



# SIDLEY

## Is the End Really Nigh?

An Assessment of Oral Argument  
in the *Chevron* Deference Cases,  
and Projections of Possible Impacts  
Across the Regulatory Space

January 17, 2024

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# WHAT WE HEARD AND WHERE THE COURT IS LIKELY GOING



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# Content of Materials

- *Chevron's* Two-Step Framework
- Evolution of Judicial Review of Agency Interpretations
- Fact Background to *Loper* and *Relentless*
- Potential Outcomes Suggested by the Briefs
- Key Themes/Topics Argued by the Parties and Amici
- Parties' Specific Arguments
- Reading Materials: Selection of Party and Amicus Briefs



# Chevron's Two-Step Framework

## STEP ONE

The court asks whether “Congress has directly spoken to the precise question at issue,” or “if the statute is silent or ambiguous with respect to the specific issue.”

## STEP TWO

If the statute is silent or ambiguous, the court must defer to the agency’s interpretation if it is “based on a permissible construction of the statute.”

An agency interpretation “qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” *United States v. Mead* (2001) (*Chevron* “Step Zero”)

# Evolution of Judicial Review of Agency Interpretations

**1944**

*Skidmore v. Swift & Co.*,  
323 U.S. 134 (1944)

Courts may give weight to agency interpretations to the extent they have the “power to persuade”

**1984**

***Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*,  
467 U.S. 837 (1984)**

**2001**

*United States v. Mead Corp.*,  
533 U.S. 218 (2001)  
*Chevron* “Step Zero”

**2022**

*West Virginia v. Environmental Protection Agency*,  
142 S. Ct. 2587 (2022)  
Applies “major questions” doctrine

**1946**

Congress enacts the Administrative Procedure Act  
“[T]he 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.”  
5 U.S.C. § 706

**1997**

*Auer v. Robbins*,  
519 U.S. 452 (1997)  
Extends deference to an agency’s interpretation of its own regulations

**2019**

*Kisor v. Wilkie*,  
139 S. Ct. 2400 (2019)  
Affirms and clarifies *Auer* deference (Kagan)  
Gorsuch dissents raising many of the arguments now at issue

**2024**

***Relentless, Inc. v. Dep’t of Commerce and Loper Bright Enterprises v. Raimondo***

# Fact Background to Loper and Relentless

## Magnuson-Stevens Act

- Statute authorizes NMFS to require fishing vessels to allow onboard “observers” to collect fishing/conservation data.
- Specifies three contexts (unrelated to Petitioners) in which certain vessels must cover the cost of observers, capped at 2-3% of haul value.

## 2020 NMFS Final Rule for Atlantic Herring Fisheries

- Requires certain fishers to pay observer costs without a cap.
- No express statutory authority to compel payment for these fisheries.
- NMFS defends rule under statutory authority to create a management plan “necessary and proper” to prevent overfishing and as ancillary to its statutory power to require observers generally.



District Courts apply  
*Chevron* in government's  
favor



Circuit Courts  
affirm



Petitioners argue  
that *Chevron* should  
be abandoned

# Potential Outcomes Suggested by the Briefs

## **Overrule *Chevron* entirely**

Independent judicial interpretation, subject to *Skidmore*

## **Narrow *Chevron***

Clarify that statutory silence does not constitute an ambiguity requiring deference, especially as to controversial powers

## **Affirm *Chevron* (subject to guidance)**

*E.g.*, encourage courts to be rigorous in ensuring an actual delegation of authority to the agency and applying canons of construction at Step One, and not to default to finding ambiguity



# Key Themes and Questions in the Arguments For and Against *Chevron*

Does *stare decisis* apply?

Does *Chevron* violate (or respect) separation of powers?

What impact does the “major questions” doctrine have?

What best promotes consistency of judicial decision making?

Would overruling *Chevron* improve legislation?

Should “ties” go to the regulator or regulated?

# Stare Decisis Arguments

## Petitioners

- “*Chevron* deference” is not the decision’s substantive holding but a methodology. Such interpretive methodologies do not enjoy the same kind of *stare decisis* as substantive decisions.
- No reliance concerns, as courts have been questioning *Chevron* for decades, and *Chevron* deference itself creates reliance problems (e.g., new agency rules every executive administration; judges apply the doctrine inconsistently).
- *Chevron* is “egregiously wrong” and should not be preserved for the sake of *stare decisis*.

## Government

- Courts have applied *Chevron* deference for 40+ years, and the Supreme Court has maintained it despite many challenges over the decades (involving the same arguments Petitioners raise here).
- Congress has drafted all laws since *Chevron* with deference in mind, and upending *Chevron* would change how our laws are executed all at once without congressional desire to do so.
- If Congress wanted to, it could statutorily end *Chevron*. It has not.

# Separation of Powers Arguments

## Petitioners

- *Chevron* impermissibly transfers both judicial power (Article III) and legislative power (Article I) to executive agencies (Article II).
- *Chevron* encourages the executive branch to be aggressive and inconsistent (internally and between administrations), and it encourages Congress to be vague and lazy.

## Government

- *Chevron* respects the three branches of government:
  - I. the Legislature can be as clear or ambiguous as it wants, knowing that ambiguity will lead to agency deference;
  - II. the Executive has leeway to execute the law within the bounds of reasonableness; and
  - III. the Judiciary is required to use traditional methods of statutory interpretation at Step One and to determine reasonableness at Step Two.
- *Chevron* has safeguards against power encroachment:
  1. it applies only where agency action has the force of law, *see Mead*; and
  2. the major questions doctrine, *see West Virginia*.

# Political Accountability Arguments

## Petitioners

- Without agency deference, Congress will have to write clearer laws, and voters will know whom to blame when agencies aren't given clear directives.
- Agencies will have less space to whiplash when the Executive branch changes party control.

## Government

- *Chevron* allows the Executive to act nationally and uniformly in executing the law (rather than through piecemeal litigation and circuit splits) and with public input.
- Agencies are held accountable through the president; judges are not politically accountable.
- *Chevron* affords appropriate weight to the scientific expertise of federal agencies; courts cannot be expected to master regulation of nuclear power, drug manufacturing, etc. the way that agency leaders can.

# Workability Arguments

## Petitioners

- *Chevron* has yielded inconsistent results, as different judges have different conceptions of whether a particular statute is clear or ambiguous; and “reasonable interpretation” is hard to define.
- *Chevron* deference has grown unwieldy with the introduction of *Mead*’s “Step Zero” and *West Virginia*’s “major questions doctrine.”

## Government

- Courts will reach even more inconsistent results if asked to review every agency rule *de novo* without deference to an agency’s decisions.
- The cases/doctrines that limit *Chevron* (major questions and *Mead*) are not difficult or confusing to apply, and courts have been able to do it.



# Other Arguments

## Due Process

### **Petitioners:**

*Chevron* deference allows the government to enter a courtroom with a predisposition to winning. Cases start in the government's favor.

### **Government:**

Judges do not introduce unfair bias by determining whether an agency acted reasonably. And Congress can eliminate deference if it wants to.

## APA

### **Petitioners:**

The *Chevron* decision did not consider and contravenes the APA, which makes clear that courts — not agencies — are supposed to interpret statutes.

### **Government:**

The APA states that courts have the authority to “decide all relevant questions of law,” but the APA does not provide a standard of review. Accordingly, the courts were free to determine the standard (*Chevron*) and then apply it.

## Historical Arguments

### **Petitioners:**

Since *Marbury v. Madison* (1803) and creation of federal-question jurisdiction (1875), it has been the role of the judiciary to interpret the law.

### **Government:**

The Court has a history of deference to agencies, even prior to *Chevron*.

