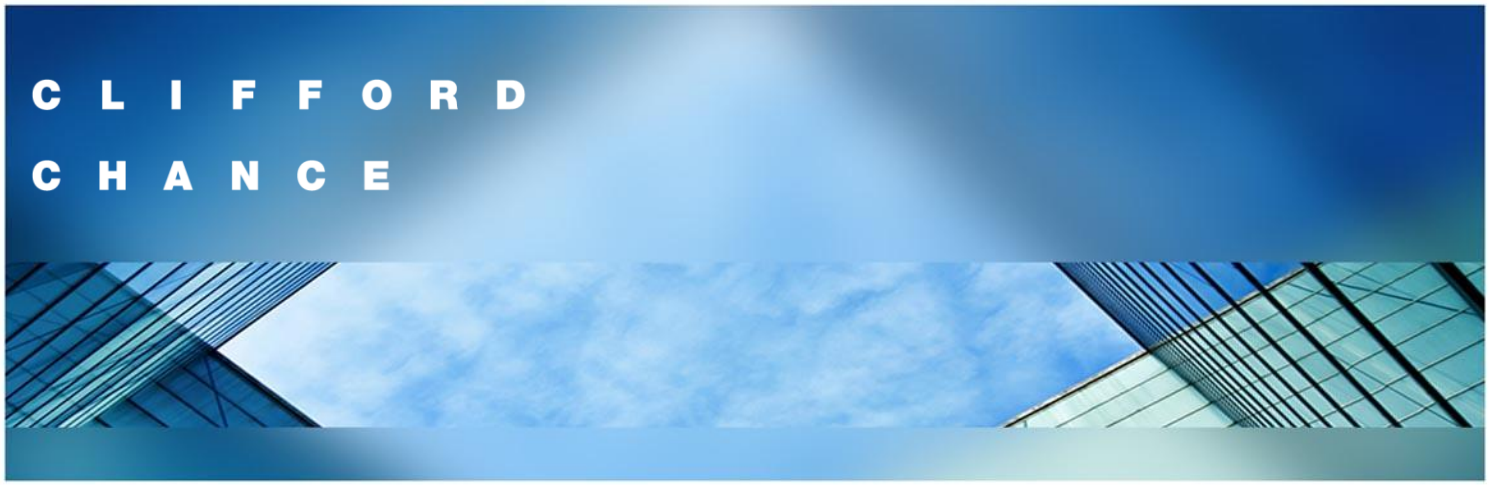

U.S. SUPREME COURT REELS IN FEDERAL AGENCY INTERPRETATION POWER, OVERTURNING CHEVRON DOCTRINE, AND LENGTHENS DEADLINE FOR BRINGING CHALLENGES

On June 28, 2024, the U.S. Supreme Court, in a 6-3 vote, overruled the landmark 40-year-old *Chevron* decision that required federal courts to defer to a federal agency's reasonable interpretation of ambiguous statutes. Additionally, on July 1, 2024, the Court, in a 6-3 vote, held that the six-year statute of limitations for challenging agency regulations does not start to run until the plaintiff is injured by final agency action. The ruling in *Loper Bright Enterprises v. Raimondo*[1] tips the balance away from agencies and toward courts, increasing the prospects for regulated entities to successfully challenge agency regulations and agency interpretations of federal law. The ruling in *Corner Post v. Board of Governors of the Federal Reserve*[2] further increases the likelihood that significantly more challenges of agency actions, even older agency decisions, will end up in front of the court. These decisions fundamentally change how federal courts interpret and apply administrative law and are expected to significantly impact a wide variety of regulated sectors—in particular, in energy and the environment.

Key issues

- U.S. federal agency actions will face increased legal challenges which will likely delay the administrative process and increase the role of courts in policymaking for regulated industries, including in the environmental and energy sectors.
- Although cases relying on the *Chevron* doctrine were not overturned, new court decisions, including *Corner Post*, will increase litigants' ability to challenge prior rulings.
- The ability of agencies like the EPA and FERC to advance meaningful regulation, including in the environmental and energy sectors, will likely be significantly hindered without the protection of *Chevron* deference. Agencies will have to look to Congress for additional guidance when issuing rules pursuant to statutorily delegated powers.

