Article

The Impact of *Loper Bright v. Raimondo*: An Empirical Review of the First Six Months

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One of the most impactful decisions of the U.S. Supreme Court's 2023–2024 term was Loper Bright Enterprises v. Raimondo*, which overruled the forty-year-old administrative law doctrine of* Chevron *deference. This doctrine allowed federal agencies to interpret ambiguities in the statutes that they administer. Courts cited* Chevron *over 18,000 times in its forty-year existence, or roughly 450 times a year—more than once a day, on average. Small wonder, then, that in the first six months after the Supreme Court decided* Loper Bright*, courts cited it more than 400 times.*

This article provides an empirical review of what courts are doing with Loper Bright *in the initial aftermath of the Supreme Court's decision. It offers three main observations. First, state courts react differently to* Loper Bright *depending on their own state administrative review standards and on whether the case before them involves federal law, with the most negative reaction coming from the Hawai'i Supreme Court and the most accepting reactions coming from states that never had or that have already eliminated the state equivalent of* Chevron *deference. Second, in the absence of additional guidance from the Supreme Court, lower federal courts are already diverging regarding what* Loper Bright *means for federal administrative law decisions, particularly with respect to other forms of administrative law deference,*

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such as Skidmore *and* Auer *deference. Finally, a decided difference has emerged between how the lower federal courts are treating new administrative rules, invalidating them almost 84 percent of the time, and how they treat all other federal activities, especially federal agency orders. While many of these rules would have been vulnerable regardless of* Loper Bright*, it remains worth watching how federal court review of new agency rules continues to unfold.*

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INTRODUCTION

On June 25, 1984, the U.S. Supreme Court decided *Chevron U.S.A. Inc. v. Natural Resources Defense Council*,[1] a case challenging the U.S. Environmental Protection Agency's (EPA's) implementation of the federal Clean Air Act.[2] Specifically, in 1981, the EPA promulgated a regulation that resolved an ambiguity in how to apply the Act's definition of "stationary source" by adopting a plant-wide definition of "stationary source."[3] Under this interpretation, if a single facility had several sources of air emissions, the entire facility would be treated as one source, as if it were enclosed under a bubble with only one vent at the top.[4]

The U.S. Supreme Court upheld the EPA's interpretation by inventing what became known as *Chevron* deference.[5] According to the *Chevron* Court:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[6]

Thus, when giving *Chevron* deference to a federal agency, federal courts accepted an agency's reasonable construction of an ambiguous statute, even if the agency's interpretation was not what the court itself would have come up with.[7]

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1. 467 U.S. 837 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

2. 42 U.S.C. §§ 7401–7428.

3. Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 50,766 (Oct. 14, 1981) (codified as amended at 40 C.F.R. § 51 (2024)).

4. *Chevron*, 467 U.S. at 840.

5. *Id*. at 865–66 (holding that agency decisions like the EPA's are "entitled to deference").

6. *Id*. at 842–43 (footnotes omitted).

7. *Id*. at 843 n.11 ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." (citations omitted)).

The *Chevron* Court effectively distinguished between the initial construction of a statute to determine whether it is ambiguous (Step 1) and the resolution of any ambiguities that emerged (Step 2). In *Chevron* Step 1:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.[8]

However, if Congress left an ambiguity or gap in the statute, then Congress had, explicitly or implicitly, delegated authority to the implementing federal agency to resolve the statute's meaning.[9] As a result, in Step 2, the agency's "legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[10]

Chevron deference became pervasive in federal administrative law. Seventy of the Supreme Court's own decisions between 1984 and 2024 turned on *Chevron* deference,[11] and, according to Westlaw, well over 18,000 court decisions have cited to *Chevron*.[12] Thus, on average, *Chevon* influenced more than 450 cases each year, or more than one case per day, for forty years.

Forty years and three days after it decided *Chevron*, however, the U.S. Supreme Court overturned *Chevron* deference in two consolidated federal fisheries cases, *Loper Bright Enterprises v. Raimond*o and *Relentless, Inc. v. Department of*

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8. *Id*. at 843 n.9 (citations omitted).

9. *Id*. at 843–44 (noting that an agency's reasonable interpretation must control regardless of whether Congress implicitly or explicitly delegates its authority).

10. *Id*. at 844.

11. Adam Liptak, *Justices Limit Power of Federal Agencies, Imperiling an Array of Regulations*, N.Y. TIMES (June 28, 2024), https://www.nytimes.com/2024/06/28/us/supreme-court-chevron-ruing.html [https://perma.cc/6TH5-CX33].

12. As of February 2025, over 18,800 cases cite *Chevron. See Westlaw Precision*, THOMSON REUTERS, https://1.next.westlaw.com/RelatedInformation/I1d248e419c9711d993e6d35cc61aab4a/kcCitingReferences.html?docSource=6007d79b888f4242b112e7278733c30c&facetGuid=h562dbc1f9a5f4b0c9e54031a19076b9c&ppcid=bd1c540073424263bb584a5dfc9e78e0&originationContext=citingreferences&transitionType=CitingReferences&contextData=%28sc.Default%29 [https://perma.cc/QMW4-DTBC] (on the *Chevron* case page, select "citing references"; then select "cases").

Commerce.[13] As Part I will discuss in detail, the *Loper Bright* Court deemed *Chevron* deference unworkable, as well as contrary to the federal Administrative Procedure Act's (APA's) judicial review provisions.[14] As a result, federal courts are now the arbitrators of statutory meaning, seeking to achieve the Supreme-Court-announced goal of fixing the statute's "best" meaning at the time of its enactment.[15] While it remains to be seen how enthusiastically and how frequently the lower federal courts will choose to disagree with federal agency interpretations of the statutes they implement, especially when agencies are trying to apply those statutes to new situations, early signs indicate that federal courts will be looking skeptically at agency actions—especially new agency rules.[16]

This Article takes the first empirical look at what the state and lower federal courts are doing in this new, non-deferential world of statutory construction. Like *Chevron* itself, *Loper Bright* is already a highly cited case: In the first six months of its existence (June 28, 2024 to December 27, 2024), courts cited *Loper Bright* over 400 times.[17] This Article begins in Part I with a summary of the *Loper Bright* decision. It then engages in an analysis of the cases that have already relied on *Loper Bright*, using a dataset of all state (n=28), U.S. Supreme Court (n=10), and U.S. Court of Appeals (n=111) cases that cited *Loper Bright* in the first six months of its existence, plus the subset of the U.S. District Court cases that seriously engaged[18] the *Loper Bright*

13. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

14. 5 U.S.C. §§ 701–706.

15. *See infra* Part I; *Loper Bright*, 144 S. Ct. at 2266 (explaining that courts must determine the "single, best meaning" that is "fixed at the time of enactment" (quoting Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2019))).

16. *See infra* Part III.

17. As of February 2025, over 500 cases cite *Loper Bright*. *See Westlaw Precision*, THOMSON REUTERS, https://1.next.westlaw.com/RelatedInformation/Ib96867e3354011efb5b5e02d7c311e0c/kcCitingReferences.html?docSource=a00d53ad95774abe8c7f1151107487c7&facetGuid=h562dbc1f9a5f4b0c9e54031a19076b9c&ppcid=e89c8168c0ea483da2c2d8a9ec2320e1&originationContext=citingreferences&transitionType=CitingReferences&contextData=%28sc.Default%29 [https://perma.cc/6J9Q-C34V] (on the *Loper Bright* case page, select "citing references"; then select "cases").

18. The dataset relies on Westlaw's classification of cases. Under these classifications, "examined by," "discussed by," and "declined to extend" indicate that a district court decision actively engaged the *Loper Bright* decision, as opposed to cases that merely "cite" or "mention" *Loper Bright*. *See id.* (on the "citing

decision (n=121) in the same period. Part II begins with the state court decisions, finding distinct differences in reaction between states that defer to state agency interpretations of statutes and states that do not. As for the federal courts, the Supreme Court has provided no additional guidance regarding the implications of *Loper Bright*. Perhaps unsurprisingly, however, differences are already emerging among the lower courts, which Part III illustrates through the courts' treatment of other forms of deference and through two agency rules and one statute that each have been reviewed by multiple courts.

Overall, this Article offers three main observations. First, state courts react differently to *Loper Bright* depending on their own state administrative review standards and on whether the case before them involves federal law, with the most negative reaction coming from the Hawai'i Supreme Court[19] and the most accepting reactions coming from states that never had or that have already eliminated the state equivalent of *Chevron* deference. Second, in the absence of additional guidance from the Supreme Court, lower federal courts are already diverging regarding what *Loper Bright* means for federal administrative law judicial review, particularly with respect to *Skidmore*[20] and *Auer*[21] deference. Finally, the lower federal courts are so far treating different types of agency actions differently, consistently overturning new agency rules while otherwise upholding agency actions more than sixty percent of the time.[22] While courts likely would have overturned many of the new rules that they reviewed even without *Loper Bright*, *Loper Bright* has made that decision easier, and it bears watching the extent to which federal court deployment of *Loper Bright* constrains in particular agency attempts to make 20th-century statutes relevant to 21st-century issues.

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references" page, refer to the "treatment" column to the left of each case result). The remaining roughly 150 district court cases add little to this Article's analysis. Many, for example, simply cite *Loper Bright* in a footnote to note that *Chevron* deference has been overruled. *E.g.*, United States v. Sharfi, 2024 WL 4483354, at *7 n.6 (S.D. Fla. Sept. 21, 2024).

19. *See infra* Part II (discussing Rosehill v. State, 556 P.3d 387 (Haw. Sept. 24, 2024)).

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

21. Auer v. Robbins, 519 U.S. 452 (1997).

22. *See infra* Part V.

I. THE *LOPER BRIGHT* DECISION IN JUNE 2024

On June 28, 2024, by a six-three vote, the Supreme Court overturned *Chevron* deference in *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce* ("*Loper Bright*").[23] Substantively, the question at the core of both cases was whether the Secretary of Commerce, acting through the National Marine Fisheries Service pursuant to the Magnuson-Stevens Fishery Conservation and Management Act,[24] can require commercial fishers to pay for onboard observers whom they are required to take on some fishing voyages.[25] However, the Supreme Court granted certiorari to decide only one issue: whether it was time to limit or overturn *Chevron* deference.[26]

In an opinion by Chief Justice John Roberts, the Supreme Court majority concluded that *Chevron* deference contradicts the APA's judicial review provisions.[27] This broad law governs both the procedures that federal agencies must follow[28] and, more importantly, the standards that federal courts must use to review agency actions.[29] As the Court emphasized, APA Section 706 requires that "the *reviewing court* shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[30] It also requires courts to set aside agency actions and decisions that do not follow the law.[31] According to the

23. 144 S. Ct. 2244 (2024).

24. 16 U.S.C. §§ 1801–1891d.

25. *Loper Bright*, 144 S. Ct. at 2255–56 (describing the challenge to the agency's rule requiring fishermen pay for observers despite no such mandate in the Act).

26. *Id*. at 2257.

27. *Id.* at 2265 ("*Chevron* defies the command of the APA that 'the reviewing court'—not the agency whose action it reviews—is to 'decide *all* relevant questions of law' and 'interpret . . . statutory provisions.'" (citing 5 U.S.C. § 706) (emphasis added)).

28. 5 U.S.C. §§ 551–559.

29. *Id.* § 706.

30. *Id.* (emphasis added); *Loper Bright*, 144. S. Ct. at 2265 (discussing the APA's demand that courts, not agencies, determine questions of law and statutory interpretation).

31. 5 U.S.C. § 706(2)(A) (instructing the reviewing court to "hold unlawful and set aside any agency action, finding, and conclusions" that are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

Supreme Court, "The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment."[32] The APA, in other words, incorporated a long-time understanding that it is *the courts*' role to interpret the law, including federal statutes.[33]

Given this emphasis, the *Loper Bright* majority then concluded that "[t]he deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA."[34] *Chevron* deference:

> demands that courts mechanically afford *binding* deference to agency interpretations, including those that have been inconsistent over time. Still worse, it forces courts to do so even when a pre-existing judicial precedent holds that the statute means something else—unless the prior court happened to also say that the statute is "unambiguous." That regime is the antithesis of the time honored approach the APA prescribes. In fretting over the prospect of "allow[ing]" a judicial interpretation of a statute "to override an agency's" in a dispute before a court, *Chevron* turns the statutory scheme for judicial review of agency action upside down.[35]

Instead, courts must interpret statutes in the first instance, and courts "understand that such statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning. That is the whole point of having written statutes; 'every statute's meaning is fixed at the time of enactment.'"[36]

As a result, the Court overruled *Chevron*.[37] It justified its departure from *stare decisis* on several grounds. First, *Chevron*

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32. *Loper Bright*, 144 S. Ct. at 2261 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

33. *Id*. at 2262 ("The APA, in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions.").

34. *Id*. at 2263; *see also id*. at 2265 ("Neither *Chevron* nor any subsequent decision of this Court attempted to reconcile its framework with the APA. The law of deference that this Court has built on the foundation laid in *Chevron* has instead been [h]eedless of the original design of the APA." (alteration in original) (citing Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 109 (2015) (Scalia, J., concurring))).

35. *Id*. at 2265 (first citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984); and then quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 984 (2005)).

36. *Id*. at 2266 (quoting Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2019)).

37. *Id*. at 2272–73.

is doctrinally irreconcilable with the APA.[38] Second, *Chevron* is "unworkable," because disagreements as to what a statutory ambiguity actually is have repeatedly forced the Court to attempt to clarify the doctrine,[39] rendering *Chevron* "an impediment, rather than an aid," to statutory construction.[40] Third, *Chevron* destroys rather than affirms reliance interests, undermining the rule of law.[41]

Nevertheless, the *Loper Bright* Court recognized that some agency interpretations might still be entitled to respect and consideration.[42] The factors it recognized as relevant in determining whether an agency's interpretation is worthy of respectful consideration are: (1) whether the statute is "doubtful and ambiguous;"[43] (2) whether the agency implements the statute;[44] (3) whether the "Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute;"[45] (4) whether the interpretation "remained consistent over time;"[46] and (5) whether the first interpreters were also drafters of the statute.[47] The *Loper Bright* Court also upheld *Skidmore* deference, under which interpretations from an expert agency are accorded respect according to their persuasiveness, especially in

38. *Id*. at 2270 (calling *Chevron* "fundamentally misguided" and concluding that it cannot be reconciled with the APA's description of judicial review of agency action).

39. *Id*. at 2270–71 ("Because *Chevron* in its original, two-step form was so indeterminate and sweeping, we have instead been forced to clarify the doctrine again and again.").

40. *Id*. at 2271.

41. *Id*. at 2272 ("Rather than safeguarding reliance interests, *Chevron* affirmatively destroys them.").

42. *Id.* at 2257 (noting that the Supreme Court has "recognized from the outset" the fact that "exercising independent judgment often include[s] according due respect to Executive Branch interpretations of federal statutes").

43. *Id*. (quoting Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827)).

44. *Id*. (noting that when the same agency officials who constructed the statute's meaning are those who are "appointed to carry its provisions into effect," the agency interpretation is "entitled to very great respect" (quoting *Edwards' Lessee*, 25 U.S. (12 Wheat.) at 210)).

45. *Id.* at 2258 (citations omitted).

46. *Id.* (citations omitted).

47. *Id*. (stating that the Court has historically given "the most respectful consideration" to agency interpretations made by the individuals who were "the draftsmen of the laws they [were] afterwards called upon to interpret" (quoting United States v. Moore, 95 U.S. 760, 763 (1878))).

light of the other factors.[48] According to the Court, "[s]uch interpretations 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance' consistent with the APA. And interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning."[49] *Skidmore* deference, however, might lead a court to "respect" the agency's view, but the court's interpretation is still what matters.[50]

Moreover, the Court also recognized that, when dealing with statutes that agencies implement, the "best" interpretation might be that Congress delegated some discretion to the agency.[51] Thus, Congress can expressly delegate to federal agencies "the authority to give meaning to a particular statutory term," to prescribe rules to implement the statutory scheme, or to act within congressionally limited ("appropriate," "reasonable") realms of flexibility.[52] However, courts must police these delegations of agency discretion and authority, ensuring that the agency stays within the boundaries of its delegated authority and that it engages in "reasoned decisionmaking."[53]

Finally, the Court insisted that all prior cases that rested on *Chevron* deference remain good law.[54] The mere fact that a court

48. *Id*. at 2259 (describing that *Skidmore* deference considers factors such as "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control" (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944))).

49. *Id*. at 2262 (quoting *Skidmore*, 323 U.S. at 140).

50. *Id*. at 2258 (cautioning that, throughout history, "[t]he views of the Executive Branch could inform the judgment of the judiciary, but did not supersede it").

51. *Id*. at 2263 ("In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion.").

52. *Id*. at 2263 n.6 (first quoting Batterton v. Francis, 432 U.S. 416, 425 (1977); then citing Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825); then citing Michigan v. EPA, 576 U.S. 743, 752 (2015); then quoting 33 U.S.C. § 1312(a); and then quoting 42 U.S.C. § 7412(n)(1)(A)).

53. *Id*. at 2263 (quoting *Michigan*, 576 U.S. at 750).

54. *Id*. at 2273 ("The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite [our] change in interpretive methodology." (citing CBOCS W., Inc. v. Humphries, 553 U.S. 442, 457 (2008))).

relied on *Chevron* deference, therefore, "is not enough to justify overruling a statutory precedent."[55]

Justice Kagan, joined by Justices Sotomayor and Jackson, dissented in *Loper Bright*. Calling *Chevron* deference a "cornerstone of administrative law," the dissenters viewed the doctrine as a commonsense approach to statutory construction given that "Congress knows that it does not—in fact cannot—write perfectly complete regulatory statutes."[56] They grounded the appropriateness of *Chevron* deference in federal agency expertise and the Executive Branch's political accountability:

> Some interpretive issues arising in the regulatory context involve scientific or technical subject matter. Agencies have expertise in those areas; courts do not. Some demand a detailed understanding of complex and interdependent regulatory programs. Agencies know those programs inside-out; again, courts do not. And some present policy choices, including trade-offs between competing goods. Agencies report to a President, who in turn answers to the public for his policy calls; courts have no such accountability and no proper basis for making policy. And of course Congress has conferred on that expert, experienced, and politically accountable agency the authority to administer—to make rules about and otherwise implement—the statute giving rise to the ambiguity or gap. Put all that together and deference to the agency is the almost obvious choice, based on an implicit congressional delegation of interpretive authority.[57]

The dissenters deplored the fact that "[i]n one fell swoop, the majority today gives itself exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law. As if it did not have enough on its plate, the majority turns itself into the country's administrative czar."[58] The dissenters also took issue with the majority's confidence that all statutory provisions have a single best meaning that was fixed at the time of enactment, given the multiple caselaw examples to the contrary.[59] Finally, the dissenters found the APA "perfectly compatible with *Chevron* deference."[60]

As the dissent suggests, many tensions remain for federal administrative law after *Loper Bright*. In particular, the

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55. *Id*.

56. *Id.* at 2294 (Kagan. J., dissenting).

57. *Id*.; *see also id.* at 2298–99 (expanding on these reasons).

58. *Id*. at 2295.

59. *Id*. at 2296–97 (chronicling cases wherein "a statutory phrase has more than one reasonable reading").

60. *Id*. at 2301–02.

majority emphasized the authority of federal courts to determine what the law is, while at the same time underscoring that every federal statute has a single best interpretation fixed at the time of its enactment.[61] Nevertheless, as the dissenters recognized, policy and expertise evolve, particularly in regulatory fields that depend heavily on scientific understanding, evolving technological capacity, and changing public norms, such as in public health law and environmental and energy law.[62] Arguably, therefore, *Loper Bright* problematized rather than resolved the issue of how to reconcile congressional intent and a changing society, particularly with respect to federal statutes that are more than one or two decades old. As Parts III and IV will discuss, lower courts are beginning to negotiate this tension through *Skidmore* deference, the reinvigoration of pre-*Chevron* forms of deference, and interpretations that conclude that Congress delegated authority to the agency.

Nevertheless, states are also relevant to this discussion. State legislatures and courts often borrow from federal administrative law, but neither they nor state agencies are bound by the federal APA or U.S. Supreme Court decisions about it. Because the limited state court decisions discussing *Loper Bright* provide interesting and varied reactions to the Supreme Court's decision despite not being bound by it, Part II begins with those state decisions.

II. STATE COURTS AND *LOPER BRIGHT*

The debate between the majority and dissent in *Loper Bright* was largely a debate over relative expertise and authority, with the majority handing interpretive—and hence, to a certain extent, implementation—primacy to the federal courts. As the *Chevron* decision itself emphasized, however, there are also good reasons for respecting agency expertise, particularly in highly specialized or technical areas of law.[63] The state court

61. See *supra* notes 15, 32–33 and accompanying text.

62. *Loper Bright*, 144 S. Ct. at 2311 (Kagan., J., dissenting) (listing hypothetical subjects of regulation, such as climate change or the American healthcare system, in which courts will "play a commanding role" post-*Loper Bright*).

63. *E.g.*, Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (reasoning that agencies are entitled to deference because they are the ones "with great expertise and charged with responsibility for administering

decisions discussing *Loper Bright* often hone in on this debate about relative expertise—but with the state court judges free to reject the U.S. Supreme Court's resolution.

Indeed, much of the debate in these state court cases is whether *Loper Bright* is even relevant. For example, some states adopted *Chevron* deference as a matter of state law and now face the issue of whether the U.S. Supreme Court's overruling of *Chevron* automatically changes the state court standard of review as well.[64] In general, however, state court reactions to *Loper Bright* depend on state law standards of review, whether federal law plays a role in the state court decision, and the state judges' respect for state agencies. Moreover, as Table 1 indicates and as is discussed in more detail below, it is the District of Columbia Court of Appeals that has been wrestling most often with the implications of *Loper Bright*.

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the provision," especially where "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies" (footnotes omitted)), *overruled by Loper Bright*, 144 S. Ct. 2244 (2024).

64. *See, e.g.*, *infra* note 97 and accompanying text (providing examples of two states that elected not to adhere to the *Loper Bright* decision despite previously adopting *Chevron*).

Table 1: State Court Cases Citing *Loper Bright*, June 28–December 27, 2024[65]

State	Number of Cases
District of Columbia	5
California	3
Kentucky	3
Indiana	2
Wisconsin	2
South Carolina	1
Alabama	1
Colorado	1
Georgia	1
Hawai'i	1
Louisiana	1
Michigan	1
Missouri	1
New Jersey	1
North Carolina	1
North Dakota	1
Pennsylvania	1
Vermont	1
TOTAL:	**28**

65. See *supra* notes 17–18 and accompanying text for a description of the methodology of gathering state cases citing *Loper Bright*.

A. *LOPER BRIGHT* IS RELEVANT WHEN STATE COURT CASES INVOLVE FEDERAL LAW

While the cases are limited in number, state courts do deem *Loper Bright* relevant when the cases they hear involve federal law. For instance, state courts will consider the impact of *Loper Bright* when they are relying on federal agency interpretations of federal statutes.[66] California is the leader in wrestling with this issue; all three of the California state court opinions that cite *Loper Bright* involve federal agencies interpreting federal law.

Indeed, in two unpublished opinions, the California Courts of Appeals have adopted a full *Loper Bright* approach to federal interpretations of federal statutes, declining to apply *Chevron* deference and applying *Skidmore* deference instead.[67] When a union claimed that the National Mediation Board had exclusive jurisdiction over a representation dispute, the California Court of Appeals, Fourth District, first noted that *Chevron* deference was no longer appropriate.[68] However, it also noted that the analytical framework that the California Supreme Court had established "draws heavily from the United States Supreme Court's decision in *Skidmore*, which has not been overruled and establishes a lower level of deference, depending on the circumstances."[69] It then went ahead and applied that deference analysis, essentially declining to give the agency *Skidmore* deference, either.[70]

The California Court of Appeals, Second District, followed almost exactly the same process. It cited *Loper Bright* for the

66. Pantoja v. Atomic Transp., LLC, 2024 WL 4714470, at *2 n.2 (Ky. Ct. App. Nov. 8, 2024) (noting that *Loper Bright* was relevant when a party offered the U.S. Department of Labor's guidance to the issue of whether a person is an employee or an independent contractor); Humboldt All. for Responsible Plan. v. Cal. Coastal Comm'n, 328 Cal. Rptr. 3d 188, 197 (Cal. Ct. App. Nov. 25, 2024) (applying federal standards to the National Oceanic & Atmospheric Administration (NOAA)).

