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Legal Sidebar

Congressional Court Watcher: Federal Appellate Decisions in Recent Years Applying *Chevron* Deference

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In late June 2024, the Supreme Court issued a decision in the consolidated cases of *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce* (collectively referred to as *Loper Bright* here) overruling the *Chevron* doctrine. The doctrine, established by the Supreme Court's 1984 decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, generally directed courts to defer to agencies' interpretations of ambiguous statutes that those agencies administer, so long as those interpretations were reasonable. The Court held in *Loper Bright* that *Chevron* deference could not be squared with the Administrative Procedure Act's command that courts interpret statutes and that, going forward, courts should "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. (A recent Legal Sidebar examines the *Loper Bright* decision in detail.)

Chevron generally required courts to perform a two-step analysis when evaluating agency interpretations of statutes that they administered. At step one, a court would determine whether the statute was silent or ambiguous with regard to the question at issue. If the court determined the statute to be ambiguous, step two required the court to accept an agency's interpretation if it was "reasonable," even if the reviewing court believed that there was a better reading of the statute. This standard likely influenced regulatory behavior. One empirical study cited in a CRS product 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.

Over its 40-year existence, the *Chevron* doctrine was cited by federal courts tens of thousands of times, though the Supreme Court and, to a lesser extent, the federal appellate courts deferred to agency interpretations under step two of the *Chevron* test with less frequency in more recent years. In some cases, this might have been because the reviewing court determined that the agency interpretation lacked the formality necessary for the *Chevron* doctrine to apply, or the agency regulation involved a "major question" of political or economic significance that made *Chevron* deference inappropriate. Other cases might have been resolved at *Chevron* step one, as the reviewing court determined that the statutory

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language was unambiguous. In still other cases, the reviewing court might have determined the statutory language was ambiguous but *Chevron* step two decided that agency interpretation was unreasonable. Still, while the Supreme Court had not reached *Chevron* step two in almost a full decade preceding the *Loper Bright* ruling, lower courts continued to apply *Chevron*—and uphold agency interpretations under *Chevron* step two—with some regularity.

During argument before the Supreme Court in *Loper Bright*, one question that arose was whether overturning *Chevron* would have the effect of overruling those decisions that relied on *Chevron* to uphold the validity of agency regulations. The *Loper Bright* majority said its ruling did not disrupt earlier court decisions that 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. It is unclear what justification would be satisfactory for a court to revisit an earlier decision.

While principles of stare decisis might result in a federal court of appeals declining to revisit its pre-*Loper Bright* determination that an agency action was lawful under *Chevron* step two, that court's decision would not be binding on courts in other federal circuits when considering similar challenges to the same agency action brought by different parties. It is possible that circuit splits could emerge between those federal appellate courts that considered challenges to agency action under *Chevron*—under which an agency interpretation of ambiguous statutory language needed only to be "reasonable" to be upheld—and those appellate courts that hear challenges post-*Loper Bright*, which must decide whether the agency interpretation is the "best" reading of the statute. The possibility that an agency action upheld under *Chevron* step two in one circuit may be challenged by a different party in another circuit may have been affected by the Court's decision in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, issued three days after *Loper Bright*, which extended the period for which certain challenges to agency regulations may be brought. (It is also possible that there might be greater likelihood of disagreement among reviewing courts over whether an agency reading is the "best" under *Loper Bright* than had occurred when courts only needed to decide whether the agency interpretation was "reasonable" under *Chevron*.)

Recent Federal Appellate Decisions Applying *Chevron* to Uphold Agency Action

As mentioned above, in the years immediately preceding *Loper Bright*, federal appellate courts appear to have reached step two of the *Chevron* test and deferred to agency statutory interpretations with less frequency than in earlier decades, though still with some regularity. It seems likely that some of these agency interpretations will be revisited post-*Loper Bright*. In the short term, this might occur in ongoing lawsuits that began prior to the *Loper Bright* decision, where the reviewing court upheld a challenged agency action under *Chevron* step two, and the plaintiffs now argue on appeal or in motions for reconsideration that *Loper Bright* compels a different result. More broadly, *Loper Bright* might prompt new lawsuits challenging agency regulations that were upheld by some reviewing courts under *Chevron* step two, in which the new plaintiffs argue that the agency interpretation is not based on the best reading of the governing statute.

The following list catalogues judicial decisions of legislative interest since October 2021 where a federal court of appeals upheld an agency action in a precedential (reported) decision after affording *Chevron* deference to the agency's interpretation of the governing statute. The list illustrates the expansive reach of the *Chevron* doctrine, as the appellate courts issued decisions concerning numerous federal agencies and a wide range of subject matter. The first section of the list provides decisions that the Supreme Court has vacated and remanded for further consideration in light of the *Loper Bright* decision, or for which a

petition for certiorari has been filed. The second section provides other examples of recent applications of *Chevron*. Most of the discussed cases were identified in preparing the Congressional Research Service's *Congressional Court Watcher* series, which briefly recaps reported decisions of the courts of appeals for the 13 federal circuits addressing topics of legislative interest. Minor revisions and updates have been made to some of the case summations, including to indicate if the decision was vacated and remanded in light of the Supreme Court's decision in *Loper Bright* or whether a petition for Supreme Court review had been filed. Subsequent case history for each decision was reviewed using Westlaw on July 26, 2024. Cases are arranged alphabetically by key topic and in reverse chronological order.