BACKGROUND

The *Chevron* doctrine arose out of the 1984 landmark decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[3] which became one of the most cited Supreme Court cases in U.S. legal history. The original case turned on the question of whether an interpretation of U.S. Environmental Protection Agency

1 *Loper Bright Enterprises v. Raimondo*, No. 22-451, together with *Relentless, Inc., v. Department of Commerce* (No. 22-1219), (Jun. 28, 2024).
2 *Corner Post v. Board of Governors of the Federal Reserve System*, No. 22-1008, (July 1, 2024).
3 467 U.S. 837 (1984).

("**EPA**") regulations allowing an entire pollution-emitting plant to be treated as a single "source" for the purpose of obtaining a Clean Air Act permit was consistent with the term "stationary source" as used in the Act.[4] In answering that question, the Supreme Court set forth a two-part legal test to determine when U.S. federal courts were required to defer to a federal agency's interpretation of a law or statute, which came to be referred to as "*Chevron* deference." First, the court asked whether Congress directly addressed the question at issue. If the intent of Congress was clear, then the inquiry ended and the agency was required to follow the letter of the law.[5] If the law at issue was ambiguous, the court was required to defer to the agency if it offered a "permissible construction" of the statute—i.e., if the agency's interpretation was "reasonable."[6] Employing that test in *Chevron*, the Supreme Court concluded that Congress had not addressed the question at issue and that EPA's interpretation was entitled to deference.[7] *Chevron* deference became a routinely invoked framework and was used as the governing standard for cases involving statutory questions of agency authority (including at least 70 times by the Supreme Court alone pre-2016), and by some counts in nearly 20,000 lower court decisions.[8]

THE *LOPER BRIGHT* DECISION

On June 28, 2024, in a 6-3 decision, the Supreme Court overruled *Chevron*.[9] In *Loper Bright Enterprises v. Raimondo*[10], and *Relentless Inc. v. U.S. Department of Commerce*[11], groups of fishermen challenged a National Marine Fisheries Service ("**NMFS**") rule requiring them to pay the cost of government observers, who board their vessels to monitor their catch, if NMFS determines that an observer is required but declines to appoint a government paid observer. The question in the lower courts was whether NMFS was granted the power to impose such a mandate under the Magnuson-Stevens Fishery Conservation and Management Act ("**MSA**"). Both the district and circuit courts applied the *Chevron* doctrine and found that the NMFS's interpretation was a "permissible construction" of the powers granted under the MSA.[12]

The Supreme Court granted certiorari in both cases specifically to determine whether *Chevron* should be clarified or overruled. The Supreme Court ultimately held that the Administrative Procedure Act ("**APA**"), a U.S. federal law that governs the process by which federal agencies develop and apply regulations and the standards by which federal courts review those agencies' actions, requires courts to exercise their "independent judgment" in deciding whether an agency has acted within its statutory authority. Overturning *Chevron*, the Supreme Court held that courts may no longer defer to an agency interpretation of the law simply because a statute is ambiguous. The Court described *Chevron* as wrongly decided and "def[ying] the command of the APA," because the APA directs that

4 *Id*. at 840.
5 *Id*. at 842.
6 *Id*. at 843.
7 *Id*. at 865.
8 *See* Hickman, Kristin E.; Pierce, Richard J. (2019). *Administrative Law Treatise* (6th ed.).
9 *Loper Bright Enterprises et al. v. Raimondo, Secretary of Commerce, et al.,* No. 22-451, slip op. (2024) (together with *Relentless, Inc., et al. v. Department of Commerce, et al.*, No. 22-1219).
10 544 F. Supp. 3d 82 (D.D.C. 2021).
11 561 F. Supp. 3d 226 (D.R.I. 2021).
12 *Loper Bright*, slip. op. at 6.

the reviewing court – not the agency whose actions it reviews – is to decide "all relevant questions of law" and "interpret . . . statutory provisions."[13] The Court rejected *Chevron*'s view that agencies are best suited to resolve competing policy choices, stating that "agencies have no special competence in resolving statutory ambiguities" and that *Chevron* wrongly forced courts to yield their responsibilities to an agency.[14]

