

News & Insights

OKC Attorney Alyssa Gillette for the Journal Record Agency Deference Under Review

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The Journal Record

<https://journalrecord.com/2023/07/26/gavel-to-gavel-agency-deference-under-review/>

The Supreme Court of the United States will hear another case with potentially broad effects for the regulated community in its October 2023 term. *Loper Bright Enterprises v. Raimondo*, Docket No. 22-451 ("Loper") asks if the Court should overrule *Chevron v. Natural Resources Defense Council* ("Chevron") or at least clarify whether statutory silence on controversial powers creates an ambiguity requiring deference to the agency. *Chevron* is a landmark case that outlined judicial deference for administrative agency decisions when a statute is ambiguous. Through *Chevron* and subsequent case law, a Court will grant deference to an agency's interpretation if 1) that agency is in charge of administering the ambiguous statute in question; 2) the agency promulgated its interpretation through a formal rulemaking process; and 3) the agency's interpretation is reasonable.

While the underlying facts in *Loper* specifically address a decision by the National Marine Fisheries Service, any change in the *Chevron* doctrine will have sweeping implications for all regulated industries and activities. The Court's decision could shift power away from the executive branch and to the judicial branch if the framework granting deference to administrative agencies is limited or reversed. Additionally, a change to *Chevron* deference could cause greater uncertainty for regulators as well as the regulated. A lack of deference to agency decisions after the formal rulemaking process allows opponents yet another chance to challenge not just the *procedural* aspects of the rule - whether the federal Administrative Procedures Act was followed and the agency's power to establish - but also to rehash the *substantive* technical underpinnings of an agency rule.

A decision to limit the power of administrative agencies would align with the Court's recent ruling in *West Virginia v. EPA*. In 2022, the Court relied upon the "major questions doctrine" to curb the Environmental Protection Agency's authority to impose emission caps based on a generation shifting approach. The Court held that an agency claiming the power to make a decision which has vast economic or political significance must show clear congressional authority granting the agency that power. However, while *West Virginia* curbed the power of administrative agencies to enact rules that have significant economic or political

impacts, any change to the *Chevron* framework under *Loper* could impact even the most miniscule and technical of agency decisions.

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Practices

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