Loper Bright Enterprises v. Raimondo: HJN Primer

On June 28, 2024, the U.S. Supreme Court issued its opinion in *Loper Bright Enterprises v. Raimondo,* 603 U.S. ___ (2024), overruling the longstanding administrative law precedent *Chevron USA Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). As *Chevron* was the fundamental bastion of the U.S. administrative state, the end of "*Chevron* deference" portends great instability in the continuing viability of federal regulations and raises profound questions for advocates and regulators.

The impacts of *Loper Bright* on day-to-day housing advocacy are more indirect and difficult to predict. But in summary, advocates should be prepared to both (i) refute specious arguments from landlords, PHAs, or other adversaries contesting the legal efficacy of regulations on which tenants rely, and (ii) use *Loper Bright* offensively to contest unjust regulations (or applications thereof) that may negatively impact tenants.

1. Okay, first of all, what even is this "*Chevron* deference" anyway?

When Congress enacts legislation, seldom can the statutory text realistically specify whether or how that new law applies to every conceivable situation that may arise relevant to the act. Even if it does, how the law applies to new circumstances that may arise in the future can also create uncertainties. For reasons such as these, the executive agency that administers the statute must often interpret ambiguous terms and provisions.

Agency interpretations of statutes can occur through various forms, ranging from informal letters and practices to enforcement and adjudicatory proceedings to formal notice & comment rulemaking. The federal Administrative Procedures Act (APA) provides rules and procedures for agencies to follow in interpreting statutes and making rules and policies based on those interpretations. *See* 5 U.S.C. § 551 *et seq.* The APA also provides a cause of action by which stakeholders may challenge agency interpretations that are inconsistent with the statute on which they are based, or that are not made in accordance with APA-required procedures. *See* 5 U.S.C. § 702.

Under the APA, generally the most elaborate means by which an agency can establish an official interpretation of a federal statute is through promulgating formal regulations. *See* 5 U.S.C. § 553. Usually this requires the agency to publish the proposed interpretation and justification for it in the Federal Register, provide the public with an opportunity to object or otherwise comment on the proposed rule, and then to meaningfully consider the feedback received before adopting the final rule. See *Id*. Ordinarily a final rule will not take effect for at least 30 days after publication, so that "an interested person [may] petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(d-e).

Chevron was a 1984 U.S. Supreme Court case which established a basic two-step framework for deciding APA lawsuits challenging agency interpretations of federal statutes reflected in regulations promulgated

Created: July 15, 2024

through formal notice & comment rulemaking. Under *Chevron*, the first step was to determine whether the statute even left any ambiguity for the agency to interpret:

> "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

Chevron, 467 U.S. at ¶ 5. If the statutory text was in some way ambiguous, however, then the court would recognize the agency's interpretive authority:

> "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation... Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit."

Chevron, 467 U.S. at ¶ 6.

Interpretive regulations made pursuant to this delegation of authority were then entitled to very strong deference; per the court: "such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. *Chevron*, 467 U.S. at ¶ 6. Put another way, *Chevron* deference meant "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."

The driving rationale underlying *Chevron* deference was a view that agency staff tended to be subject matter experts and hence were in a better position to decide the best policy from among multiple reasonable alternatives that conflicting interests and stakeholders may present. *See Chevron* at ¶¶ 6-12.

2. Okay, so what happened in this *Loper Bright* case then?

In *Loper Bright*, the right-wing bloc of the Supreme Court overruled *Chevron* and held instead that, when an agency interpretation is challenged under the APA, "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority[.]" *Loper Bright* at *35.

While the majority opinion acknowledges that "[c]areful attention to the judgment of the Executive Branch may help inform that inquiry," the opinion neither requires courts to show any deference to the agency interpretation nor indeed even *allows* such deference. *Loper Bright* at *35.

The rationale of *Loper Bright* was predicated on two points. One was the majority's view that *Chevron* itself had given rise to a series of interpretive challenges of its own and had become an increasingly complicated doctrine over the decades since being decided. *See Loper Bright* at *26-34. The other was the majority's disagreement that the substantive expertise of agency staff was genuinely relevant to the interpretation of statutes and promulgation of rules:

> "We recently noted that interpretive issues arising in connection with a regulatory scheme often 'may fall more naturally into a judge's bailiwick' than an agency's. We thus observed that '[w]hen the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority.' *Chevron's* broad rule of deference, though, demands that courts presume just the opposite. Under that rule, ambiguities of all stripes trigger deference. Indeed, the Government and, seemingly, the dissent continue to defend the

> proposition that *Chevron* applies even in cases having little to do with an agency's technical subject matter expertise. But even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency."