Decisions Upholding Agency Action under *Chevron* Vacated by the Supreme Court Post-*Loper Bright* or That Have Outstanding Petitions for Supreme Court Review

- **Criminal Law & Procedure:** In February 2024, the Fourth Circuit upheld a defendant's conviction for failing to register as a sex offender under the federal Sex Offender Registration and Notification Act (SORNA) after the defendant attempted to evade registration requirements while staying on campgrounds. SORNA requires a sex offender to keep his or her registration current in the jurisdiction where that offender "resides," which is defined as the "location . . . where the individual habitually lives." The Fourth Circuit held that the trial court permissibly used guidance from the National Guidelines for Sex Offender Registration and Notification to instruct the jury on the scope of SORNA, including the Guidelines' interpretation of the terms "resides" and "habitually lives" as applying to persons who may lack a fixed abode or permanent residence. In so doing, the circuit panel held that the statutory term "habitually lives" was ambiguous and the Guidelines offered a reasonable clarification of that term that was entitled to *Chevron* deference. A petition for certiorari has been filed with the Supreme Court (*United States v. Kokinda*).
- **Energy:** In February 2023, the D.C. Circuit rejected challenges to the Federal Energy Regulatory Commission (FERC) approval of Broadview Solar's application to become a qualifying facility under the Public Utility Regulatory Policies Act of 1978. Qualifying facilities receive special rate and regulatory treatment because they are smaller facilities that use renewable resources or alternative technology for energy generation. Under 16 U.S.C. § 796(17)(A)(ii), qualifying facilities that are not otherwise eligible solar, wind, waste, or geothermal facilities are limited to those with energy production capacities "not greater than 80 megawatts." FERC interpreted Section 796(17)(A)(ii) not to bar Broadview Solar's designation because the facility in question could only send out 80 megawatts of alternating current power, although it could generate 160 megawatts of direct current power. The court ruled that FERC's interpretation of the statute was entitled to *Chevron* deference and was neither arbitrary nor capricious. On July 2, 2024, the Supreme Court granted certiorari in the case, vacated the D.C. Circuit's judgment, and remanded for further consideration in light of *Loper Bright* (*Solar Energy Indus. Ass'n v. FERC*).
- **Environmental Law:** In November 2023, the Ninth Circuit, applying *Chevron* deference, affirmed a district court's grant of summary judgment to an environmental organization that brought a citizen suit under the Clean Water Act (CWA) against the operator of a suction dredge miner. Following Ninth Circuit precedent, the panel determined that the act of suction dredging the bed of a river, removing gold from the sediment, and returning the excess sand, rock, and other materials to the water constituted "adding" a pollutant to a body of water and required a National Pollutant Discharge Elimination System permit. In deferring to the agency's interpretation of the law, the panel noted that the term "addition" in the CWA's definition of "discharge of a pollutant"

was ambiguous and that the Environmental Protection Agency's (EPA's) interpretation was reasonable. On July 2, 2024, the Supreme Court denied certiorari in the case, days after deciding *Loper Bright* (*Idaho Conservation League v. Poe*).