In an apparent effort to avoid re-litigating cases already decided, and despite finding that *stare decisis* did not justify upholding the *Chevron* doctrine itself, the Court held that prior cases that relied on *Chevron* "are still subject to statutory stare decisis despite [the court's] change in interpretative methodology."[15]

THE *CORNER POST* DECISION

On July 1, 2024, in a 6-3 decision, the Supreme Court held that a claim under the APA does not accrue for purposes of the APA's six-year statute of limitations until the plaintiff is injured by final agency action.[16] In *Corner Post v. Board of Governors of the Federal Reserve System*[17], Corner Post, Inc., a North Dakota truck stop and convenience store, challenged a 2011 Federal Reserve Board rule that set maximum interchange fees for debit card transactions under the APA, arguing that the regulation permitted higher interchange fees than the Board's statutory authority allowed under the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act. The question in the lower courts was whether the APA's six-year statute of limitations had elapsed, as Corner Post, Inc. did not open its doors until 2018. Both the district and circuit courts found that the statute of limitations for facial challenges to regulations under the APA begins when they are finalized – in this case, beginning in 2011.[18] The circuit court's decision deepened a circuit split over when the APA's statute of limitations begins to run for suits challenging agency action, with six circuits holding that the limitations period for "facial" APA challenges begins on the date of final agency action (*e.g.*, when the rule was promulgated), regardless of when the plaintiff was injured.[19]

The Supreme Court granted certiorari to resolve the circuit split. The Supreme Court ultimately held that because an APA plaintiff may not file suit and obtain relief until they suffer an injury from final agency action, the statute of limitations does not begin to run until that time (i.e., when a regulation first affects an entity or person, regardless of when the regulation was promulgated). Thus, the 6-year statute of limitations for Corner Post, Inc.'s claim did not begin to accrue until the entity opened its doors in 2018. Rejecting policy concerns, the Court held that "pleas of administrative inconvenience . . . never justify departing from the statute's clear text," and noted that the "concerns are overstated."[20]

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13 *Id*. at 21.
14 *Id*. at 23, 29.
15 *Id*. at 34.
16 *Corner Post v. Board of Governors of the Federal Reserve System*, No. 22-1008, slip op. (2024).
17 2022 WL 909317, (ND, Mar. 11, 2022).
18 *Corner Post*, slip. op. at 8. *See also North Dakota Retail Assn v. Board of Governors of FRS*, 55 F. 4th 634 (8th Cir., 2022).
19 *Corner Post*, slip. op. at 8.
20 *Id*. at 25.

POTENTIAL IMPACTS

The Court in *Loper Bright* focused on the balance of power between the federal executive and judiciary as enumerated in the Constitution and early jurisprudence. Proponents of *Chevron* deference have criticized the *Loper Bright* decision as allowing courts to impose their own interpretations of complex, technical statutes when agency regulations are questioned in a judicial forum, essentially allowing policymaking in the judiciary. Opponents of the *Chevron* doctrine have argued that it has allowed federal agencies essentially unbridled power to impose and apply broad, onerous regulations unchecked by meaningful judicial review. While the ultimate impact of *Loper Bright*, in conjunction with *Corner Post*, remains to be seen, the shift in interpretive methodology will likely lead to an increase in the regulated sectors' challenges to actions taken by federal agencies, which will impose additional barriers to the already slow wheels of the administrative process. These decisions are expected to significantly impact a number of regulated areas, especially in the areas of environmental regulation and rules impacting the energy industry.