# Reading Materials: Selection of Party and Amicus Briefs

## *Loper*

- [Brief of the Petitioners](#)
- [Brief of the Respondent](#)
- [Reply Brief](#)

## *Relentless*

- [Brief of the Petitioners](#)
- [Brief of the Respondent](#)
- Reply Brief  
(will be filed today,  
1/17/2024)

## **Sample Amicus Briefs**

- [Environmental Defense Fund](#)
- [U.S. House of Representatives](#)
- [Mountain States Legal Foundation](#)
- [Professor Thomas W. Merrill](#)



# IMPACT OF POSSIBLE OUTCOMES ON FEDERAL AGENCIES

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# EPA



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# Overview of *Chevron* Deference and Impact of Possible Outcomes: EPA

- In administering the Clean Air Act, the EPA often finds itself before the Supreme Court — *Chevron* was a CAA case, and so was *West Virginia v. EPA*, the big “major questions doctrine” case from two years ago.
- *Chevron* has played a role in many environmental cases, and as *Chevron* itself shows, the doctrine is a sword that cuts both ways. In *Chevron*, the challengers targeted a regulation from President Reagan’s first EPA Administrator, Anne Gorsuch — Justice Gorsuch’s mother — that relieved pollution control requirements on new industrial facilities. In other words, *Chevron* is also a boon for agencies that want to *deregulate*.
- Through the Clean Air Act, Congress conveyed authority to the EPA in exceedingly general terms. For purposes of the Clean Air Act’s permitting programs, for example, there needs to be a metric for determining a pollution “increase,” 42 U.S.C. § 7411(a)(4). Arguably, neither the text alone nor traditional statutory construction tools reveal which metric to use. Under *Chevron*, judges have limited their inquiry to deciding whether the agency has stayed within the bounds of the discretion granted by Congress, rather than upholding the agency’s decision only if they — the judges — would have arrived at the metric.
- Overruling *Chevron* could create serious administrability problems, with circuit courts reaching wildly disparate decisions about the meaning of general terms in the CAA.





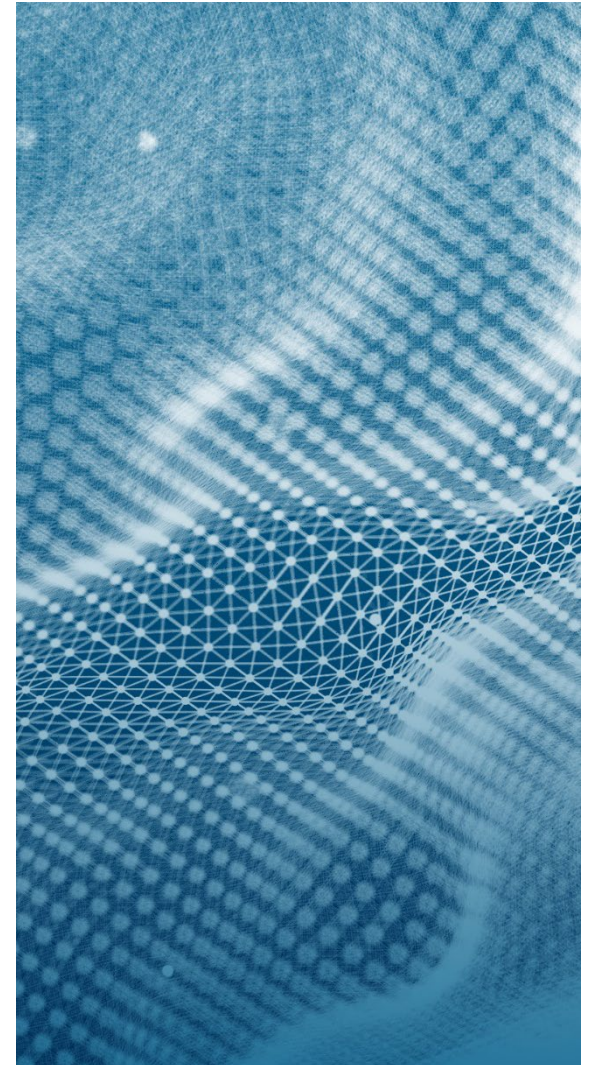
# CMS



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# Overview of *Chevron* Deference and Impact of Possible Outcomes: CMS

- Many CMS-related cases are resolved at *Chevron* Step Zero (concluding the agency does not have authority to issue binding rules) or Step One (concluding the text is not ambiguous and the government's regulation either clearly finds support in that text, or contradicts the text), and that trend seems to have been growing.
- Indeed, in two recent Supreme Court cases involving interpretations of Social Security Act provisions (*AHA v. Becerra* and *Becerra v. Empire Health*), the Court concluded that the statutory text was clear, and the Court never addressed *Chevron*.
  - These cases may have previewed the Court's desire to reassess *Chevron*. Indeed, despite the fact that the D.C. Circuit's decision in *AHA v. Becerra* relied on *Chevron* deference to side with the government, the Supreme Court's decision reversing the D.C. Circuit does not reference *Chevron* even once.



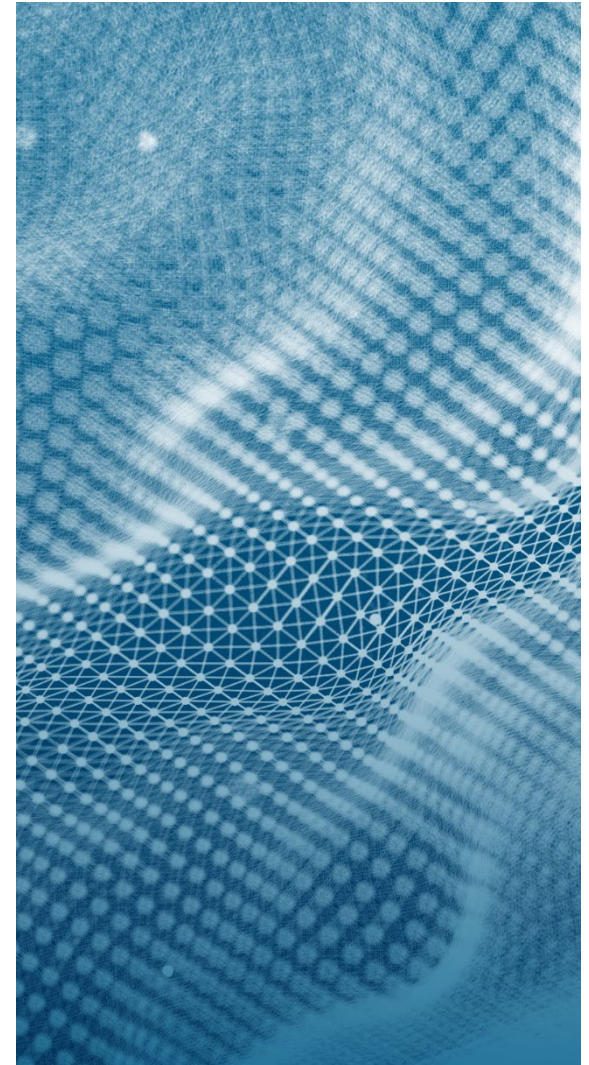
# Overview of *Chevron* Deference and Impact of Possible Outcomes: CMS

- Nonetheless, the Social Security Act provisions controlling government healthcare rules and regulations – which increasingly reaches to commercial markets as well – are vast and offer plenty of opportunities for CMS to rely on *Chevron* deference. CMS often implicitly invokes *Chevron* when justifying its regulatory interpretations in the preambles to its multiple annual rulemakings, and CMS has successfully leveraged *Chevron* in a number of cases.
  - For example, in the 2020 D.C. Circuit decision *AHA v. Azar*, the panel relied on *Chevron* deference to uphold HHS’ decision to impose a “site neutral” payment policy, decreasing reimbursement rates for off-campus provider-based departments affiliated with hospitals to bring those rates in line with physician office reimbursement rates for the same services.
  - While CMS, until the Inflation Reduction Act, has not had direct control over drug prices, CMS has long had influence on drug pricing and reimbursement through various regulatory classifications, including by designating a drug a single-source versus a multiple-source drug. In *Baxter Healthcare Corp. v. Weeks*, the D.C. district court applied *Chevron* to uphold a CMS determination that a product can be categorized as a multiple source drug (associated with a lower reimbursement rate), despite concluding that the plaintiff company “has cause to feel treated unfairly.”



