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## SEC Rulemaking and the Future of Agency Deference after *Chevron*

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The 2023-2024 United States Supreme Court term was one of the most consequential in recent history for administrative law. Beginning at the end of June, and over the course of only a few days, the Court issued a series of opinions that reshaped decades of jurisprudence concerning judicial review of agency action and processes. This article discusses the Supreme Court's recent decisions and their potential near- and long-term impact on Securities and Exchange Commission (SEC) rulemaking and the interpretation of the federal securities laws. The Court's decisions in *Ohio v. EPA*, *Loper Bright Enterprises v. Raimondo*, and *Corner Post, Inc. v. Board of Governors of the Federal Reserve System* are each remarkable in their own right, but taken together, their collective impact on financial services regulation could be substantial.<sup>1</sup>

### ***Chevron*—Then and Now**

The Supreme Court's ruling in *Chevron v. Natural Resources Defense Council* famously established the test for judicial deference to government agencies' interpretations of certain agency-related statutes. Under *Chevron*, courts are instructed to perform a two-part analysis to determine if an agency's interpretation of a statute should be upheld. The first question is whether Congress has directly spoken to the precise question at issue. If congressional intent was "clear," that would end the inquiry. If the statute

is silent or ambiguous with respect to the specific issue, the second question for the court is whether the agency's interpretation is based on a permissible construction of the statute. In such cases, "a court may not substitute its own construction of a statutory provision for a *reasonable* interpretation made by the administrator of an agency."<sup>2</sup> *United States v. Mead Corporation* added a third, preliminary step, colloquially known as *Chevron* "step zero."<sup>3</sup> Under *Chevron* "step zero," *Chevron* step one or two deference would only apply when the agency's interpretation was promulgated in the exercise of authority delegated by Congress to the agency to make rules carrying the force of law.<sup>4</sup> *Chevron* therefore established a highly deferential framework for courts to review agency interpretations of ambiguous statutes, and over its 40-year existence, *Chevron* has been cited in more than 18,000 court decisions and more than 3,000 administrative decisions.<sup>5</sup> At the circuit level, agency interpretations prevailed in nearly 8 out of 10 cases in which *Chevron* applied.<sup>6</sup>

At the Supreme Court level, the application of *Chevron* has not been consistently applied over time. One study suggested that the Court applied *Chevron* deference only one-quarter of the time in which it would have seemed to apply.<sup>7</sup> The Supreme Court has not relied on *Chevron* since 2016, and lower courts more and more bypassed *Chevron's* various steps and nuances, giving way to the burgeoning

“major questions doctrine.”<sup>8</sup> On the last day of its October 2021 term, the Supreme Court for the first time invoked, in a majority opinion, the major questions doctrine in *West Virginia v. EPA*, a case involving the scope of the Environmental Protection Agency’s (EPA) authority to regulate greenhouse emissions from coal-fired electric power plants. In *West Virginia*, the Court rejected EPA’s reliance on a statutory provision that, in the Court’s view, was a “previously little-used backwater.”<sup>9</sup> The Court concluded that it was unlikely Congress would task EPA with “balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy,” such as deciding the optimal mix of energy sources nationwide over time and identifying an acceptable level of energy price increases.<sup>10</sup> Under the major questions doctrine, a court must treat questions of “vast economic and political significance” differently when reviewing agency interpretations of its statutory authorities. In cases where there is something extraordinary about the “history and breadth of the authority” an agency asserts or the “economic and political significance” of that assertion, the Court should “hesitate before concluding that Congress meant to confer such authority.”<sup>11</sup> The Court also expressed heightened skepticism when an agency claims broad authority based on new interpretations of older statutes or statutes in which the grant of authority is not explicitly stated.

In her dissent in *West Virginia*, Justice Kagan sharply criticized the major questions doctrine, asserting that “[t]he current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the ‘major questions doctrine’ magically appear as get-out-of-text-free cards.”<sup>12</sup> Indeed, the origin of the major questions doctrine was tenuous from the outset and its precise relationship to the *Chevron* doctrine was unclear. Though attempts to properly place it within the *Chevron* rubric have been made in the period before and after its formal introduction by the Court

in *West Virginia*, lower courts have largely struggled for consistency in its applicability and limitations.