Environmental Regulation

Chevron deference has historically had a significant impact on environmental regulations and arguably strengthened the EPA's ability to promulgate regulations targeting air pollutant emissions, discharges to waterways, cleanup of contaminated property, and protection of endangered species. It is therefore unsurprising that many environmental non-governmental organizations ("**NGOs**") submitted *amicus* briefs in *Loper Bright* supporting the *Chevron* doctrine, and have expressed concerns that the jettisoning of Chevron "shifts power to judges who do not have the expertise of agency staff who live and breathe the science, financial principles, and safety concerns that federal agencies specialize in," and would allow courts to "legislate from the bench."[21] By contrast, the U.S. Chamber of Commerce described the decision as "an important course correction that will help create a more predictable and stable regulatory environment," by avoiding the potential for "each new presidential administration to advance their political agendas through flip-flopping regulations and not provide consistent rules of the road for businesses to navigate, plan, and invest in the future."[22] The *Loper Bright* decision certainly has the potential to make it more difficult to promulgate environmental regulations. Environmental regulations are typically technically complex, requiring specific expertise and experience to craft, and the *Loper Bright* decision provides an expanded opportunity for the judiciary to question the judgments of those agency draftspersons. Those opportunities will arise both when the regulations are promulgated – for example, in the current challenge to the Securities and Exchange Commission's (the "**SEC's**") final climate disclosure-related rules, which are currently stayed[23] – and when the regulations are applied

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21 *See* Supreme Court Decision Threatens Clean Air and Clean Water for All, June 28, 2024, available at https://www.edf.org/media/supreme-court-decision-threatens-clean-air-and-clean-water-all and The Supreme Court Overturns Chevron Doctrine, Gutting Federal Environmental Protections, June 28, 2024, available at https://www.sierraclub.org/sierra/supreme-court-overturns-chevron-doctrine-gutting-federal-environmental-protections.

22 *See* U.S. Chamber President and CEO Suzanne P. Clark: Chevron Deference Ruling is an "Important Course Correction," available at https://www.uschamber.com/lawsuits/u-s-chamber-president-and-ceo-suzanne-p-clark-chevron-deference-ruling-is-an-important-course-correction.

23 In total, twenty-five states, energy companies, and business advocates have challenged the final climate disclosure-related rules since their release, with Iowa leading a consolidated lawsuit in the U.S. Court of Appeals for the Eighth Circuit. Notably, the final rules scaled back many of

– given the decision in *Corner Post* that the 6-year statute of limitations for filing lawsuits under the APA begins to run when a regulation first affects a party, rather than when the regulation is first issued.

In light of the *Loper Bright* and *Corner Post* decisions, many EPA rulemakings may be more likely to come under challenge in the future. Particularly, climate initiatives have been a focus of the Biden Administration and EPA regulations have promulgated several key actions aimed at combating climate change that could be vulnerable without *Chevron* deference. One example is the EPA's April 2024 rules focused on limiting emissions from power plants. Additionally, EPA's strategy of finding creative, new ways to tackle these issues using older, existing environmental laws have the potential to subject more settled federal actions to challenge after *Corner Post*.

Looking forward, the *Loper Bright* and *Corner Post* decisions could (depending on the presidential administration and composition of Congress) encourage Congress to enact new or clarifying laws that, while broad, also expressly authorize agencies like the EPA or the U.S. Department of the Interior to promulgate regulations filling in the statutory gaps using their technical expertise. But in the meantime, the agencies must defend their regulations and interpretations based on the laws that exist, and courts are more likely to hold that an agency interpretation, while perhaps "reasonable," does not comport with the best reading of a statute.

Energy Regulation and the Energy Transition

The environmental implications discussed above have some overlap in that the impacts there will undoubtedly raise issues for the energy industry, particularly where many of the climate focused issues have also been a driver for the energy transition. For example, under the Clean Air Act, the EPA is required to identify the "best system for emissions reduction" for pollution sources.[24] The EPA's April 2024 power plant rules use carbon capture and sequestration technology as the method for reducing greenhouse gas emissions.

It will ultimately take time to fully realize and understand the extent of the impact on the energy industry, but, on balance, the Court's decisions in *Loper Bright* and *Corner Post* seem likely to have at least some adverse impact on the energy industry in the U.S. While an in-depth analysis is beyond the scope of this alert, below are four broad, practical impacts we anticipate to the U.S. energy industry.