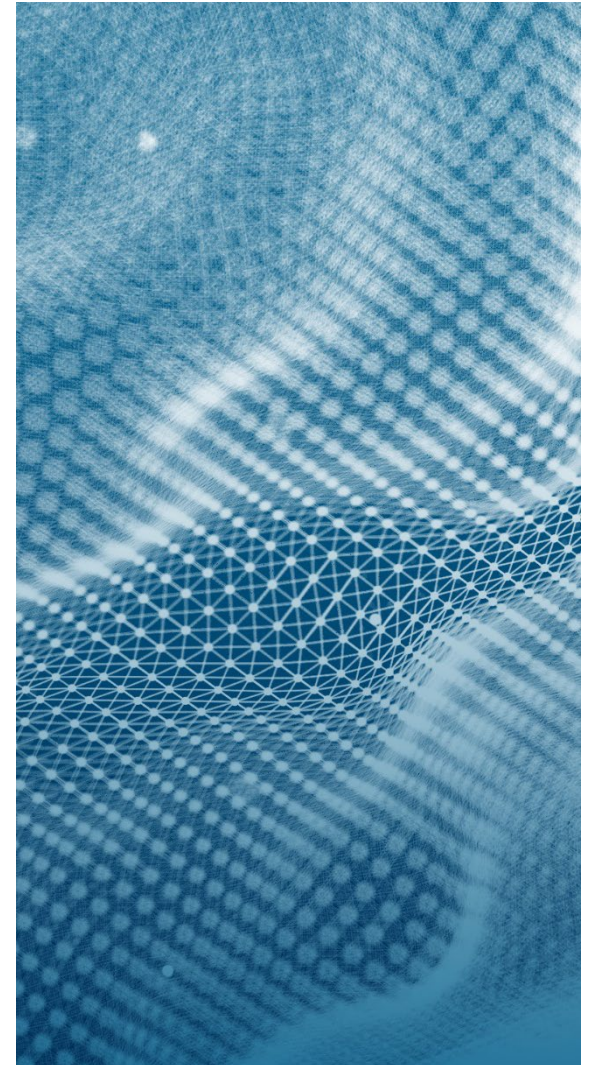
# Overview of *Chevron* Deference and Impact of Possible Outcomes: CMS

- If courts were no longer required to uphold agency action merely because it is permissible – *i.e.*, not flatly prohibited by – the underlying statute, cases like *Baxter v. Weeks*, where the court clearly disagreed with the reasonableness of the agency's position, might come out differently.



# Relevant Cases

- *American Hospital Association v. Becerra*
- *American Hospital Association v. Azar*
- *Baxter Healthcare Corp. v. Weeks*
- *Becerra v. Empire Health*







# FCC



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# Overview of *Chevron* Deference and Impact of Possible Outcomes: FCC

## 47 U.S.C., § 201(b)

- “The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.”
- This provision gives the FCC authority to issue legislative rules for the Communications Act. *See, e.g., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 269–86 (1999) (Scalia, J.).
  - The Communications Act vests the FCC authority over numerous important areas, including the provision of telecommunications services, cable services, spectrum licensing, and broadcasting.
  - Private parties can enforce certain provisions of the Communications Act (47 U.S.C. §§ 207, 208) and obtain damages.
  - The FCC has authority to impose substantial forfeiture penalties for violation of the Communications Act and the FCC’s rules. *See* 47 U.S.C. §§ 503-04.
- The FCC frequently utilizes its rulemaking authority, and has been able to claim *Chevron* deference when doing so. *See, e.g., Iowa Utils. Bd.*, 525 U.S. at 387; *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863 (2013).

# Overview of *Chevron* Deference and Impact of Possible Outcomes: FCC

## 47 U.S.C., § 201(b) (cont.)

- Limitation or rejection of *Chevron* in *Loper Bright* would not directly limit the scope of the FCC's regulatory authority or its ability to issue rules implementing the Communications Act, *but* it would:
  - Subject FCC action to more searching judicial review;
  - Give regulated parties stronger arguments to resist FCC or private party enforcement; and
  - Create greater uncertainty on the extent to which regulated parties can rely on an FCC rule.

# Overview of *Chevron* Deference and Impact of Possible Outcomes: FCC

## *National Cable & Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005) (Thomas, J.)

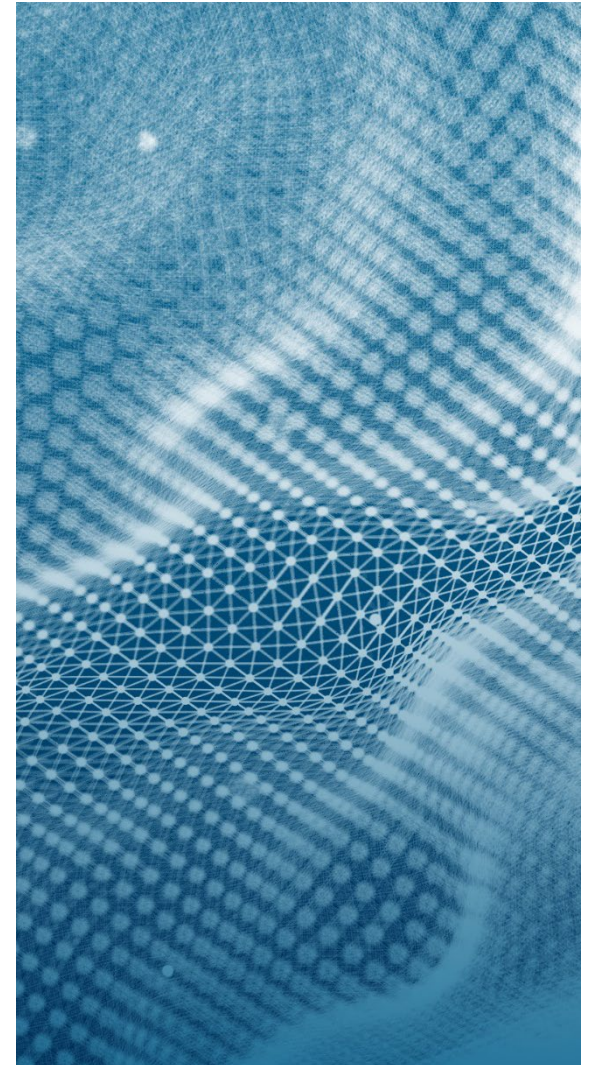
- The case involved an FCC's order declaring that broadband internet access service providers did *not* offer a separate "telecommunications service" (last mile connectivity) that had to be provided to competitors to allow them to offer their own internet access service.
- The Ninth Circuit reversed the FCC's order on the grounds that, in a prior case (*not* involving the FCC and prior to the FCC proceeding), it found that the "best" (but not the only) reading of the statute was that broadband internet access did include a separate "telecommunications service." *Id.* at 983.
- The Supreme Court reversed the Ninth Circuit, holding a "prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 984.
- Applying *Chevron*, the Supreme Court upheld the FCC order as reasonable. *Id.* at 986.
- If the FCC were to limit or reverse *Chevron* in *Loper Bright*, that would logically call *Brand X* into question.
  - But, does it make sense to allow a court to make an authoritative determination of a regulatory provision prior to an agency rulemaking?
  - When would the agency be allowed to make a different judgment?



