agency authority and reasonableness in the exercise of that authority, thereby restricting *Chevron* severely.

Many believe the Supreme Court will make a final decision in *Relentless, Inc.* and *Loper Bright* about whether the *Chevron* Doctrine *should survive at all*. That may not hold true, but it is certainly the eventuality that parties on both sides of the fight believe to be the most likely. The stakes are high.

Proponents argue the *Chevron* Doctrine has been a significant factor enabling a complex national government to function across spheres from construction to environmental protection to civil rights. They argue that without *Chevron* deference the everyday decisioning and rulemaking essential to operation of modern, complex statutory constructs could grind to a halt and the courts could be overwhelmed by a tidal wave of lawsuits, challenging administrative rules on everything from the width of doorways required to comply with the Americans with Disabilities Act, to the practices in housing and lending which are prohibited to prevent racially discriminatory redlining, to the practicalities of preserving American fisheries from over-fishing and habitat degradation — all of which, as a practical matter, Congress has neither the time nor the staffing resources nor in-depth experience to enact. Thus, the alternative becomes the federal courts, which they argue results in a *de facto* shift of lawmaking to the Judicial Branch, presenting more constitutional issues than it solves. (The authors filed an amicus brief in *Loper Bright* on behalf of several civil rights organizations supporting the government's position that the *Chevron* Doctrine should not be overturned.)

Detractors argue the doctrine has permitted Congress to abdicate its responsibilities to make the laws and empowered the Executive Branch to oppress the citizenry unrestrained by the courts.

If the *Chevron* doctrine survives these latest challenges, Justice Scalia, an accomplished administrative lawyer who appreciated the complexity of the doctrine as well as its advantages and limitations, may have predicted the reasons for that survival in his lecture at Duke Law School. He predicted the doctrine would endure, "not because it represents a rule that is easier to follow and thus easier to predict (though that is true enough), but because it more accurately reflects the reality of government, and thus more adequately serves its needs."

About the authors



James P. McLoughlin Jr. (L) is a member of **Moore & Van Allen** and focuses his practice in civil disputes, criminal investigations, and trials. He is based in Charlotte and can be reached at jimmcloughlin@mvalaw.com. **Mary Katherine Stukes** (C) is head of the firm's environmental practice. She is based in Charlotte and advises clients on environmental issues involved in all types of business transactions, as well as regulatory compliance issues and environmental litigation. She can be reached at marykatherinestukes@mvalaw.com. **Pierce Werner** (R), based in Charlotte, represents entities, businesses, and industries across the full spectrum of environmental legal issues. He has experience with complex environmental litigation, and regulatory enforcement and compliance actions at the local, state, and federal levels, as well as transactional environmental due diligence, Brownfields redevelopment, environmental permitting. He can be reached at piercewerner@mvalaw.com. Chassity Bobbitt, a litigation associate at the firm, contributed to this article. The authors filed an amicus brief in *Loper Bright* on behalf of several civil rights organizations supporting the government's position that the *Chevron* Doctrine should not be overturned.

This article was first published on Reuters Legal News and Westlaw Today on November 7, 2023.