67. Int'l Ass'n of Sheet Metal, Air, Rail & Transp. Workers v. Cal. Pub. Emp. Rels. Bd., 2024 WL 3407701, at *1, *7 n.5 (Cal. Ct. App. July 15, 2024); Camarillo Sanitary Dist. v. Cal. Reg'l Water Control Bd., 2024 WL 5164726, at *3, *4 (Cal. Ct. App. Dec. 19, 2024).

68. *Int'l Ass'n*, 2024 WL 3407701, at *7 n.5 (noting that *Chevron* was overruled and is no longer applicable).

69. *Id*. (citing Yamaha Corp. v. State Bd. of Equalization, 960 P.2d 1031 (Cal. 1999)).

70. *Id*. at *7–9 (concluding that deference was unwarranted).

rule that "[w]e must exercise our independent judgment in determining the meaning of the federal statutory provisions at issue" but then accorded the California Supreme Court's version of *Skidmore* deference to the U.S. Environmental Protection Agency's interpretations of and expertise regarding the federal Clean Water Act.[71] Thus, under its independent judgment, "[g]iven the value of expertise in this area, we find persuasive EPA's guidance and interpretation, which appropriately reflects the federal rules and is manifestly based on a studied consideration of the issues."[72]

At least three state courts have suggested that *Loper Bright* is also relevant when *state* agencies or courts interpret federal statutes.[73] State courts have also cited to *Loper Bright* positively for the basic principle of court interpretive primacy when there is no competing, authoritative agency interpretation at issue.[74]

B. *LOPER BRIGHT* IS GENERALLY *NOT* RELEVANT TO STATE ADMINISTRATIVE LAW

State court decisions are nearly uniform in finding that *Loper Bright* did not change the outcome of cases involving *state* administrative law.[75] The Michigan Court of Appeals, for

71. *Camarillo Sanitary Dist.*, 2024 WL 5164726, at *4 (first citing Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024); and then citing Skidmore v. Swift & Co., 323 U.S. 134 (1944)); *id.* at *11 (affirming a trial court's award of deference to the EPA's guidance under *Skidmore*).

72. *Id*. at *4 (quoting *Loper Bright*, 144 S. Ct. at 2267).

73. Velasquez v. Miranda, 321 A.3d 876, 898 n.18 (Pa. Aug. 29, 2024) (acknowledging that, pursuant to *Loper Bright*, a state court must use its independent judgment when interpreting federal immigration law, although the federal agency's interpretation can be informative); Humboldt All. for Responsible Plan. v. Cal. Coastal Comm'n, 328 Cal. Rptr. 3d 188, 197 (Cal. Ct. App. Nov. 25, 2024) (noting that "it is not clear what, if any, deference should be accorded to a *state* agency's interpretation of a *federal* regulation" (citation omitted)); Bd. of Educ. v. M.N., 318 A.3d 670, 676 n.4 (N.J. Aug. 7, 2024) (describing that because the U.S. Department of Energy would receive no deference for its interpretations of federal law after *Loper Bright*, no deference was appropriate for a state agency's interpretation of the same federal law—even though *Loper Bright* did not bind the state court).

74. *E.g.*, Karr v. Kan. City Life Ins., 702 S.W.3d 1, 18 (Mo. Ct. App. Sept. 24, 2024) (citing *Loper Bright* for the proposition that courts, not agencies, interpret the law).

75. *E.g.*, Bd. of Comm'rs v. Brantley Cnty. Dev. Partners, 905 S.E.2d 685, 704 (Ga. Ct. App. Aug. 15, 2024) (Dillard, J., concurring) (noting that while the court followed Georgia administrative law in this case, it should reconsider its

example, declared that "*Loper Bright* is a federal case dealing with federal law and has no particular relevance to this state-law dispute."[76] However, simple declaratory statements of *Loper Bright*'s inapplicability (as in Michigan) are surprisingly rare. While the strongest rejection of *Loper Bright* so far has come from the Hawai'i Supreme Court, some states and the District of Columbia have been far more ambivalent about the potential impact of *Loper Bright*.

1. The Hawai'i Supreme Court's Strong Condemnation of *Loper Bright*

The Hawai'i Supreme Court has gone the furthest in rejecting *Loper Bright*, producing what is so far the most negative discussion of the case in any majority opinion. Specifically, the court took issue with the lack of respect for agency expertise that underlies *Loper Bright*. Reviewing the state Land Use Commission's interpretation of a statute, the court affirmed that "[w]hen there is ambiguous statutory language, 'the applicable standard of review regarding an agency's interpretation of its own governing statute requires this court to defer to the agency's expertise and to follow the agency's construction of the statute unless that construction is palpably erroneous.'"[77] The court then criticized *Loper Bright* at some length:

> We note that Hawai'i's approach to administrative deference now differs sharply from federal precedent. These days, the United States Supreme Court seems determined to ensure that "settled law easily unsettles." Recently, the court toppled forty years of precedent that shaped the "warp and woof of modern government." The court overruled *Chevron*, which molded administrative law doctrine. Under *Chevron*, the reviewing court would, upon close inspection, ask if Congress had "directly spoken to the precise question at issue." If it had, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." If the statute was silent or ambiguous as to the question at hand, the court would defer to the administrative agency's reasonable interpretation of the statute.

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approach to deference in light of *Loper Bright* in the future). *But see* Colonial Pipeline Co. v. S.C. Dep't of Revenue, 905 S.E.2d 129, 134–35 (S.C. Ct. App. July 17, 2024) (following *Loper Bright* as an example of "rules governing statutory construction" when interpreting the South Caroline tax code).

76. DTE Energy, Inc. v. Mich. Occupational Safety & Health Admin., 2024 WL 4820147, at *2 (Mich. Ct. App. Nov. 18, 2024).

77. Rosehill v. State, 556 P.3d 387, 403 (Haw. Sept. 24, 2024) (citing Pofolk Aviation Haw., Inc. v. Dep't of Transp., 354 P.3d 436, 440–41 (Haw. 2015)).

> *Chevron*'s well-reasoned analysis allowed agencies to function in a modern nation using older statutes — statutes that, at the time they were written, could not possibly account for the many nuanced situations that arise in a rapidly changing world. Justice Kagan's dissent in *Loper Bright* cites to paradigmatic examples of agency deference. *Chevron* made for good, balanced governance, whereby Congress made laws while agencies, subject to accountability from a duly-elected President, implemented those laws and reasonably filled in the gaps. As is often the case, policy implementation requires substantial know-how. Under *Chevron*, agencies had the ability to allow experts to, within reason, make the rules.
>
> Now, the U.S. Supreme Court considers itself and other federal courts the experts on exceedingly complicated areas of American life, including worker safety, air quality, food and drug safety, airplane safety, telecommunications, and the integrity of our financial markets. We do not believe the expertise of courts outstrips that of the agencies charged with implementing complex regulatory schemes on a day-to-day basis. In Hawai'i, we defer to those agencies with the na'auao (knowledge/wisdom) on particular subject matters to get complex issues right. "Ku'ia ka hele a ka na'au ha'aha'a (hesitant walks the humble hearted)." A court's domain is the law, and judges should recognize the limits of their expertise.[78]

Thus, deference to federal administrative agencies will remain the norm in Hawai'i, with the courts there respecting state agency expertise in complicated legal matters.

2. More Ambivalence in North Dakota and Vermont: Is *Loper Bright* Inapplicable or Irrelevant?

An increasing number of state courts in states that traditionally have deferred to state agencies have hedged their decisions not to engage with *Loper Bright*, categorizing *Loper Bright* as irrelevant to the particular issue involved or concluding that the court would have reached the same decision as the state agency. For example, both the Vermont Supreme Court and the North Dakota Supreme Court decided that *Loper Bright* was

78. *Id*. at 404–05 (first quoting City of Honolulu v. Sunoco LP, 537 P.3d 1173, 1208, 1210 (Haw. 2023) (Eddins, J., concurring); then quoting Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2294 (2024) (Kagan, J., dissenting); then quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984); then citing *Loper Bright*, 144 S. Ct. at 2296–97 (Kagan, J., dissenting); and then quoting *Sunoco*, 537 P.3d at 1210 (Eddins, J., concurring)) (footnotes omitted).

irrelevant to the issue at hand—as opposed to simply inapplicable—in their review of state agencies.[79]

In *In re Investigation Pursuant to 30 V.S.A. Sec. 30 & 209*, the Vermont Supreme Court recited its usual "substantial deference" standard for reviewing the Public Utility Commission's decisions, then noted in a footnote that "nothing in our decision today implicates deference to an agency's 'permissible construction' of an ambiguous statute. We therefore need not decide the impact on our jurisprudence of the U.S. Supreme Court's recent decision abrogating *Chevron* deference."[80] Moreover, in response to the challenging developer's argument that the court deferred too much to state agencies, the court noted—again in a footnote—that:

> Developer argues that, like federal courts, "this Court too defers to agencies," and it asks that we overrule our precedents requiring agency deference. However, *Loper Bright* dealt only with "*Chevron* deference"—that is, deference to an agency's "permissible construction" of a statute that is "silent or ambiguous" as to the issue at hand. Nothing in our decision today implicates the deference to an agency's legal interpretations of an ambiguous statute called for in *Chevron*. Rather, our decision rests on our independent examination of the statutory text and legislative purpose. We therefore need not decide whether to follow *Loper Bright* at this time.[81]

Similarly, in *Liberty Petroleum Corp. v. North Dakota Industrial Commission*, the North Dakota Supreme Court addressed *Loper Bright* in reviewing the North Dakota Industrial Commission's actions but deemed the decision irrelevant:

> This Court has said that "we generally defer to an administrative agency's reasonable interpretation of its governing statutes and rules." The United States Supreme Court recently held that "courts need not and under the [federal Administrative Procedure Act] may not defer to an agency interpretation of the law simply because a statute is ambiguous." This case does not involve the interpretation of a federal statute under the federal Administrative Procedure Act. Nor have the parties argued the statutes involved in this case are ambiguous. Because we

79. *In re* Investigation Pursuant to 30 V.S.A. Sec. 30 & 209, 327 A.3d 789, 797 n.1 (Vt. Aug. 30, 2024); Liberty Petroleum Corp. v. N.D. Indus. Comm'n, 11 N.W.3d 851, 855 (N.D. Sept. 26, 2024).

80. *In re Investigation*, 327 A.3d at 797 (quoting *In re* Vt. Gas Sys., Inc., 312 A.3d 519, 526 (Vt. Jan. 12, 2024)); *id.* at n.1 (first quoting *Chevron*, 467 U.S. at 843; and then citing *Loper Bright*, 144 S. Ct. at 2244).

81. *Id.* at n.6 (first citing *Loper Bright*, 144 S. Ct. at 2264; and then citing *Chevron*, 467 U.S. at 843) (internal citations omitted).

> conclude that the relevant statutes are unambiguous in this context, we need not reevaluate our precedent in light of *Loper Bright*.[82]

Thus, on the one hand, the Vermont and North Dakota Supreme Courts suggest that *Loper Bright* is simply inapplicable to state administrative law. On the other, however, both courts stressed that no agency interpretation was really at issue—the Vermont Supreme Court performed its own interpretation of the statute at issue, while North Dakota deemed the statute at issue "unambiguous."[83] Moreover, both courts suggested that they may have to, eventually, re-examine state administrative law in light of *Loper Bright*.[84] This state court ambivalence regarding *Loper Bright*'s potential to change state administrative law is worth watching as *Loper Bright*'s legacy continues to unfold.

3. D.C. Court of Appeals: Repeated Avoidance

The District of Columbia is, of course, a special case in many ways. The U.S. Constitution provides for its creation, and Congress has plenary legislative authority over it.[85] However, while "Congress retains ultimate authority on local legislative and public policy matters in the District of Columbia,"[86] in 1973, Congress accorded the District of Columbia home rule through the District of Columbia Self-Government and Governmental

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82. 11 N.W.3d at 855 (first quoting Black Hills Trucking, Inc. v. N.D. Indus. Comm'n, 904 N.W.2d 326, 333 (N.D. 2018); and then quoting *Loper Bright*, 144 S. Ct. at 2273); *see also* Comm'r of Dep't of Workplace Standards, Educ., & Lab. Cabinet v. Kalkreuth Roofing & Sheet Metal, Inc., 2024 WL 4469215, at *2 (Ky. Ct. App. Oct. 11, 2024) (noting that Kentucky had applied *Chevron* deference but that *Loper Bright* did not matter to the case because the *Chevron* doctrine would not have applied to the Cabinet's decision).

83. *In re Investigation*, 327 A.3d at 805 n.6 ("[O]ur decision rests on our independent examination of the statutory text and legislative purpose."); *Liberty Petroleum Corp.*, 11 N.W.3d at 855.

84. *In re Investigation*, 327 A.3d at 805 n.6 (noting the court "need not decide whether to follow *Loper Bright at this time*" (emphasis added)); *Liberty Petroleum Corp.*, 11 N.W.3d at 855 (suggesting that if a case or controversy presented "the interpretation of a federal statute under the federal Administrative Procedure Act," or the argument that an implicated statute was ambiguous, it may need to reconsider North Dakota precedent in light of *Loper Bright*).

85. U.S. CONST. art. I, § 8, cl. 17.

86. CONG. RSCH. SERV., IF12577, GOVERNING THE DISTRICT OF COLUMBIA: OVERVIEW AND TIMELINE 1 (Jan. 29, 2024), https://crsreports.congress.gov/product/pdf/IF/IF12577 [https://perma.cc/FGE4-J5H7].

Reorganization Act of 1973.[87] Perhaps most importantly for *Loper Bright*, the government of the District of Columbia is explicitly *not* a federal agency for the purposes of the federal APA.[88] Thus, while all law in the District of Columbia ultimately traces to federal law, for purposes of administrative law the District operates as a state or territory[89] rather than as a federal agency. Even so, the avoidance tactic has been a hallmark of the D.C. Court of Appeals' post-*Loper Bright* administrative law decisions.

As Table 1 indicates, the District of Columbia, through the D.C. Court of Appeals, has wrestled with the *Loper Bright* in five different cases—each time ambivalently. In the property tax case of *Vornado 3040 M Street LLC v. District of Columbia*, for example, the court decided to "reserve judgment" on whether *Loper Bright* affected its normal deference doctrine, emphasizing that "[t]his case was argued before *Loper Bright* was decided, and neither party has suggested that this case might affect our deference to agencies."[90] A week later, the court similarly concluded, with respect to a challenge to the D.C. Public Service Commission, that

> [w]e have no occasion in this case to consider the possible implications of *Loper Bright* for our review of agency action under the DCAPA [District of Columbia Administrative Procedure Act], because this court has already held that it owes no deference to the Commission with respect to the Commission's interpretation of and compliance with the DCAPA.[91]

A week after that, however, the D.C. Court of Appeals indicated that *Loper Bright* had created "uncertainty" regarding the deference owed, although it also concluded that the test that the District of Columbia Department of Employee Services used for determining whether a worker's compensation claimant was an "employee" was "plainly correct."[92] The court then ducked the

87. Pub. L. No. 93-198, § 102(a), 87 Stat. 774, 777 (1973) (granting powers of local self-government to the District of Columbia).

88. 5 U.S.C. § 551(1)(D).

89. Congress also exempted the United States' territories from the APA. *Id.* § 551(1)(C).

90. 318 A.3d 1185, 1195 n.7 (D.C. July 25, 2024).

91. Potomac Elec. Power Co. v. Pub. Serv. Comm'n, 319 A.3d 392, 402 (D.C. Aug. 1, 2024) (citing Wash. Gas Energy Servs., Inc. v. D.C. Pub. Serv. Comm'n, 893 A.2d 981, 986–87 (D.C. 2006)).

92. Lopez v. D.C. Dep't of Emp. Servs., 319 A.3d 985, 993 n.5 (D.C. Aug. 8, 2024).

Loper Bright impact issue a fourth time by emphasizing that it was not deferring to the Department of Housing and Community Development's interpretation of the Tenant Opportunity to Purchase Act even though the court agreed with that interpretation,[93] and a fifth time by insisting that "our holding concerning the zoning regulation at issue would be the same even on de novo review."[94] Thus, while the D.C. Court of Appeals has recognized that *Loper Bright* may create a deference issue and has effectively shifted to de novo review of D.C. agencies' interpretations, it has yet to fully grapple with the amount of deference owed to District of Columbia agencies.

C. STATE COURTS UNDERGOING THEIR OWN STATE LAW DEFERENCE TRANSITIONS CITE *LOPER BRIGHT* AS PART OF ONGOING DEBATES ABOUT AGENCY EXPERTISE

States can, of course, change their own rules about deference to state agencies independently of the federal government, and at least two states—Indiana and North Carolina—were in the process of eliminating their state-law versions of *Chevron* deference as the U.S. Supreme Court was considering and deciding *Loper Bright*. Notably, *Loper Bright* figured into state supreme court decisions in both states reflecting that change, sparking the same debate about agency expertise that the dissenters raised in *Loper Bright*.

1. Indiana's State-Level Changes in Administrative Review

Loper Bright was perfectly timed to correspond with the Indiana Legislature's independent decision to abolish deference to agency legal interpretations,[95] and the two Indiana decisions citing *Loper Bright* reflect this change in state administrative law. In the first of these cases, the Indiana Court of Appeals emphasized that the Indiana Supreme Court had cited *Chevron* with approval when applying the Indiana Administrative Orders and Procedures Act (IAOPA) and that the 2024 amendments to the

93. Lane v. Dep't of Hous. & Cmty. Dev., 320 A.3d 1044, 1047 n.1 (D.C. Aug. 22, 2024).

94. Friends of the Field v. D.C. Bd. of Zoning Adjustment, 321 A.3d 673, 680 n.2 (D.C. Aug. 29, 2024).

95. *See* IND. CODE § 4-21.5-5-11(b) (2024) (effective July 1, 2024) ("The court shall decide all questions of law, including any interpretation of a federal or state constitutional provision, state statute, or agency rule, without deference to any previous interpretation made by the agency.").

IAOPA did not apply to the case.[96] It then concluded that *Loper Bright* was a federal decision only and did not overrule parallel state law; hence, it continued to apply *Chevron* deference.[97]

In contrast, in December 2024, after the new Indiana rules had gone into effect, the Indiana Supreme Court debated how to define the new relationship between the courts and state agencies.[98] While the majority applied the new plenary (de novo) review standard without evident discomfort, concurring Justice Goff relied on Justice Kagan's dissent in *Loper Bright* to argue that the majority had gone too far by implementing plenary review:

> The court, of course, still plays its part in all this. But rather than inserting itself into an "agency's expertise-driven, policy-laden functions," the court "polices the agency to ensure that it acts within the zone of reasonable options." Thus, our review is properly limited to deciding whether the agency "acted within its legal guardrails" or "stayed within its jurisdiction and conformed to the statutory standards and legal principles involved in producing its decision." Such an arrangement is "best suited to keep every actor in its proper lane."[99]

From Justice Goff's perspective, plenary review not only disrespected agencies but also created a separation of powers problem:

> With today's decision, however, the Court demands more than just a "fresh look." Rather than showing judicial restraint, the Court "gives itself exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law." To be sure, "we have a constitutional system of government in which the

96. Brookston Res., Inc. v. Dep't of Nat. Res., 243 N.E.3d 1127, 1137–38 (Ind. Ct. App. Sept. 11, 2024) (citations omitted).

97. *Id.* at 1138; *see also* Comm'r of the Dep't of Workplace Standards, Educ., & Lab. Cabinet v. Kalkreuth Roofing & Sheeting, 2024 WL 4469215, at *2–3, *5 (Ky. Ct. App. Oct. 11, 2024) (declining to find that *Loper Bright* affected the case despite the fact that Kentucky had adopted the *Chevron* approach); Liberty Petroleum Corp. v. N.D. Indus. Comm'n, 11 N.W.3d 851, 855 (N.D. Sept. 26, 2024) (declining to find that *Loper Bright* affected the case despite the fact that North Dakota defers to agency interpretations of statutes).

98. Ind. Off. of Util. Consumer Couns. v. Duke Energy Ind., LLC, 248 N.E.3d 1205, 1210 (Ind. Dec. 19, 2024) (deciding as a matter of state law that plenary review rather than deference applied to the state agency's interpretation of state law).

99. *Id.* at 1219 (Goff, J., concurring) (first quoting Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2300 (2024) (Kagan, J., dissenting); then quoting Ind. Off. of Util. Consumer Couns. v. Duke Energy Ind., LLC, 183 N.E.3d 266, 268, 269 (Ind. 2022); then quoting Ind. Gas Co. v. Ind. Fin. Auth., 999 N.E.2d 63, 66 (Ind. 2013); and then quoting *Loper Bright*, 144 S. Ct. at 2300 (Kagan, J., dissenting)).

> judiciary is said to be supreme in determining the jurisdiction and limits on the powers of the other branches of the government, as fixed by the constitution and laws." But "this supremacy does not extend to the point where we may substitute our judgment for, or control the discretionary action of the executive or legislative branches, so long as their action is within the sphere and jurisdiction fixed by the statutes and constitution." And yet, plenary review does just that, effectively usurping "all discretionary action" in those branches of government.[100]

However, the majority explicitly refuted Justice Goff's argument, asserting that "we no more overstep our role when we interpret the law authoritatively in the cases that come before us than the general assembly oversteps its role when it establishes public policy through its lawmaking, or the governor oversteps his role when he takes care that the laws are faithfully executed."[101] Thus, respect for the agency and its expertise seemingly played no role in the majority's view of the new de novo judicial review rule.

2. North Carolina

A tax credit case became the occasion for the North Carolina Supreme Court to abandon deference to agency interpretations, subject to a dissent decrying the court's apparent adoption of *Loper Bright*. The case turned on the issue of whether Philip Morris could carry forward Export Credits earned under the North Carolina tax code, which in turn turned on the meaning of "credit allowed" in the statute.[102] The North Carolina Supreme Court first held that "since neither party's textual analysis provides a univocal interpretation, we find the statute ambiguous."[103] It then reversed the grant of summary judgment in favor of the Department of Revenue, holding that "any generated Export Credit in excess of the annual statutorily defined cap may be carried forward for the succeeding ten years."[104] The court proceeded to analyze the statutory meaning de novo, even though both the tax code and case law gave the Secretary of

100. *Id*. at 1220 (Goff, J., concurring) (first quoting *Loper Bright*, 144 S. Ct. at 2295 (Kagan, J., dissenting); and then quoting Pub. Serv. Comm'n v. City of Indianapolis, 131 N.E.2d 308, 312 (Ind. 1956)).

101. *Id*. at 1212 (first citing *id*. at 1220 (Goff., J., concurring); and then citing *Loper Bright*, 144 S. Ct. at 2295 (Kagan, J., dissenting)).

102. Philip Morris USA, Inc. v. N.C. Dep't of Revenue, 909 S.E.2d 197, 200 (N.C. Dec. 13, 2024).

103. *Id*.

104. *Id*.

Revenue authority to interpret statutory terms.[105] According to the North Carolina Supreme Court, "We therefore align ourselves with previous precedent repudiating agency deference when the question is one of law."[106]

However, dissenting Justice Riggs, like Justice Goff in Indiana and the Hawai'i Supreme Court, saw danger in adopting the *Loper Bright* line of reasoning:

> I am troubled by the scolding tone with which the majority addresses the Department. . . . Here, it seems plain to me that regardless of the Department's prior interpretations, the Department's current interpretation is consistent with the clear intent and purpose of the law at issue here. I do not see any grounds for inferring bad intent or actions on the part of the Department for honoring the intent of the legislature. It may be that this Court intends to follow the federal trend and more fully reject agency deference as the Supreme Court of the United States did in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 1244 (2024). But this larger, politically-charged issue does not relate to situations in which an agency is acting in accord with the legislature regarding what I believe to be a non-ambiguous statute.[107]

Thus, regardless of whether the state courts accord deference or not, the issue of respect for state agencies remains a live one.

D. STATES THAT DO NOT DEFER TO AGENCY INTERPRETATIONS TEND TO APPROVE *LOPER BRIGHT*

In contrast to states with their own deference doctrines, courts in states that do not defer to state agency interpretations of statutes are far more likely to find *Loper Bright* persuasive or to follow it outright. For example, the Colorado Court of Appeals cited *Loper Bright* to emphasize that agency interpretations are not binding; "[r]ather, we interpret the statute de novo. And when the statute is unambiguous, as it is here, we apply it as written, giving words and phrases their plain and ordinary meanings."[108] Similarly, the Wisconsin Court of Appeals adopted

105. *Id*. at 201 (applying the de novo standard of review); *id*. at 206–07 (noting that while Indiana precedent, tax code, and legislation suggest that the Secretary of Revenue is owed deference, "not *every* interpretation by the Secretary of Revenue is deserving of deference by a reviewing court").