## ***Ohio v. EPA***

On June 27, 2024, the Supreme Court issued its decision in *Ohio v. EPA*.<sup>13</sup> In a 5-4 ruling written by Justice Gorsuch, the Court enjoined the EPA’s implementation of a cross-state smog reduction plan while litigation challenging the EPA’s action under the APA’s arbitrary and capricious standard of review continued. At issue were actions taken by the EPA after it required states to submit plans for the implementation, maintenance, and enforcement of Clean Air Act standards in their jurisdictions. Several years later, the EPA announced its intention to disapprove 19 of the plans. During the public comment period for the proposed plan disapprovals, the EPA issued a single, proposed federal plan that would enforce more stringent ozone pollution controls before rejecting the state plans as insufficient. Several states and companies then challenged the rule and requested a temporary block to its implementation, claiming the controls could lead to power grid emergencies.<sup>14</sup>

The Court found that the applicants were likely to prevail on their claim that the EPA’s action was arbitrary or capricious because the agency failed to offer a satisfactory explanation for its action, including a rational connection between the facts found and the choice made, and ignored an important aspect of the problem. Some observers suspected this case to be decided through the application of the major questions doctrine. Instead, the Court applied a more skeptical version of the arbitrary and capricious test as the basis for prohibiting an agency from implementing a rule where the agency did not adequately discuss comments that criticized the proposed rule. Justice Gorsuch found that for an agency action to avoid being arbitrary or capricious, it must offer “a satisfactory explanation for its action, including a rational connection between facts found and choices made.... Accordingly, an agency cannot simply ignore an important aspect of the problem.”<sup>15</sup>

The court effectively lowered the bar for what constitutes “arbitrary and capricious.”

## ***Loper Bright***

The following day, the Court issued its highly anticipated decision in the consolidated cases of *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce*<sup>16</sup> on June 28, 2024. These cases challenged an obscure National Marine Fisheries Service rule that mandated fishermen pay part of the cost of having federal observers aboard their ships to monitor compliance with federal fisheries regulations. The petitioners challenged the new rule under the Administrative Procedure Act (APA). Both the DC Circuit and First Circuit applied the *Chevron* doctrine in finding the regulations were permissible. The Court granted certiorari on the issue of whether *Chevron* should survive or be clarified. Writing for the majority, Chief Justice Roberts left no room for doubt: “*Chevron* is overruled,” holding that courts may not defer to an agency’s statutory interpretation of a law simply because the statute is ambiguous because such an approach violates the APA.

The majority began with the fundamental principle of judicial review to support the Court’s decision that interpretation of the law is within the province of courts—not administrative agencies. He reasoned that the framers of the Constitution envisioned that the final interpretation of the laws would rest within the province of the courts. Citing *United States v. Morton Salt* for the proposition that the APA was “a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices,” the Court interpreted the APA as a reflection of the framers’ vision embodied in Article III of the Constitution that interpretation of laws is the duty of the federal courts.<sup>17</sup>

The majority focused on *Chevron*’s inconsistency with the APA, which mandates that “[t]o the extent necessary to decision and when presented, the 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.”<sup>18</sup> In so doing, it found that *Chevron* defies the command of the APA that “the reviewing court”—not the agency whose action it reviews—is to “decide all relevant questions of law” and “interpret . . . statutory provisions.” Thus Section 706 of the APA requires a court to ignore, not follow, “the reading the court would have reached” had it exercised its independent judgment as required by the APA.

Going forward, courts should instead “exercise independent judgment in determining the meaning of statutory provisions” by using every tool at their disposal to determine the “best” reading of a statute and resolve the ambiguity.<sup>19</sup> It is unclear precisely what this means. Prior to the 1984 *Chevron* decision, courts applied the guidance established in *Skidmore v. Swift & Co.*<sup>20</sup> Under *Skidmore* deference, courts give weight to an agency’s interpretation based on its persuasiveness rather than its authority. A court would adjust the deference it would give to an agency’s statutory interpretation based on factors such as the thoroughness of the agency’s reasoning, its consistency with previous interpretations, and its overall ability to persuade. This approach allows for a flexible, case-by-case evaluation, ensuring that courts can rely on the expertise and informed judgment of agencies while retaining the final say in statutory interpretation.