- **Environmental Law:** In the second of the two consolidated cases that resulted in the Supreme Court overruling *Chevron* (along with *Loper Bright*), the First Circuit in March 2023 upheld a National Marine Fisheries Service (NMFS) rule establishing industry-funded monitoring programs for New England fisheries that place observers on private fishing vessels. Applying the *Chevron* framework, the court joined the D.C. Circuit in ruling that NMFS possesses the authority under the Magnuson-Stevens Fishery Conservation and Management Act to require industry monitoring. The court rejected arguments that the legislative history and definitions in the Act demonstrated that the agency lacked statutory authority to promulgate the rule. The court also rejected arguments that the rule was arbitrary and capricious in violation of the Administrative Procedure Act, that it violated the Regulatory Flexibility Act (which requires agencies to consider the effects of their actions on small businesses), and that it exceeded Congress's Commerce Clause power. The Supreme Court later granted certiorari to review the First Circuit and D.C. Circuit decisions, overruled the *Chevron* framework on which they relied, and remanded for further proceedings consistent with the Court's opinion (*Relentless, Inc. v. U.S. Dep't. of Com.*).
- **Environmental Law:** The Eighth Circuit in May 2023 held that regulations governing farmers' requests for reviews of wetland certifications under the Swampbuster Act were not inconsistent with the governing statute. The act generally provides that certain farm-related benefits are unavailable to farmers who convert wetlands or produce crops on converted wetlands, and it provides that a prior wetland certification remains in effect until a person affected by the certification requests review. Implementing regulations establish procedural requirements for making an effective review request. The circuit court rejected petitioner's argument that the review regulations impermissibly narrowed the right to seek review of a certification under the Swampbuster Act, applying the *Chevron* framework and deferring to the agency's reasonable interpretation of statutory language that the court found ambiguous. On July 2, 2024, the Supreme Court granted certiorari in the case, summarily vacated the Eighth Circuit's decision, and remanded the case for further consideration in light of the *Loper Bright* decision (*Foster v. U.S. Dep't of Agric.*).
- **Environmental Law:** In one of the two consolidated cases that resulted in the Supreme Court overruling the *Chevron* doctrine, a divided D.C. Circuit panel in August 2022 upheld an NMFS rule establishing industry-funded monitoring programs for New England fisheries. The court first determined that the rule did not implicate the "major questions" doctrine, which counsels against interpreting general delegations of agency authority as empowering agencies to pursue policies of economic and political significance inconsistent with the agencies' historical assertions of authority. Applying the *Chevron* framework, the majority held that, although the governing Magnuson-Stevens Fishery Conservation and Management Act did not unambiguously authorize the Service to require industry-funded monitoring, the Service's interpretation of the Act as allowing such monitoring was reasonable and entitled to deference. The majority also rejected arguments that the rule was arbitrary and capricious or issued in a procedurally improper manner. The Supreme Court subsequently granted certiorari, overruled the *Chevron* framework on which the lower court's decision relied, and remanded for further proceedings consistent with the Court's opinion (*Loper Bright Enters., Inc. v. Raimondo*).

- **Immigration:** In September 2023, the Fourth Circuit affirmed the BIA's decision that a conviction for receipt of stolen property is a crime involving moral turpitude if knowledge that the goods were stolen is an element of the offense. On that basis, the court held that the conviction rendered the petitioner ineligible for cancellation of removal under 8 U.S.C. §§ 1229b(b)(1)(C) and 1227(a)(2)(A)(i). Applying *Chevron*, the Fourth Circuit deferred to the BIA's interpretation of what constitutes a crime involving moral turpitude under the INA. The panel joined the majority of reviewing appellate courts in upholding the BIA's interpretation. On July 2, 2024, the Supreme Court granted certiorari in the case, summarily vacated the Fourth Circuit's decision, and remanded the case for further consideration in light of the *Loper Bright* decision (*Solis-Flores v. Garland*).
- **Immigration:** Sitting en banc, a divided Ninth Circuit in June 2022 affirmed a BIA ruling that an alien who had immigrated to the United States was removable under 8 U.S.C. § 1227(a)(2)(E)(i) because of a conviction for a "crime of child abuse, child neglect, or child abandonment." The decision added to a circuit split over the BIA's interpretation of the statute. A plurality of the en banc court ruled that the BIA was entitled to *Chevron* deference in its interpretation of Section 1227(a)(2)(E)(i) as encompassing any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being, including sexual abuse or exploitation. On July 2, 2024, the Supreme Court granted certiorari in the case, summarily vacated the Ninth Circuit's decision, and remanded the case for further consideration in light of the *Loper Bright* decision (*Diaz-Rodriguez v. Garland*).
- **Immigration:** In April 2022, the Eleventh Circuit affirmed the BIA's determination that an alien's conviction relating to culpably negligent child neglect was a removable offense under the INA. A provision of the INA, 8 U.S.C. § 1227(a)(2)(E)(i), renders an alien removable if he or she is convicted of a "crime of child abuse, child neglect, or child abandonment." The Eleventh Circuit panel rejected the petitioner's argument (and the position taken by an earlier Tenth Circuit decision) that, to be removable under this provision for non-injurious child neglect or endangerment, the underlying offense must require the defendant to have acted knowingly, intentionally, or recklessly. The Eleventh Circuit panel decided that the removal provision was ambiguous as to the intent required for an offense to be covered. Applying *Chevron*, the court deferred to the BIA's reasonable interpretation of Section 1227(a)(2)(E)(i) as covering non-injurious child neglect where a showing of criminal negligence was necessary to convict. On July 2, 2024, the Supreme Court granted certiorari in the case, summarily vacated the Eleventh Circuit's decision, and remanded the case for further consideration in light of the *Loper Bright* decision (*Bastias v. U.S. Att'y Gen.*).
- **Labor & Employment:** In April 2023, a divided Fifth Circuit upheld the NLRB's prehearing withdrawal of an unfair labor practice complaint against two labor unions. The NLRB General Counsel (GC) issued the complaint after an employer initially filed an unfair labor practice charge with the NLRB against the unions. After President Biden removed the GC and designated an Acting GC, the NLRB withdrew the complaint. Deciding it had jurisdiction over the case, the circuit court held that the President had authority to remove the GC and that the Acting GC's designation was valid. The majority also held that the National Labor Relations Act—which provided that the GC "shall have final authority . . . in respect of the prosecution of . . . complaints before the" NLRB, was ambiguous as to the line between prosecutorial and adjudicatory decisions. Applying *Chevron* deference, the circuit panel majority held that the NLRB permissibly determined