106. *Id*. at 206 (repudiating Aronov v. Sec'y of Revenue, 371 S.E.2d 468, 473 (N.C. 1988); and then citing Brooks v. McWhirter Grading Co., 281 S.E.2d 24, 29 (N.C. 1981)).

107. *Id*. at 215 (Riggs, J., dissenting).

108. HCPI/CO Springs Ltd. v. El Paso Bd. of Comm'rs, 558 P.3d 636, 639 (Colo. App. Aug. 1, 2024) (citations omitted); *see also* Bevco Precision Mfg. Co.

Loper Bright's insistence on courts being the sole interpreters of the law, which accords with Wisconsin's approach to deference.[109]

E. SUMMARY OF STATE REACTIONS TO *LOPER BRIGHT*

Even before *Loper Bright*, state administrative law standards for deference to state agencies differed, including deference to agency interpretations of state law. Unsurprisingly, therefore, states with existing traditions of not deferring to agencies' interpretations of the law find *Loper Bright* more persuasive and useful than those states that have an ongoing state version of *Chevron* deference. At the same time, however, for states like Indiana and North Carolina that were already in the process of moving to a de novo or plenary review approach to questions of law, *Loper Bright* can help sharpen remaining tensions and disagreements about that transition, especially regarding the extent to which state agency interpretations still deserve respect, suggesting that new state-law versions of *Skidmore* deference may emerge.

In contrast, state courts in jurisdictions that defer to state agency interpretations of the laws they implement generally do not allow *Loper Bright* to change the outcome of their state administrative law cases. However, these courts' comfort in rejecting *Loper Bright* outright exists on a continuum, with Hawai'i and Michigan at one end and the D.C. Court of Appeals at the other. The extent to which state courts will allow *Loper Bright* to change state administrative law thus remains to be seen.

III. FEDERAL COURTS AND *LOPER BRIGHT*

Federal courts obviously must follow *Loper Bright*—when it applies. Table 2 summarizes by federal circuit the frequency of *Loper Bright* citations in the lower federal courts in the first six months after the Supreme Court's decision.

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v. Wis. Lab. & Indus. Rev. Comm'n, 12 N.W.3d 552, 556 n. 8 (Wis. Ct. App. Aug. 21, 2024) (emphasizing that Wisconsin courts give no deference to an agency interpretation that contradicts a prior court interpretation and citing *Loper Bright* for the fact that the U.S. Supreme Court had reached the same no deference rule).

109. Kaul v. Wis. State Legislature, 2024 WL 4926387, at *5 (Wis. Ct. App. Dec. 2, 2024) (crediting *Loper Bright* as foundational for the understanding that judges apply judgment "*independent*" of the political branches (citing Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024))).

Table 2: *Loper Bright* Citations Among the Federal Circuits, June 28–December 27, 2024[110]

Circuit	Courts of Appeals Citations	District Court Citations
1st Circuit: MA, ME, NH, PR, RI	1	4
2nd Circuit: CT, NH, NY, VT	5	5
3rd Circuit: DE, NJ, PA, USVI	11	8
4th Circuit: MD, NC, SC, VA, WV	4	11
5th Circuit: LA, MS, TX	16	18
6th Circuit: KY, MI, OH, TN	16	15
7th Circuit: IL, IN, WI	4	5
8th Circuit: AR, IA, MN, MO, ND, NE, SD	3	8
9th Circuit: AK, AZ, CA, Guam, HI, ID, MT, NMI, NV, OR, WA	16	12
10th Circuit: CO, KS, NM, OK, UT, WY	3	17
11th Circuit: AL, FL, GA	8	8
D.C. Circuit	14	5
Federal Circuit	7	5
Court of Veterans Appeals	3	0
TOTAL:	**111**	**121**

As might be expected given the number of administrative law cases decided there in general, *Loper Bright* citations are particularly frequent in the U.S. Courts of Appeals for the D.C. and Ninth Circuits (and the district courts within those circuits). Notably, however, the U.S. Courts of Appeals for the Fifth and Sixth Circuits and the district courts within them are also actively discussing the applicability and impact of *Loper Bright*.

110. See *supra* notes 17–18 and accompanying text for a description of the methodology of gathering federal cases citing *Loper Bright*.

A. THE SUPREME COURT'S LACK OF FURTHER GUIDANCE REGARDING *LOPER BRIGHT*

By December 27, 2024, ten U.S. Supreme Court cases had cited *Loper Bright*. Nine of these, all issued on July 2, 2024, were two-sentence decisions that granted certiorari and then vacated and remanded to the relevant Court of Appeals' decision in light of *Loper Bright*.[111] Four of these were immigration cases,[112] and two laid within the field of environmental, natural resources, and energy law,[113] suggesting that these two federal law specialties may be on the front lines of working out the new rules of agency deference going forward. The other three cases involved tax and labor relations.[114]

In the tenth case, *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, Justice Jackson cited *Loper Bright* in her dissent.[115] In this decision, issued on July 1, 2024, the Supreme Court decided that the default statute of limitations for APA suits against the United States and its agencies does not start to run until the plaintiff is actually injured by a final agency action.[116] According to Justice Jackson, joined by Justices Sotomayor and Kagan, the combination of *Corner Post* and *Loper Bright* will give the federal courts extensive authority to overturn longstanding agency rules, because "[a]ny new objection to any old rule must be entertained and determined *de novo* by

111. Bastias v. Garland, 144 S. Ct. 2704 (2024) (mem.); Diaz-Rodriguez v. Garland, 144 S. Ct. 2705 (2024) (mem.); Edison Elec. Inst. v. Fed. Energy Regul. Comm'n, 144 S. Ct. 2705 (2024) (mem.); Cruz v. Garland, 144 S. Ct. 2706 (2024) (mem.); Foster v. Dep't of Agric., 144 S. Ct. 2707 (2024) (mem.); Lissack v. Comm'r, 144 S. Ct. 2707 (2024) (mem.); KC Transp., Inc. v. Su, 144 S. Ct. 2708 (2024) (mem.); United Nat. Foods, Inc. v. NLRB, 144 S. Ct. 2708 (2024) (mem.); Solis-Flores v. Garland, 144 S. Ct. 2709 (2024) (mem.).

112. For the pre-*Loper Bright* discussion of the immigration cases vacated on July 2, 2024, see Bastias v. U.S. Atty. Gen., 42 F.4th 1266 (11th Cir. 2022); Diaz-Rodriguez v. Garland, 55 F.4th 697 (9th Cir. 2022); Cruz v. Garland, 2023 WL 4118011 (4th Cir. June 22, 2023); Solis-Flores v. Garland, 82 F.4th 264 (4th Cir. 2023).

113. For the pre-*Loper Bright* discussion of the environmental, natural resources, and energy law cases vacated on July 2, 2024, see Solar Energy Indus. Ass'n v. Fed. Energy Regul. Comm'n, 59 F.4th 1287 (D.C. Cir. 2023); Foster v. U.S. Dep't of Agric., 68 F.4th 372 (8th Cir. 2023).

114. United Nat. Foods, Inc. v. NLRB, 66 F.4th 536 (5th Cir. 2023); Lissack v. Comm'r, 68 F.4th 1312 (D.C. Cir. 2023); Sec'y of Lab. v. KC Transp., Inc., 77 F.4th 1022 (D.C. Cir. 2023).

115. 144 S. Ct. 2440, 2482 (2024) (Jackson, J., dissenting).

116. *Id.* at 2450 (majority opinion).

judges who can now apply their own unfettered judgment as to whether the rule should be voided."[117]

Justice Jackson may well be correct.[118] Nevertheless, none of these ten cases gives the lower courts any additional guidance on what to do with *Loper Bright*.

B. DEFINING *LOPER BRIGHT*'S APPLICABILITY

Thus far, much of the attention of the lower federal courts, especially of the district courts, has focused on defining when exactly *Loper Bright* is relevant. As is the case with most new major pronouncements from the Supreme Court, litigants often assert that *Loper Bright* supports their argument, or requires reexamination of a previous decision, under a broad array of circumstances—far broader than the Supreme Court indicated. While the lower federal courts have been fairly consistent in containing *Loper Bright*, they have begun to diverge regarding *Loper Bright*'s impact on non-*Chevron* doctrines of judicial deference.

1. If *Chevron* Would Not Have Applied, Neither Does *Loper Bright*

Many lower federal courts have explicitly limited *Loper Bright* to its specific context—that is, to federal agency interpretations of the statutes they implement, reviewed pursuant to the federal APA, that previously would have received *Chevron*

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117. *Id.* at 2482 (Jackson, J., dissenting).

118. *See*, *e.g.*, Cacho v. McCarthy & Kelly LLP, 739 F. Supp. 3d 195, 204 n.6 (S.D.N.Y. July 3, 2024) ("[T]he Court pauses to note that this case highlights the disruption that the Supreme Court's recent decision in *Loper Bright* portends. Regulatory regimes that have been settled for decades are now subject to de novo review in private disputes such as this one, without the benefit of briefing from the expert agency tasked with administering the relevant statute."). *But see* Cal. Coastalkeeper All. v. Cosumnes Corp., 2024 WL 4819208, at *11 (E.D. Cal. Nov. 18, 2024) (holding in a Clean Water Act (CWA) citizen suit that the EPA's Confined Animal Feeding Operations regulations will remain in place because the CWA itself, 33 U.S.C. § 1369(b), requiring that they be challenged within 120 days of promulgation, explaining that the defendant cannot collaterally challenge the regulations in a citizen suit, and concluding that *Corner Post* does not apply because the defendant was not seeking relief under the APA); Cogdell v. Reliance Standard Life Ins., 2024 WL 4182589, at *3 & n.6, *4 (E.D. Va. Sept. 11, 2024) (holding that the defendant could not use *Loper Bright* to bring a facial challenge to a regulation), *appeal docketed*, No. 25-1083 (4th Cir. Jan. 28, 2025).

deference.[119] Thus, federal courts have found *Loper Bright* irrelevant to various claims that did not turn on federal agency interpretations of statutes.[120] As one example, less than a month

119. *See*, *e.g.*, Purdy v. Carver, 2024 WL 4651275, at *5 (D. Md. Nov. 1, 2024) (noting that *Loper Bright* is relevant only if "the challenge raised . . . pertain[s] to a regulation put into place by the administrative agency which is being challenged under the APA. Further, there must be some ambiguity in the statute the agency administers that conceivably calls into question the validity of the regulation challenged" (citing Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2261–62 (2024))).

120. Martinez Medina v. Garland, 2024 WL 4692028, at *2 (5th Cir. Nov. 6, 2024) (finding Martinez Medina did not demonstrate that the Board of Immigration Appeals' decision implicated any federal deference standard); Rana v. Jenkins, 113 F.4th 1058, 1066, 1067 (9th Cir. Aug. 15, 2024) (evaluating double jeopardy in the context of India's request for extradition of a Pakistani national and concluding that "because the logic underpinning *Chevron* deference is entirely distinct from the logic underpinning a deference to the Executive in matters of foreign affairs, . . . *Loper Bright* has no effect on our decision here"—specifically, the reasoning in *Loper Bright* "does not touch, let alone undermine, the principle that we are to give deference to the Executive Branch's understanding of its own treaties"); Firearms Regul. Accountability Coal. v. Garland, 112 F.4th 507, 519 n.12 (8th Cir. Aug. 9, 2024) (noting that application of *Loper Bright* to review a regulation is unnecessary when the plaintiff will succeed on an APA claim instead); Bridgeport Hosp. v. Becerra, 108 F.4th 882, 890 n.4 (D.C. Cir. July 23, 2024) (reasoning that *Chevron* deference would not have applied when the agency was not resolving an ambiguity); Lion Elastomers, LLC v. NLRB, 108 F.4th 252, 255 n.1 (5th Cir. July 9, 2024) (stating that *Loper Bright* is not relevant if the court resolves the case on grounds other than the agency's interpretation); Gonzalez v. Garrett, 2024 WL 5096474, at *2 (E.D. Ark. Dec. 12, 2024) (finding both *Loper Bright* and *Chevron* inapplicable when the regulation at issue is unambiguous); Parker v. Tenneco, Inc., 2024 WL 5004326, at *3 (E.D. Mich. Dec. 6, 2024) (acknowledging that *Loper Bright* does not speak to any questions about other "judge-made rules"); Strebel v. Scoular, 2024 WL 4903907, at *4 (N.D. Ill. Nov. 27, 2024) (declining to apply *Loper Bright* where the issue "involves neither a federal statute nor a federal agency interpretation"); United States v. Szostak, 2024 WL 4828721, at *4 (E.D. Mich. Nov. 19, 2024) (suggesting that if *Chevron* would not play a role in a case's outcome, neither will *Loper Bright*); Hernandez v. Eischen, 2024 WL 4839827, at *1 n.2 (D. Minn. Oct. 28, 2024) (acknowledging the diminished role of deference after *Loper Bright* but finding no relevant issue of statutory interpretation demanding its application); Reynolds v. Warden, FCI Beckley, 2024 WL 4202385, at *1 (S.D.W. Va. Sept. 16, 2024) (holding that *Loper Bright* plays no role when none of the authorities that a Magistrate Judge relied on turned on *Chevron* deference), *appeal docketed*, No. 24-6952 (4th Cir. Oct. 3, 2024); Cogdell v. Reliance Standard Life Ins., 2024 WL 4182589, at *3 & n.6, *4 (E.D. Va. Sept. 11, 2024) (stating that *Loper Bright* applies only when there is statutory ambiguity and holding that *Loper Bright* does not allow a defendant to raise a facial challenge to a regulation when it could not do so before), *appeal docketed*, No. 25-1083 (4th

after the *Loper Bright* decision, the U.S. Court of Appeals for the Third Circuit concluded that *Loper Bright* does not apply to court determinations of whether APA jurisdiction exists—specifically, whether an EPA health advisory under the federal Safe Drinking Water Act qualifies as "final agency action" subject to APA review.[121] Similarly, *Loper Bright* did not affect the standard governing Rule 12(b)(6) motions to dismiss for failure to state a

Cir. Jan. 28, 2025); Xia v. Garland, 2024 WL 3925766, at *5 (E.D.N.Y. Aug. 23, 2024) (concluding in an immigration mandamus case that "the Supreme Court's ruling in *Loper Bright*, which overturned the prior norm of deference to agency interpretations of ambiguous statutes, simply has no bearing on this case" because "[t]he governing statute here, 8 U.S.C. § 1252(a)(2)(B)(i), has been interpreted by courts—not by any executive agency—to preclude jurisdiction over discretionary denials of adjustment of status" (citations omitted)), *appeal docketed*, No. 24-2304 (2d Cir. argued Feb. 6, 2025); Baskin v. L.A. Super. San Fernando Ct., 2024 WL 4867800, at *1 (C.D. Cal. Aug. 19, 2024) ("Petitioner does not explain how *Loper Bright* impacts his case. Petitioner does not appear to challenge an administrative decision. Nor does Petitioner identify any administrative decision or guidance that this Court previously relied on."); Milless v. Salmonsen, 2024 WL 3725318, at *1 (D. Mont. Aug. 6, 2024) (responding to a prisoner's habeas petition and argument "that the U.S. Supreme Court's overruling of the *Chevron* doctrine is relevant to his claims," holding that "[i]t is not. This Court's determinations of the law regarding Milless' case are not based on deference to any agency's determination of the law. The repeated citations to *Loper Bright* are inapt.").

121. Chemours Co. FC v. EPA, 109 F.4th 179, 183 n.3 (3d Cir. July 23, 2024) (holding that cases decided on jurisdictional grounds do not implicate *Loper Bright*); *see also* Generous Home Care Mgmt., LLC v. Becerra, 2024 WL 3843789, at *3 n.1 (W.D. Tex. July 22, 2024) ("[T]his Court does not defer to any HHS interpretation of an ambiguous statute to conclude that it lacks jurisdiction over Generous Home's claims."); White v. U.S. Att'y Gen., 2024 WL 4665163, at *7 (D. Haw. Nov. 4, 2024) ("[I]n considering whether there has been an unreasonable delay under the APA, the Court has not deferred to Defendants' construction of the APA's requirements. Instead, the Court has 'exercised [its] independent judgment' in deciding . . . whether the agency action here has been unreasonably withheld. *Loper Bright* therefore has no relevance to these issues." (citing *Loper Bright*, 144 S. Ct. at 2273)); Bauman v. Garland, 2024 WL 4406962, at *3 (C.D. Cal. Aug. 28, 2024) ("The Supreme Court's decision in *Loper Bright* . . . has no impact on the Court's decision regarding its lack of subject matter jurisdiction in this case. Indeed, the Court's decision is not based on any deference to an agency's interpretation of a statute, but rather is based on the statutory language of 8 U.S.C. § 1252(a)(2)(B)(i), as interpreted by the courts." (citing *Loper Bright*, 144 S. Ct. at 2266)); Reeder v. United States, 2024 WL 3912751, at *7 & n.8 (D.N.M. Oct. 23, 2024) (holding that *Loper Bright* and its overruling of *Chevron* does not affect arbitrary and capricious review under the APA), *appeal dismissed and remanded*, 2024 WL 4926611 (10th Cir. Nov. 25, 2024).

claim.[122] Even when the issue is statutory interpretation, moreover, *Loper Bright* does not require reexamination if a previous interpretation did not turn on *Chevron* deference,[123] particularly when the prior interpreters were the courts themselves, as *Loper Bright* now demands.[124]

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122. *White*, 2024 WL 4665163, at *7.

123. Frey v. Comm'r of Soc. Sec., 2024 WL 5090079, at *1 n.1 (W.D. Mich. Dec. 12, 2024) (noting that other courts had determined that "the analytical framework [for Social Security appeals] has not changed since *Loper Bright*" and finding that plaintiffs had not identified "any specific error of law in the ALJ's decision that would raise an issue under *Loper Bright*"); Horizon Tower Ltd. v. Park Cnty., 2024 WL 4525229, at *7 (D. Wyo. Oct. 4, 2024) (reasoning that *Chevron* deference applied to "direct challenges to agency regulations," whereas it would have been improper to invoke *Chevron* deference in an action regarding the denial of permits, therefore *Loper Bright* was irrelevant); Adams v. All Coast, LLC, 2024 WL 4291520, at *3–4 (W.D. La. Sept. 25, 2024) (finding that *Loper Bright* did not affect a Fifth Circuit determination on seaman status when the Fifth Circuit had not applied *Chevron* deference); Hicks v. Comm'r of Soc. Sec. Admin., 2024 WL 3901190, at *2 n.3 (E.D. Ky. Aug. 19, 2024) (finding that *Loper Bright* did not change the analytical framework in a social security case, wherein the agency should still receive deference), *appeal docketed*, No. 24-5946 (6th Cir. Oct. 17, 2024); Am. Wild Horse Campaign v. Stone-Manning, 2024 WL 3872558, at *5 n.3 (D. Wyo. Aug. 14, 2024) ("*Loper Bright* is of little consequence in this matter . . . . [because] this Court reaches its conclusion without deferring to BLM's interpretation of the WHA, NEPA, or FLPMA—only that its actions were justified by those laws."), *appeal docketed*, No. 24-8057 (10th Cir. Aug. 20, 2024).

124. *See, e.g.*, Save Jobs USA v. U.S. Dep't of Homeland Sec., 111 F.4th 76, 79 n.2 (D.C. Cir. Aug. 2, 2024) (following the reasoning of *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 50 F.4th 164 (D.C. Cir. 2022), and noting that the court had not relied on *Chevron* deference); Williams v. O'Malley, 2024 WL 3519774, at *1 n.1 (9th Cir. July 24, 2024) (finding that *Loper Bright* did not undercut Ninth Circuit precedent because the prior holding did not defer to the Social Security Administration's interpretation of the Social Security Act (citing Cross v. O'Malley 89 F.4th 1211 (9th Cir. 2024))); Lowmaster v. Dir., Bureau of Prisons, 2024 WL 5135970, at *2–3 (D. Kan. Dec. 17, 2024) (declining to undercut the Supreme Court's deference to Bureau of Prisons over sentence reductions in *Lopez v. Davis*, 531 U.S. 230 (2001)); King v. IC Grp., Inc., 2024 WL 4654114, at *3 (D. Utah Nov. 1, 2024) (denying a plaintiff's motion for reconsideration because the district court's earlier dismissal did not rely on an agency's interpretation of a statute); Black Farmers & Agriculturists Ass'n v. Vilsack, 2024 WL 4571446, at *1 (W.D. Tenn. Oct. 24, 2024) (denying plaintiffs' motion because the district court had not previously relied upon USDA's interpretation of a statute, but on the "plain language . . . itself"); United States v. Moore, 2024 WL 4379748, at *6 (S.D. Ohio Oct. 3, 2024) (noting that it's reasoning did not entail interpreting an agency's organic statute, but rather the Second Amendment); United States v. Farmer, 2024 WL 4254320, at *3 (E.D. Mich. Sept. 20, 2024) (ruling that since the statutory definition of "machinegun" is

Some specific situations have repeatedly required the federal district courts to cabin overeager litigants trying to extend *Loper Bright* to new contexts. For example, paralleling the state court approaches to *Loper Bright*, federal courts hearing state administrative law issues deem *Loper Bright* inapplicable to state law.[125] Multiple courts have ruled that *Loper Bright* does not affect an Article III judge's ability to adopt a magistrate judge's findings and recommendations.[126] Courts have also rebuffed arguments that *Loper Bright* empowers federal courts to excuse litigants' untimeliness,[127] nullify various kinds of

clear and unambiguous, the court did not apply *Chevron* deference in analyzing a prior motion to dismiss); *Milless*, 2024 WL 3725318, at *1 (dismissing a habeas petition because the district court's determinations of law were not based on deference to any agency's determination of law); *Xia*, 2024 WL 3925766, at *5 (noting that the court was following prior courts' interpretation of the relevant governing statute, not that of any executive agency); *Bauman*, 2024 WL 4406962, at *3 (same); *Hicks*, 2024 WL 3901190, at *2 n.3 (noting that courts had afforded the same level of deference to the Social Security Administration both before and after the *Loper Bright* decision); *Generous Home*, 2024 WL 3843789, at *3 n.1 (reasoning that, in finding that it lacked jurisdiction over claims seeking injunctive relief, the district court did not defer to any agency interpretation of an ambiguous statute).

125. Thompson v. Keliher, 2024 WL 4851243, at *29 n.17 (D. Me. Nov. 21, 2024) (distinguishing *Loper Bright* from state law claims, and finding that the district court lacked subject matter jurisdiction to rule on the lawfulness of state agency rules); Gotschall v. Salmonsen, 2024 WL 4751614, at *2 (D. Mont. Nov. 12, 2024) (finding an attempted application of *Loper Bright* to state actors to be meritless); Pryor v. Salmonsen, 2024 WL 4535014, at *3 (D. Mont. Oct. 21, 2024) (same).

126. *See* Su v. Forge Indus. Staffing, Inc., 2024 WL 4825382, at *4 (W.D. Mich. Nov. 19, 2024) (adopting a magistrate judge's report and recommendation after finding that the magistrate judge did not defer to an agency's interpretation of a statute and noting that *Loper Bright* did not appear to cut through subpoena enforcement jurisprudence), *appeal docketed*, No. 24-2024 (6th Cir. Nov. 25, 2024); Reynolds v. Warden, FCI Beckley, 2024 WL 4202385, at *1 (S.D.W. Va. Sept. 16, 2024) (finding no error in the magistrate judge's use of authority, which did not involve application of *Chevron* deference), *appeal docketed*, No. 24-6952 (4th Cir. Oct. 3, 2024); Kornegay v. Brown, 2024 WL 3964947, at *2 (N.D.W. Va. Sept. 28, 2024) ("The decision in *Loper Bright Enterprises* only alters the requirement of courts to defer to agencies in the interpretation of ambiguous statutes, and does not invalidate reports and recommendations issued by courts.").