Importantly, recognizing the substantial impact of its decision on any federal administrative statute molded by *Chevron* deference, the Court cautioned that the *Loper Bright* decision does not overrule prior decisions where a court applied *Chevron* deference to hold that an agency interpretation was lawful. The *Loper Bright* majority declared that some special justification—not simply that *Chevron* had been overruled—would be required for a court that had upheld an agency action under *Chevron* step two to reconsider that ruling in a new legal challenge filed in the future.<sup>21</sup> It is unclear what justification would be satisfactory for a court to revisit old decisions or

rules, whether through new administrative proceedings or through new judicial challenges.

## Corner Post

On July 1, 2024, the Supreme Court issued its decision in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, addressing when a plaintiff may bring a facial challenge to a final agency action under the APA.<sup>22</sup> *Corner Post* was a challenge to Federal Reserve Regulation II, which regulated debit card interchange fees pursuant to authority granted by the Durbin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Later that year, a group of retail-industry trade associations challenged Regulation II, but the US Court of Appeals for the DC Circuit upheld the rule in 2014 as a reasonable construction of the statute.<sup>23</sup>

Corner Post, Inc., a convenience store and truck stop in North Dakota that first opened for business in 2018, joined a 2021 challenge by several trade associations to Regulation II under the APA. They argued that Regulation II was “arbitrary and capricious, contrary to the APA, and in violation of the Durbin Amendment.”<sup>24</sup> The district court dismissed the challenge as untimely because under 28 U.S.C. § 2401 claimants generally must file civil suits against the government “within six years after the right of action first accrues” and the US Court of Appeals for the Eighth Circuit affirmed.<sup>25</sup> Applying its own precedent and following a majority of other federal circuit courts, the Eighth Circuit ruled that “when plaintiffs bring a facial challenge to a final agency action, the right of action accrues, and the limitations period begins to run, upon publication of the regulation.”<sup>26</sup> As a result, the appellate court held that *Corner Post*’s challenge—brought more than six years after the Federal Reserve issued Regulation II—was untimely. In April 2023, *Corner Post*’s petition for a writ of certiorari seeking Supreme Court review was granted in September 2023.

In a 6-3 decision, the Court held that, for purposes of Section 2401(a)’s statute of limitations, a claim under the APA accrues when a plaintiff is injured by final agency action. Rejecting the Federal Reserve’s argument that the statute of limitations began to run when an agency action is final under the APA, the Court instead ruled that a “right of action ‘accrues’ when the plaintiff has a ‘complete and present cause of action,’” which, under the APA, occurs when that plaintiff “suffers an injury from final agency action.” As a result, the statute of limitations does not begin to run until the plaintiff is actually injured by an agency action. As *Corner Post* filed its challenge within that six-year period, the Court held that its claim was timely and, accordingly, reversed the Eighth Circuit’s decision dismissing the case.

Relying on the plain language of Section 2401(a) and the Court’s own precedent interpreting that statute and other statutes of limitations, the Court rejected the Federal Reserve’s arguments that Section 2401(a) should be read against other statutes of limitations that (1) start the clock at finality (as opposed to when a plaintiff’s injury occurs), and (2) disfavor a “challenger-by-challenger” approach to calculating when a claim accrues. The Court relied on dictionaries contemporaneous to the 1948 enactment of Section 2401, which “explained that a cause of action accrues ‘on [the] date that damage is sustained and not [the] date when causes are set in motion which ultimately produce injury.’” Explaining that its interpretation of accrual was “the ‘standard rule for limitations periods,’” the Court found “good reason to conclude that Congress codified the traditional rule in Section 2401(a),” as that statute “uses standard language that had a well-settled meaning in 1948.”<sup>27</sup>

The Court also dismissed the Federal Reserve’s “policy concerns” regarding the need for finality, noting that parties may always challenge regulations in certain contexts. It also recognized that “courts entertaining later challenges often will be able to rely on binding Supreme Court or circuit precedent” and

that, “if no other authority upholding the agency action is persuasive, the court may have more work to do, but there is all the more reason for it to consider the merits of the newcomer’s challenge.” The majority opinion asserts that *Corner Post* should not mean that late entrants will succeed in setting aside older regulations,<sup>28</sup> though after *Loper Bright* such a challenge would be more promising.