Loper Bright at *24 (internal citations omitted). The majority added that, in cases where technical expertise is truly relevant, the court remains the proper decisionmaker and the technical material may be presented to the court through submissions of the parties and amici. *Loper Bright* at *24-*25.

3. **Okay, so *Loper Bright* overturned *Chevron*—what is the new legal standard for determining whether a court will defer to an agency regulation interpreting a federal statute?**

Well that's just it, *Loper Bright* substantially ends entirely the concept of judicial deference to agency interpretations of statutes. At most, even an agency interpretation that has withstood the crucible of notice & comment rulemaking now appears entitled at most to something resembling so-called *Skidmore* deference, which means only that the weight given to an agency interpretation depends on how persuasive it is. *See, e.g., Gonzales v. Oregon,* 546 U.S. 243, 268 (2006) (deference to agency may be appropriate "in accordance with … 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."), *citing Skidmore v. Swift & Co.,* 323 U.S. 134 (1944).[1]

Simply put, agencies may prove successful in persuading courts as to the wisdom of their interpretations of federal statutes. But the possibility that a court might uphold an agency interpretation by the power of persuasion is not really *deference*—which by definition means a court accepts any reasonable agency interpretation, even over a competing interpretation the court finds more persuasive.

If any window does remain open for agencies to create regulations entitled to deference, it is where Congress can be shown to have purposefully authorized the agency to make the interpretation in question:

> "[W]hen a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."

Loper at *35. But even this much is unclear; to "respect" a Congressional declaration of agency authority to interpret a statute does not necessarily mean to defer to the resulting interpretation. See *Loper Bright* at *9 ("Respect,' though, was just that. The views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it. Whatever respect an Executive Branch interpretation was due, a judge 'certainly would not be bound to adopt the construction given by the head of a department.'"), *quoting Decatur v. Paulding,* 14 Pet. 497, 515 (1840).

---

[1] Note that "*Skidmore* deference" generally applies to agency interpretations of statutes that appear in sub-regulatory materials or are otherwise taken without notice & comment, *United States v. Mead Corp.,* 533 U.S. 218 (2001), and agency interpretations of its *own regulations* are entitled to a similarly deferential review largely centered on whether the interpretation was taken in good faith. *See Kisor v. Wilkie,* 588 U.S. 558 (2019).

Accordingly, at best the *Loper* decision constrains the field of subject matter in which federal agencies can make regulations entitled to deference only to those topics on which Congress has demonstrably delegated authority beyond simply by leaving the statute ambiguous. More likely, *Loper* allows for no deference whatsoever, and agency interpretations are binding only insofar as courts agree with them.

4. Does *Loper Bright* have any immediate impacts on federal housing law and policy?

Loper Bright is a profoundly destabilizing decision. It knocks out a central pillar of U.S. administrative law and sharply contracts the range of subject matter on which federal agencies can promulgate reliable, binding regulations. Undoubtedly many existing regulations promulgated in reliance upon *Chevron* are now vulnerable to attack, as the agency's adherence to a perfectly reasonable and defensible interpretation will not save it against a competing version the court likes better. Accordingly, it is conceivable that agency regulations important to tenants or low-income homeowners could face new legal challenges, though exactly which regulations and when and where they will be challenged is difficult to predict.

By the same token, the inability of regulations to benefit from *Chevron* deference will pose a serious impediment to promulgating new regulations that can withstand legal attack. Even with an immaculate administrative record and unmistakable interpretive mandate from Congress, any new agency rule is now vulnerable to vacatur by a judge who simply finds a different interpretation more persuasive. This is particularly problematic in that challengers have the choice of forum—and industry has shown it knows where to find judges who see things their way. Though perhaps not technically outcome-determinative, the absence of deference is practical decisive when the validity of a regulation is to be determined by a single judge, hand-picked by industry for partisan anti-regulatory views, exercising *de novo* judgment.

The demise of *Chevron* thus appears especially worrisome in connection with regulations that impose distinct burdens or restrictions on industry. In the housing sphere, this presents two distinct targets:

- Anti-discrimination regulations promulgated to implement the Fair Housing Act and other fair housing laws such as the Equal Credit Opportunity Act or the VAWA housing provisions; and
- Regulations implementing consumer protection laws that affect tenants and homeowners, such as the Truth-in-Lending Act, Fair Credit Reporting Act, or the Federal Trade Commission Act.