that the Acting GC had discretion to withdraw the complaint. On July 2, 2024, the Supreme Court granted certiorari in the case, summarily vacated the Fifth Circuit's decision, and remanded the case for further consideration in light of the *Loper Bright* decision (*United Nat. Foods, Inc. v. NLRB*).

- **Tax:** In May 2023, the D.C. Circuit held that the Internal Revenue Service (IRS) did not owe an individual a whistleblower award under the Internal Revenue Code (IRC) when information submitted by the whistleblower did not lead to a tax adjustment on the specific issue reported but did lead the IRS to make an adjustment on a separate tax issue involving the same scrutinized entity. Section 7623(b)(1) of the IRC requires the IRS to pay whistleblowers an award for information that leads to a tax adjustment brought by an "administrative [] action." IRS regulations implementing that provision provide that the whistleblower's tip must directly lead to a tax adjustment on the specific tax issue reported by the whistleblower. The D.C. Circuit found that the IRC provision did not unambiguously address whether a whistleblower's tip must provide direct information related to the adjustment and upheld the IRS regulation as a reasonable interpretation of the statute. On July 2, 2024, the Supreme Court granted certiorari, vacated the judgment, and remanded to the D.C. Circuit for further consideration in light of the *Loper Bright* decision (*Lissack v. Comm'r*).

Other Recent Appellate Decisions Upholding Agency Action under *Chevron*

- **Abortion:** In November 2023, a divided Sixth Circuit affirmed in part and reversed in part a district court's decision not to issue a preliminary injunction halting enforcement of a 2021 Department of Health and Human Services (HHS) rule for the Title X family-planning grant program. The lawsuit challenging the rule, brought by Ohio and other states, turns on whether the rule comports with Section 1008 of Title X, which bars funds appropriated for Title X from being used "in programs where abortion is a method of family planning." In *Rust v. Sullivan*, the Supreme Court held that Section 1008's scope was ambiguous, entitling a reasonable construction of the provision by HHS to *Chevron* deference. Applying *Rust*, the Sixth Circuit held that one of the 2021 rule's components, which required Title X grant recipients to make abortion referrals upon request, was based on a permissible interpretation of Section 1008 as not barring this practice. The circuit panel majority held that another component of the 2021 rule, which rescinded an earlier HHS requirement that grant recipients keep family planning services physically and financially separate from any abortion-related services, conflicted with Section 1008. The majority held that a preliminary injunction halting enforcement of the rule was warranted but only as applied to Ohio-based Title X grant recipients (*Ohio v. Becerra*).
- **Communications:** In July 2023, the Third Circuit ruled that a local zoning board's denial of a zoning variance to a wireless provider seeking to build a cell tower violated the Telecommunications Act's prohibition on state or local measures that have "the effect of prohibiting personal wireless services." The court held that the ordinance would violate a judicially created test previously used in the circuit and by some out-of-circuit courts. The court also held that the denial of a zoning variance would violate a newer test adopted by the Federal Communications Commission (FCC), which the court decided was based on a reasonable construction of ambiguous statutory language entitled to *Chevron* deference. The FCC test examines whether state or local action would "materially inhibit" wireless providers' right to compete in a fair marketplace. The panel concluded that the FCC standard was preferable to the judicially created test previously employed by the circuit and held that the zoning board materially inhibited the ability of

a wireless provider to compete in a fair and balanced legal and regulatory market (*CellCo P'ship v. White Deer Twp. Zoning*).