In his concurring opinion, Justice Kavanaugh explained what he views as a “crucial additional point: *Corner Post* can obtain relief . . . only because the APA authorizes vacatur of agency rules.”<sup>29</sup> Under the APA, a court has the authority to “set aside agency action, findings, and conclusions” that it deems unlawful. Although courts routinely vacate, or set aside, agency actions, the government argued that district courts do not have the authority under the APA to universally vacate unlawful agency rules—only to direct the agency not to apply the rule against a particular litigant. Justice Kavanaugh opined that courts must have the power to universally vacate unlawful rules, because unregulated parties like *Corner Post* (that is, those that are not directly regulated by an agency enforcing its rules) otherwise would have no way to challenge the rule on the basis of its “adverse downstream effects. A court could not issue an injunction preventing the Federal Reserve from enforcing Regulation II against *Corner Post*, because the Federal Reserve does not regulate *Corner Post* directly. In his view, only vacatur would provide a remedy to unregulated parties like *Corner Post*.<sup>30</sup> An open question remains as to whether a regulated party should be the beneficiary of a vacated rule if in fact, vacatur remedied an injury of an unregulated party.

## Implications

Although themes emerge from this series of decisions, their immediate impact is unclear. Some observers have suggested that the *Loper Bright* decision changes very little when it comes to the SEC because federal courts have a history of interpreting the securities laws without little deference to the

views of the SEC.<sup>31</sup> When considered over the course of a full *Chevron* lifetime, and especially within the last twenty years, courts have not granted *Chevron* deference to the SEC in most major cases, particularly when reviewing SEC rulemaking. At the same time, however, one cannot ignore a critical distinction between SEC rulemaking during that same period when compared to the last few years. That is, the SEC is operating with one of the most aggressive rulemaking agendas, in both volume and scope, in recent memory. Challenges to some of these actions have been successful before *Loper Bright* without invoking *Chevron* not because the courts offered less deference to the SEC, but because in many instances it didn’t need to do so.

While *Loper Bright* officially jettisons four decades of the *Chevron* standard for statutory interpretation, it did so with no surprise insofar as *Chevron* had been trending toward obsolescence for years. Still, *Chevron* established a deferential framework for courts to review agency interpretations of ambiguous statutes.<sup>32</sup> Studies have shown that this highly deferential standard has influenced regulatory behavior over the last 40 years regardless of whether a particular agency action was ultimately challenged. One empirical study cited by the Congressional Research Service observed that over 80% of agency rule drafters surveyed either “agreed” or “somewhat agreed” that *Chevron* made them more willing to adopt “a more aggressive interpretation” of their authority.<sup>33</sup> It is therefore reasonable to expect that the unavailability of this agency advantage will also impact regulatory behavior. For the SEC, reduced deference will curtail the agency’s ability to take expansive interpretations of the statutes it is charged with administering. Moreover, because of *Corner Post*, federal agencies, including the SEC, will need to defend their rulemakings over longer periods of time, and do so against parties it does not regulate. Now any rule—no matter how old—is subject to challenge by the right plaintiff, and the calculus for challenging it has changed.

## Longer Rulemaking Process

The Court's emphasis on unaddressed public comments in *Ohio v. EPA* underscores the importance of the public comment process in agency policymaking. The Court found that the EPA had likely acted in an arbitrary or capricious manner by failing to offer a "reasoned response" to comments submitted during a notice and comment period and that states would likely prevail in their challenge because "the EPA's final rule was not 'reasonably explained,' ... the agency failed to supply 'a satisfactory explanation for its action' ... and ... instead ignored 'an important aspect of the problem' before it."<sup>34</sup> Although the Supreme Court's decision in *Ohio v. EPA* dealt with the Clean Air Act, its message resonates within the financial industry.

Publicly available comments on recent SEC rule proposals echo procedural concerns, including the need for more time for the public to fully consider and the necessity to analyze the market and economic implications of the proposals when taken as a whole.<sup>35</sup> The timeline to propose, adopt and implement new and amended rules is likely to be further extended as agencies take more time to address concerns of commenters, particularly where rulemaking requires interagency coordination. Challenges to rulemaking may also take longer to process through the judicial system without *Chevron*.