# Overview of *Chevron* Deference and Impact of Possible Outcomes: FCC

## *City of Arlington, Texas v. FCC*, 569 U.S. 290 (2013) (Scalia, J.)

- The Court held that an agency’s “interpretation of statutory ambiguity that concerns the scope of its own regulatory authority (that is, its jurisdiction)” was entitled to *Chevron* deference. 569 U.S. at 1866.
- The Court described the *Chevron* framework as “now canonical.” *Id.* at 1868.
- The Court rejected the notion that deference was only owed to “humdrum, run-of-the-mill” agency interpretations but not “big, important ones.” *Id.*
- To the extent the Supreme Court limits or reverses *Chevron* in *Loper Bright*, it would logically follow that little or no deference will be owed to an agency’s determination of its “jurisdiction.”
  - This would effectively reverse *City of Arlington*.





# FDA



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# Overview of *Chevron* Deference and Impact of Possible Outcomes: FDA

## FDA's Interpretations of “Drug”

- The year before *Chevron* was decided, the Supreme Court engaged in **de novo statutory interpretation of the foundational term “drug”** as used in sections of the Food, Drug, and Cosmetic Act (FDCA). See *United States v. Generix Drug Corp.*, 460 U.S. 453, 454, 457 (1983).
  - The Court relied on its “reading of [the FDCA’s] plain language” rather than looking to FDA’s interpretation. *Id.* at 459-60.
- Lower courts have since faced similar questions about the meaning of “drug” in sections of the FDCA and related Acts — but post-*Chevron*, courts showed the FDA **significant deference**.
  - Courts upheld **more than one meaning of “drug,”** as interpreted by the FDA. See [Appendix](#) (summarizing the FDA’s interpretations of “drug” to mean **both “active moiety” and finished “drug product”**).
    - The D.C. Circuit expressed openness to deferring even to two different meanings of “drug” used within the same statutory section. *Abbott Labs. v. Young*, 920 F.2d 984, 987 (D.C. Cir. 1990) (“[I]t is not impermissible under *Chevron* for an agency to interpret an imprecise term differently in two separate sections of a statute which have different purposes.”).
- With the decline of *Chevron*, courts have become **less inclined to defer to the FDA** on questions of statutory interpretation. See, e.g., *Catalyst Pharms., Inc. v. Becerra*, 14 F.4th 1299, 1301 (11th Cir. 2021) (finding no ambiguity in statutory language and rejecting deference).
- If the pendulum swings back toward *Generix* such that courts decide de novo whether the FDA’s interpretations are correct (not merely whether they are reasonable), this could, for example, be **disruptive to exclusivity programs** implicating the definition of “drug.”
  - Given the economic importance of exclusivity questions, they represent one of the most frequent sources of litigation that the FDA faces and an example of how the waning of *Chevron* could open the door to increased litigation.

# Overview of *Chevron* Deference and Impact of Possible Outcomes: FDA

## FDA's Interpretations of “Device”

- Although the FDA historically has taken the position that “[t]he definition of a device applies equally to [in vitro diagnostic products (IVDs)] manufactured by conventional device manufacturers and those manufactured by laboratories,” the Agency has said that it is exercising enforcement discretion with respect to laboratory-developed tests (LDTs). FDA, [Framework for Regulatory Oversight of Laboratory Developed Tests \(LDTs\): Draft Guidance](#) (Oct. 3, 2014).
- The FDA recently announced that it plans to “**phase out its general enforcement discretion approach** for LDTs so that IVDs manufactured by a laboratory would generally fall under the same enforcement approach as other IVDs.” [Medical Devices; Laboratory Developed Tests](#), 88 Fed. Reg. 68,006, 68,007 (proposed Oct. 3, 2023).
  - The FDA’s proposed rule would do this by amending the definition of “[i]n vitro diagnostic products” at [21 C.F.R. § 809.3](#) to state that “[t]hese products are devices as defined in section 201(h)(1) of the [FDCA] . . . *including when the manufacturer of those products is a laboratory.*” 88 Fed. Reg. at 68,031 (emphasis added).

# Overview of *Chevron* Deference and Impact of Possible Outcomes: FDA

## FDA's Interpretations of “Device” (cont.)

- Congress **did not pass the VALID Act of 2023 or other legislation that would have given the FDA explicit statutory authority** to regulate LDTs. See, e.g., [VALID Act of 2023](#), H.R. 2369, 118th Cong. (2023). The **existing statutory definition of “device,”** where it is otherwise met, extends to a range of products, including “an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory.” See [21 U.S.C. § 321\(h\)\(1\)](#). The existing statutory definition of “device,” where it is otherwise met, extends to a range of products, including “an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory.”
  - If the FDA’s assertion of authority to regulate LDTs by amending its definitional regulation is challenged, a court may not show the agency deference.

Statutory Definition of “Device” 21 U.S.C. § 321(h)(1).	Proposed Definition of “In Vitro Diagnostic Products” 88 Fed. Reg. at 68,031.
“The term ‘device’ . . . means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or <b>other similar or related article</b> . . . .”	“Reagents, instruments, and <b>systems</b> . . . are devices . . . <b>including when the manufacturer of these products is a laboratory.</b> ”

See generally Sidley Austin LLP, [FDA Proposes Regulation of Laboratory Developed Tests and Sets Up Collision Course with Major Questions Doctrine](#) (Sept. 29, 2023).

# Overview of *Chevron* Deference and Impact of Possible Outcomes: FDA

## FDA's Approach to Issuing Guidance

- The FDCA provides that the FDA “shall develop guidance documents with public participation,” and that the FDA guidance documents “shall not create or confer any rights for or on any person, although they may present the views of the Secretary on matters under [FDA’s] jurisdiction.” [21 U.S.C. § 371\(h\)\(1\)\(A\)](#).
  - The statute includes procedures by which the agency can issue guidance documents communicating “initial interpretations of a statute or regulation, changes in interpretation or policy that are of more than a minor nature, complex scientific issues, or highly controversial issues.” [21 U.S.C. § 371\(h\)\(C\)\(i\)](#).
- The Food and Drug Modernization Act of 1997, which added the statutory section cited above to the FDCA, “directed the agency to issue a regulation consistent with the act.” See [Administrative Practices and Procedures; Good Guidance Practices](#), 65 Fed. Reg. 56,468, 56,468 (Sept. 19, 2000).
- The FDA promulgated regulations outlining the agency’s “**good guidance practices**” (GGPs), which are its “policies and procedures for developing, issuing, and using guidance documents” properly. See [21 C.F.R. § 10.115\(a\)](#). For example:
  - Guidance documents must “[p]rominently display a **statement of the document’s nonbinding effect**.” *Id.* [§ 10.115\(i\)\(1\)](#).
  - Guidance documents “**must not include mandatory language** such as ‘shall,’ ‘must,’ ‘required,’ or ‘requirement,’ unless FDA is using these words to describe a statutory or regulatory requirement.” *Id.* [§ 10.115\(i\)\(2\)](#).