127. Hughes v. Dep't of Veterans Affs., 2024 WL 4294792, at *1 (D.C. Cir. Sept. 25, 2024).

procedural waivers or exhaustion requirements,[128] or ignore litigants' failure to qualify under statutory requirements.[129]

While most analyses in the first six months were short, a few federal courts more deeply examined the impact of the *Loper Bright* decision on prior rulings. In the U.S. District Court for the Eastern District of Michigan, for example, a criminal defendant asked the court to reconsider its December 2022 decision not to dismiss the indictment, which turned on the interpretation of "machinegun," in light of *Loper Bright*.[130] The defendant asserted that the district judge had relied on the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF's) interpretation of "machinegun."[131] The district court, however, concluded that: (1) "Defendant is incorrect that the Government relies on the ATF's interpretation of the statute for the charges against him. Instead, the Government relies on the plain language of § 5845(b)";[132] (2) "[a]s such, *Loper Bright* is inapposite";[133] and (3) "there is no problem under *Loper Bright*, because *court* precedent interprets the statute to include devices like DIAS and Glock switches."[134]

Nevertheless, if a federal agency asks for *Chevron* deference, the federal courts will now refuse.[135] Thus, federal courts are

128. Lopez v. Garland, 2024 WL 4763923, at *3 (2d Cir. Nov. 13, 2024) (declining a petitioner's request to re-brief their petition); Clary v. Salmonsen, 2024 WL 5186996, at *1 (D. Mont. Dec. 19, 2024) (finding *Loper Bright* inapplicable to a Rule 60 reconsideration proceeding); Garg Tube Exp. LLP v. United States, 740 F. Supp. 3d 1355, 1366–67 (Ct. Int'l Trade Nov. 7, 2024) (holding that *Loper Bright* did not excuse plaintiff's duty to exhaust administrative remedies); Sichting v. Rardin, 2024 WL 4973202, at *2–3 (D. Minn. Sept. 12, 2024) (finding that the Court did not have jurisdiction over petitioner's habeas claim because the "rule that conditions-of-confinement claims cannot be raised in a habeas petition does not derive from [an agency's] interpretation" of a federal law), *modified*, 2024 WL 4785007 (D. Minn. Nov. 14, 2024).

129. *See* Johnston v. Colbert, 2024 WL 4903725, at *1 (9th Cir. Nov. 27, 2024) (declining to address a petitioner's *Loper Bright*–based argument because the petitioner did not meet the First Step Act of 2018's statutory eligibility requirement).

130. United States v. Farmer, 2024 WL 4254320, at *1 (E.D. Mich. Sept. 20, 2024).

131. *Id*. at *3.

132. *Id*. (citing 26 U.S.C. § 5845).

133. *Id*.

134. *Id*. at *4.

135. BNSF Ry. Co. v. Ctr. for Asbestos Related Disease, Inc., 2024 WL 4273814, at *2 n.3 (9th Cir. Sept. 24, 2024); Sinclair Wyo. Refin. Co. v. EPA, 114

clearly applying *Loper Bright*'s most basic lesson even as they clarify that decision's applicability, and federal agency requests for *Chevron* deference will likely disappear as the transition period passes.

2. Federal Agencies Can Still Receive Deference in Some Circumstances—Even for Statutory Interpretation

a. APA Versus Non-APA Judicial Review

Perhaps the biggest battle emerging among the lower courts centers around what *Loper Bright* did to other sources of judicial review of and deference to the executive branch. For example, some courts insist that their review must be pursuant to the APA before *Loper Bright* eliminates deference, retaining deference to agencies in other circumstances. Thus, for example, the Third Circuit was unwilling to change its traditional, pre-*Chevron* standard of deference to the National Labor Relations Board's classifications under the National Labor Relations Act,[136] while district courts have held *Loper Bright* inapplicable to criminal law issues.[137]

F.4th 693, 709 (D.C. Cir. Aug. 14, 2024); Amazon Servs. v. U.S. Dep't of Agric., 109 F.4th 573, 581–82 (D.C. Cir. July 26, 2024); *see also* Quito-Guachichulca v. Garland, 122 F.4th 732, 735–36, 735 n.1 (8th Cir. Dec. 9, 2024) (noting that the court would not defer to the Board of Immigration Appeals' interpretation of a statute when performing de novo review); Grand Canyon Univ. v. Cardona, 121 F.4th 717, 723 (9th Cir. Nov. 8, 2024) ("We review de novo whether the Department [of Education] correctly construed the [Higher Education Act]."); Tista-Ruiz de Ajualip v. Garland, 114 F.4th 487, 494–95 (6th Cir. Aug. 9, 2024) (applying de novo review to questions of law in a Board of Immigration Appeals opinion); *cf.* United States v. Multistar Indus., Inc., 2024 WL 5055552 (9th Cir. Dec. 10, 2024) (noting that, even where EPA did not request deference, federal courts would not defer to EPA's approach to differentiating between stationary containers and containers in transit, yet nevertheless finding EPA's interpretation of the statute to be persuasive).

136. Alaris Health at Boulevard E. v. NLRB, 123 F.4th 107, 121 (3d Cir. Dec. 9, 2024); *see also* Deptula v. Greene, 2024 WL 4729879, at *3 n.1 (M.D. Pa. Nov. 8, 2024) (holding *Loper Bright* inapplicable because "18 U.S.C. § 3632(d)(4)(E)(i) is a statute, not a regulation; it is not subject to challenge under the APA"); Collingwood v. Neely, 2024 WL 3656752, at *1 (N.D. Ala. Aug. 2, 2024) ("*Loper Bright* concerns court deference to agency interpretations of statutes when those interpretations are challenged under the Administrative Procedure Act ("APA"). 144 S. Ct. at 2262. Section 3624(g)(1)(D)(1) is a statute, not a regulation; it is not subject to challenge under the APA.").

137. United States v. Chilcoat, 2024 WL 5008714, at *6 (D.D.C. Dec. 6, 2024) ("The holding in [*Loper Bright*] does not bear on Defendants' [criminal]

The most interesting of these decisions so far is the U.S. Court of Appeals for the Ninth Circuit's decision that *Loper Bright* does not apply, and federal courts must still defer, to the U.S. Department of State's analyses and interpretations of international treaties to which the United States is a party.[138] Deciding the issue in the context of a double jeopardy determination regarding extradition of a Pakistani national to India, the Ninth Circuit concluded that "because the logic underpinning *Chevron* deference is entirely distinct from the logic underpinning a deference to the Executive in matters of foreign affairs, . . . *Loper Bright* has no effect on our decision here";[139] specifically, the reasoning in *Loper Bright* "does not touch, let alone undermine, the principle that we are to give deference to the Executive Branch's understanding of its own treaties."[140]

However, some courts are extending *Loper Bright*'s rule of non-deference to non-APA judicial review contexts if the source of judicial review standards is "APA-like." For example, the D.C. Circuit extended *Loper Bright* to judicial review of the EPA's decisions pursuant to the Clean Air Act's judicial review provisions, "because judicial review under the Clean Air Act is 'essentially the same' as judicial review under the APA."[141]

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prosecution. The Court assures Defendants that it will interpret the law in this case without deference to the Department of Justice or any other agency. To the extent Defendants' [sic] request any relief under *Loper Bright*, the Court will DENY their request."); Su v. Forge Indus. Staffing, Inc., 2024 WL 4825382, at *4 (W.D. Mich. Nov. 19, 2024) ("*Loper Bright* seems inapposite here because it is not clear that the axe to *Chevron* also cut through the subpoena enforcement jurisprudence."), *appeal docketed*, No. 24-2024 (6th Cir. Nov. 25, 2024). *But see* United States v. Ramos, 2024 WL 4710905, at *4 n.8 (N.D. Ill. Nov. 6, 2024) ("The Sentencing Commission is not an agency, per se, but *Loper*'s logic and import are highly relevant and persuasive in this context, too."), *appeal docketed*, No. 24-3052 (7th Cir. Nov. 12, 2024); Nat'l Ass'n for Gun Rts. v. Garland, 741 F. Supp. 3d 568, at 600 (N.D. Tex. July 23, 2024) (rejecting Defendants' arguments for expanding an administrative record because they were "little more than a thinly veiled backdoor effort to import *Chevron*-style deference"), *appeal docketed*, No. 24-10707 (5th Cir. Aug. 6, 2024).

138. Rana v. Jenkins, 113 F.4th 1058, 1066–67 (9th Cir. Aug. 15, 2024), *cert. denied*, 2025 WL 247461 (U.S. 2025).

139. *Id.* at 1066 (citations omitted).

140. *Id*. at 1067.

141. U.S. Sugar Corp. v. EPA, 113 F.4th 984, 991 n.7 (D.C. Cir. Sept. 3, 2024) (quoting Ethyl Corp. v. EPA, 51 F.3d 1053, 1064 (D.C. Cir. 1995)); *see also* NextEra Energy Res., LLC v. Fed. Energy Regul. Comm'n, 118 F.4th 361, 368 (D.C. Cir. Oct. 4, 2024) (noting that it had previously accorded "*Chevron*-like"

b. Deference to Agency Interpretations in APA Review: Skidmore *and* Auer *Deference After* Loper Bright

As discussed, *Loper Bright* itself commended *Skidmore* deference as the legal vehicle through which federal courts could continue to consider and respect agency interpretations of the statutes they implement.[142] As a result, as Table 3 indicates, most of the lower federal courts that have considered the issue have concluded that *Skidmore* deference[143] remains a viable form of deference that courts can accord federal agencies' statutory constructions.[144]

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deference to FERC's reasonable interpretations of ambiguous contracts and tariffs, and raising the issue of whether such deference survived *Loper Bright*); Garg Tube Exp. LLP v. United States, 740 F. Supp. 3d 1355, 1365 n.10 (Ct. Int'l Trade Nov. 7, 2024) ("[W]hile this Court reviews this redetermination under 28 U.S.C. § 2640, the logic of *Loper Bright* applies here because, similar to the APA, 28 U.S.C. § 2640 directs review to 19 U.S.C. § 1516a(a)(2)(B)(iii) providing that the court will set aside a determination found to be 'contrary to law.'").

142. *See supra* notes 42–50 and accompanying text.

143. Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

144. Perez v. Owl, Inc., 110 F.4th 1296, 1307–08 (11th Cir. Aug. 6, 2024) (applying *Skidmore* deference); Ard v. O'Malley, 110 F.4th 613, 618–19 (4th Cir. Aug. 7, 2024) (noting *Skidmore* deference still applies to interpretations in agency manuals); Anderson v. Diamondback Inv. Grp., 117 F.4th 165, 188 n.14 (4th Cir. Sept. 4, 2024) (applying *Skidmore* deference but finding the agency's interpretation lacking the "power to persuade" (quoting *Skidmore*, 323 U.S. at 140)); Lopez v. Garland, 116 F.4th 1032, 1038–40 (9th Cir. Sept. 11, 2024) (applying *Skidmore* deference); Hanan v. U.S. Citizenship & Immigr. Servs., 2024 WL 4293917, at *4 (N.D. Cal. Sept. 25, 2024) (applying *Skidmore* deference to a Board of Immigration Appeals decision), *appeal docketed*, No. 24-6193 (9th Cir. Oct. 11, 2024); Harding v. Steak N Shake, Inc., 2024 WL 3833341, at *7 (N.D. Ohio Aug. 15, 2024) ("*Loper Bright* makes clear that *Skidmore* deference is the appropriate standard to evaluate agency regulations."); Varian Med. Sys., Inc. v. Comm'r, 2024 WL 3936396, at *18 (T.C. Aug. 26, 2024) (quoting *Loper Bright*'s approval of *Skidmore* deference); Clinkenbeard v. King, 2024 WL 4355063, at *4 (D. Minn. Sept. 30, 2024) ("And even post-*Loper Bright*, courts should still defer to an agency's interpretation when a statute expressly delegates interpretive authority to an agency or when the statute allows the agency to 'fill up the details of a statutory scheme'" (quoting Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024))), *aff'd*, No. 24-3127 (8th Cir. Mar. 27, 2025); *In re* Yellow Corp., 2024 WL 4194560, at *7 (Bankr. D. Del. Sept. 13, 2024) ("The Supreme Court explained that the 'interpretations and opinions' of a government agency with 'specialized experience' could be a source 'to which courts and litigants [could] properly resort for guidance,' particularly when the agency's view was well reasoned, longstanding, and consistently held." (alteration in original) (quoting *Loper Bright*, 144 S. Ct. at 2259)), *amended and superseded on reconsideration*, 2024 WL 4925124 (Bankr. D. Del. Nov. 5, 2024);

Perhaps more importantly, several federal courts have determined,[145] assumed,[146] or strongly suggested[147] that *Loper Bright* did not eliminate the deference owed to a federal agency

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Regents of the Univ. of Cal. v. Chefs' Warehouse, Inc. Emp. Benefit Plan, 2024 WL 3937161, at *5 n.3 (E.D. Cal. Aug. 26, 2024) ("Although the Supreme Court has overruled *Chevron*, it has not disturbed district courts' application of *Skidmore* deference principles." (citation omitted)), *appeal docketed*, No. 24-5985 (9th Cir. Oct. 1, 2024); NLRB v. Macomb, 2024 WL 4240545, at *3 (6th Cir. Sept. 19, 2024) (noting that although the court now uses de novo review, it pays "careful attention" to the implementing agency's interpretation); Am. Wild Horse Campaign v. Stone-Manning, 2024 WL 3872558, at *5 n.3 (D. Wyo. Aug. 14, 2024) ("[T]he Supreme Court in *Loper Bright* noted that while an agency's interpretation of a statute cannot bind a court, it may still be especially informative to the extent it rests on factual premises within that agency's expertise. That informativeness would become ever more salient given the unique nature of this [case's facts]." (citation omitted)), *appeal docketed sub nom*. Friends of Animals v. Bureau of Land Mgmt., No. 24-8057 (10th Cir. Aug. 20, 2024).

145. *See* United States v. Trumbull, 114 F.4th 1114, 1118 n.2 (9th Cir. Aug. 22, 2024) ("The Supreme Court did not call *Kisor* into question in *Loper Bright* (and in fact cited it), and as the concurrence acknowledges did not overrule it, so we continue to apply it." (citation omitted)); United States v. Boler, 115 F.4th 316, 322 n.4 (4th Cir. Oct. 8, 2024) ("Since *Loper Bright* dealt specifically with ambiguities in statutory directives to agencies and did not address the issue of agency interpretations of their own regulations, we will apply the Supreme Court's recent guidance in *Kisor* to address the issue before us today."); United States v. Durio, 2024 WL 3791225, at *4 (E.D. La. Aug. 13, 2024) ("Simply put, the only kind of deference relevant to this case is *Seminole Rock* deference . . . ."); Battineni v. Mayorkas, 2024 WL 4367522, at *7 n.3 (D.D.C. Oct. 2, 2024) ("The Supreme Court's recent decision in *Loper Bright* . . . does not affect [*Auer* deference]. *Loper Bright* presented an issue of an agency's interpretation of a statute, not of its own regulations."); Rorie v. McDonough, 37 Vet. App. 430, 434 (Vet. App. Aug. 16, 2024) ("We see no principled reason that the same rule of stare decisis does not hold sway in the context of the Supreme Court's change from *Auer* to *Kisor* deference in terms of ambiguous regulations."), *appeal docketed*, No. 25-1194 (Fed. Cir. Nov. 19, 2024).

146. *See* United States v. Charles, 2024 WL 4554806, at *13 (6th Cir. Oct. 23, 2024) ("Assuming [the *Kisor* framework] is not altered by the Supreme Court's recent decision in *Loper Bright* . . . we defer to an agency's interpretation of its own regulation when the regulation remains 'genuinely ambiguous after [this court] exhaust[s] all the traditional tools of construction . . . .'" (alteration in original)).

147. *See* Schaffner v. Monsanto Corp., 113 F.4th 364, 384 n.12 (3d Cir. Aug. 15, 2024) ("And while courts may sometimes defer to an agency's interpretation of its own regulations, the Court has 'cabined' the scope of that deference 'in varied and critical ways.'" (quoting Kisor v. Wilkie, 139 S. Ct. 2400, 2405 (2019))).

interpreting its own regulations, generally known as *Auer*[148] or *Seminole Rock*[149] deference.[150] The U.S. Supreme Court refused to overrule *Auer* deference in 2019,[151] and the *Loper Bright* Court did not address it.[152] As a result, the U.S. Court of Appeals for the Sixth Circuit assumed that *Auer* deference remains applicable to the commentaries on the Federal Sentencing Guidelines.[153] Similarly, the Ninth Circuit concluded that the *Loper Bright* majority did not call *Auer* deference into doubt and, "as the concurrence acknowledges did not overrule it, so we continue to apply it."[154]

However, some courts view *Loper Bright* instead as a signal that the Supreme Court will be getting rid of *Auer* deference as well.[155] Thus, the U.S. Court of Appeals for the Fourth Circuit concluded that "[t]he Supreme Court's recent ruling in *Loper Bright Enterprises v. Raimondo*. . . calls into question the viability of *Auer* deference"; nevertheless, because "*Loper Bright* dealt specifically with ambiguities in statutory directives to agencies and did not address the issue of agency interpretations of their own regulations, we will apply the Supreme Court's recent guidance in *Kisor* to address the issue before us today."[156] Most complex is the U.S. District Court for the District of New Mexico,

148. Auer v. Robbins, 519 U.S. 452, 461 (1997) (deferring to the agency's interpretation of its regulation unless it is "plainly erroneous" (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989))).

149. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

150. *See Kisor*, 139 S. Ct. at 2408 ("This Court has often deferred to agencies' reasonable readings of genuinely ambiguous regulations. We call that practice *Auer* deference, or sometimes *Seminole Rock* deference, after two cases in which we employed it.").

151. *Id.* at 563–64 (declining to overrule *Auer* deference, albeit modifying how it applies).

152. *But see* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2306–10 (2024) (Kagan, J., dissenting) (discussing the *Kisor* Court's reasoning to not overrule deference to administrative agencies).

153. United States v. Charles, 2024 WL 4554806, at *13 (6th Cir. Oct. 23, 2024); *see also* United States v. Ponle, 110 F.4th 958, 961–62 (7th Cir. Aug. 5, 2024) (determining that *Auer* deference, as modified by *Kisor*, still applies to Sentencing Guidelines).

154. United States v. Trumbull, 114 F.4th 1114, 1118 n.2 (9th Cir. Aug. 22, 2024).

155. *See infra* Table 3 (categorizing cases by treatment of forms of deference since *Loper Bright*).

156. United States v. Boler, 115 F.4th 316, 322 n.4 (4th Cir. Oct. 8, 2024) (citation omitted).

which has repeatedly denounced *Auer* deference while simultaneously acknowledging that it remains the law of the land after *Loper Bright*.[157]

Finally, a debate is beginning to emerge among the federal courts regarding whether *Loper Bright* affects "arbitrary and capricious" review. For the most part, courts conclude that *Loper Bright*, with its emphasis on the APA's primacy, left arbitrary and capricious (and substantial evidence) review intact.[158] The U.S. District Court for the District of New Mexico, for example, has concluded that *Loper Bright* has "little bearing" on arbitrary and capricious review.[159] From a slightly different perspective, the U.S. District Court for the District of Rhode Island has concluded that *Loper Bright*'s adherence to the APA *requires* deference to agencies under "arbitrary and capricious" or "substantial evidence" review.[160] More generally, the U.S. District Court for the District of Vermont has concluded that "*Loper* overruled *Chevron* but does not appear to affect 'judicial review of agency policymaking and factfinding.'"[161] Nevertheless, the U.S. District Court for the District of South Dakota has asserted that "the Supreme Court's recent decision overturning *Chevron* deference calls into question the applicability of the arbitrary and capricious standard to agency legal conclusions," suggesting that

157. *See* Dolan v. Fed. Emergency Mgmt. Agency, 2024 WL 5145808, at *10–13 (D.N.M. Dec. 17, 2024) (noting that *Auer* deference is the "law of the land" but agreeing with Justice Scalia's skepticism regarding the doctrine (quoting Decker v. Nw. Env't Def. Ctr., 568 U.S. 597, 612–21 (2013) (Scalia, J., dissenting))); Aero Tech, Inc. v. U.S. Dep't of the Interior, 2024 WL 4581545, at *7–10 (D.N.M. Oct. 25, 2024) (same); Friends of the Floridas v. U.S. Bureau of Land Mgmt., 2024 WL 3952037, at *60–62 (D.N.M. Aug. 27, 2024) (same), *appeal docketed*, No. 24-2164 (10th Cir. Oct. 31, 2024).

158. *See infra* Table 3 (presenting a breakdown of courts' treatment of arbitrary and capricious review since *Loper Bright*).

159. Reeder v. United States, 2024 WL 3912751, at *7 (D.N.M. Aug. 23, 2024).

160. Newbury v. U.S. Dep't of Hous. & Urb. Dev., 2024 WL 3890779, at *8–9 (D.R.I. Aug. 20, 2024).

161. Indus. Tower & Wireless, LLC v. Roisman, 2024 WL 4329935, at *12 n.10 (D. Vt. Aug. 19, 2024) (quoting Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2261 (2024)), *appeal docketed*, No. 24-2512 (2d Cir. Sept. 24, 2024); *see also* Tista-Ruiz de Ajualip v. Garland, 114 F.4th 487, 495 (6th Cir. Aug. 9, 2024) (noting that *Loper Bright*'s decision explained "that deferential review of an agency decision is 'cabined to factbound determinations'"); Small v. Holzapfel, 2024 WL 4268040, at *4 (S.D.W. Va. Sept. 23, 2024) (holding that *Loper Bright* does not direct courts to override the Bureau of Prisons' authority to calculate credits under the First Step Act).

Loper Bright may affect agency determinations based on mixed questions of law and fact.[162]

Table 3: Federal Court Conclusions Regarding Other Forms of Deference to Federal Agencies, June 28–December 27, 2024

Deference Decision	Courts of Appeals	District Courts
Court recognized and/or applied *Skidmore* deference[163]	8	23

162. Finneman v. U.S. Dep't of Agric., 2024 WL 5158473, at *9 (D.S.D. Dec. 17, 2024).

163. Art & Antique Dealers League of Am., Inc. v. Seggos, 121 F.4th 423, 435 (2d Cir. Nov. 13, 2024); Seldon v. Garland, 120 F.4th 527, 531 (6th Cir. Oct. 31, 2024); Shamrock Bldg. Materials, Inc. v. United States, 119 F.4th 1346, 1355 (Fed. Cir. Oct. 23, 2024); Lopez v. Garland, 116 F.4th 1032, 1036 (9th Cir. Sept. 11, 2024); Anderson v. Diamondback Inv. Grp., 117 F.4th 165, 188 n.14 (4th Cir. Sept. 4, 2024); Rest. L. Ctr. v. U.S. Dep't of Lab., 120 F.4th 163, 174 (5th Cir. Aug. 23, 2024); Ard v. O'Malley, 110 F.4th 613, 618–19 (4th Cir. Aug. 7, 2024); Perez v. Owl, Inc., 110 F.4th 1296, 1307–08 (11th Cir. Aug. 6, 2024); Friends of Animals v. U.S. Fish & Wildlife Servs., 2024 WL 5200514, at *13 (D. Utah Dec. 23, 2024); Shop Rite Inc. v. U.S. Small Bus. Admin., 2024 WL 5183329, at *4 (W.D. La. Dec. 19, 2024) (quoting *Loper Bright*, 144 S. Ct. at 2262), *appeal docketed*, No. 25-30028 (5th Cir. Jan. 20, 2025); Mohammed v. Stover, 2024 WL 5146440, at *4 (D. Conn. Dec. 17, 2024) (citing *Loper Bright*, 144 S. Ct. at 2262); Green v. Perry's Rests. Ltd., 2024 WL 4993356, at *6 (D. Colo. Dec. 5, 2024); Doe v. U.S. Dep't of Health & Hum. Servs., 2024 WL 4719612, at *4 (E.D. Tex. Nov. 8, 2024); Ventura Coastal, LLC v. United States, 736 F. Supp. 3d 1342, 1357 (Ct. Int'l Trade Nov. 7, 2024); *In re* Yellow Corp., 2024 WL 4925124, at *7 (Bankr. D. Del. Nov. 5, 2024); Aero Tech, Inc. v. U.S. Dep't of the Interior, 2024 WL 4581545, at *7 n.3 (D.N.M. Oct. 25, 2024); Kumho Tire (Vietnam) Co. v. United States, 741 F. Supp. 3d 1277, 1289, 1332 n.47 (Ct. Int'l Trade Oct. 18, 2024); U.S. Dep't of State v. Picur, 2024 WL 4502250, at *8 (D.D.C. Oct. 16, 2024); Vogue Tower Partners VII v. City of Elizabethton, 2024 WL 4351425, at *4 (E.D. Tenn. Sept. 30, 2024) (citing *Loper Bright*, 144 S. Ct. at 2262); Clinkenbeard v. King, 2024 WL 4355063, at *4 (D. Minn. Sept. 30, 2024), *aff'd*, No. 24-3127 (8th Cir. Mar. 27, 2025); Houtz v. Paxos Rests., 2024 WL 4336738, at *3 (E.D. Pa. Sept. 27, 2024); Andrews v. 1788 Chicken, LLC, 2024 WL 4291521, at *7 n.11 (S.D. Miss. Sept. 25, 2024); Hanan v. U.S. Citizenship & Immigr. Servs., 2024 WL 4293917, at *4 (N.D. Cal. Sept. 25, 2024), *appeal docketed*, No. 24-6193 (9th Cir. Oct. 11, 2024); Lirones v. Leaf Home Water Sols., LLC, 2024 WL 4198134, at *7 (N.D. Ohio Sept. 16, 2024) (quoting *Loper Bright*, 144 S. Ct. at 2267); Kalshiex LLC v. Commodity Futures Trading Comm'n, 2024 WL 4164694, at *7 n.9 (D.D.C. Sept. 12, 2024), *appeal docketed*, No. 24-5205 (D.C. Cir. Sept. 12, 2024); Friends of the Floridas v. U.S. Bureau of Land Mgmt., 2024

Court called into question *Skidmore* deference[164]	2	0
Court recognized and/or applied *Auer*/*Seminole Rock*/*Kisor* deference[165]	10	9

WL 3952037, at *60 n.42 (D.N.M. Aug. 27, 2024), *appeal docketed*, No. 24-2164 (10th Cir. Oct. 31, 2024); Regents of the Univ. of Cal. v. Chefs' Warehouse, Inc. Emp. Benefit Plan, 2024 WL 3937161, at *5 n.3 (E.D. Cal. Aug. 26, 2024), *appeal docketed*, No. 24-5985 (9th Cir. Oct. 1, 2024); Varian Med. Sys., Inc. v. Comm'r, 2024 WL 3936396, at *18 (T.C. Aug. 26, 2024); Harding v. Steak N Shake, Inc., 2024 WL 3833341, at *7 (N.D. Ohio Aug. 15, 2024); Am. Wild Horse Campaign v. Stone-Manning, 2024 WL 3872558, at *5 n.3 (D. Wyo. Aug. 14, 2024) (citing *Loper Bright*, 144 S. Ct. at 2273), *appeal docketed sub nom*. Friends of Animals v. Bureau of Land Mgmt., No. 24-8057 (10th Cir. Aug. 20, 2024); Lyman v. Quinstreet, Inc., 2024 WL 3406992, at *4 (N.D. Cal. July 12, 2024).