## Other Means

Currently, much of securities law is produced through informal guidance and in settlements and enforcement actions, which serve as touchstones for practitioners and the industry at large. *Loper Bright* removes any additional incentive *Chevron* may have provided for agencies, including the SEC, to issue regulations via notice-and-comment rulemaking in lieu of other mechanisms to accomplish their objectives that carry fewer procedural protections for entities—regulatory guidance, FAQs and interpretive rulemakings. The SEC may also look to lean more heavily on its broad enforcement powers, which tend

to be less public and focus on the most egregious and least sympathetic cases.

## Flip-Flopping

The Court in *Loper Bright* emphasized the importance of consistency and criticized *Chevron* for granting deference to agency interpretations "that have been inconsistent over time" and undermining reliance interests by "becom[ing] a license authorizing an agency to change positions as much as it likes."<sup>36</sup> In his concurrence, Justice Gorsuch condemned *Chevron* for enabling constant regulatory uncertainty: "because the reasonable bureaucrat may change his mind year-to-year and election-to-election, the people can never know with certainty what new 'interpretations' might be used against them."<sup>37</sup> In general, he noted, *Chevron* deference leads to a negative outcome that "engenders constant uncertainty and convulsive change even when the statute at issue itself remains unchanged."<sup>38</sup>

The *Loper Bright* majority opinion also declined to overturn past decisions made on the basis of *Chevron* deference, stating that "we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful . . . are still subject to statutory stare decisis despite our change in interpretive methodology."<sup>39</sup> Changes to an agency's longstanding interpretations and revisions to existing regulations based on competing political or philosophical views may become less frequent. When they do occur, an agency will be called upon to justify its new interpretation, which may be challenging in the absence of the presumption created by *Chevron* and its progeny that there could be more than one "permissible" interpretation of a single statutory text.<sup>40</sup>

## Major Questions

In *West Virginia*, the Court cited a line of recent precedents in support of the Court's holding that "in certain extraordinary cases" where there is reason to doubt that Congress authorized a particular agency action, "both separation of powers principles and a

practical understanding of legislative intent” require the agency to point to “clear congressional authorization” for its action.<sup>41</sup> In *Loper Bright*, the Court cited *West Virginia v. EPA* as part of a list of previous refinements to *Chevron*, but did not otherwise clarify the relationship between the major questions doctrine and *Loper Bright*. By recognizing the legitimacy of statutes that use broad language to confer policy making power on agencies, *Loper Bright* preempts most plausible applications of the major questions doctrine. Together, the Court’s decisions in *Ohio*, *Loper Bright* and *Corner Post* will curtail federal agencies’ power and create significant opportunities for challenging unfavorable regulations. With courts now directed by *Loper Bright* to apply all the tools of statutory construction, along with the *Skidmore* standard, and a demanding application of the arbitrary and capricious standard under *Ohio v. EPA*, there may be less room for the major questions doctrine going forward.

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#### NOTES

- <sup>1</sup> Another important decision, *SEC v. Jarkesy*, has not been overlooked but will be explored in a forthcoming issue.
- <sup>2</sup> *Chevron USA, Inc. v. Nat’l Res. Def. Council*, 467 U.S. 837 (1984) (emphasis added).
- <sup>3</sup> *United States v. Mead Corporation*, 533 U.S. 218 (2001).
- <sup>4</sup> *Id.*
- <sup>5</sup> Brittany Pemberton and Daniel Pope, “After ‘Chevron’ deference, ‘respect’: ‘Loper Bright’ and agency policymaking,” *Reuters* (July 8, 2024), <https://www.reuters.com/legal/legalindustry/after-chevron-deference-respect-loper-bright-agency-policymaking-2024-07-08/>.
- <sup>6</sup> See Kent Barnett & Christopher J. Walker, “Chevron in the Circuit Courts,” 116 *Mich. L. Rev.* 1 (2017).