- **Communications:** The Ninth Circuit, in March 2023, upheld an FCC order holding that a local telephone exchange carrier violated the Communications Act of 1934 by imposing "unjust and unreasonable" charges when it restructured its business operations to exploit a loophole to avoid complying with an FCC rule on "access stimulation." The local exchange carrier argued that the FCC could not declare a charge unjust and unreasonable under 47 U.S.C. § 201(b) if there were no explicit rule violation. The panel, applying *Chevron* deference and established precedent, found Section 201(b) to be ambiguous with regard to whether an explicit rule violation is required and held the FCC's interpretation that it could enforce the provision solely through adjudication to be reasonable. The panel further held that the FCC complied with due process requirements and reasonably found that the carrier rearranged its business to capitalize on the technical loophole to avoid compliance with the rule (*Wide Voice, LLC v. FCC*).
- **Education:** In August 2023, the D.C. Circuit rejected a challenge from a guaranty agency (GA) under the Federal Family Education Loan Program to a Department of Education rule that prohibits GAs from assessing debt-collection costs against defaulted borrowers who attempt to end their default status within 60 days of receiving certain notice from the GA. Applying *Chevron*, the court concluded that the rule was a permissible interpretation of the Higher Education Act of 1965, which requires that borrowers who defaulted on certain student loans pay "reasonable collection costs" (*Ascendium Educ. Solutions, Inc. v. Cardona*).
- **Environmental Law:** In August 2022, a divided Eighth Circuit panel affirmed the EPA's decision to deny a citizen's petition under the Clean Air Act (CAA) to object to the issuance of a CAA permit for a North Dakota coal power plant. The CAA requires a petition asking the EPA to object to a permit to "demonstrate[] to the Administrator that the [proposed] permit is not in compliance with the requirements of [the CAA.]" The EPA interpreted the term "demonstrate" in the statute to mean that the petitioner must address specific deficiencies in the permit or the reasons provided for granting it. Applying *Chevron* deference, the Eighth Circuit panel upheld the EPA's decision by finding the term "demonstrate" to be ambiguous and the agency's interpretation of the term to be reasonable (*Voigt v. EPA*).
- **Environmental Law:** In February 2022, the Ninth Circuit affirmed a district court's judgment for the U.S. Forest Service concerning the agency's determination that a company could resume its operations at a uranium mine site located in the Kaibab National Forest. The case largely turned on the application of the General Mining Act of 1872, which enables U.S. citizens to acquire enforceable property rights to "valuable mineral deposits" they discover on federal land. The court held that the Forest Service did not act arbitrarily and capriciously in ignoring "sunk costs" the company incurred (i.e., costs already incurred that could not be recovered) when determining whether the company had a claim to "valuable mineral deposits." The court also concluded that the Forest Service reasonably relied on a determination of the Department of the Interior (which is charged with administering the Mining Act) that sunk costs are not considered when assessing a mining operation's value and that the Department's approach to sunk costs was entitled to *Chevron* deference (*Grand Canyon Trust v. Provencio*).
- **Environmental Law:** The CWA requires states to submit proposed water quality standards to the EPA for approval. EPA regulations allow a state to request a variance from approved water quality standards when full compliance is shown to be unfeasible

but require the variance to "represent the highest attainable condition" feasible for the water body. In October 2021, a Ninth Circuit panel held that the EPA's regulations, which permit EPA to consider compliance costs when approving a water quality standard or variance, are a reasonable interpretation of the CWA entitled to *Chevron* deference. The panel also held that EPA may approve a variance that allows for achievement of the "highest attainable condition" by the end of the variance term, rather than from the outset (*Upper Mo. Waterkeeper v. EPA*).

- **Health:** In April 2022, the D.C. Circuit upheld the Centers for Medicare and Medicaid Services' (CMS's) methodology for calculating Medicare reimbursements for hospice care during a budget sequestration imposed by the Budget Control Act of 2011 (BCA). In addressing the agency's construction of the Medicare statute, the panel found the statutory phrase "amount of payment made" in a provision regarding the aggregate cap for hospice care reimbursements to be ambiguous and deferred to the agency's interpretation for calculating the aggregate cap during a sequestration imposed by the BCA. The panel further found that CMS's sequestration methodology was not an arbitrary or capricious construction of the BCA (*Gentiva Health Servs., Inc. v. Becerra*).
- **Health:** A 2019 revised rule of the CMS regulates the use of arbitration agreements by long-term care facilities that participate in the Medicare and Medicaid programs. In October 2021, an Eighth Circuit panel held that the rule did not contravene Federal Arbitration Act requirements; was premised on a reasonable interpretation of the Medicare and Medicaid statutes entitled to *Chevron* deference; and was not arbitrary and capricious. While the rule's accompanying certification under the Regulatory Flexibility Act did not comport with that Act's procedural requirements, the court deemed this to be harmless error. The Supreme Court later denied a petition for certiorari in the case (*Northpoint Health Servs. of Ark., LLC v. U.S. Dep't of Health & Hum. Servs.*).
- **Immigration:** In April 2024, the Tenth Circuit upheld the Board of Immigration Appeals' (BIA's) interpretation of 8 U.S.C. § 1229b(b)(1)(D) concerning when an alien may be granted cancellation of removal because removal would create an "exceptional and extremely unusual hardship to the alien's . . . [U.S. citizen] child." Federal immigration law defines a *child* as "an unmarried person under twenty-one years of age," meaning that a potentially qualifying relative may age out of that designation. Applying the *Chevron* doctrine, the circuit court determined that Section 1229b(b)(1)(D) was ambiguous as to when the age of the qualifying relative is to be determined, and the panel deferred to the BIA's determination that the age of the qualifying "child" should be fixed at a date no later than when the immigration judge closes the administrative record. On July 10, 2024, the Tenth Circuit vacated the decision and agreed to rehear the case, with the parties directed to file supplemental briefs on the impact of *Loper Bright* on the dispute (*Rangel-Fuentes v. Garland*).
- **Immigration:** Joining the Third Circuit, the Second Circuit in a March 2024 decision held that the BIA's interpretation of the term "conviction" under 8 U.S.C. § 1101(a)(48)(A) was entitled to *Chevron* deference. The BIA determined that a "conviction" under the statute requires a formal judgment of guilt that follows a state proceeding that is a substantively constitutional criminal proceeding in nature with "minimum constitutional protections," such as proof beyond a reasonable doubt and the right to confront one's accusers. Applying *Chevron*, the court determined that the meaning of "conviction" under Section 1101(a)(48)(A) is ambiguous and that the BIA's interpretation of Section 1101(a)(48)(A) is reasonable and entitled to deference (*Wong v. Garland*).