# Appendix: FDA's Interpretations of “Drug”

	Statutory Language	FDA Interpretation
<i>Abbott Labs. v. Young</i> , 920 F.2d 984 (D.C. Cir. 1990)	“ <b>active ingredient</b> (including any ester or salt of the active ingredient)” 21 U.S.C. § 355(j)(4)(D)(i), (v)	“possibly . . . a virtual synonym for <b>active moiety</b> ” <sup>1</sup> <i>Abbott</i> , 920 F.2d at 987
<i>Pfizer, Inc. v. FDA</i> , 753 F. Supp. 171 (D. Md. 1990)	“ <b>drug</b> ” 21 U.S.C. § 355(b)(1), (c)(2)	“ <b>drug product</b> ” for which the [NDA] was filed” <i>Pfizer</i> , 753 F. Supp. at 171
<i>Nat’l Pharm. All. v. Henney</i> , 47 F. Supp. 2d 37 (D.D.C. 1999)	“ <b>drug</b> ” 21 U.S.C. § 355a	“entire line of drug products having the <b>same active moiety</b> ” <i>Nat’l Pharm. All.</i> , 47 F. Supp. 2d at 39 (citing 1998 FDA guidance document)
<i>Baker-Norton Pharms., Inc. v. FDA</i> , 132 F. Supp. 2d 30 (D.D.C. 2001)	“ <b>drug</b> ” ( <i>i.e.</i> , <b>same drug</b> ) 21 U.S.C. § 360cc(a) (Orphan Drug Act)	“ <b>same active moiety</b> ” 21 C.F.R. § 316.3(b)(14)(i)
<i>Ferring Pharms., Inc. v. Burwell</i> , 169 F. Supp. 3d 199 (D.D.C. 2016)	“ <b>drug</b> ” 21 U.S.C. § 355(j)(5)(F)(ii)	“ <b>drug product</b> ” ( <i>i.e.</i> , “an article that presumably might include more than one active ingredient”) <i>Ferring</i> , 169 F. Supp. 3d at 210, 214

<sup>1</sup> The *Abbott* court rejected the FDA’s interpretation as argued, but it found the statutory language ambiguous and remanded to the agency for interpretation. 920 F.2d at 985, 988-90.

# FERC



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# Overview of *Chevron* Deference and Impact of Possible Outcomes: FERC

## *Edison Electric Institute et al. v. FERC*

### Overview

- The Edison Electric Institute and North Western Energy (collectively, “Petitioners”) recently petitioned the Supreme Court for a writ of certiorari regarding the D.C. Circuit’s application of *Chevron* deference to a Federal Energy Regulatory Commission (“FERC” or “Commission”) final action.
- The Petitioners requested that the Supreme Court grant their petition or, at minimum, hold the petition in abeyance pending disposition of *Loper Bright Enterprises, Inc. v. Raimondo*, a case whereby the Supreme Court granted certiorari to determine whether *Chevron* should be clarified or overruled.

### Procedural History

- Respondent Broadview Solar, LLC (“Broadview”) filed an application at FERC seeking qualifying facility certification of its solar energy project.
- In September 2020, the Commission issued an order denying Broadview’s application, concluding that Broadview did not meet the statutory output limit for qualifying facilities under PURPA.
- In March 2021, the Commission granted a rehearing, set aside its initial order, and granted Broadview’s application, concluding that the relevant statute was ambiguous and allowed for Commission interpretation.
- In June 2021, the Commission denied a rehearing of its March 2021 order.
- In February 2023, the D.C. Circuit upheld the FERC orders on the ground that the Commission’s reading of PURPA is entitled to *Chevron* deference.

# Overview of *Chevron* Deference and Impact of Possible Outcomes: FERC

## *Edison Electric Institute et al. v. FERC* (cont.)

### Petitioners' Arguments

- D.C. Circuit's application of the *Chevron* deference was inaccurate.
- The court's *Chevron* Step One analysis failed to employ the traditional tools of statutory construction and address the statutory context, purpose, or history of PURPA.
- The court's *Chevron* Step Two analysis failed to explain how the statutory language supported its conclusion that FERC's interpretation was reasonable.
- If the Supreme Court determines that the D.C. Circuit's decision was consistent with *Chevron*, then the Court should reconsider how and when *Chevron* should be applied, and at a minimum clarify its limits.
  - Lower courts should not be permitted to grant *Chevron* deference when the federal agency has stated that it did not use its expertise to interpret a particular statute.
- The petition should be held in abeyance pending resolution of *Loper Bright*.
  - If the Supreme Court were to overrule *Chevron* as a result of *Loper Bright*, then the D.C. Circuit's judgment in this case could not stand as it relied explicitly on the *Chevron* framework.
  - Even if the Supreme Court only provides *Chevron* clarification in *Loper Bright*, a vacatur and remand is still necessary to allow the D.C. Circuit to reconsider its decision in light of the new *Chevron* guidance.
- The case provides an ideal means to address very important energy industry issues and resolve *Chevron* concerns.



# IRS

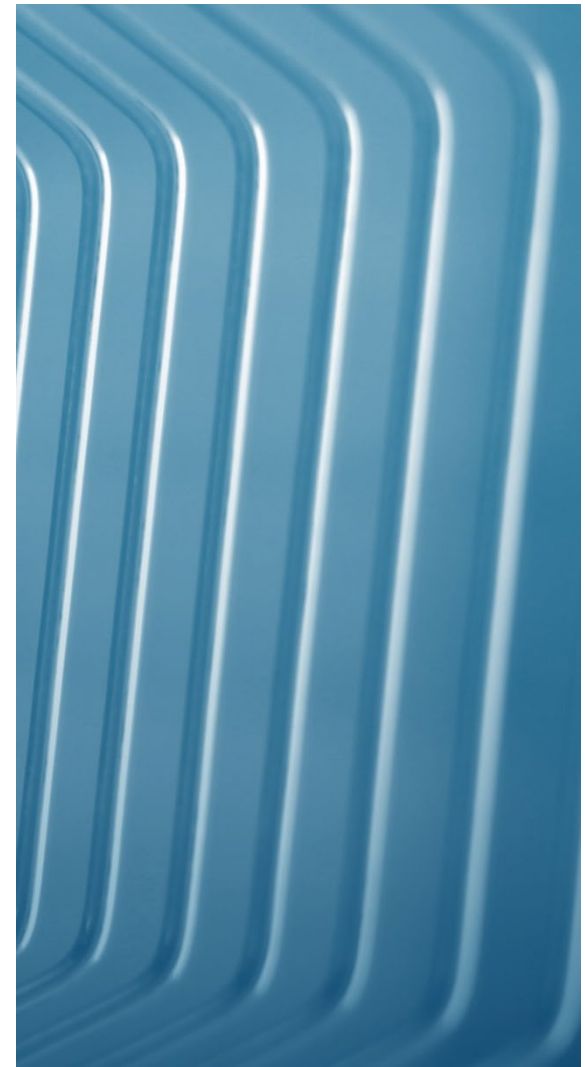


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# History of *Chevron* Deference in Tax Law

- For decades, there was some uncertainty regarding whether the *Chevron* Step Two analysis applied to the tax law at all.
- Instead, courts frequently relied on the multi-factor approach used to review a tax regulation in *National Muffler*.
- However, in *Mayo Foundation for Medical Ed. & Research v. U.S.*, 562 U.S. 44 (2011), the Supreme Court announced that *Chevron*'s two-step analysis would apply in tax cases. This marked the end of so-called tax exceptionalism.
- Giving deference to agency interpretations of the Internal Revenue Code has frequently been outcome determinative.
- Congress often struggles to write unambiguous tax laws, lacking the expertise to craft provisions that address nuanced applications of complex concepts or preferring to leave the details to the IRS.
- Often, the IRS adopts a reading that, while arguably reasonable, may not be the best or most reasonable interpretation of Congressional language.
- The next few slides provide some examples of how deference has shaped the tax law and given the agency substantial power to make the rules.