Increased Appeals

Loper Bright likely will increase appeals of orders issued by the Federal Energy Regulatory Commission ("**FERC**") and the Department of Energy ("**DOE**"), as parties are emboldened by a potential chance for a second substantive bite at the apple. These appeals will be brought by those seeking to challenge new energy

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the components of the proposed rules, including the requirement for Scope 3 reporting, and added materiality qualifiers throughout, suggesting that the SEC aimed to draft the final rules in a way that fell within the scope of the agency's authority to withstand a challenge if *Chevron* was overturned. SEC Chair Gary Gensler has stressed that the rules are strictly securities regulations, designed to keep investors informed on climate-related risks, rather than attempting to regulate companies' climate-related activities. See Statement on Final Rules Regarding Mandatory Climate Risk Disclosures, March 6, 2024, available at https://www.sec.gov/newsroom/speeches-statements/gensler-statement-mandatory-climate-risk-disclosures-030624#:~:text=The%20final%20rules%20provide%20specificity,annual%20reports%20and%20registration%20statements.

[24] 42 U.S.C. § 7411(a)(1).

projects (e.g., pipelines to be certificated by FERC under the Natural Gas Act ("**NGA**")) and disputes within the industry (e.g., parties disputing changes to electricity market rules adopted by Independent System Operators ("**ISOs**") and Regional Transmission Organizations ("**RTOs**") under the Federal Power Act ("**FPA**")).

Increased Uncertainty

The expanded opportunity for challenge (including after *Corner Post*) will introduce additional uncertainty regarding the finality of FERC and DOE decisions. While the Court asserted in *Loper Bright* that agencies lack any "special competence in resolving statutory ambiguities[,]" the fact is that agencies, especially those like EPA, FERC, and DOE, do have specialized technical knowledge of complex industries and markets. Some may argue that, despite the Court's expertise in adjudication generally, this specialized knowledge is inherently implicated when one considers how statutory language should be translated into actual decisions (e.g., what is a "just and reasonable" rate, whether a pipeline is in the "public interest"). Without *Chevron* deference, there will be an increased likelihood that FERC and DOE decisions will be overturned by federal courts, especially as courts wade more substantively into these complex, technical markets. This is particularly concerning because regulatory uncertainty is anathema to an industry that plans in time horizons of decades and must attract investment and financing from those who plan on the same timescale.

Increased Delay and Cost

The increased opportunity for challenge to FERC and DOE orders will increase the timeline in which parties can expect to receive a final order, particularly in areas that are more contentious (e.g., pipeline certificate proceedings, DOE export authorizations, tariff filings in certain RTO/ISO markets). This increased timeline will likely have a compounding effect and be particularly challenging in the classes of proceedings that already take years. The delay may only get worse as the federal courts grapple with increases to their dockets and may spend more time on each case as they seek to more substantively exercise their "independent judgement" over these complex issues. The increased litigation and delay likely will translate into increased costs for certain industry participants.

Potential Undermining of Regulatory Reforms

Perhaps most concerningly, *Loper Bright* could significantly undermine or limit FERC's ability to adopt reforms designed to improve the functioning of the energy markets. Those involved in the U.S. power markets recently witnessed the issuance of key, sweeping FERC orders that sought to improve the functioning of FERC-jurisdictional power markets, including orders to reform the transmission planning processes (FERC Order No. 1920) and generator interconnection processes (FERC Order No. 2023) across the country. Historically, these types of orders, when issued, have been challenged before the Courts of Appeals (sometimes across multiple circuits), but have survived, often due to *Chevron* deference. *Loper Bright* may undermine the durability of these orders, as FERC seeks to defend its orders in multiple circuits (some of which may be more hostile to FERC's authority than others) without the shield of *Chevron* deference.

CONCLUSION

The *Loper Bright* and *Corner Post* decisions and related impacts are likely to be felt across sectors and will impact all areas of agency regulation. Regulated entities now have an additional tool to push back against contentious regulations and regulators may need to look to Congress for additional guidance when implementing statutes. Until we see how the new rulings are interpreted in the lower courts, the full extent of the impact of these decisions is unclear. What is somewhat more certain is that we can expect to see a significant increase in legal challenges to the administrative state as a whole, including (and especially) in the environmental and energy sectors.

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