Regulations in adjacent fields that nevertheless significantly impact neighborhoods and communities, such as education, environment, and transportation, will face their own challenges as well.

Some recent regulations that may face renewed litigation threats include HUD's discriminatory effects rule[2] and HUD's equal access rule (requiring equal access to HUD housing programs regardless of sexual orientation or gender identity).[3] Under *Chevron*, challenging these regulations would require showing they were promulgated improperly or represent arbitrary and capricious interpretations of the Fair Housing Act. Under *Loper Bright*, a challenger would need only to persuade the judge that an alternative FHA interpretation is superior. Further, APA claims had been subject to a functional six-year limitations period (from the time the rule becomes final) until a separate recent Supreme Court decision, *Corner*

[2] 88 Fed.Reg. 19450 (Mar. 31, 2023).
[3] 77 Fed.Reg. 5662 (Mar. 5, 2012).

Post, effectively did away with that limitations period by ruling that an APA cause of action does not accrue until the challenger has suffered an injury from the regulation. *See Corner Post, Inc. v. Board of Governors,* 603 U.S. ----144 S.Ct. 2440 (2024).

In addition, several regulations currently in progress that would have benefited from *Chevron* deference include HUD's anticipated new rules on affirmatively further fair housing[4] and on the use of criminal history in subsidized housing decisions,[5] and the FTC's proposed rule on unfair and deceptive fees.[6] If final rules are introduced now, those rules would likely face APA suits before hostile U.S. District Judges in Texas or Louisiana and those judges would be free to adopt the challenger's competing interpretations of the relevant statutes with no deference given to the agency expertise or consideration of stakeholder input. Hence the potential impacts of *Loper Bright* are twofold: (i) existing or newly-promulgated regulations may be challenged judicially and struck down by partisan courts, and (ii) agencies may be reluctant to even bother promulgating new regulations in anticipation of such judicial outcomes.

5. Okay, how about my day-to-day cases; will *Loper Bright* have an impact there?

Disruptive though *Loper Bright* may be, it will be important to be clear on what *Loper Bright* does not establish. First, *Loper Bright* does not directly impact any federal regulation outside the ocean fishing rules at issue in that case. Second, the *Loper Bright* majority made clear they "d[id] not call into question prior cases that relied on the *Chevron* framework" and that "[t]he holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory stare decisis despite our change in interpretive methodology." *Loper Bright* at *34. While the ruling makes federal regulations easier to challenge, until actually challenged and struck down agency regulations remain in effect as before.

Third, and perhaps most importantly, *Loper Bright is* an APA case and its holding impacts the legal standard a court must apply in evaluating a challenge to a promulgated regulation under the APA. *See Loper Bright* at 35. APA challenges are specifically authorized under 5 U.S.C. § 702 and limited to federal court only. *See e.g., Fannie Mae v. LeCrone,* 868 F.2d 190, 193 (6th Cir. 1989); *see also Smith v. Cromer,* 159 F.3d 875, 879 (4th Cir. 1998) ("For a state court (or federal court exercising removal jurisdiction) to assert the power of judicial review over decisions made by federal agencies while implementing their own regulations is contrary to the Administrative Procedures Act, 5 U.S.C. § 702, which expressly limits such review authority to the federal courts."), *citing Boron Oil Co. v. Downie,* 873 F.2d 67, 71 (4th Cir. 1989). Even if the action is brought in federal court, the APA authorizes judicial review only where the complaint identifies the improper agency action. *See, e.g., Sciolino v. Marine Midland Bank-W.,* 463 F. Supp. 128, 130 (W.D.N.Y. 1979) ("The claim of jurisdiction under 5 U.S.C. s 702 can be dismissed out of hand. Such section applies only to a governmental agency's action and the jurisdiction of district courts to review such action. Nothing in the federal complaint speaks of agency action and no review of any such action is sought.").

[4] 88 Fed.Reg. 8516 (Feb. 9, 2023).
[5] 89 Fed.Reg. 25332 (Apr. 10, 2024).
[6] 89 Fed.Reg. 21216 (Mar. 27, 2024).