# Tax Regulation Cases Deferring to the IRS

## ***Altera Corp. v. Commissioner*, 926 F.3d 1061 (9th Cir. 2019)**

- In *Altera*, the Ninth Circuit Court of Appeals overturned a Tax Court decision, holding that a Treasury regulation interpreting the transfer pricing provisions of the Internal Revenue Code.
  - “Given the long history of the application of other methods, and the text and legislative history of the Tax Reform Act of 1984, Treasury’s understanding of its power to use methodologies other than a pure transactional comparability analysis was reasonable, and **we defer to its interpretation** under *Chevron*.” (emphasis added).
- The decision was surprising in that the Tax Court, a court with specialized expertise in tax law, had decided, 15-0, that the regulation was invalid.

## ***Seminole Nursing Home, Inc. v. Commissioner*, 12 F.4th 1150 (10th Cir. 2021)**

- In *Seminole Nursing Home*, the Tenth Circuit Court of Appeals held that a Treasury regulation that restricted an economic hardship exception to individual taxpayers was a reasonable interpretation of the statute.
- The court stated: “Still, given our lack of expertise in the intricacies of the Tax Code, we are reluctant to say that every reasonable interpretation of subparagraph (D) would exclude nonindividuals from its purview. What we can say, however, is that the language of the exemption does not compel that it be interpreted to apply to corporations and that the contours of the exemption are properly left to the expertise of the Secretary.” (internal citations omitted)

# Tax Regulation Cases Deferring to the IRS (cont.)

## ***Oakbrook Land Holdings, LLC v. Commissioner*, 28 F.4th 700 (6th Cir. 2022)**

- In *Oakbrook Land Holdings*, the Sixth Circuit Court of Appeals affirmed a holding of the Tax Court that conservation easement regulations were valid, with the majority concluding that the regulation was entitled to deference under the two-part *Chevron* test. The court stated: “Over three decades of congressional acquiescence to the proceeds regulation leaves us confident that the regulation is owed our deference under *Chevron*.”
  - The taxpayer first argued that the IRS had failed to comply with the APA, and the court rejected that assertion. This conflicted with the recent Eleventh Circuit decision in *Hewitt v. Commissioner*, 21 F.4th 1336 (11th Cir. 2021), which came to the opposite conclusion.

## ***Lissack v. Commissioner*, 68 F.4th 1312 (D.C. Cir. 2023)**

- In *Lissack*, the D.C. Circuit Court of Appeals held that regulations under section 7623 were valid under the two-part *Chevron* test.
- The taxpayer, a whistleblower, had submitted information about a condominium development group that had allegedly evaded taxes. Upon examination, the IRS discovered an unrelated issue regarding a \$60M erroneous deduction. The IRS determined that the taxpayer was ineligible for an award. The court determined that the section 7623 regulations were valid and that it was reasonable for the IRS to deny the award.

# Tax Regulation Cases Deferring to the IRS (cont.)

## ***3M Co. v. Commissioner*, No. 5816-13., 160 T.C. No. 3 (2023)**

- In *3M*, the Tax Court held that a transfer pricing regulation applicable in determining the arm's-length amount for a transaction was valid. Citing *Chevron*, the court determined, “the actual words of section 482 do not reveal that Congress unambiguously intended to prevent respondent from making the allocation at issue.”
- Six judges dissented, arguing that “the record here leaves no doubt that Treasury failed to comply with [the APA].”
- Indeed, there have been numerous recent cases where taxpayers have challenged regulations not on the basis of their substantive reasonableness but rather based on the agency's alleged non-compliance with the APA.

# Implications of Deference in Tax Law and Administration

- It is clear that the courts have accepted the Commissioner's purportedly "reasonable" interpretation of statutes, even when there could possibly be a different interpretation that better captures what Congress intended.
- Indeed, the Tax Court made that clear in 2018, in *SIH Partners LLLP v. Commissioner*, 150 T.C. 28 (2018):

“Undoubtedly, as petitioner has shown, alternatives exist to (and improvements might be imagined for) the generally applicable rules for CFC pledges and guaranties. Nevertheless, ‘we do not sit as a committee of revision to perfect the administration of the tax laws’, *United States v. Correll*, 389 U.S. 299, 306–307, 88 S. Ct. 445, 19 L. Ed. 2d 537 (1967), and we will uphold regulations that have a reasonable basis in the statutory history even where the taxpayer's challenge to a regulation's policy has ‘logical force’, *Fulman v. United States*, 434 U.S. 528, 536, 98 S. Ct. 841, 55 L. Ed. 2d 1 (1978). ‘The role of the judiciary in cases of this sort begins and ends with assuring that the Commissioner's regulations fall within his authority to implement the congressional mandate in some reasonable manner.’ *Correll*, 389 U.S. at 307.”
- Thus, if *Chevron* is reversed or limited, that could have a significant effect on tax regulations. Taxpayers may be able to show that there are better interpretations of what Congress has said than what the IRS has offered and thereby negate regulations that are “reasonable.”
  - In addition, the IRS will likely feel compelled to adhere more closely to the dictates of the APA in its rulemaking, to show that it considered and fairly evaluated all reasonable comments in light of Congress' words and intent.
  - Nonetheless, even if *Chevron* is reversed, as a practical matter, judges (especially judges in the Court of Federal Claims and the district courts) may continue to defer to the IRS in cases involving complex and technical tax issues, because of the agency's expertise.





# SEC



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# Overview of *Chevron* Deference and Impact of Possible Outcomes: SEC

## Insider Trading Liability Under Rule 10b5-1 of the Exchange Act

### Background

- Rule 10b-5, issued under Section 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”), makes it illegal for anyone to employ “manipulative and deceptive devices,” which includes directly or indirectly using any measure to defraud, making false statements, omitting relevant information, or otherwise conducting business operations that would deceive another person in the process of conducting transactions involving stock and other securities. See 15 U.S.C. § 78j.
  - In 1997, the Supreme Court held that trading “on the basis” of inside information violates Section 10(b) of the Exchange Act. *United States v. O’Hagan*, 521 U.S. 642, 652–53 (1997).
- In 2000, the SEC established Rule 10b5-1 to clarify the issue of what, if any, connection must be shown between a trader’s possession of material nonpublic information (“MNPI”) and his or her trading to establish liability under Rule 10b-5.
  - At that time, there was a circuit split over whether the government must prove that a defendant has “knowing possession” of MNPI or must instead prove actual “use” of the MNPI to trade.
    - In *United States v. Teicher*, the Second Circuit determined that only “knowing possession” of MNPI was required to establish insider trading liability under Rule 10b-5. 987 F.2d 112, 120 (2d Cir. 1993).
    - In *SEC v. Adler* and *United States v. Smith*, the Eleventh and Ninth Circuits held that the government must prove actual “use” of MNPI when trading to establish insider trading liability. *SEC v. Adler*, 137 F.3d 1325 (11th Cir. 1998); *United States v. Smith*, 155 F.3d 1051 (9th Cir. 1998).
  - Rule 10b5-1 was designed by the SEC to address this issue by providing that the purchase or sale of an issuer’s security is on the basis of MNPI about the security or issuer if the person making the purchase or sale *was aware of* MNPI when the person made the purchase or sale.
    - A person is aware of MNPI if they know, consciously avoid knowing, or are reckless in not knowing that the information is material and nonpublic. See *SEC v. Obus*, 693 F.3d 276, 286–88, 293 (2d Cir. 2012).