- **Immigration:** In March 2024, the Eleventh Circuit issued a substitute opinion for one originally issued in December 2022, denying in part and dismissing in part a petition for review of a BIA decision that a petitioner was subject to removal for committing an aggravated felony under the Immigration and Nationality Act (INA). The petitioner challenged (1) a decision by the Attorney General, *Matter of Thomas*, that state court orders modifying a criminal sentence do not remove the immigration consequences of a criminal conviction if the modification is based on reasons unrelated to the merits of the underlying case; and (2) the BIA's decision in the petitioner's case applying *Matter of Thomas*. The Eleventh Circuit first held that Congress gave the Attorney General broad authority to decide legal questions arising under the immigration laws. Second, the court held that the Attorney General's interpretation of the INA provision defining a "conviction" was reasonable and entitled to *Chevron* deference. Accordingly, the court held that the petitioner was an aggravated felon under the INA, despite a state court's modification of his criminal sentence (*Edwards v. U.S. Att'y Gen.*).
- **Immigration:** In a September 2023 case, a divided Second Circuit applied *Chevron* deference to the BIA's determination that, under 8 U.S.C. § 1227(a)(2)(A)(i), an alien's removability due to a state conviction for a crime involving moral turpitude for which "a sentence of one year or longer may be imposed" depends on the state law as it stood at the time of the conviction. Although a state legislature had passed a law reducing the maximum penalty for the petitioner's conviction and the reduction had retroactive effect under state law, the court held that the reduced penalty had no effect on the petitioner's removability (*Peguero Vasquez v. Garland*).
- **Immigration:** In May 2023, the Eighth Circuit affirmed the BIA's dismissal of an alien's petition for asylum and other forms of relief from removal and in so doing applied *Chevon* deference to the BIA's interpretation of a "particular social group" under the federal asylum statute. Under 8 U.S.C. § 1158(b), an alien may be eligible for asylum if he or she faces persecution on account of a protected characteristic, including membership in a "particular social group." The circuit panel decided that this statutory phrase was ambiguous and that the BIA had reasonably interpreted the phrase to refer to a group "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." The panel held that the BIA did not err in concluding that the petitioner's proposed social group—witnesses who cooperate with law enforcement—lacked the particularity and social distinction to be covered by the asylum statute (*Oxlaj v. Garland*).
- **Immigration:** In December 2022, a divided Fourth Circuit panel denied an alien's petition for review of a BIA decision that she could not adjust her status to that of a conditional permanent resident without an affidavit of support from her former husband, a U.S. citizen. The husband had originally petitioned for a K-1 visa for the alien and initially filed an affidavit of support for her adjustment of status, but he later withdrew his affidavit as they had divorced. The BIA had held that abuse and death are the only statutory exceptions to the requirement that the affidavit in support of adjustment must come from the original K-1 petitioner, neither of which applied to this alien. The Fourth Circuit majority held that the Immigration and Nationality Act does not expressly speak to the relevant issues and that the BIA's decision was entitled to *Chevron* deference (*Song v. Garland*).
- **Immigration:** In November 2022, in a case centered on the immigration consequences of being convicted of a "crime of moral turpitude," the Seventh Circuit granted a lawful permanent resident's petition for review and remanded to the BIA. The petitioner pleaded guilty to criminal neglect of a dependent in state court and was sentenced to a year in jail

suspended to time served plus 30 days. After she was placed in removal proceedings, she successfully petitioned the state court to modify her sentence to less than six months to qualify for the so-called "petty offense" exception to the crime of moral turpitude ground of inadmissibility, 8 U.S.C. § 1182(a)(2)(A)(ii)(II). The BIA did not apply that exception, relying on an intervening decision of the Attorney General declaring that state-court sentence modification orders are effective for immigration purposes only if based on a procedural or substantive defect in the underlying criminal proceeding. The Seventh Circuit held that the state criminal neglect offense is categorically a crime of moral turpitude and that the Attorney General's decision was entitled to *Chevron* deference but that applying that decision to the petitioner was an impermissibly retroactive application of a new rule (*Zaragoza v. Garland*).