164. Moctezuma-Reyes v. Garland, 124 F.4th 416, 422–23 (6th Cir. Dec. 23, 2024) (noting that under *Loper Bright*, courts are not *required* to accord *Skidmore* deference even if it would be appropriate); Mayfield v. U.S. Dep't of Lab., 117 F.4th 611, 619–20 (5th Cir. Sept. 11, 2024) (questioning "what work *Skidmore* deference can do" if courts must determine the best interpretation of a statute after *Loper Bright*).

165. United States v. McIntosh, 124 F.4th 199, 205–06 (3d Cir. Dec. 23, 2024); Seldon v. Garland, 120 F.4th 527, 531 (6th Cir. Oct. 31, 2024); United States v. Peralta, 2024 WL 4603297, at *2 n.2 (11th Cir. Oct. 29, 2024); United States v. Charles, 2024 WL 4554806, at *13 (6th Cir. Oct. 23, 2024); United States v. Korotkiy, 118 F.4th 1202, 1210 n.6 (9th Cir. Oct. 10, 2024); United States v. Trumbull, 114 F.4th 1114, 1118 n.2 (9th Cir. Aug. 22, 2024); Rana v. Jenkins, 113 F.4th 1058, 1067 (9th Cir. Aug. 15, 2024); United States v. Ponle, 110 F.4th 958, 961 n.3 (7th Cir. Aug. 5, 2024); Finneman v. U.S. Dep't of Agric., 2024 WL 5158473, at *16 (D.S.D. Dec. 17, 2024); *Perry's Rests. Ltd.*, 2024 WL 4993356, at *6; Rappaport v. Guardian Life Ins. Co. of Am., 2024 WL 4872736, at *11–12 (S.D.N.Y. Nov. 22, 2024); Niblock v. Univ. of Ky., 2024 WL 4891025, at *4 (E.D. Ky. Oct. 28, 2024), *appeal docketed*, No. 24-6060 (6th Cir. Nov. 26, 2024); Battineni v. Mayorkas, 2024 WL 4367522, at *7 & n.3 (D.D.C. Oct. 2, 2024); United States *ex rel.* Schroeder v. Hutchinson Reg'l Med. Ctr., 2024 WL 4298655, at *18 n.12 (D. Kan. Sept. 26, 2024); Sec'y of Lab. v. Macy's, Inc., 2024 WL 4302093, at *3 (S.D. Ohio Sept. 26, 2024); *Steak N Shake*, 2024 WL 3833341, at *7–8; United States v. Durio, 2024 WL 3791225, at *2, *4 (E.D. La. Aug. 13, 2024).

Court called into question *Auer*/*Seminole Rock*/*Kisor* deference (including the New Mexico District Court)[166]	2 + 1[167]	3
Court applied arbitrary and capricious or substantial evidence review as normal[168]	2	4
Court deemed *Loper Bright* relevant to arbitrary and capricious or substantial evidence review[169]	0	1
Court recognized or applied *Mead*[170]	0	1
Court called *Mead* into question[171]	1	0

166. *See supra* note 157 and accompanying text; United States v. Boler, 115 F.4th 316, 322 n.4 (4th Cir. Oct. 8, 2024) ("[*Loper Bright*] calls into question the viability of *Auer* deference."); Schaffner v. Monsanto Corp., 113 F.4th 364, 384 n.12 (3d Cir. Aug. 15, 2024) (emphasizing the limitations *Kisor* placed on deference and the Supreme Court's reminder in *Loper Bright* that the judiciary interpret law); Dolan v. Fed. Emergency Mgmt. Agency, 2024 WL 5145805, at *10–13 (D.N.M. Dec. 17, 2024) (agreeing with Justice Scalia's denouncement of *Auer* deference (quoting Decker v. Nw. Env't Def. Ctr., 568 U.S. 597, 616–21 (2013) (Scalia, J., dissenting))); *Aero Tech, Inc.*, 2024 WL 4581545, at *7–10 (same); *Friends of the Floridas*, 2024 WL 3952037, at *60–62 (same).

167. United States v. Trumbull, 114 F.4th 1114, 1126 (9th Cir. Aug. 22, 2024) (Bea, J., concurring) ("Although I acknowledge that *Loper Bright* did not expressly overrule *Kisor*, the majority is mistaken to brush *Loper Bright* aside and treat it as irrelevant to the interpretation of regulatory language.").

168. China Unicom (Ams.) Operations Ltd. v. FCC, 124 F.4th 1128, 1151–56 (9th Cir. Dec. 24, 2024); Rest. L. Ctr. v. U.S. Dep't of Lab., 120 F.4th 163, 175 (5th Cir. Aug. 23, 2024); Aero Tech, Inc. v. U.S. Dep't of the Interior, 2024 WL 4581545, at *12–16 (D.N.M. Oct. 25, 2024); *Am. Wild Horse Campaign*, 2024 WL 3872558, at *5; Newbury v. U.S. Hous. & Urb. Dev., 2024 WL 3890779, at *8–9 (D.R.I. Aug. 20, 2024); Hicks v. Comm'r of Soc. Sec. Admin., 2024 WL 3901190, at *7–8 (E.D. Ky. Aug. 19, 2024), *appeal docketed*, No. 24-5946 (6th Cir. Oct. 17, 2024).

169. *Finneman*, 2024 WL 5158473, at *10 ("[*Loper Bright*] calls into question the applicability of the arbitrary and capricious standard to agency legal conclusions.").

170. Nat'l Ass'n for Gun Rts. v. Garland, 741 F. Supp. 3d 568, 601 n. 106 (N.D. Tex. July 23, 2024), *appeal docketed sub nom.* Nat'l Ass'n v. McHenry, No. 24-10707 (5th Cir. Aug. 6, 2024).

171. *Schaffner*, 113 F.4th at 397 n.19 ("Because the Supreme Court has since overruled *Chevron*, the reliance on *Mead* in *Hardeman II* and *Carson II* might no longer be appropriate today." (citation omitted)).

3. *Loper Bright* May Increasingly Affect the Scope of a Federal Agency's Authority for Other Functions

Federal courts are beginning to determine whether *Loper Bright* affects other federal agency functions, such as rulemaking. For example, in deciding a case that implicated the EPA's pesticide labeling authority under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), the U.S. Court of Appeals for the Third Circuit concluded that *Loper Bright* did not affect the analysis.[172] It distinguished agency interpretations subject to *Loper Bright* from the promulgation of implementing regulations:

> [W]hile *Loper Bright* requires courts, not agencies, to determine the meaning of statutory terms such as "misbranding," we do not read the decision to undermine the EPA's authority to promulgate the regulations that implement FIFRA. As the Court explained in *Loper Bright*, while courts alone must ascertain a statute's meaning, "the statute's meaning may well be that the agency is authorized to exercise a degree of discretion." And one way for statutes to express that meaning is when they "empower an agency to prescribe rules to 'fill up the details' of a statutory scheme." FIFRA is such a statute: it expressly authorizes the EPA Administrator "to prescribe regulations to carry out the provisions" of the statute. We therefore conclude that *Loper Bright* does not undermine the validity of the EPA regulations that govern pesticide labeling and that we consider in analyzing preemption under FIFRA in this opinion.[173]

Similarly, the U.S. Court of Appeals for the Seventh Circuit deemed *Loper Bright* to require federal courts to uphold agency regulations when Congress expressly delegated rulemaking authority to the agency.[174] Nevertheless, as this and other examples discussed below acknowledge, courts increasingly apply *Loper Bright* to independently assess the scope of the agency's authority—especially in rulemaking.[175]

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172. *Id.* at 381 n.9.

173. *Id.* (citations omitted).

174. Midthun-Hensen v. Grp. Health Coop. of S. Cent. Wis., 110 F.4th 984, 988 (7th Cir. Aug. 5, 2024); *see also* Tex. Med. Ass'n v. U.S. Dep't of Health & Hum. Servs., 120 F.4th 494, 504 (5th Cir. Oct. 30, 2024) (noting broad statutory delegation to HHS); Hudson Inst. of Process Rsch. v. NLRB, 117 F.4th 692, 700 (5th Cir. Sept. 18, 2024) (noting that when Congress delegates authority to an agency, the court must "effectuate the will of Congress").

175. *See infra* Part IV (describing three case studies of lower court treatment of agency interpretations after *Loper Bright*).

C. ADHERENCE TO *CHEVRON*-BASED PRECEDENT IN THE WAKE OF *LOPER BRIGHT*

As noted, before late June 2024, federal courts decided thousands of cases by applying *Chevron* deference.[176] One immediate concern in the wake of *Loper Bright* was whether these decisions remain good law. As discussed in Part I, the *Loper Bright* majority went out of its way—somewhat ironically, given its own treatment of *Chevron*—to ensure that precedent remains precedent.[177] It emphasized that prior court decisions upholding agency interpretations based on *Chevron* deference cannot be challenged solely because of that fact and emphasized that these decisions "are still subject to statutory *stare decisis*."[178] In other words, no challenger can go back to a court that relied on *Chevron* deference and ask the court to change its original decision to uphold the agency's interpretation.

Nevertheless, as Table 4 shows, while some of the lower courts have applied this part of the *Loper Bright* decision as the Supreme Court announced it, others regard prior decisions that rested on *Chevron* deference with suspicion. Notably, the federal courts of appeals are only slightly more likely to discard *Chevron*-based precedent than the district courts, although one might have assumed that the latter would be more inclined to follow both binding precedent and nonbinding decisions from higher-ranked courts. These decisions thus suggest that lower federal courts will continue to wrestle with one of *Loper Bright*'s core tensions: Why should courts continue to follow prior decisions that deferred to a federal agency regarding an interpretation that the court itself thinks is wrong—or, at least, not the best reading of the statute?

176. *See supra* note 12 and accompanying text (noting over 18,800 cases cite *Chevron*).

177. *See supra* notes 54–55 and accompanying text.

178. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

Table 4: Lower Courts' Treatment of *Chevron*-Based Precedent, June 28–December 27, 2024

Court's Approach	Courts of Appeals	District Courts
Court applied *Chevron*-based precedent as decided[179]	2	11

179. Siqueira v. U.S. Att'y Gen., 2024 WL 4590031, at *2 (11th Cir. Oct. 28, 2024) (declining to "disturb prior" interpretations that relied on *Chevron* because the parties did not challenge such interpretations); Tennessee v. Becerra, 117 F.4th 348, 363–64 (6th Cir. Aug. 26, 2024) ("In short, abandoning *Rust* and *Ohio* based on their reliance on *Chevron*, is unwarranted."); Lowmaster v. Dir., Bureau of Prisons, 2024 WL 5135970, at *3 (D. Kan. Dec. 17, 2024) ("*Lopez* and the Tenth Circuit opinions applying that case to felon-in-possession offenders remain good law and must be followed by this Court."); Rappaport v. Guardian Life Ins. Co. of Am., 2024 WL 4872736, at *12 (S.D.N.Y. Nov. 22, 2024) ("The Court therefore declines to depart from settled Circuit precedent . . . ."); United States v. Glover, 2024 WL 4753811, at *3 (N.D. Ill. Nov. 12, 2024) (following precedent that found Sentencing Commission guidance unreasonable under *Chevron* and reluctantly denying compassionate release); Niblock v. Univ. of Ky., 2024 WL 4891025, at *4 (E.D. Ky. Oct. 28, 2024) (noting that Sixth Circuit precedent "remains good law" after *Loper Bright*), *appeal docketed*, No. 24-6060 (6th Cir. Nov. 26, 2024); Hansen v. Lab'y Corp. of Am., 2024 WL 4564357, at *6 (E.D. Wis. Oct. 24, 2024) ("Although *Morash* predates *Loper*, the *Loper* Court was clear that its decision does 'not call into question prior cases that relied on the *Chevron* framework.'" (quoting *Loper Bright*, 144 S. Ct. at 2273)); Horizon Tower Ltd. v. Park Cnty., 2024 WL 4525229, at *8 (D. Wyo. Oct. 4, 2024) ("*City of Portland* remains good law despite the Ninth Circuit's deferral to the FCC's interpretation of the definition of an 'effective prohibition' under *Chevron* in that case."); Clinkenbeard v. King, 2024 WL 4355063, at *5 (D. Minn. Sept. 30, 2024) (looking to a *Chevron*-based precedent as persuasive and noting that no other district courts had deviated from the precedent yet after *Loper Bright*), *aff'd*, No. 24-3127 (8th Cir. Mar. 27, 2025); United States v. Uriarte, 2024 WL 4111867, at *5 (N.D. Ill. Sept. 6, 2024) (noting the court would uphold Sentencing Commission guidance if "writing on a clean slate" after *Loper Bright*, but it must instead follow precedent), *appeal docketed*, No. 24-2627 (7th Cir. Sept. 18, 2024); Am. Wild Horse Campaign v. Stone-Manning, 2024 WL 3872558, at *5 n.3 (D. Wyo. Aug. 14, 2024) ("[I]nsofar as the cases cited throughout this ruling themselves rely upon the old framework overturned by *Loper Bright*, the Supreme Court made clear that it did not find justification to overrule those cases as well."), *appeal docketed sub nom*. Friends of Animals v. Bureau of Land Mgmt., No. 24-8057 (10th Cir. Aug. 20, 2024); Fed'n of Ams. for Consumer Choice v. U.S. Dep't of Lab., 2024 WL 3554879, at *6, *13–15 (E.D. Tex. July 25, 2024) (relying on precedent that concluded that the Department of Labor's regulation *failed Chevron* deference at Step 2); Lyman v. Quinstreet, Inc., 2024 WL 3406992, at *4 (N.D. Cal. July 12, 2024) (applying a Ninth Circuit decision

Court noted *Loper Bright* rule regarding *Chevron*-based precedent but did not need to apply it.[180]	5	9
Court used *Loper Bright* to call *Chevron*-based precedent into question[181]	4	3

upholding an FCC interpretation and admitting the interpretation would also stand "under pre-*Chevron* principles").

180. Moctezuma-Reyes v. Garland, 124 F.4th 416, 422 (6th Cir. Dec. 23, 2024); Hudson Inst. of Process Rsch., Inc. v. NLRB, 117 F.4th 692, 700 (5th Cir. Sept. 18, 2024); Lopez v. Garland, 116 F.4th 1032, 1045 (9th Cir. Sept. 11, 2024); Rorie v. McDonough, 37 Vet. App. 430, 434 (Aug. 16, 2024), *appeal docketed*, No. 25-1194 (Fed. Cir. Nov. 19, 2024); Oklahoma v. U.S. Dep't of Health & Hum. Servs., 107 F.4th 1209, 1225 n.16 (10th Cir. July 15, 2024); Strebel v. Scoular, 2024 WL 4903907, at *4 (N.D. Ill. Nov. 27, 2024) (ducking an argument between plaintiff and defendant over whether *Chevron*-based precedent should be deemed overruled after *Loper Bright*); Barton v. U.S. Dep't of Lab., 2024 WL 4886048, at *7 (E.D. Ky. Nov. 25, 2024) ("[E]ven if [precedential cases at issue] had relied on *Chevron*, '[t]he holdings of those cases that specific agency actions are lawful . . . are still subject to statutory *stare decisis* despite our change in interpretive methodology.'" (quoting *Loper Bright*, 144 S. Ct. at 2273)); Doe v. U.S. Dep't of Health & Hum. Servs., 2024 WL 4719612, at *5 n.3 (E.D. Tex. Nov. 8, 2024); Black Farmers & Agriculturists Ass'n v. Vilsack, 2024 WL 4571446, at *1 n.2 (W.D. Tenn. Oct. 24, 2024); Adams v. All Coast, LLC, 2024 WL 4291520, at *3 (W.D. La. Sept. 25, 2024) (noting *Chevron*-based precedent is not overruled but ultimately "the Fifth Circuit did not apply *Chevron* deference" in its decision remanding the case); Andrews v. 1788 Chicken, LLC, 2024 WL 4291521, at *7 n.11 (S.D. Miss. Sept. 25, 2024); O'Brien v. Lowell Gen. Hosp., 2024 WL 4123514, at *4–5 (D. Mass. Sept. 6, 2024), *appeal docketed*, No. 24-1844 (1st Cir. Sept. 23, 2024); Dupree Farms, LLC v. Producers Agric. Ins. (*In re* Dupree Farms, Inc.), 2024 WL 3633272, at *9 n.10 (Bankr. E.D.N.C. Aug. 1, 2024); United States v. Carroll, 2024 WL 3566635, at *2 n.1 (E.D. Mo. July 29, 2024).

181. Diaz-Arellano v. U.S. Att'y Gen., 120 F.4th 722, 726 n.5 (11th Cir. Oct. 29, 2024) (questioning whether it should rely on *Chevron*-based immigration decisions from another circuit); Coleman v. Child.'s Hosp. of Phila., 2024 WL 4490602, at *3 n.4 (3d Cir. Oct. 15, 2024) (noting that whether relevant precedent remained good law was an open question, but one that did not need to be addressed in the case at hand); Rangel-Fuentes v. Garland, 2024 WL 3405079 (10th Cir. July 10, 2024) (reconsidering an immigration decision based on *Chevron* in light of *Loper Bright*), *vacating and granting panel rehearing*, 99 F.4th 1191, 1194–97 (10th Cir. Apr. 23, 2024); Williams v. O'Malley, 2024 WL 3519774, at *1 n.1 (9th Cir. July 24, 2024) (following precedent only because the court did not defer to the agency in the precedential case); Gonzalez v. Garrett, 2024 WL 5096474, at *2 & n.3 (E.D. Ark. Dec. 12, 2024) (relying on precedent but only because the agency's interpretation was unnecessary to the result); Sharma v. Peters, 2024 WL 4668135, at *7 (M.D. Ala. Nov. 4, 2024) (concluding that pre–*Loper Bright* precedent remained authoritative because it found the

Court used *Loper Bright* to change *Chevron*-based precedent[182]	1	1
Extended *Loper Bright* precedent principle to prior decisions based on *Auer* deference[183]	1	0

IV. ILLUSTRATING DIVERGING APPROACHES IN THE LOWER COURTS: THREE CASE STUDIES

A. U.S. DEPARTMENT OF EDUCATION: TITLE IX SEX DISCRIMINATION INCLUDES GENDER IDENTITY

On April 29, 2024, the U.S. Department of Education redefined "sex discrimination" for purposes of Title IX's sexual harassment regulations to "[c]larify that sex discrimination includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity,"[184] to become effective August 1, 2024 ("Title IX Gender Rule").[185] Title IX came into being through the Education Amendments of 1972,[186] and "[t]he Department's predecessor, the Department of Health, Education, and Welfare (HEW), first promulgated regulations under Title IX, effective in 1975."[187]

statute unambiguous); Teche Vermilion Sugar Cane Growers Ass'n v. Su, 2024 WL 4246272, at *21 (W.D. La. Sept. 18, 2024) (refusing to follow nonbinding decisions from other courts that relied on *Chevron* deference).

182. Quito-Guachichulca v. Garland, 122 F.4th 732, 735–37 (8th Cir. Dec. 9, 2024) (using *Loper Bright* to depart from Eighth Circuit precedent regarding the deference owed to the Board of Immigration Appeals); Mazariegos-Rodas v. Garland, 122 F.4th 655, 672 (6th Cir. Dec. 5, 2024) (holding that the Board of Immigration Appeals could no longer use a rule relying on *Chevron* to change Sixth Circuit precedent); Mazariegos-Rodas v. Garland, 117 F.4th 860, 877 (6th Cir. July 23, 2024) (same), *amended and superseded on other grounds*, 122 F.4th 655 (6th Cir. Dec. 5, 2024); Harding v. Steak N Shake, Inc., 2024 WL 3833341, at *7 n.5 (N.D. Ohio Aug. 15, 2024) (concluding that all cases upholding the 1967 regulation at issue on the basis of *Chevron* deference "are no longer good law, nor are they binding").

183. *Rorie*, 37 Vet. App. at 434.

184. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474, 33,476 (Apr. 29, 2024).

185. *Id*. at 33,474.

186. *Id*.

187. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,028 (May 19, 2020).

However, the Title IX regulations have never defined "sex," and the 2024 rule provided the first regulatory definition of "sex discrimination."[188]

Over half the states challenged the new regulations in ten lawsuits—Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming—while an additional fifteen states supported the Department of Education as amici.[189] Although states challenged the regulation before the Supreme Court decided *Loper Bright*, their lawsuits were nevertheless well timed to allow courts to deploy *Loper Bright*, and the lower courts hearing these challenges issued all but two of their decisions after the *Loper Bright* decision.

Alone among the ten federal courts that had already considered the rule,[190] the U.S. District Court for the Northern District of Alabama refused to preliminarily enjoin the rule's

188. Alabama v. Cardona, 2024 WL 3607492, at *6 (N.D. Ala. July 30, 2024), *rev'd sub nom.* Alabama v. U.S. Sec'y of Educ., 2024 WL 3981994 (11th Cir. Aug. 22, 2024).