# Overview of *Chevron* Deference and Impact of Possible Outcomes: SEC

## Insider Trading Liability Under Rule 10b5-1 of the Exchange Act (cont.)

### Rule 10b5-1 and *Chevron* Deference

- In 2008, the Second Circuit addressed Rule 10b5-1 and the issue of whether a defendant can be convicted for insider trading if the defendant traded while in “knowing possession” of MNPI as opposed to requiring proof that the defendant “used” such information in making the relevant trade.
  - In *United States v. Royer*, the Second Circuit held that the SEC “enacted Rule 10b5-1, adopting a *knowing possession* standard, and that determination is itself entitled to deference.” 549 F.3d 886 (2008) (emphasis added) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc.*, 567 U.S. 837, 843–44 (1984)).
  - By applying *Chevron* deference to resolve the issue of what is required to create insider trading liability under Rule 10b-5, the Second Circuit lowered the government’s burden of proof to secure an insider trading conviction.
- However, since Rule 10b5-1’s adoption, other courts have ignored Rule 10b5-1 and concluded that the “use” standard applies when determining insider trading liability. See *Fried v. Stiefel Lab’ys, Inc.*, 814 F.3d 1288, 1295 (11th Cir. 2016) (citing *SEC v. Adler* to hold that the district court correctly refused to give a jury instruction that would permit a finding of liability without proof that the defendant had actually used MNPI to trade).
- If the Supreme Court were to overrule or limit *Chevron* through the *Relentless* and *Loper Bright* cases, the issue of whether insider trading liability requires “knowing possession” or actual “use” of MNPI would again be unsettled, especially given the circuit split discussed above.
  - As a result, courts would be required to analyze the text of Rule 10b-5 and could ultimately decide that a “use” standard is more appropriate to determine insider trading liability under Rule 10b-5.

# Overview of *Chevron* Deference and Impact of Possible Outcomes: SEC

## The SEC's New Private Fund Adviser Rules

### Background

- In August 2023, the SEC adopted new rules and amendments under the Investment Advisers Act of 1940 (the “Advisers Act”) that imposed new requirements on advisers to private funds.<sup>1</sup>
  - Specifically, the new rules include:
    - restrictions on business practices and on “preferential treatment” by any advisers to private funds, not just advisers registered or required to be registered;
    - requirements for fairness or valuation opinions for adviser-led secondaries by registered private fund advisers; and
    - requirements for quarterly statements and annual audits for private fund clients of registered advisers.
- In September 2023, a group of trade associations representing the private fund industry filed a lawsuit in the Fifth Circuit to vacate the recently adopted private fund adviser rules.
  - These groups argue that the new rules, among other things, “exceed the Commission’s statutory authority.” Petition For Review, *National Ass’n of Private Fund Managers, et. al. v. Securities and Exchange Commission*, No. 23-60471 (5th Cir. Sep. 1, 2023).
  - Specifically, the groups claim that the new rule exceeds the SEC’s authority by attempting to regulate the terms of the relationship between private funds, which are specifically exempt from such regulation, and their investors. Opening Brief for Petitioners, *National Ass’n of Private Fund Managers, et. al. v. Securities and Exchange Commission*, No. 23-60471, 25–28 (5th Cir. Nov. 1, 2023).

<sup>1</sup> U.S. Securities and Exchange Commission, *SEC Enhances the Regulation of Private Fund Advisers* (August 23, 2023), available at <https://www.sec.gov/news/press-release/2023-155>.

# Overview of *Chevron* Deference and Impact of Possible Outcomes: SEC

## The SEC's New Private Fund Adviser Rules (cont.)

### The Private Fund Advisers Rules and *Chevron* Deference

- Because petitioners argue that the SEC lacks statutory authority to implement the new private fund adviser rules, the fate of *Chevron* will play an important role in the Fifth Circuit's determination of whether the SEC acted within its statutory authority.
  - In its brief filed in December 2023, the SEC argues that Congress authorized the SEC to adopt the new rules pursuant to Section 211(h) of the Advisers Act. Brief of Respondent, *National Ass'n of Private Fund Managers, et. al. v. Securities and Exchange Commission*, No. 23-60471, 17–22 (5th Cir. Dec. 15, 2023).
  - Notably, in response to one of petitioners' arguments, the SEC argues that if the Fifth Circuit were to reach the issue of whether the SEC's interpretation of a certain term is entitled to deference, it should “defer to [the Commission's] construction because it is reasonable.” (citing *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 433 (5th Cir. 2021)).
    - The case cited by the SEC (*Huawei*) considered whether the Federal Communication Commission “exceeded its statutory authority under the *Chevron* framework”.
- Courts have traditionally held that SEC rules are entitled to *Chevron* deference. See, e.g., *Roth ex rel. Beacon Power Corp. v. Perseus LLC*, 522 F.3d 242, 249 (2d Cir. 2008) (“Therefore, we give *Chevron* deference to the SEC's opinion on whether the transactions exempted by Rule 16b-3(d) are comprehended within the purpose of Section 16(b).”).
  - If the Supreme Court overrules or limits *Chevron* through the *Relentless* and *Loper Bright* cases, the Fifth Circuit will be forced to view the SEC's authority to implement the new private fund adviser rules with greater scrutiny.
  - Without *Chevron* to rely on, the Fifth Circuit may ultimately agree with petitioners that the SEC has exceeded its statutory authority in adopting the new private fund adviser rules.



# Overview of *Chevron* Deference and Impact of Possible Outcomes: SEC

## The SEC's Proposed Climate-Disclosure Rule

### Background

- In March 2022, the SEC proposed rule changes that would require registrants to include certain climate-related disclosures in their registration statements and periodic reports.<sup>2</sup>
  - The disclosures would include information about climate-related risks that are reasonably likely to have a material impact on their business, results of operations, or financial condition, and certain climate-related financial statement metrics in a note to their audited financial statements.
  - The required information about climate-related risks would also include disclosure of a registrant's greenhouse gas emissions, which have become a commonly used metric to assess a registrant's exposure to such risks.
- In February 2023, it was reported that the SEC is considering softening its proposed climate-disclosure rule following pushback from investors, companies, and lawmakers.<sup>3</sup>
  - Public companies like Amazon and Walmart have stated that the proposed disclosures will force businesses to perform “speculative and subjective” analysis and “to keep a second set of accounting books.”
  - Financial services firms, including BlackRock, have similarly argued that the SEC's proposal “would result in highly inaccurate disclosures and unduly burdensome compliance costs.”
  - As a result of this pushback, the SEC is considering making certain climate-related disclosure requirements less burdensome on companies, such as by raising the threshold at which companies must report climate costs.

<sup>2</sup> U.S. Securities and Exchange Commission, *SEC Proposes Rules to Enhance and Standardized Climate-Related Disclosures for Investors* (March 21, 2022), available at <https://www.sec.gov/news/press-release/2022-46>.

<sup>3</sup> Jean Eaglesham and Paul Kiernan, “SEC Considers Easing Climate-Disclosure Rules After Investor Pushback,” *The Wall Street Journal* (Feb. 3, 2023), available at [https://www.wsj.com/articles/sec-considers-easing-climate-disclosure-rules-after-investor-pushback-11675416111?st=0pmtlts51w4hfu3&reflink=desktopwebshare\\_permalink](https://www.wsj.com/articles/sec-considers-easing-climate-disclosure-rules-after-investor-pushback-11675416111?st=0pmtlts51w4hfu3&reflink=desktopwebshare_permalink).