- <sup>7</sup> *Id.* at 15-16.
- <sup>8</sup> Jack M. Beermann, “The Anti-Innovation Supreme Court: Major Questions, Delegation, Chevron, and More,” 65 *Wm. & Mary L. Rev.* 1265, 1281 (2024).
- <sup>9</sup> *West Virginia v. EPA*, 597 U.S. 697, 730 (2022).
- <sup>10</sup> *Id.* at 701.
- <sup>11</sup> *Id.* at 700.
- <sup>12</sup> *Id.* at 779 (Kagan, J., dissenting).
- <sup>13</sup> *Ohio v. EPA*, 144 S. Ct. 2040 (2024).
- <sup>14</sup> *Id.* at 2048-2050.
- <sup>15</sup> *Id.* at 2053-2056.
- <sup>16</sup> *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).
- <sup>17</sup> *Id.* at 2258 (citing *Morton Salt Co.*, 338 U. S. 632, 644 (1950)).
- <sup>18</sup> 5 U.S.C. § 706.
- <sup>19</sup> *Loper Bright*, 144 S. Ct. at 2265.
- <sup>20</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).
- <sup>21</sup> *Loper Bright*, 144 S. Ct. at 2272-73.
- <sup>22</sup> *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440 (2024).
- <sup>23</sup> *NACS v. Bd. of Governors of the Fed. Rsrv. Sys.*, 746 F.3d 474, 477 (2014).
- <sup>24</sup> *N. Dakota Retail Ass’n v. Bd. of Governors*, 55 F.4th 634 (8th Cir. 2022).
- <sup>25</sup> *Id.*
- <sup>26</sup> *Id.* at 640-41.
- <sup>27</sup> *Corner Post*, 144 S. Ct. 2440 at 2451-2453.
- <sup>28</sup> *Id.* at 2459 (“Moreover, the opportunity to challenge agency action does not mean that new plaintiffs will always win or that courts and agencies will need to expend significant resources to address each new suit.”).
- <sup>29</sup> *Id.* at 2460 (Kavanaugh, J., concurring).
- <sup>30</sup> *Id.* at 2460-63.
- <sup>31</sup> See, e.g., Dan Berkovitz, “After Chevron: No Deference, No Difference for SEC or CFTC,” *LAW360* (July 2, 2024).
- <sup>32</sup> *Id.*
- <sup>33</sup> Christopher J. Walker, “Chevron Inside the Regulatory State: An Empirical Assessment,” 83 *Fordham L. Rev.* 703 (2014).

<sup>34</sup> *Ohio*, 144 S. Ct. 2040 at 2045-2047 (citing *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)).

<sup>35</sup> Joint Association Letter to Chair Gensler re: Importance of Appropriate Length of Comment Periods (Apr. 5, 2022), available at [https://www.sifma.org/wp-content/uploads/2022/02/SEC\\_Joint-Trades-Comment-Period-Letter\\_4-5-2022.pdf](https://www.sifma.org/wp-content/uploads/2022/02/SEC_Joint-Trades-Comment-Period-Letter_4-5-2022.pdf) (noting that “[r]ulemakings must provide sufficient factual detail on the legal basis, rationale, and supporting evidence for regulatory provisions such that interested parties are ‘fairly apprised’ of content, the reasoning of the agency implementing them, and the manner in which such regulations foreseeably may affect their interests”) (citations omitted).

<sup>36</sup> See, e.g., *Loper Bright*, 144 S. Ct. at 2258 (“the long-standing practice of the government—like any other interpretive aid—can inform [a court’s] determination of what the law is.”) (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014); *McCulloch v. Maryland*, 4 Wheat. 316, 401 (1819); and *Marbury v. Madison*, 1 Cranch 137, 177 (1803)) (internal quotation marks omitted); see also *id.* at 15, 21

(criticizing Chevron for “demand[ing] that courts mechanically afford binding deference to agency interpretations, including those that have been inconsistent over time” (emphasis in original) and because under Chevron, “a statutory ambiguity, no matter why it is there, becomes a license authorizing an agency to change positions as much as it likes, with ‘[u]nexplained inconsistency’ being ‘at most ... a reason for holding an interpretation to be ... arbitrary and capricious.’”).

<sup>37</sup> *Loper Bright*, 144 S. Ct. at 2293 (Gorsuch, J., concurring).

<sup>38</sup> *Id.* at 2288-2292.

<sup>39</sup> *Id.* at 2272-2274.

<sup>40</sup> See *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 981 (2005) (agency interpretations that are inconsistent with prior practice are permitted as long as they are adequately explained by the agency).

<sup>41</sup> *West Virginia*, 597 U.S. at 716 (citing *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)).

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