- **Immigration:** In November 2022, the Second Circuit upheld the BIA's denial of a petitioner's withholding-of-removal claim, where the BIA held that the petitioner failed to show his ethnicity was "at least one central reason" motivating his alleged persecution. The governing statute, 8 U.S.C. § 1231(b)(3)(A), bars the removal of an alien whose "life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." The majority held that Section 1231(b)(3)(A) is ambiguous as to the showing required to establish that a covered ground, like ethnicity, motivated the persecutor. Applying the *Chevron* framework, the majority held that the BIA's interpretation of the withholding-of-removal statute as incorporating the same "one central reason" standard used in asylum cases for determining motive was reasonable and entitled to deference (*Quituizaca v. Garland*).
- **Immigration:** Under 8 U.S.C. § 1101(g), an alien is considered to have been "deported or removed" once he or she has (1) been "ordered deported or removed" and (2) "left the United States." Applying the rule of lenity and affording the government's interpretation *Chevron* deference, the Eleventh Circuit held in December 2021 that an alien is only considered to have been removed under Section 1101(g) if the alien departs the United States after the issuance of a removal order and not if the alien departs beforehand. The Supreme Court later denied certiorari in the case (*Romero v. Sec'y, U.S. Dep't of Homeland Sec.*).
- **Labor & Employment:** In May 2024, the Ninth Circuit minimally amended an opinion from February that denied a hospital's petition for rehearing en banc, granted the National Labor Relations Board's (NLRB's) cross-application for enforcement, and enforced the NLRB's order finding that the hospital engaged in an unfair labor practice when it stopped deducting union dues after the expiration of a collective bargaining agreement. The NLRB has changed its position multiple times in recent years on whether the National Labor Relations Act (NLRA) permits an employer to unilaterally cease collecting dues after an agreement expires. In affirming the NLRB's changed interpretation, the Ninth Circuit explained that the NLRA is ambiguous on the issue and then upheld the NLRB's permissible interpretation of the statute under the *Chevron* doctrine (*Valley Hosp. Med. Ctr., Inc. v. NLRB*).
- **Labor & Employment:** In June 2023, the Fifth Circuit held that audiologists are "physicians" under Section 7(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 907(b). Section 907(b) of the LHWCA provides covered employees with the right to choose an attending physician to provide medical care. The panel decided that there was some ambiguity presented by the plain text of Section 907(b) as to whether the term "physician" includes audiologists. Applying *Chevron* deference, the panel held that the interpretation of the Director of the Office of Workers' Compensation Programs including audiologists in the regulatory definition of

"physician" was a permissible reading of the statute (*Huntington Ingalls, Inc. v. Dir., Off. of Workers' Comp. Programs*).

- **Labor & Employment:** In June 2023, an Eleventh Circuit panel affirmed a district court ruling that the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) required a municipality to reimburse its employees for benefits that were improperly withheld while the employees were on military leave. Under USERRA, employers are required to provide employees on military leave the same benefits that are provided to similarly situated employees on non-military leave—that is employees with similar "status" and "pay." The municipality argued that, because the employees were on "unpaid status" while they were on leave, they were not owed benefits because other employees on an unpaid status do not receive such benefits. However, the court held that the term "status" was ambiguous because it could refer to "'an employee's job position,' generally, or to the way the employer classifies the employee while on leave." Under *Chevron* step two, the court deferred to the Department of Labor's reasonable interpretation that "status" referred to the employee's job position and affirmed the ruling requiring the municipality to reimburse the employees for their unpaid benefits (*Myrick v. City of Hoover*).
- **Labor & Employment:** In August 2022, the Eighth Circuit reinstated the Department of Labor's decision imposing a "flagrant" designation and finding individual liability for a mine operator's violations under the Federal Mine Safety and Health Act, 30 U.S.C. § 820. A violation of the act is *flagrant* when it is "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." The court decided that the Department of Labor's interpretation of recklessness as applied to the mine operator's conduct was reasonable and entitled to *Chevron* deference (*Northshore Mining Co. v. Sec'y of Lab.*).
- **Labor & Employment:** In August 2022, the D.C. Circuit set aside a decision from the Federal Labor Relations Authority (FLRA) interpreting two provisions of the Federal Service Labor-Management Relations Statute. The decision provided that agency heads could (1) review a collective bargaining agreement (CBA) extended under a continuance clause and (2) enforce regulations that conflicted with the CBA and became effective after the agreement's original effective date. Applying *Chevron*, the court found no statutory basis for either part of the FLRA interpretation. The court reasoned that invoking a continuance clause does not execute a new agreement, so there is no basis for a second round of agency-head review, and agencies may not enforce subsequently enacted regulations that conflict with an agreement that remains in effect (*Nat'l Treasury Emps. Union v. FLRA*).
- **Public Benefits:** In March 2023, the Fourth Circuit upheld a district court's determination that a new Social Security Administration (SSA) rule preventing an administrative law judge (ALJ) from considering disability determinations of other agencies when reviewing applications for disability benefits under the Social Security Act was entitled to *Chevron* deference. An applicant for Social Security disability benefits had previously been determined to be 100% disabled by the Department of Veterans Affairs (VA). The SSA rejected her application and followed 2017 SSA regulations establishing that the agency would not consider disability determinations from other agencies when adjudicating an applicant's rights to benefits under the Social Security Act. Under previous judicially imposed rules, the SSA was required to give weight to a separate agency's disability determinations. The court found that the Social Security Act was silent with regard to how the SSA should treat disability determinations from other