189. Alabama v. Cardona, 2024 WL 3607492, at *2.

190. Tennessee v. Cardona, 2024 WL 3453880, at *5 (6th Cir. July 17, 2024) (denying the Department of Education's motion for a partial stay of the district court's preliminary injunction that enjoined enforcement of the rule in Tennessee, Kentucky, Ohio, Indiana, Virginia, and West Virginia); Louisiana v. U.S. Dep't of Educ., 2024 WL 3452887, at *3 (5th Cir. July 17, 2024) (per curiam) (denying the Department's motion for a partial stay of the district court's preliminary injunction that enjoined enforcement of the rule in Louisiana, Mississippi, Montana, and Idaho); Oklahoma v. Cardona, 743 F. Supp. 3d 1314, 1333–34 (W.D. Okla. July 31, 2024) (enjoining enforcement in Oklahoma); Arkansas v. U.S. Dep't of Educ., 742 F. Supp. 3d 919 (E.D. Mo. July 24, 2024) (enjoining enforcement of the rule in Arkansas, Missouri, Iowa, Nebraska, North Dakota, and South Dakota); Carroll Indep. Sch. Dist. v. U.S. Dep't of Educ., 741 F. Supp. 3d 515 (N.D. Tex. July 11, 2024) (partially enjoining enforcement of the rule in a specific school district); Texas v. United States, 2024 WL 3405342 (N.D. Tex. July 11, 2024) (enjoining enforcement of the rule against individual plaintiffs and the State of Texas); Kansas v. U.S. Dep't of Educ., 739 F. Supp. 3d 902 (D. Kan. July 2, 2024) (enjoining enforcement of the rule in Kansas, Alaska, Utah, Wyoming, and in specific schools), *appeal docketed*, No. 24-3097 (10th Cir. July 11, 2024); Tennessee v. Cardona, 737 F. Supp. 3d 510 (E.D. Ky. June 17, 2024) (enjoining enforcement of the rule in Tennessee, Kentucky, Ohio, Indiana, Virginia, and West Virginia), *appeal docketed*, No. 24-5588 (6th Cir. June 26, 2024); Louisiana v. Dep't of Educ., 737 F. Supp. 3d 377 (W.D. La. June 13, 2024) (enjoining enforcement of the rule in Louisiana, Mississippi, Montana, and Idaho).

enforcement, on grounds that challengers Alabama, Florida, Georgia, and South Carolina had failed to establish a substantial likelihood of success on the merits.[191] However, the U.S. Court of Appeals for the Eleventh Circuit reversed, adhering—like all the other courts have done—to a historical definition of "sex."[192] The Eleventh Circuit's historical orientation was evident from the beginning of the case:

> On April 29, 2024, the U.S. Department of Education promulgated a new administrative rule "interpreting" Title IX to break new ground in the 52-year history of that landmark statute. The rule represents a sea change to the regulations administering Title IX by, among other things, expanding the definition of discrimination on the "basis of sex" to include discrimination based on gender identity—as well as materially altering and expanding the scope of Title IX's sexual-harassment-related regulations.[193]

It also cited *Loper Bright* twice for the proposition "that statutes 'have a single, best meaning.'"[194] Finally, the Eleventh Circuit had already decided in 2022 that "sex" in Title IX unambiguously refers to biological sex, making it easy for the court to preliminarily enjoin the 2024 Title IX Gender Rule.[195]

Of course, the Eleventh Circuit's 2022 decision and the two challenges to the 2024 rule resolved before the Supreme Court decided *Loper Bright* clearly demonstrate that courts could invalidate new interpretations of old statutes without *Loper Bright*'s help. The U.S. District Court for the Western District of Louisiana invoked the major questions doctrine to enjoin the 2024 Title IX Gender Rule, concluding that:

> Because the Final Rule is a matter of both vast economic and political significance, the Court finds the enactment of this rule involves a major question pursuant to the major questions doctrine. Therefore, Congress must have given "clear statutory authorization" to the applicable

191. Alabama v. Cardona, 2024 WL 3607492, at *1; *see also id.* at *3 ("The court therefore must ultimately conclude that Plaintiffs have failed to 'clearly' establish that they are entitled to the 'extraordinary and drastic remedy' that is a preliminary injunction." (quoting Suntrust Bank v. Houghton Mifflin Co., 252 F.3d 1165, 1166 (11th Cir. 2001))).

192. Alabama v. U.S. Sec'y of Educ., 2024 WL 3981994, at *2, *4–5 (11th Cir. Aug. 22, 2024).

193. *Id.* at *1 (citation omitted).

194. *Id.* at *4–5 (quoting Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266 (2024)).

195. *Id.* at *4–5 (citing Adams *ex rel.* Kasper v. Sch. Bd., 57 F.4th 791, 811–17 (11th Cir. 2022)).

> agency. The Court finds that Congress did not give clear statutory authorization to this agency.[196]

It also found the rule arbitrary and capricious but gave short shrift to *Chevron* deference.[197] In contrast, the U.S. District Court for the Eastern District of Kentucky briefly considered the major questions doctrine,[198] but it more prominently followed the *Chevron* deference analysis, concluding through its own statutory interpretation analysis at Step 1 that Congress had spoken directly to the issue of whether "sex" could include gender identity.[199]

As these two cases demonstrate, administrative law before *Loper Bright* gave courts multiple analytical pathways to invalidate a rule but no agreed-upon methodology for doing so. *Loper Bright* simplified the methodology by validating the approach to statutory interpretation that seeks a single, best interpretation of statutory words based on Congress's language use, judged at the moment it enacted the statute. Courts addressing the 2024 Title IX Gender Rule after *Loper Bright* readily embraced this historically minded methodology. Thus, in the first of the post–*Loper Bright* decisions to address this rule, the U.S. District Court for the District of Kansas apparently had been prepared to rest on the major questions doctrine.[200] Instead, its final decision rests on *Loper Bright*'s ruling that it need not defer to the Department of Education, concluding that, "[a]fter review, the court finds that the unambiguous plain language of the statutory provisions and the legislative history make clear that the term 'sex' means the traditional concept of biological sex in which there are only two sexes, male and female."[201] Similarly, in a related challenge to the parallel Affordable Care Act Gender Rule, the U.S. District Court for the Middle District of Florida noted

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196. Louisiana v. U.S. Dep't of Educ., 737 F. Supp. 3d 377, 402 (W.D. La. June 13, 2024) (footnote omitted).

197. *Id.* at 405–06.

198. Tennessee v. Cardona, 737 F. Supp. 3d 510, 536–37 (E.D. Ky. June 17, 2024), *appeal docketed*, No. 24-5588 (6th Cir. June 26, 2024).

199. *Id.* at 529–36.

200. Kansas v. U.S. Dep't of Educ., 739 F. Supp. 3d 902, 924–25 (D. Kan. July 2, 2024) (finding that "the Final Rule involves issues of both vast economic and political significance and therefore involves a major question," and that Congress did not give a clear statutory authorization to the Department of Education to "expand the meaning of 'sex discrimination' to include gender identity"), *appeal docketed*, No. 24-3097 (10th Cir. July 11, 2024).

201. *Id.* at 919.

that "Title IX, decades old, did not change meaning in 2024. HHS's attempt to alter prospectively the meaning of Title IX shows the wisdom of *Loper*'s statement that 'agencies have no special competence in resolving statutory ambiguities. Courts do.'"[202] The U.S. District Court for the Eastern District of Texas developed this historical perspective on statutes even further, emphasizing that:

> [T]he Court interprets Title IX's phrase "on basis of sex" as it was reasonably understood at the time the statute was enacted. "The upshot [of this principle] is that new rights cannot be suddenly 'discovered' years later in a document, unless everyone affected by the document had somehow overlooked an applicable provision that was there all along." And here, there is no question that at the time Congress enacted Title IX, everyone understood the statute to prohibit treating members of one sex (women) worse than the other (men).[203]

As Part V will discuss in more detail, lower federal courts reviewing challenges to new federal rules in the wake of *Loper Bright* have been particularly willing to overturn those rules. The cases reviewing the Title IX Gender Rule reveal one reason why: *Loper Bright* gives courts ample ammunition to prevent federal agencies from attempting to evolve their long-lived statutory regimes to match evolving social norms and preferences. *Loper Bright* thus created powerful precedent for plaintiffs seeking to challenge agency attempts to update long-lived statutes. Indeed, *Loper Bright* goes beyond overturning *Chevron* deference by allowing federal courts to also eliminate ambiguity, discretion, and the ability of statutory regimes to evolve independently of congressional intervention and amendment.

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202. Florida v. Dep't of Health & Hum. Servs., 739 F. Supp. 3d 1091, 1105 (M.D. Fla. July 3, 2024) (quoting Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266 (2024)). By law, sex discrimination under the Affordable Care Act must track sex discrimination under Title IX. *Id.* at 1097; Patient Protection and Affordable Care Act (ACA) § 1557, 42 U.S.C. § 1816.

203. Texas v. Becerra, 739 F. Supp. 3d 522 (E.D. Tex. July 3, 2024) (alteration in original) (internal citation omitted) (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 78–92, 81 (2012)).

B. FEDERAL COMMUNICATION COMMISSION: CELL PHONE USERS ARE RESIDENTIAL TELEPHONE SUBSCRIBERS

Thousands, perhaps millions, of Americans seek freedom from telemarketers by signing up for the National Do Not Call Registry, a product of the Telephone Consumer Protection Act of 1991 (TCPA) and the Federal Communications Commission's (FCC's) regulations implementing it.[204] The TCPA makes it illegal "to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party . . . ."[205] In 1992, the FCC adopted rules to implement the TCPA, including requiring entities that make telephone solicitations to maintain do-not-call lists.[206] Then, in 2003, the FCC responded to the expansion of telemarketing activities with the National Do Not Call Registry, making it illegal for any "person or entity . . . [to] initiate any telephone solicitation . . . to . . . [a] residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the federal government."[207]

At the time Congress enacted the TCPA in 1991, most residential telephones were still landlines that did not leave the home. When the FCC established the National Do Not Call registry over a decade later, the FCC acknowledged that consumers were increasingly abandoning landlines in an order providing

204. *The Do Not Call Registry*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/topics/do-not-call-registry [https://perma.cc/KAZ2-9AX2] ("The Registry now has more than 221 million telephone numbers on it . . ."); *see also* Telephone Consumer Protection Act of 1991 § 3, 47 U.S.C. § 227.

205. 47 U.S.C. § 227(b)(1)(B). The U.S. Supreme Court held the debt collection exemption from this prohibition unconstitutional in 2020, but the Court severed that provision from the rest of the statute. Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2346–47, 2356 (2020).

206. Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 18 FCC Rcd. 14014, 14020 (2003). Throughout the 1990s and early 2000s, various states created centralized do-not-call lists. *Id.* at 14024–25; *see also* Marguerite M. Sweeney & Justin Shumacher, *Do Not Call: The History of Do Not Call and How Telemarketing Has Evolved*, NAT'L ASS'N OF ATT'YS GEN. (May 3, 2017), https://www.naag.org/attorney-general-journal/do-not-call-the-history-of-do-not-call-and-how-telemarketing-has-evolved [https://perma.cc/39NF-ZAKL] (providing examples of state efforts to establish do not call lists).

207. 47 C.F.R. § 64.1200(c)(2) (2003); *see also* Sweeney & Shumacher, *supra* note 206 (highlighting the FCC's rulemaking process to establish the National Do Not Call Registry).

that "wireless subscribers may participate in the national do-not-call list" and that the Commission "presume[s] wireless subscribers who ask to be put on the national do-not-call list to be 'residential subscribers.'"[208] Thus, the FCC extended to National Registry protections to cell phones, and, given the order's date of 2003, one would think the issue was settled.

However, *Loper Bright* has given telemarketers and others new license to challenge the FCC's interpretation in private lawsuits initiated by cell phone users accusing them of violating the TCPA. For example, in *Cacho v. McCarthy & Kelly LLP*, a consumer sued over violations of the TCPA, and the defendants argued that although the TCPA provision on solicitation mentioned cellular service, the provision instructing the FCC to promulgate its rules did not, indicating that cell phone users could not be "residential telephone subscribers" deserving protection.[209] Although the U.S. District Court for the Southern District of New York cited *Loper Bright* to acknowledge that it now had an independent duty to interpret the TCPA, it instead first emphasized that both consumers and businesses had settled expectations based on the FCC order:

> For more than two decades, cellphone users have been permitted by the FCC to register for the National Do Not Call Registry as "residential subscribers." Countless cellphone users have relied upon that protection to ensure their privacy. They have purchased cellphones on the assumption that their devices would be protected against unwanted telemarketing. Telemarketing firms have developed policies and practices to comply with their Do Not Call obligations for cellphone users. The FCC, Federal Trade Commission, and state agencies alike have enforced the rights of cellphone users on the Registry. As Americans increasingly "no longer maintain wireline phone service, and rely only on their wireless telephone service," Defendant's interpretation of the TCPA would effect a sea change in the telemarketing industry and leave many consumers without protections that they have long enjoyed. There is little doubt that if the Court were to apply the deference owed to the FCC's interpretation of the TCPA at the time Congress enacted the statute, the Court would uphold the FCC's interpretation as reasonable.[210]

Following *Loper Bright*, and applying its own interpretation of the statute, "the Court concludes that users of cellphones are not

208. Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 18 FCC Rcd. 14014, 14039 & n.139 (2003).

209. 739 F. Supp. 3d 195, 202–03 (S.D.N.Y. July 3, 2024).

210. *Id*. at 203–04 (citations and footnotes omitted) (quoting 18 FCC Rcd. At 14039).

categorically excluded from the definition of 'residential subscriber' under the TCPA."[211] According to the court, "Defendant's *expressio unius* argument . . . amounts to a category mistake: Cellular telephones—like telephone lines, paging services, radio common carrier services, and telephone facsimile machines—are a kind of telephonic communications technology."[212] More importantly, "[a] 'residential subscriber' . . . does not refer to the specific phone technology, but to the type or identity of the subscriber to the technology. Thus, a 'residential subscriber' and a cellular telephone are not members of the same genus."[213] In other words, what matters is who subscribed and for what purpose, not the kind of technology deployed.

In contrast, facing the identical issue, the U.S. District Court for the Central District of California turned instead to *Loper Bright*'s acknowledgement that sometimes, the best interpretation of a statute is that Congress has delegated authority and discretion to the agency.[214] After a bit of its own interpretation of the statute and a discussion of Congress's intent to protect residential phone users, as *Loper Bright* requires, it noted:

> Congress has expressly conferred discretionary authority on the agency to flesh out the TCPA. Using its discretion within the boundaries of its delegation, the agency has created a presumption that a cell phone registered on the Do Not Call Registry is a residential phone, a presumption that has lasted for more than two decades. The FCC's interpretation "rests on factual premises within the agency's expertise," thus giving its interpretation "particular power to persuade, if lacking power to control." In this context, it is "especially informative" and particularly persuasive. In any event, however, the Court would reach the same conclusion in the absence of any FCC interpretation of the TCPA's statutory text.[215]

As in the Southern District of New York, therefore, the FCC order's longevity was important—but this time because the consistency supported *Skidmore* deference and respect for the agency's interpretation.

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211. *Id*. at 204.

212. *Id*.

213. *Id*. at 205.

214. Lyman v. QuinStreet, Inc., 2024 WL 3406992, at *4 (C.D. Cal. July 12, 2024).

215. *Id*. (internal citations omitted) (quoting Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2267 (2024)).

Similarly, the U.S. District Court for the Northern District of Ohio opted to find the FCC's interpretation "persuasive."[216] While "consideration of the 2003 Order is . . . appropriate under *Loper*,"

> Congress expressly conferred discretionary authority on the FCC to flesh out the TCPA. "Using its discretion within the boundaries of its delegation," the FCC has created a presumption that a cellular telephone registered on the DNC is a residential phone. "The FCC's interpretation 'rests on factual premises within the agency's expertise,' thus giving its interpretation 'particular power to persuade, if lacking power to control.'" The Court finds the FCC's interpretation of "residential subscriber" persuasive.[217]

As Part V will discuss, these decisions are typical of how lower federal courts treat both agency orders and issues of agency interpretation in private lawsuits under *Loper Bright*; in both situations, the agency is more likely to be upheld than in a challenge to a new rule. At the same time, however, one must wonder whether federal courts would have so readily embraced the FCC's interpretation as a valid exercise of delegated discretion if the FCC had issued it in a 2024 rulemaking instead of a 2003 order.

C. FEDERAL BUREAU OF PRISONS: IMPLEMENTING THE FIRST STEP ACT

Table 5 makes clear that the lower federal courts have been wrestling with the impacts of *Loper Bright* in more than just civil cases; instead, *Loper Bright* has implications for criminal law and habeas petitions, as well.[218] Among the most frequent of these discussions are habeas petitions challenging the U.S. Attorney General's and Bureau of Prisons' implementation of the First Step Act.[219]

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216. Lirones v. Leaf Home Water Sols., LLC, 2024 WL 4198134, at *7 (N.D. Ohio Sept. 16, 2024).

217. *Id*. (quoting *Lyman*, 2024 WL 3406992, at *4 (quoting *Loper Bright*, 144 S. Ct. at 2267)).

218. *See infra* Table 5 (categorizing lower court decisions by the type of decision the court was reviewing and the treatment of the federal agency's decision).

219. Pub. L. No. 115-391, 132 Stat. 5194 (2018) (codified as amended in scattered sections of 18, 21, 34, and 42 U.S.C.).

Congress enacted the First Step Act in 2018 to reduce recidivism.[220] The Attorney General developed a web-based risk and needs assessment to, among other things, "determine the recidivism risk of each prisoner as part of the intake process, and classify each prisoner as having minimum, low, medium, or high risk for recidivism" and "determine the type and amount of evidence-based recidivism reduction programming that is appropriate for each prisoner and assign each prisoner to such programming accordingly, and based on the prisoner's specific criminogenic needs."[221] Prisoners who successfully participate in the program become entitled to a variety of incentives that the Director of the Bureau of Prisons develops,[222] including, most relevantly for the habeas petitions, time credits toward early release from prison.[223]

Prisoners in the anti-recidivism program thus have every incentive to ensure that the assessment tool is applied, and the time credits are calculated correctly. Several of them seized on *Loper Bright* as a means of securing de novo review of how the Attorney General and Bureau of Prisons were applying that program to them. As is the case with many habeas petitions, many of these are filed pro se and with dubious legal reasoning despite *Loper Bright*, and the federal courts dispatch them quickly.[224]

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220. *See* 132 Stat. at 5195–216 (setting out provisions for "recidivism reduction").

221. 18 U.S.C. § 3632(a)(1), (3).

222. *Id*. § 3632(d).

223. *Id*. § 3632(d)(4).

224. *E.g.*, Gonzalez v. Garrett, 2024 WL 5096474, at *2 (E.D. Ark. Dec. 12, 2024) (rejecting Gonzalez' argument because *Loper Bright* does not change the fact that a prisoner can only earn time credits beginning December 21, 2018, the act's effective date); Deptula v. Greene, 2024 WL 4729879, at *3 n.1 (M.D. Pa. Nov. 8, 2024) (calling Deptula's argument "meritless" because *Loper Bright* does not allow a court to review statutes); Purdy v. Carter, 2024 WL 4651275, at *5 (D. Md. Nov. 1, 2024) (holding that a prisoner with a "high" risk of recidivism cannot have time credits applied toward release when "[t]he statute in question here unambiguously mandates that only inmates with low and minimum recidivism scores are eligible to have earned time credits under the FSA applied toward pre-release custody or supervised release."); Sichting v. Rardin, 2024 WL 4973202, at *2 (D. Minn. Sept. 12, 2024) (finding *Loper Bright* does not change the rule that "conditions-of-confinement claims cannot be raised in a habeas petition" because that rule "does not derive from the BOP's interpretation of the FSA or another federal law; instead, the rule derives from prior judicial interpretation of the scope of the federal habeas statute."), *modified*, 2024 WL 4785007 (D. Minn. Nov. 14, 2024); Collingwood v. Neely, 2024 WL

On occasion, however, *Loper Bright* has caused courts to review the implementation of the First Step Act more deeply. For example, the First Step Act does not define when a prisoner "successfully completes" programming to earn time credits; instead, those details are provided in a January 2022 Bureau of Prisons rule.[225] Under *Loper Bright*, the U.S. District Court for the Middle District of Florida found this rule to be facially valid because it furthered the First Step Act's goal by incentivizing successful participation in programming.[226] At the same time, however, the court concluded that the Bureau of Prisons had improperly applied the rule in the case at hand by disqualifying credits for programming that the prisoner had completed elsewhere than at his designed facility, because the First Step Act itself "does not lay this limit on a prisoner's eligibility to earn time credits or constrain BOP's ability to review a prisoner's programing across separate BOP facilities."[227] Similarly, the U.S. District Court for the District of New Jersey concluded pursuant to *Loper Bright* that prisoners' eligibility for time credits commences when they are taken into federal custody, not—as the Bureau of Prison's regulation dictated—when they finally reach their designated prison.[228]

Similarly, the First Step Act was not clear about what to do with prisoners who are serving multiple sentences for multiple crimes, some of which are eligible for time credit and some of which are not. The United States and the Bureau of Prisons concluded "that when a person is convicted of multiple crimes—some independently eligible for time credits and some not—the phrase 'serving a sentence for a conviction' of an ineligible crime renders the prisoner ineligible for time credits for the full length of the sentence."[229] Applying both *Loper Bright* and *Skidmore* deference, the U.S. District Court for the District of Minnesota

3656752, at *1 (N.D. Ala. Aug. 2, 2024) (noting that nothing in *Loper Bright* allows review of federal statutes, and the Bureau of Prison's program statement adheres to the statutory language).

225. 28 C.F.R. §§ 523.40–.44 (2023).

226. Pelullo v. FCC Coleman—Low, 2024 WL 3771691, at *4 (M.D. Fla. Aug. 13, 2024).

227. *Id*. at *4–5; *see also* Jackson v. Doerer, 2024 WL 4719489, at *5 (C.D. Cal. Nov. 7, 2024) (reaching the same conclusion); Puana v. Williams, 2024 WL 4932514, at *4 (D. Colo. Dec. 2, 2024) (reaching the same conclusion).

228. Heath v. Knight, 2024 WL 5198863, at *1, *4 (D.N.J. Dec. 23, 2024).

229. Clinkenbeard v. King, 2024 WL 4355063, at *2 (D. Minn. Sept. 30, 2024), *aff'd*, No. 24-3127 (8th Cir. Mar. 27, 2025).

agreed with the government, noting that the criminal code elsewhere treats concurrent and consecutive sentences as a single term of imprisonment,[230] but emphasizing that:

> [T]he Attorney General and the Bureau of Prisons are entrusted with sole authority to compute federal sentences. The First Step Act also expressly delegates at least some authority to the Attorney General and the Bureau of Prisons to fill up the details of the time credit system . . . .
>
> Though the Court does not rely exclusively on the BOP's interpretation of the statute to preclude prisoners like Clinkenbeard from becoming eligible for time credits, the Court nevertheless takes note of the BOP's experience with implementing the First Step Act and finds that its interpretation is a more accurate reading of Congress's intent.[231]

If the First Step Act cases add a third "flavor" to the lower courts' deployment of *Loper Bright*, it is that the Bureau of Prisons and U.S. Attorney General appear to retain the traditional respect that used to be accorded to all federal agencies acting within their areas of statutory expertise. While the result is not *Chevron* deference, the federal courts clearly (if silently) accord the Bureau of Prisons a presumption of correctness in these habeas cases, reversing the government's position only when it clearly contradicts explicit statutory language.

D. AN OBSERVATION ACROSS THE CASE STUDIES: RELIANCE INTERESTS

Taken together, these three sets of cases suggest that federal courts in a post-*Chevron* world both consciously and unconsciously take reliance interests into account when deciding what to do with an agency's interpretation of a statute. In the best reading of the Title IX Gender Rule cases, the rule was a departure from longstanding reliance on a definition of "sex" that allowed both girls and boys the safety of separate bathrooms and locker rooms in schools; the specter of a transgender girl (identified at birth as male) in the girls' rooms or competing in girls' sports haunted more than one court.[232] The cell phone cases acknowledged the pervasive and substantial reliance upon the current regulatory regime and courts' unwillingness to upset it.

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230. *Id*. at *3 (quoting 18 U.S.C. § 3584(c)).

231. *Id*. at *4.

232. The author acknowledges, nevertheless, that reliance was weakest in these cases; the Title IX Gender Rule was going down in flames in these courts regardless.

Even the few First Step Act cases that went against the government can be classified as reliance-based, because they involved prisoners who participated in anti-recidivism programming on the understanding that they could reduce their sentences, only to find out that the Bureau of Prisons did not intend to give them credit for those programs. Whether courts develop this reliance thread further, of course, remains to be seen—but it does help to explain the courts' otherwise varying approaches to applying *Loper Bright*.

V. THE OVERALL IMPACT OF *LOPER BRIGHT* IN THE LOWER FEDERAL COURTS

In a *Loper Bright* world of administrative law, especially in combination with the Major Questions Doctrine, agency rulemakings fare worse in judicial review than agency adjudications and enforcement actions. As Table 5 reveals, in the first six months after the *Loper Bright* decision, only six federal courts fully upheld a new agency rule in a direct challenge to that rule, as opposed to 31 decisions that have stayed, remanded, vacated, or preliminarily enjoined new agency rules (see Figure 1), invalidating new agency rules 83.8% of the time—although, similarly to the cell phone cases, courts have also confirmed the validity of existing rules after *Loper Bright* in other contexts (most often private lawsuits that turn on the application of federal rules, such as overtime pay disputes). In contrast, federal courts citing *Loper Bright* upheld agency orders (including enforcement actions and permits) 54 times,[233] deeming them partially or completely invalid only 22 times (see Figure 2), a success rate for federal agencies of 71%.