# Overview of *Chevron* Deference and Impact of Possible Outcomes: SEC

## The SEC's Proposed Climate-Disclosure Rule (cont.)

### The Climate-Disclosure Rule and *Chevron* Deference

- In addition to pushback regarding the burden that the proposed climate-disclosure rule will place on companies, it is expected that industry groups and lawmakers will bring legal challenges to the rule.<sup>4</sup>
- Specifically, one challenge will likely be to the SEC's statutory authority to require such disclosures.
  - Opponents of the rule will argue that the SEC lacks the authority to create rules related to the disclosure of climate-related risks and impacts.
- If *Chevron* is not overruled or limited by the *Loper Bright* and *Relentless* cases, courts will likely rely on *Chevron* to defer to the SEC's authority granted by Congress to require disclosures "necessary or appropriate in the public interest or for the protection of investors."<sup>5</sup>
- However, if *Chevron* is reduced or eliminated, courts will be forced to examine the scope of the SEC's statutory authority to require climate-related disclosures.
- The fate of *Chevron* will inevitably play a crucial role in the survival of the SEC's climate-disclosure rule and the scope of the Commission's statutory authority to require certain disclosures of registrants.

<sup>4</sup> Dylan Tokar, "The Supreme Court Case That Could Threaten the SEC's Climate Disclosure Rule," *The Wall Street Journal* (May 8, 2023), available at [https://www.wsj.com/articles/the-supreme-court-case-that-could-threaten-the-secs-climate-disclosure-rule-84ace2dc?st=xxiknnqvu6uor90&reflink=desktopwebshare\\_permalink](https://www.wsj.com/articles/the-supreme-court-case-that-could-threaten-the-secs-climate-disclosure-rule-84ace2dc?st=xxiknnqvu6uor90&reflink=desktopwebshare_permalink).

<sup>5</sup> Tracey Longo, "Supreme Court Ruling Clouds SEC's Climate Change Disclosure Rules," *Financial Advisor* (July 1, 2022), available at <https://www.fa-mag.com/news/supreme-court-ruling-clouds-sec-s-climate-change-disclosure-rules-68588.html?section=3>.



# STB



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# Overview of *Chevron* Deference and Impact of Possible Outcomes: STB

## 49 U.S.C. § 11102(c)

- “The Board may require rail carriers to enter into reciprocal switching agreements, where it finds such agreements to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service.”
- Created in 1980, this provision gives the STB the authority to require an incumbent railroad to permit a competitor railroad to serve its customers.
- Following its enactment, the ICC (the predecessor of the STB) interpreted this provision as only permitting forced competitive access where the incumbent railroad engaged in “anticompetitive conduct” by using its market power to extract unreasonable terms, deprive a shipper of a more efficient route, or disregard the shipper’s needs by rendering inadequate service. 49 C.F.R. § 1144.2(a)(1).
- This interpretation was reviewed and affirmed applying the new *Chevron* test. *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1514 (D.C. Cir. 1988); *Baltimore Gas & Electric Co. v. United States*, 817 F.2d 108, 110 (D.C. Cir. 1987).
- Since the mid-1980s, Congress has rejected legislation to compel broader use of forced competitive access 18 times.<sup>1</sup>

# Overview of *Chevron* Deference and Impact of Possible Outcomes: STB

## 49 U.S.C. § 11102(c) (cont.)

- The STB has recently proposed new rules that would require forced competitive access if certain service metrics are not met. *See Reciprocal Switching*, EP 711 (Sub-No. 2) (STB served Sept. 7, 2023). Many of the comments on this proposed rule have called into question fundamental questions about the scope of the STB’s authority under § 11102(c). Others ask the agency to be more aggressive and set aside its prior interpretation of this provision. Legal issues raised include:
  - The meaning of “public interest;”
  - The meaning of “reciprocal switching;”
  - The meaning of “necessary to provide competitive rail service;” and
  - The scope of the STB’s authority to compel disclosure of information to third parties in advance of a formal complaint.
- If the *Chevron* doctrine is abandoned or curtailed, that will transform the legal review of this contested rule. Parties will ask the courts to resolve fundamental questions about the scope and power of the STB – in light of this old statutory provision adopted in 1980 in a highly deregulatory environment.



# Overview of *Chevron* Deference and Impact of Possible Outcomes: STB

## 49 U.S.C. § 11102(c) (cont.)

<sup>1</sup> See, e.g., (1) Rail Shipper Fairness Act of 2015, S. 853, 114th Cong., § 3 (2015) (requiring rail carriers to quote rates between any interchange points of two or more carriers and requiring competitive switching in terminal areas or within 100 miles of an interchange unless infeasible or unsafe); (2) Surface Transportation Board Reauthorization Act of 2011, S. 158, 112th Cong., § 302 (2011) (overturning *Midtec*, establishing when STB should provide terminal access, and create a pricing mechanism); (3) Surface Transportation Board Reauthorization Act of 2009, S. 2889, 111th Cong., § 302 (2009) (same as S. 158); (4) Railroad Competition and Service Improvement Act of 2007, S. 953, 110th Cong., § 104 (2007) (requiring, rather than authorizing, STB to order reciprocal switching); (5) Railroad Competition and Service Improvement Act of 2007, H.R. 2125, 110th Cong., § 104 (2007) (same); (6) Railroad Competition Improvement and Reauthorization Act of 2005, H.R. 2047, 109th Cong., § 5 (reversing *Midtec* by prohibiting the Board from requiring evidence of anticompetitive conduct as condition to ordering reciprocal switching); (7) Railroad Competition Act of 2006, S. 2921, 109th Cong., § 104 (2006) (reversing *Midtec* by amending statute to read “the Board shall not require evidence of anticompetitive conduct by a rail carrier from which access is sought” as condition to terminal access or reciprocal switching); (8) Railroad Competition Act of 2005, S. 919, 109th Cong., § 102 (2005) (prohibiting the Board from requiring evidence of anticompetitive conduct as pre-condition to ordering terminal access or reciprocal switching); (9) Railroad Competition Act of 2003, H.R. 2924, 108th Cong., § 5 (2003) (abrogating *Midtec* by prohibiting the Board from requiring evidence of anticompetitive conduct as pre-condition to ordering terminal access or reciprocal switching); (10) Railroad Competition Act of 2003, S. 919, 108th Cong., § 5 (2003) (same); (11) Surface Transportation Board Reform Act of 2003, H.R. 2192, 108th Cong., § 104 (2003) (overturning *Midtec*); (12) Railroad Competition Act of 2001, S. 1103, 107th Cong., § 103 (2001) (abrogating *Midtec* by providing that, in considering requests for reciprocal switching or terminal access, STB “may not require evidence of anticompetitive conduct by a rail carrier from whom access is sought”); (13) Surface Transportation Board Reform Act of 2001, H.R. 141, 107th Cong., § 104 (2001) (same); (14) Railroad Competition and Service Improvement Act of 1999, H.R. 2784, 106th Cong., § 7 (1999) (overturning *Midtec* by prohibiting STB from requiring evidence of anticompetitive conduct as condition to ordering terminal trackage rights or reciprocal switching); (15) Railroad Competition and Service Improvement Act of 1999, S. 621, 106th Cong., § 7 (1999) (same); (16) Surface Transportation Board Reauthorization Act of 1999, H.R. 3163, 106th Cong. § 6 (1999) (same); (17) Surface Transportation Board Reform Act of 1999, H.R. 3446, 106th Cong., § 104 (1999) (to same effect); and (18) Surface Transportation Board Modernization Act, H.R. 3398, 106th Cong., § 12 (1999) (overturning *Midtec* by changing the standards for terminal access and reciprocal switching and altering the procedure for Board action).



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