agencies and held the SSA's new regulations to be a permissible construction of the statute. The panel remanded the case to the agency for further proceedings to address evidence present in the record that it did not consider (*Rogers v. Kijakazi*).

- **Public Benefits:** In June 2022, the Eleventh Circuit recognized that an SSA regulation abrogated the judicially created treating-physician rule that had been used by the Eleventh Circuit and other circuits. The courts' rule directed ALJs adjudicating disability claims under the Social Security Act to defer to the medical opinion of the treating physicians. The SSA regulation instead directs ALJs to accord the treating physician's opinion no deference and instead weigh medical opinions based on their persuasiveness. The circuit panel observed that the Social Security Act grants the Commissioner broad authority to adopt "reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same." Because the Social Security Act was silent on how evidence from a treating physician should be weighed, the panel held that the challenged regulation was entitled to *Chevron* deference and superseded the prior, judicially created rule. (*Harner v. SSA*).
- **Securities:** In July 2022, the Second Circuit upheld a Securities and Exchange Commission (SEC) determination that an individual who submitted information to the agency regarding potentially unlawful conduct by a financial institution was ineligible for a whistleblower award where the SEC did not itself bring an enforcement action against the institution but where other agencies obtained financial settlements in partial reliance on the information shared by the whistleblower. The SEC's whistleblower award program is authorized by 15 U.S.C. § 78u-6, which permits awards for "covered judicial or administrative action" and "related actions" resulting in sanctions over a specified amount. Applying *Chevron* deference, the court held that the SEC's determination that the whistleblower was ineligible for an award was based on a reasonable interpretation of Section 78u-6 as authorizing awards only when the covered action was brought by the SEC itself, not another agency. The Supreme Court later denied a petition for certiorari in the case (*Hong v. SEC*).
- **Tax:** Splitting with the Eleventh Circuit, a Sixth Circuit panel in March 2022 rejected procedural and substantive challenges to the validity of a Department of Treasury regulation, 26 C.F.R. § 1.170A-14(g)(6), that addresses the disposition of proceeds that result from judicial extinguishment of a conservation easement. The parties in the case did not dispute that the governing statute, requiring the conservation purpose of a donation be "protected in perpetuity," did not speak directly on the question of how judicial extinguishment affects this perpetuity requirement. The panel concluded that the challenged rule was owed *Chevron* deference as a permissible reading of the ambiguous statute. The rule is relevant to taxpayers' ability to claim a charitable deduction on federal income tax returns for the donation of an easement in land to a conservation organization. The Supreme Court denied a petition to review the case (*Oakbrook Land Holdings, LLC v. Comm'r*).

- **Trade:** The Federal Circuit, in July 2022, affirmed a U.S. Court of International Trade decision approving the Department of Commerce's (DOC's) method of calculating an antidumping duty rate when it issued an antidumping order covering steel nails from the People's Republic of China. During its administrative review, DOC calculated dumping margins by including adverse facts available (AFA) in its computations to determine the "all-others rate." Applying *Chevron*, the panel held that the statute was silent with regard to the use of AFA-based margins and that DOC's interpretation that AFA-based margins should be used to calculate the appropriate rate was reasonable to avoid manipulation of the rates. The panel further held that the DOC's factual findings that the entities in question had engaged in a fraudulent transshipment scheme and had impeded the DOC's proceedings by providing unverifiable information were based on substantial evidence and reasonable. (*Shanxi Hairui Trade Co. v. United States*).
- **Veterans:** In March 2022, the Federal Circuit largely upheld VA regulations governing a family caregiving assistance program for eligible veterans. The panel applied *Chevron* to address challenges related to numerous VA statutory interpretations, concluding that most of the challenged provisions were silent with regard to the specific issue addressed and that the agency's interpretations were reasonable. The court did, however, conclude, under *Chevron* step one, that one challenged regulation violated the clear text of the statute by impermissibly merging two distinct statutory avenues by which a veteran may be deemed "in need of personal care services." The Supreme Court denied certiorari on February 21, 2023 (*Veteran Warriors, Inc. v. Sec'y of Veterans Affs.*).

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