233. Under the federal APA, an agency "order" is "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6).

Figure 1: Disposition of New Federal Rules

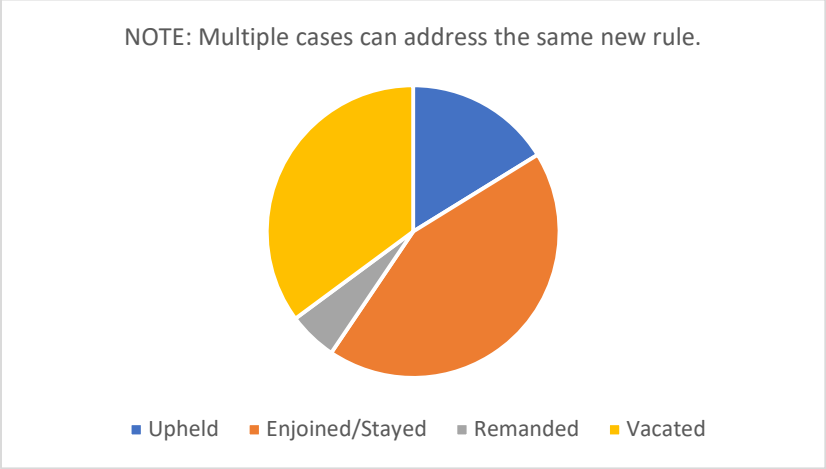
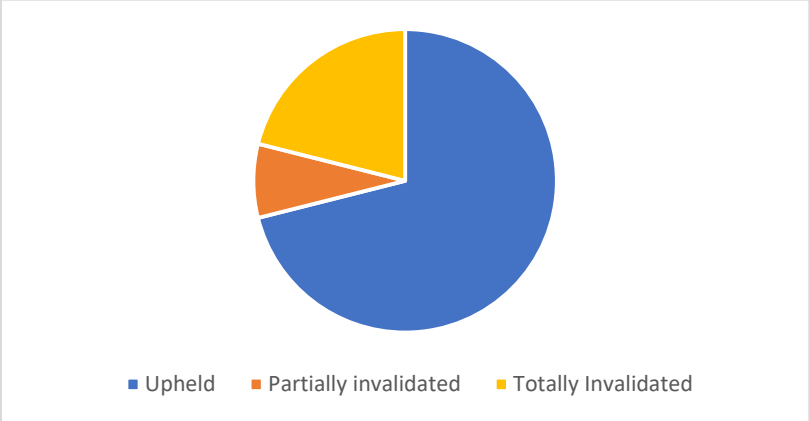


Figure 2: Disposition of Federal Orders, Including Permits and Agency Enforcement



Two further observations about new agency rules in a *Loper Bright* world are important. First, courts are more likely to characterize new rules as raising issues regarding the agency's *authority* than any other form of agency action.[234] In particular,

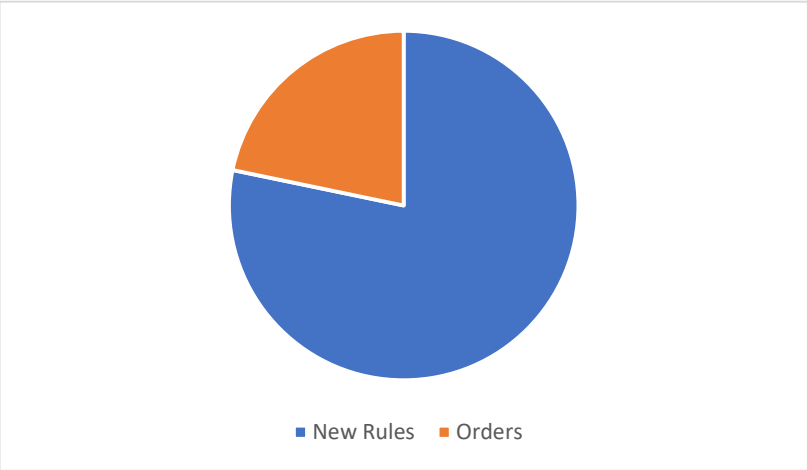
234. NOTE: In classifying these decisions, the author focused on whether the court explicitly discussed its decision in terms of the agency's statutory authority. If not, the case was classified into the category of "invalid

and *not* counting Major Questions Doctrine determinations, courts engaged in a *Loper Bright* analysis characterized the validity of new rules as turning on the agency's authority eighteen times, while agency orders were framed in terms of agency authority only five times (see Figure 3). These cases provide evidence that *Loper Bright* licenses the federal courts to thoroughly examine a federal agency's basic statutory authority, not just its statutory interpretations. As the U.S. District Court for the Eastern District of Texas summarized, "when there is an ambiguity 'about the scope of an agency's own power . . . abdication in favor of the agency is least appropriate.'"[235] Apparently, however, agency rulemaking far more often sparks concerns among the lower federal courts about keeping agencies within their delegated authority than orders do. This result makes a certain amount of sense, because orders generally reflect the day-to-day administration of a statute, while rules are more likely to take a statute in a new direction.

interpretations or applications". The distinction, however, is not always clear, especially because *Loper Bright* itself focused both on agency interpretations of statutes and on patrolling the bounds of agency authority.

235. Texas v. U.S. Dep't of Lab., 2024 WL 4806268, at *13 (E.D. Tex. Nov. 15, 2024) (citing Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2246 (2024)); *see also In re:* Dupree Farms, LLC, 2024 WL 3633272, at *9 n.10 (Bankr. E.D.N.C. Aug. 1, 2024) (noting that under *Loper Bright*, "the limits of an administrative agency's statutory authority are now a justiciable issue"); ATS Tree Servs. v. FTC, 2024 WL 3511630, at *13 n.16 (E.D. Pa. July 23, 2024) (acknowledging that, pursuant to the APA after *Loper Bright*, "courts are required to exercise their independent judgment in deciding whether an agency has acted within its statutory authority").

Figure 3: Decisions Framed in Terms of Agency Authority



Second, when federal courts invalidate agency rules, they far more often vacate, stay, or enjoin the rule than remand it to the agency to fix. *Loper Bright*'s emphasis on the APA helps to ensure this result. As the U.S. District Court for the Northern District of Texas emphasized, quoting *Loper Bright*, "The text of the APA means what it says[,]" and hence, having concluded that a rule "is arbitrary and capricious, the Court must 'hold unlawful' and 'set aside' the [rule] as required under § 706(2)."[236]

Nevertheless, despite their apparent predilection to overturn new agency rules, lower federal courts citing *Loper Bright* uphold federal agency action in general more often than they invalidate it (Figures 4 & 5). As discussed in Part IV.C, habeas and criminal law cases make up a significant percentage of the cases discussing *Loper Bright* in the first six months since the Supreme Court's decision, and, not surprisingly, courts uphold government action in those cases at a higher frequency than in civil cases. Nevertheless, even setting aside the criminal and habeas cases, lower federal courts still uphold the federal government 62.8% of the time.

236. Ryan, LLC v. FTC, 2024 WL 3879954, at *14 (N.D. Tex. Aug. 20, 2024) (quoting *Loper Bright*, 144 S. Ct. at 2262).

Figure 4: Disposition of Federal Action in Lower Federal Courts Citing *Loper Bright*—All Types of Cases

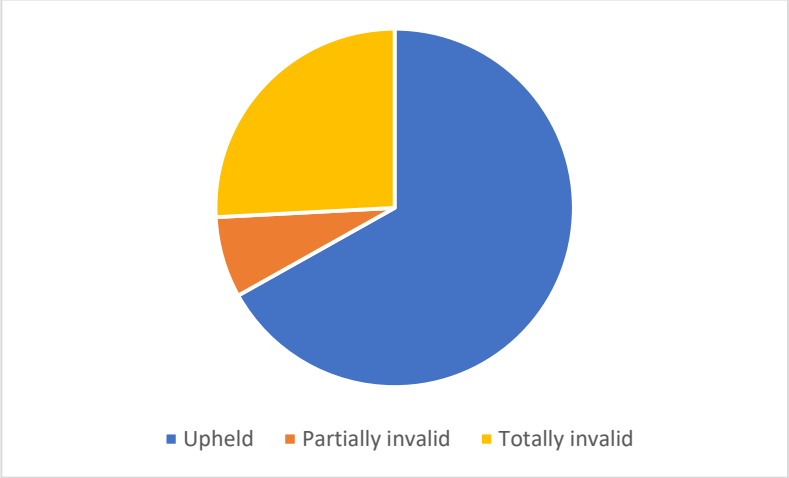


Figure 5: Disposition of Federal Action in Lower Federal Courts Citing *Loper Bright*: Civil Cases Only

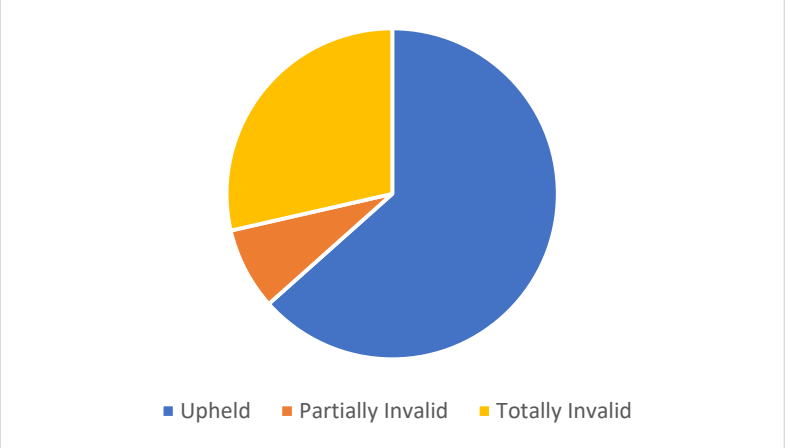


Table 5: Treatment of Federal Agencies in Lower Federal Court Cases Citing *Loper Bright*, June 28–December 27, 2024

NOTE: Numbers do not match total cases because not all cases ruled on a federal agency action and because some cases fit more than one category, especially when they involved rules deemed partially or totally invalid for multiple reasons.

Court's Decision	Courts of Appeals Decisions	District Court Decisions
The government's interpretation or application of the federal statute was valid *in toto*.		
Habeas	2	16
Criminal appeal	6	6
Appeal from agency adjudication OR agency court enforcement	31	23
Challenge to agency rulemaking	2	1
Other	2	12
TOTAL:[237]	**43**	**58**

237. For "habeas" decisions, see Johnston v. Colbert, 2024 WL 4903725, at *1 (9th Cir. Nov. 27, 2024); Giovinco v. Pullen, 118 F.4th 527, 530 (2d Cir. Oct. 8, 2024); Clary v. Salmonsen, 2024 WL 5186996, at *2 (D. Mont. Dec. 19, 2024); Mohammed v. Stover, 2024 WL 5146440, at *4–5 (D. Conn. Dec. 17, 2024); Lowmaster v. Dir., Bureau of Prisons, 2024 WL 5135970, at *3 (D. Kan. Dec. 17, 2024); Gonzalez v. Garrett, 2024 WL 5096474, at *2 (E.D. Ark. Dec. 12, 2024); Gotschall v. Salmonsen, 2024 WL 4751614, at *2 (D. Mont. Nov. 12, 2024); Deptula v. Greene, 2024 WL 4729879, at *2 (M.D. Pa. Nov. 8, 2024); Jackson v. Doerer, 2024 WL 4719489, at *5 (C.D. Cal. Nov. 7, 2024); Washington v. Marshall, 2024 WL 4668127, at *1 (M.D. Ala. Nov. 4, 2024); Hernandez v. Eischen, 2024 WL 4839827, at *2 (D. Minn. Oct. 28, 2024); Hanley v. LeJeune, 2024 WL 4589856, at *4 (D. Minn. Oct. 28, 2024); Pryor v. Salmonsen, 2024 WL 4535014, at *1–3 (D. Mont. Oct. 21, 2024); Clinkenbeard v. King, 2024 WL 4355063, at *1, *4 (D. Minn. Sept. 30, 2024), *aff'd*, No. 24-3127 (8th Cir. Mar. 27, 2025); Small v. Holzapfel, 2024 WL 4268040, at *4 (S.D.W. Va. Sept. 23, 2024); Reynolds v. Warden, FCI Beckley, 2024 WL 4202385, at *2 (S.D.W. Va. Sept. 16, 2024), *appeal docketed*, 2024 WL 4202385 (4th Cir. Oct. 03, 2024); Milless v. Salmonsen, 2024 WL 3725318, at *1 (D. Mont. Aug. 6, 2024); Collingwood v. Neely, 2024 WL 3656752, at *2 (N.D. Ala. Aug. 2, 2024).

For "criminal appeal" decisions, see United States v. Peralta, 2024 WL 4603297, at *2 & n.2 (11th Cir. Oct. 29, 2024) (according *Auer* deference to Sentencing Guidelines commentary when guideline is truly ambiguous); United States v. Charles, 2024 WL 4554806, at *14 (6th Cir. Oct. 23, 2024) (ruling that Sentencing Guidelines receive *Auer* deference); United States v. Korotly, 118 F.4th 1202, 1210 (9th Cir. Oct. 10, 2024) (reviewing de novo interpretation of regulations); United States v. Boler, 115 F.4th 316, 322 & n.4 (4th Cir. Oct. 8, 2024) (upholding the Sentencing Guidelines' interpretation of "loss" pursuant to *Auer* deference); United States v. Deleon, 116 F.4th 1260, 1263–64 (11th Cir. Sept. 5, 2024); United States v. Trumbull, 114 F.4th 1114, 1118–19 (9th Cir. Aug. 22, 2024) (upholding Sentencing Guidelines' interpretation of "large capacity magazine" pursuant to *Auer* deference); United States v. Moulton, 2024 WL 5102816, at *2–3 (S.D. Fla. Dec. 13, 2024); United States v. Chilcoat, 2024 WL 5008714, at *1, *6 (D.D.C. Dec. 6, 2024); United States v. Moore, 2024 WL 4379748, at *6 (S.D. Ohio Oct. 3, 2024); United States v. Farmer, 2024 WL 4254320, at *3 (E.D. Mich. Sept. 20, 2024); United States v. Durio, 2024 WL 3791225, at *4 (E.D. La. Aug. 13, 2024) (according *Auer* deference to the Sentencing Guidelines); United States v. Carroll, 2024 WL 3566635, at *1–2 (E.D. Mo. July 29, 2024).

For decisions regarding "appeals from agency adjudication OR agency court enforcement," see China Unicom (Ams.) Operations Ltd. v. FCC, 124 F.4th 1128, 1151–54 (9th Cir. Dec. 24, 2024); Moctezuma-Reyes v. Garland, 124 F.4th 416, 418 (6th Cir. Dec. 23, 2024); United States v. McIntosh, 124 F.4th 199, 204–06 (3d Cir. Dec. 23, 2024); Vanda Pharm., Inc. v. Food & Drug Admin., 123 F.4th 513, 520–21 (D.C. Cir. Dec. 17, 2024); United States v. Multistar Indus., Inc., 2024 WL 5055552, at *2 (9th Cir. Dec. 10, 2024); Alaris Health at Boulevard E. v. NLRB, 123 F.4th 107, 116–17 (3d Cir. Dec. 9, 2024); Simon-Domingo v. Garland, 2024 WL 4850698, at *1 (6th Cir. Nov. 21, 2024) (applying substantial evidence review); Lopez v. Garland, 2024 WL 4763923, at *3 (2d Cir. Nov. 13, 2024); Grand Canyon Univ. v. Cardona, 121 F.4th 717, 723 (9th Cir. Nov. 8, 2024); Martinez Medina v. Garland, 2024 WL 4692028, at *2 (5th Cir. Nov. 6, 2024); Seldon v. Garland, 120 F.4th 527, 531–32 (6th Cir. Oct. 31, 2024); Diaz-Arellano v. U.S. Att'y Gen., 120 F.4th 722, 722, 725 (11th Cir. Oct. 29, 2024); Miranda Gomes v. U.S. Att'y Gen., 2024 WL 4588900, at *1, *3 (11th Cir. Oct. 28, 2024); Siqueira v. U.S. Att'y Gen., 2024 WL 4590031, at *1 (11th Cir. Oct. 28, 2024); Mem'l Hermann Accountable Care Org. v. Comm'r, 120 F.4th 215, 219–20 (5th Cir. Oct. 28, 2024); Shamrock Bldg. Materials, Inc. v. United States, 119 F.4th 1346, 1352–55 (Fed. Cir. Oct. 23, 2024); Windsor v. McDonough, 2024 WL 4511184, at *2 (Vet. App. Oct. 17, 2024), *appeal docketed sub nom.* Windsor v. Collins, No. 25-1385 (Vet. App. Jan. 24, 2025); NextEra Energy Res. LLC v. Fed. Energy Regul. Comm'n, 118 F.4th 361, 368 (D.C. Cir. Oct. 4, 2024); NLRB v. Macomb, 2024 WL 4240545, at *1 (6th Cir. Sept. 19, 2024); Lopez v. Garland, 116 F.4th 1032, 1041 (9th Cir. Sept. 11, 2024); Brown v. Comm'r, 116 F.4th 861, 875 (9th Cir. Aug. 29, 2024); Tennessee v. Becerra, 117 F.4th 348, 363–64 (6th Cir. Aug. 26, 2024); Rorie v. McDonough, 37 Vet. App. 430, 444–45 (Vet. App. Aug. 16, 2024); Rieth-Riley Constr. Co. v. NLRB, 114 F.4th 519, 528–29 (6th Cir. Aug. 14, 2024); Sunnyside Coal Co. v. Dir., Off. of Workers Comp. Programs, U.S. Dep't of Lab., 112 F.4th 902, 910, 912–13 (10th Cir. Aug. 13, 2024); Ard v. O'Malley, 110 F.4th 613, 618–19, 621 (4th Cir. Aug. 7, 2024) (upholding the

denial of Social Security benefits through *Skidmore* deference); Midthun-Hensen v. Grp. Health Coop. of S. Cent. Wis., 110 F.4th 984, 988 (7th Cir. Aug. 5, 2024) (upholding denial of health insurance coverage; *Loper Bright* deemed irrelevant); Adee Honey Farms v. United States, 107 F.4th 1322, 1331 (Fed. Cir. July 15, 2024) (upholding the agency as correct after *Loper Bright* de novo interpretation); Oklahoma v. U.S. Dep't of Health & Hum. Servs., 107 F.4th 1209, 1214 (10th Cir. July 15, 2024) (denied a preliminary injunction motion to stop HHS's rescission of a grant); Consumer Fin. Prot. Bureau v. Townstone Fin., Inc., 107 F.4th 768, 771 (7th Cir. July 11, 2024) (reversing the district court's decision to uphold the CFPB's interpretation in an enforcement action); Aguilar v. U.S. Att'y Gen., 107 F.4th 164, 170 n.3 (3d Cir. July 10, 2024) (upholding the Board of Immigration Appeals despite applying *Loper Bright* de novo review); Friends of Animals v. U.S. Fish & Wildlife Serv., 2024 WL 5200514, at *3 (D. Utah Dec. 23, 2024), *appeal docketed*, No. 25-4021 (10th Cir. Feb. 21, 2025); Shop Rite Inc. v. U.S. Small Bus. Admin., 2024 WL 5183329, at *8 (W.D. La. Dec. 19, 2024), *appeal docketed*, No. 25-30028 (5th Cir. Jan. 20, 2025); Frey v. Comm'r of Soc. Sec., 2024 WL 5090079, at *1–2 (W.D. Mich. Dec. 12, 2024); Bloomberg LP v. Comm'r, T.C.M. (RIA) 2024-108, at *1, *24–25 (2024); United States v. Szostak, 2024 WL 4828721, at *1 (E.D. Mich. Nov. 19, 2024); Su v. Forge Indus. Staffing, Inc., 2024 WL 4825382, at *1 (W.D. Mich. Nov. 19, 2024); Doe v. U.S. Dep't of Health & Hum. Servs., 2024 WL 4719612, at *4–6 (E.D. Tex. Nov. 8, 2024); Ventura Coastal, LLC v. United States, 736 F. Supp. 3d 1342, 1363–64 (Ct. Int'l Trade Nov. 7, 2024); Garg Tube Export LLP v. United States, 740 F. Supp. 3d 1355, 1366–67 (Ct. Intl. Trade Nov. 7, 2024); White v. U.S. Att'y Gen., 2024 WL 4665163, at *1 (D. Haw. Nov. 4, 2024); Jazz Pharma., Inc. v. Becerra, 2024 WL 4625731, at *12–13 (D.D.C. Oct. 30, 2024), *appeal docketed*, No. 24-5262 (D.C. Cir. Nov. 20, 2024); Dekovic v. Tarango, 2024 WL 4346415, at *8 (D. Colo. Sept. 30, 2024), *appeal docketed*, No. 24-1431 (10th Cir. Oct. 31, 2024); Salutoceuticals, LLC v. U.S. Small Bus. Admin., 2024 WL 4931853, at *1 (W.D. Texas Sept. 26, 2024); Sec'y of Lab. v. Macy's, Inc., 2024 WL 4302093, at *1 (S.D. Ohio Sept. 26, 2024); Hanan v. U.S. Citizenship & Immigr. Servs., 2024 WL 4293917, at *8 (N.D. Cal. Sept. 25, 2024), *appeal docketed*, No. 24-6193 (9th Cir. Oct. 11, 2024); Bauman v. Garland, 2024 WL 4406962, at *3 (C.D. Cal. Aug. 28, 2024) (finding *Loper Bright* was irrelevant; the court lacked subject matter jurisdiction); Xia v. Garland, 2024 WL 3925766, at *1 (E.D.N.Y. Aug. 23, 2024), *appeal docketed*, (2d Cir. argued Feb. 6, 2025); Reeder v. United States, 2024 WL 3912751, at *1 (D.N.M. Aug. 23, 2024), *appeal dismissed & remanded*, 2024 WL 4926611 (10th Cir. Nov. 25, 2024); Isleem v. Peacock, 2024 WL 3887511, at *12 (E.D. La. Aug. 21, 2024); Baskin v. L.A. Super. San Fernando Ct., 2024 WL 4867800, at *12 (C.D. Cal. Aug. 19, 2024); Am. Wild Horse Campaign v. Stone-Manning, 2024 WL 3872558, at *6 (D. Wyo. Aug. 14, 2024), *on appeal*, No. 24-8057 (10th Cir. Aug 20, 2024) (providing an arbitrary and capricious review); Tidewater Fin. Co. v. U.S. Small Bus. Admin, 2024 WL 4329140, at *6–7 (E.D. Va. Aug. 9, 2024).

For decisions in cases posing a "challenge to agency rulemaking," see Avon Nursing & Rehab. v. Becerra, 119 F.4th 286, 291–92 (2d Cir. Oct. 17, 2024); Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. U.S. Dep't of Homeland Sec., 107 F.4th 1064, 1067 (9th Cir. July 18, 2024) (applying *Skidmore* deference

The government's interpretation or application of the statute was valid in part and invalid in part.		
Habeas	0	1
Criminal appeal	1	0
Appeal from agency adjudication OR agency court enforcement	3	3

after *Loper Bright*); ATS Tree Servs. v. FTC, 2024 WL 3511630, at *1, *14–18 (E.D. Pa. July 23, 2024) (applying the "Non-Compete Rule").