In summary, this means adversaries in day-to-day housing litigation will not realistically be able to avoid application of federal housing regulations on which tenants and low-income homeowners rely unless and until those regulations are challenged and vacated under a proper APA judicial review proceeding. It is not difficult to imagine many specious challenges of this agency regulations that arise spontaneously in housing litigation being asserted:

- A landlord who collects side payments from a voucher tenant might argue, in the context of a state court eviction proceeding, that the regulations prohibiting landlords from seeking or collecting side payments and providing that a tenant's withholding of side payments does not constitute noncompliance with a rental agreement,[7] does not reflect the best interpretation of the U.S. Housing Act and ask the eviction trial judge to decline to follow the regulation as invalid;

- A subsidized multifamily owner might treat as "annual income, amounts a household receives that are excluded by 24 C.F.R. § 5.609(b)—then, in response to a breach of contract action seeking to enforce the tenant's right to a proper subsidy, may argue that 24 C.F.R. § 5.609(b) excludes amounts Congress did not intend to exclude and the judge should reconsider the regulation accordingly.

- A public housing agency may adopt a policy of not disclosing any evidence to a public housing tenant in advance of a grievance hearing concerning eviction. If the tenant later argues in eviction court that the proceeding must be dismissed because the PHA withheld evidence in violation of 24 C.F.R. §§ 966.4(m), the PHA may contend that the relevant statute (42 U.S.C. § 1437d(k)(3)) requires only that the tenant have the opportunity to view the evidence *at the hearing* and that HUD's regulation is thus invalid.

- A mortgage company whose agent engages in a discriminatory lending practice may argue that 24 C.F.R. § 100.7(b), which provides that principals are liable for the discriminatory acts of their agents, is not authorized by the statutory text of the Fair Housing Act and hence of no force.

In scenarios such as these, in which the validity of a regulation on which the tenant relies is contested not through a federal APA action but as an ancillary question in litigation not directly involving the relevant federal agency, the court should simply honor the regulation. *See, e.g., Sciolino* at 130.

The same is true for any such arguments raised in state courts. *See, e.g., Boron*, 873 F.2d at 71 ("agency regulations implementing federal statutes have the force and effect of federal law which state courts are bound to follow"), *citing Chrysler Corp. v. Brown,* 441 U.S. 281, 295–96 (1979); *see also Mann v. Henderson,* 261 N.C. 338, 341, 134 S.E.2d 626, 628–29 (1964) ("Federal laws and regulations, where applicable, are, of course, binding on state courts and subject to judicial notice by state courts."), *quoting Lange v. Nelson-Ryan Flight Serv., Inc.,* 259 Minn. 460, 466, 108 N.W.2d 428, 432 (1961).

allowing parties to spontaneously challenge regulations in the course of unrelated litigation or state court proceedings, with no deference shown to the agency interpretation, would produce absolute chaos. Without the participation of the relevant agencies, it would fall to private litigants to defend those regulations—and courts would evaluate them without a complete record or possibly no record at all. *Loper Bright* certainly creates the possibility that regulations important to low-income tenants and

[7] 24 C.F.R. § 982.451(b)(4).

homeowners may be challenged in APA suits, enjoined or vacated, and then not available to for reliance in subsequent legal matters. But the case does not subject the federal regulatory state to the absolute free-for-all that some less-sophisticated litigation adversaries can be expected to call for.

6. What are the longer-term implications of *Loper Bright*?

The fundamental purpose of government is to protect persons and communities with less power and resources against exploitation and abuse by wealthier and more powerful actors. Government does this through making and enforcing regulations. Traditional political discourse in the U.S. has centered on whether the government should regulate more or should regulate less. But certain extremists have endeavored to disable the ability of the federal government to regulate altogether.

Loper Bright serves this extreme agenda by significantly reducing the scope in which the federal government can make binding regulations and deeply complicates their enforcement. This will likely manifest in federal agencies becoming even more reluctant to attempt certain forms of regulation or enforcement, for fear of courts overturning new regulatory measures on partisan grounds or rejecting their preferred statutory interpretations in challenges raised in defense of enforcement proceedings.

The long-term impact of *Loper Bright* is thus to shift the balance of power significantly further toward private wealth and corporate resources.

7. Is there anything positive about *Loper Bright*?

At present, the federal administration is generally respectful of, if not legitimately friendly, toward the interests tenants and lower-income homeowners. However there is a distinct possibility the next (or other future) administration could be quite hostile to tenants and low-income persons, especially distinct sub-groups such as immigrants and people of color. Just as *Loper Bright* will help industry attack regulations the current administration has or is in the process of promulgating, the holding could help advocates challenge harmful or abusive regulations that a new regime might impose.