For "other" decisions, see Rana v. Jenkins, 113 F.4th 1058, 1066–67, 1070 (9th Cir. Aug. 15, 2024) (giving a higher level of deference to the Department of State's interpretation and implementation of treaties than *Loper Bright* would allow); Perez v. Owl, Inc., 110 F.4th 1296, 1307–08 (11th Cir. Aug. 6, 2024) (upholding the Department of Labor's longstanding interpretation of the Fair Labor Standards Act in an employee's lawsuit against the employer); Green v. Perry's Rests. Ltd., 2024 WL 4993356, at *7 (D. Colo. Dec. 5, 2024) (upholding the Department of Labor's 1988 guidance under both *Skidmore* and *Auer* deference in a private employment law lawsuit); Rappaport v. Guardian Life Ins. Co. of Am., 2024 WL 4872736, at *11 (S.D.N.Y. Nov. 22, 2024) (continuing to follow precedent that held the rules valid in private lawsuit); *In re:* Yellow Corp., 2024 WL 4194560, at *6–7 (Bankr. D. Del. Sept. 13, 2024), *amended and superseded on reconsideration*, 2024 WL 4925124 (D. Del. Nov. 5, 2024) (upholding ERISA rule in the course of a bankruptcy proceeding); Ctr. for a Sustainable Coast v. U.S. Army Corps of Eng'rs, 2024 WL 4731126, at *1, *5, *10 (S.D. Ga. Oct. 21, 2024) (ruling Army Corps not arbitrary and capricious in giving permission to landowner to build a dock); Horizon Tower Ltd. v. Park Cnty., 2024 WL 4525229, at *7–8 (D. Wyo. Oct. 4, 2024) (upholding the Federal Communication Commission's regulatory definitions despite *Loper Bright* and the Ninth Circuit's prior deference to them in private litigation); Houtz v. Paxos Rests., 2024 WL 4336738, at *3–4 (E.D. Pa. Sept. 27, 2024) (according *Skidmore* deference, in private litigation, to the Department of Labor's longstanding definitions of "tip" and "service fee" under the Fair Labor Standards Act); United States *ex rel.* Schroeder v. Hutchinson Reg'l Med. Ctr., 2024 WL 4298655, at *18–20 (according *Auer* deference to Health and Human Services' Guidance); Adams v. All Coast LLC, 2024 WL 4291520, at *4–5 (W.D. La. Sept. 25, 2024) (retaining the Secretary of Labor's definition of "seaman" for the Fair Labor Standards Act in private employment litigation, despite a party's argument that *Loper Bright* rendered it invalid); Lirones v. Leaf Home Water Sols., LLC, 2024 WL 4198134, at *7 (N.D. Ohio Sept. 16, 2024) (according *Skidmore* deference in a private class action to the FCC's view that cell phone users can be residential customers); Harding v. Steak N Shake, Inc., 2024 WL 3833341, at *8 (N.D. Ohio Aug. 15, 2024) (according *Skidmore* deference in private employment dispute to the Department of Labor's regulations); Lyman v. QuinStreet, Inc., 2024 WL 3406992, at *4 (N.D. Cal. July 12, 2024) (upholding the FCC's treatment of cell phones as residential phones in a private putative class action); Cacho v. McCarthy & Kelly LLP, 739 F. Supp. 3d. 195, 203–04 (S.D.N.Y. July 3, 2024) (same).

Challenge to agency rulemaking	2	1
TOTAL:[238]	**6**	**5**
The government's interpretation or application the statute was invalid *in toto*.		
Habeas	0	4
Criminal appeal	2	1
Appeal from agency adjudication OR agency court enforcement	10	6
Challenge to agency rulemaking	4	8
Other	2	2
TOTAL:[239]	**18**	**21**

238. For "habeas" decisions, see Sharma v. Peters, 2024 WL 4668135, at *4–9 (M.D. Ala. Nov. 4, 2024).

For "criminal appeal" decisions, see United States v. Cisneros, 2024 WL 3770325, at *1–2 (9th Cir. Aug. 13, 2024) (upholding the conviction but vacating the sentencing).

For decisions regarding "appeals from agency adjudication OR agency court enforcement," see Hudson Inst. of Process Rsch., Inc. v. NLRB, 117 F.4th 692, 707 (5th Cir. Sept. 18, 2024); Sinclair Wyo. Refin. Co. v. EPA, 114 F.4th 693, 700 (D.C. Cir. Aug. 14, 2024); Williams v. O'Malley, 2024 WL 3519774, at *1, *2 (9th Cir. July 24, 2024) (remanding Social Security disability determination because the ALJ did not properly weigh all the evidence); Finneman v. U.S. Dep't of Agric., 2024 WL 5158473, at *11–17 (D.S.D. Dec. 17, 2024) (using both arbitrary & capricious and substantial evidence review); Dep't of State v. Picur, 2024 WL 4502250, at *9, *13 (D.D.C. Oct. 16, 2024) (upholding the Department of State's interpretation of the statute but concluding that it lacked statutory authority to include special differentials in an annuity calculation); Friends of the Floridas v. U.S. Bureau of Land Mgmt., 2024 WL 3952037, at *62–78 (D.N.M. Aug. 27, 2024), *appeal docketed*, No. 24-2164 (10th Cir. Oct. 31, 2024) (providing hard look review under the National Environmental Policy Act).

For decisions reviewing a "challenge to agency rulemaking," see Env't. Def. Fund v. EPA, 124 F.4th 1, 18–19 (D.C. Cir. Dec. 20, 2024); Mazariegos-Rodas v. Garland, 122 F.4th 655, 672–73 (6th Cir. Dec. 5, 2024); Tex. Med. Ass'n v. U.S. Dep't of Health & Hum. Servs., 120 F.4th 494, 511 (5th Cir. Oct. 30, 2024); Kansas v. U.S. Dep't of Lab., 2024 WL 3938839, at *5–9 (S.D. Ga. Aug. 26, 2024) (deciding an agricultural labor rule was valid under the Immigration and Naturalization Act but conflicted with the National Labor Relations Act).

239. For "habeas" decisions, see Heath v. Knight, 2024 WL 5198863, at *1, *4–5 (D.N.J. Dec. 23, 2024); Puana v. Williams, 2024 WL 4932514, at *4 (D. Colo. Dec. 2, 2024); United States v. Uriarte, 2024 WL 4111867, at *4 (N.D. Ill. Sept. 6, 2024), *on appeal*, (7th Cir. Sept. 18, 2024) (refusing to follow "compelling" Sentencing Guidelines guidance in favor of Seventh Circuit precedent

regarding compassionate release); Pelullo v. FCC Coleman-Low, 2024 WL 3771691, at *1, *5 (M.D. Fla, Aug. 13, 2024).

For "criminal appeal" decisions, see United States v. Burwell, 122 F.4th 984, 995–97 (D.C. Cir. Dec. 9, 2024); United States v. Rutherford, 120 F.4th 360, 371, 373 (3d Cir. Nov. 1, 2024) (overturning Sentencing Commission's amended policy regarding compassionate release); United States v. Ramos, 2024 WL 4710905, at *4 (N.D. Ill. Nov. 6, 2024), *appeal docketed*, No. 24-3052 (7th Cir. Nov. 12, 2024).

For decisions regarding "appeals from agency adjudication OR agency court enforcement," see All. for Fair Bd. Recruitment v. SEC, 125 F.4th 159, 177–78 (5th Cir. Dec. 9, 2024); Quito-Guachichulca v. Garland, 122 F.4th 732, 735–36 (8th Cir. Dec. 9, 2024); Van Loon v. Dep't of the Treasury, 122 F.4th 549, 549, 561–62 (5th Cir. Nov. 26, 2024) (reversing and remanding because the district court gave too much deference to the agency); Lake Region Healthcare Corp. v. Becerra, 133 F.4th 1002, 1007 (D.C. Cir. Sept. 3, 2024) (overturning prior interpretation given *Chevron* deference in light of *Loper Bright*); Mouns v. Garland, 113 F.4th 399, 415 (4th Cir. Aug. 28, 2024); Pac. Gas & Elec. Co. v. Fed. Energy Regul. Comm'n, 113 F.4th 943, 949 (D.C. Cir. 2024); MCR Oil Tools, LLC v. U.S. Dep't of Transp., 110 F.4th 677, 687 (5th Cir. July 30, 2024) (ruling on non-*Loper Bright* grounds); Amazon Servs. v. U.S. Dep't of Agric., 109 F.4th 573, 582 (D.C. Cir. July 26, 2024); Lion Elastomers, LLC v. NLRB, 108 F.4th 252, 262 (5th Cir. July 9, 2024) (deciding on non-*Loper Bright* grounds); Dolan v. Fed. Emergency Mgmt. Agency, 2024 WL 5145808, at *1 (D.N.M. Dec. 17, 2024) (providing an arbitrary & capricious review); Greenwich Terminals LLC v. U.S. Army Corps of Eng'rs, 2024 WL 4595590, at *2 (E.D. Pa. Oct. 28, 2024) (using an arbitrary & capricious review); Kumho Tire (Vietnam) Co. v. United States, 741 F. Supp. 3d 1277, 1352–53 (Ct. Intl. Trade 2024) (ordering the Department of Commerce's determination remanded for a better explanation); Battineni v. Mayorkas, 2024 WL 4367522, at *1 (D.D.C. Oct. 2, 2024) (reversing an immigration decision as arbitrary and capricious despite *Auer* deference); Vogue Tower Partners VII, LLC v. City of Elizabethton, 2024 WL 4351425, at *4 (E.D. Tenn. Sept. 30, 2024) (rejecting the Federal Communication Commission's text under *Loper Bright* in favor of Sixth Circuit precedent); Varian Med. Sys., Inc. v. Comm'r, 163 T.C. No. 4, at 19 (U.S. Tax. Ct. Aug. 26, 2024).

For decisions reviewing a "challenge to agency rulemaking," see Al Otro Lado v. Exec. Off. for Immigr. Rev., 120 F.4th 606, 610–11 (9th Cir. Oct. 23, 2024); U.S. Sugar Corp. v. EPA, 113 F.4th 984, 988 (D.C. Cir. Sept. 9, 2024); Rest. L. Ctr. v. U.S. Dep't of Lab., 115 F.4th 396, 408–10 (5th Cir. Aug. 23, 2024); Alabama v. U.S. Sec'y of Educ., 2024 WL 3981994, at *4–5 (11th Cir. Aug. 22, 2024); Purl v. U.S. Dep't of Health & Hum. Servs., 2024 WL 5202497, at *7–11 (N.D. Tex. Dec. 22, 2024) (reviewing a 2024 HIPAA Privacy Rule); Teche Vermilion Sugar Cane Growers Ass'n v. Su, 2024 WL 4246272, at *22 (W.D. La. Sept. 18, 2024) (finding the rule to be arbitrary and capricious for failure to explain); Ryan, LLC v. FTC, 2024 WL 3879954, at *9 (N.D. Tex. Aug. 20, 2024) (ruling the Non-Compete Rule was arbitrary and capricious); Oklahoma v. Cardona, 743 F. Supp. 3d 1314, 1330–31 (W.D. Okla. July 31, 2024) (finding the Department of Education incorrectly construed "sex" in Title IX to include gender identity); Fed'n of Ams. for Consumer Choice, Inc. v. U.S. Dep't of Lab., 742 F. Supp. 3d 677, 693–97 (E.D. Tex. July 25, 2024) (examining a 2024 Fiduciary

Rule); Arkansas v. U.S. Dep't of Educ., 742 F. Supp. 3d 919, 941–42 (E.D. Mo. July 24, 2024) (reviewing a Title IX Gender Rule); Texas v. Becerra, 739 F. Supp. 3d 522, 533–34 (E.D. Tex. July 3, 2024), *modified on reconsideration*, 2024 WL 4490621 (E.D. Tex. Aug. 30, 2024) (reviewing a Title IX Gender Rule); Tennessee v. Becerra, 739 F. Supp. 3d 467, 477–81 (S.D. Miss. July 3, 2024) (examining a Title IX Gender Rule); Florida v. Dep't of Health & Hum. Servs., 739 F. Supp. 3d 1091, 1105–10 (M.D. Fla. July 3, 2024) (reviewing an Affordable Health Care Act Gender Rule); Kansas v. U.S. Dep't of Educ., 739 F. Supp. 3d 902, 919–23 (D. Kan. July 2, 2024), *appeal docketed*, No. 24-3097 (10th Cir. July 11, 2024) (scrutinizing a Title IX Gender Rule); Texas v. U.S. Dep't of Lab., 738 F. Supp. 3d 807, 821–24 (E.D. Tex. June 28, 2024) (reviewing a rule exempting employees from overtime wages).

For "other" decisions, see Kaweah Delta Health Care Dist. v. Becerra, 123 F.4th 939, 944–45 (9th Cir. Dec. 11, 2024) (vacating an agency policy); Anderson v. Diamondback Inv. Grp., 117 F.4th 165, 187–88 (4th Cir. Sept. 4, 2024) (agreeing with the Ninth Circuit's interpretation of 2018 Farm Bill over the Drug Enforcement Agency's); Aero Tech, Inc. v. U.S. Dep't of the Interior, 2024 WL 4581545, at *12 (D.N.M. Oct. 25, 2024) (deeming the Department of the Interior arbitrary and capricious in a private lawsuit about damages to a fire-fighting airplane).

The challengers received a preliminary injunction against or stay of a rule.[240]		
TOTAL:	**4**	**12**
The agency's rule was upheld.[241]		
TOTAL:	**3**	**3**
The agency's rule was remanded.[242]		

240. Al Otro Lado v. Exec. Off. for Immigr. Rev., 120 F.4th 606, 610–11 (9th Cir. Oct. 23, 2024); Alabama v. U.S. Sec'y of Educ., 2024 WL 3981994, at *2 (11th Cir. Aug. 22, 2024); Firearms Regul. Accountability Coal., Inc. v. Garland, 112 F.4th 507, 519 & n.12 (8th Cir. Aug. 9, 2024) (declining to address the statutory interpretation issue); *In re* MCP No. 185, 2024 WL 3650468, at *1–2 (6th Cir. Aug. 1, 2024); Purl v. U.S. Dep't of Health & Hum. Servs., 2024 WL 5202497, at *11 (N.D. Tex. Dec. 22, 2024) (2024 HIPAA Privacy Rule); Barton v. U.S. Dep't of Lab., 2024 WL 4886048, at *1, *19–20 (E.D. Ky. Nov. 25, 2024); Int'l Fresh Produce Ass'n v. U.S. Dep't of Lab., 2024 WL 4886058, at *11–12 (S.D. Miss. Nov. 25, 2024); Teche Vermilion Sugar Cane Growers Ass'n v. Su, 2024 WL 4246272, at *24 (W.D. La. Sept. 18, 2024); Kansas v. U.S. Dep't of Lab., 2024 WL 3938839, at *9 (S.D. Ga. Aug. 26, 2024); Oklahoma v. Cardona, 743 F. Supp. 3d at 1324–25 (Title IX gender rule); *Fed'n of Ams. for Consumer Choice, Inc.*, 742 F. Supp. 3d at 683 (2024 Fiduciary Rule); Arkansas v. U.S. Dep't of Educ., 742 F. Supp. 3d 919, 941–42 (E.D. Mo. July 24, 2024) (Title IX Gender Rule); Texas v. Becerra, 739 F. Supp. 3d at 536–37 (Title IX Gender Rule); Tennessee v. Becerra, 739 F. Supp. 3d at 486–87 (Title IX Gender Rule); Florida v. Dep't of Health & Hum. Servs., 739 F. Supp. 3d at 1116–17 (Affordable Health Care Act Gender Rule); Kansas v. U.S. Dep't of Educ., 739 F. Supp. 3d at 919–23 (Title IX Gender Rule); Texas v. U.S. Dep't of Lab., 738 F. Supp. 3d at 821–24 (exempt employee for overtime wages rule).

241. Avon Nursing & Rehab. v. Becerra, 119 F.4th 286, 291–92 (2d Cir. Oct. 17, 2024); Mayfield v. U.S. Dep't of Lab., 117 F.4th 611, 619–20 (5th Cir. Sept. 11, 2024); Bernardo-De La Cruz v. Garland, 114 F.4th 883, 890 (7th Cir. Aug. 15, 2024); Rappaport v. Guardian Life Ins. Co. of Am., 2024 WL 4872736, at *11 (S.D.N.Y. Nov. 22, 2024) (continuing to follow precedent that held the rules valid); Nosirrah Mgmt., LLC v. AutoZone, Inc., 2024 WL 4804083, at *6 n.4 (W.D. Tenn. Nov. 15, 2024); *In re* Yellow Corp., 2024 WL 4925124, at *6–7 (Bankr. D. Del. Nov. 5, 2024) (upholding ERISA rule under *Loper Bright* in the course of a bankruptcy proceeding).

242. Arnesen v. Raimondo, 115 F.4th 410, 414 (5th Cir. Aug. 23, 2024) (citing *Loper Bright* only for fisheries statute); Utah v. Su, 109 F.4th 313, 322 (5th Cir. July 18, 2024) (remanding the Department of Labor's ERISA regulation allowing ERISA fiduciaries to consider environmental, social, and governance objective when making investment decisions to the district court, which had denied the plaintiffs' challenge, for reconsideration in light of *Loper Bright*'s removal of deference).

TOTAL:	**2**	**0**
The agency's rule was vacated or set aside.[243]		
TOTAL:	**11**	**2**
The government had authority to take the action it did.		
Habeas	0	1
Criminal appeal	1	0
Appeal from agency adjudication OR agency court enforcement	2	0
Challenge to agency rule	3	2
Other	3	5
TOTAL:[244]	**9**	**8**

243. Env't Def. Fund v. EPA, 124 F.4th 1, 18–19 (D.C. Cir. Dec. 20, 2024) (in part); Metro. Area EMS Auth. v. Sec'y of Veterans Affs., 122 F.4th 1339, 1344–48 (Fed. Cir. Dec. 9, 2024); Kentucky v. EPA, 123 F.4th 447, 464–66 (6th Cir. Dec. 6, 2024); Tex. Med. Ass'n v. U.S. Dep't of Health & Hum. Servs., 120 F.4th 494, 508 (5th Cir. Oct. 30, 2024); U.S. Sugar Corp. v. EPA, 113 F.4th at 1002; Laska v. McDonough, 37 Vet. App. 460, 468–70 (Vet. App. Sept. 6, 2024); *Rest. L. Ctr.*, 115 F.4th at 408–10; Union Pac. R.R. Co. v. Surface Transp. Bd., 113 F.4th 823, 838–39 (8th Cir. Aug. 20, 2024); Tex. Med. Ass'n v. U.S. Dep't of Health & Hum. Servs., 110 F.4th 762, 776 (5th Cir. Aug. 2, 2024); Nat'l Fam. Farm Coal. v. Vilsack, 2024 WL 4951257, at *10 (N.D. Cal. Dec. 2, 2024) (holding APHIS rule arbitrary and capricious); Texas v. U.S. Dep't of Lab., 2024 WL 4806268, at *26 (E.D. Tex. Nov. 15, 2024) (reviewing a salary rule for exemption under the Fair Labor Standards Act); Nat'l Ass'n for Gun Rts. v. Garland, 741 F. Supp. 3d 568, 616–17 (N.D. Tex. July 23, 2024) (BAFT's 2018 machine gun rule), *on appeal*, (5th Cir. Aug. 6, 2024).

244. For the "habeas" decision, see Purdy v. Carter, 2024 WL 4651275, at *5 (D. Md. Nov. 1, 2024).

For the "criminal appeal" decision, see United States v. Ponle, 110 F.4th 958, 960–62 (7th Cir. Aug. 5, 2024) (upholding a criminal conviction where *Loper Bright* played no role).

For decisions in cases reviewing "appeals from agency adjudication OR agency court enforcement," see Softview LLC v. Apple Inc., 108 F.4th 1366, 1372 n.2 (Fed. Cir. July 26, 2024); Kovac v. Wray, 109 F.4th 331, 335 (5th Cir. July 25, 2024), *petition for certiorari docketed*, (U.S. Dec. 23, 2024) (No. 24-674).

For decisions in cases involving a "challenge to agency rule," see Metro. Area EMS Auth. v. Sec'y of Veterans Affs., 122 F.4th 1339, 1344–45, 1347–48 (Fed. Cir. Dec. 9, 2024); Laska v. McDonough, 37 Vet. App. 460, 467 (Vet. App. Sept. 6, 2024); Union Pac. R.R. v. Surface Transp. Bd., 113 F.4th 823, 838–39 (8th Cir. Aug. 20, 2024); Tex. Med. Ass'n v. U.S. Dep't of Health & Hum. Servs., 110 F.4th 762, 775 (5th Cir. Aug. 2, 2024); *In re* MCP No. 185, 2024 WL 3650468,

CONCLUSION

The state and federal courts are certainly aware of *Loper Bright* and have begun to navigate a new jurisprudence when reviewing agency interpretations and implementations of the statutes they administer. In the state courts, this jurisprudence has so far generally found *Loper Bright* irrelevant. Nevertheless, the state courts—with a few notable exceptions like the Hawai'i Supreme Court—have been surprisingly reluctant to reject *Loper Bright* as simply inapplicable to state administrative law. Some of this reluctance undoubtedly stems from the fact—as a few of the cases acknowledge explicitly—that state administrative law in general and deference doctrines in particular often borrow heavily from federal law. Notably, in the states that expressly adopted *Chevron* deference as state law, the impact of *Loper Bright* may in fact not be clear until the state supreme court or legislature decisively confronts the issue.

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at *4 (6th Cir. Aug. 1, 2024) (indicating that *Loper Bright* helps the major questions doctrine); Bridgeport Hosp. v. Becerra, 108 F.4th 882, 888–89 (D.C. Cir. July 23, 2024) (finding that although *Chevron* deference was deemed not relevant, the agency exceeded the bounds of its authority); Purl v. U.S. Dep't of Health & Hum. Servs., 2024 WL 5202497, at *7–10 (N.D. Tex. Dec. 22, 2024) (2024 HIPAA Privacy Rule); Barton v. U.S. Dep't of Lab., 2024 WL 4886048, at *1, *9–12 (E.D. Ky. Nov. 25, 2024) (finding farmworker rule violated the National Labor Relations Act); Int'l Fresh Produce Ass'n v. U.S. Dep't of Lab., 2024 WL 4886058, at *8–10 (S.D. Miss. Nov. 25, 2024) (finding the Department lacked authority to promulgate the farmworkers rule authorizing collective bargaining); Texas v. U.S. Dep't of Lab., 2024 WL 4806268, at *12–17 (E.D. Tex. Nov. 15, 2024) (discussing the salary rule for exemption under the Fair Labor Standards Act); KalshiEX LLC v. Commodity Futures Trading Comm'n, 2024 WL 4164694, at *1, *8–9 (D.D.C. Sept. 12, 2024), *appeal docketed*, No. 24-5205 (D.C. Cir. Sept. 12, 2024); Ryan, LLC v. FTC, 2024 WL 3879954, at *12 (N.D. Tex. Aug. 20, 2024) (deciding FTC lacked authority to promulgate the Non-Compete Rule); Nat'l Ass'n for Gun Rts. v. Garland, 741 F. Supp. 3d 568, 597–99 (N.D. Tex. July 23, 2024), *on appeal sub nom.* Nat'l Ass'n for Gun Rts. v. Bondi, No. 24-10707 (5th Cir. Aug. 6, 2024) (reviewing BAFT's 2018 machine gun rule).

For "other" decisions, see Art & Antique Dealers League of Am., Inc. v. Seggos, 121 F.4th 423, 442–43 (2d Cir. 2024) (finding Endangered Species Act restrictions on display of ivory artifacts violated the First Amendment); Marin Audubon Soc'y v. FAA, 121 F.4th 902, 910 (D.C. Cir. 2024) (holding that the Council on Environmental Quality lacked authority under the National Environmental Policy Act to promulgate regulations of general applicability in the course of a challenge to the FAA's compliance with NEPA); *In re* Fosmax (Alendronate Sodium) Prods. Liab. Litig., 118 F.4th 322, 356 n.27 (3d Cir. 2024) (holding as part of a tort lawsuit that the Food & Drug Administration lacked authority to determine preemption issues); Teche Vermilion Sugar Cane Growers Ass'n v. Su, 2024 WL 4246272, at *19 (W.D. La. Sept. 18, 2024).

The federal courts, too, have decided a spate of cases that begin to define *Loper Bright*'s scope. The most interesting issue arising from this group is whether courts will generally confine *Loper Bright* to agency interpretations reviewed *pursuant to the APA*, or whether judicial review pursuant to other statutes is similarly governed by the *Loper Bright* analysis.

Like *Chevron* deference itself, however, even when *Loper Bright* applies, it still gives agencies multiple pathways for review. Courts can choose to stress their own duty to interpret the statute and perform a de novo analysis of its historical meaning on the day Congress enacted it.[245] Alternatively, courts can find congressional delegations of authority and discretion to the relevant agency and only lightly police how the agency uses those delegations.[246] Thus far, those alternative pathways have resulted in the lower federal courts overturning or preliminarily enjoining new rules at high rates (83.8%) while simultaneously upholding most agency orders and prior rule-based interpretations.

If in applying *Loper Bright* federal courts continue to favor the old over the new, the ability of federal agencies to use old statutes to address new problems may all but disappear. Increased action by Congress, is, of course, the obvious answer to how to deal with new problems—but Congress often has been unresponsive to pre-*Loper Bright* requests that it update statutes, and the current (2025–2027) Congress is unlikely to amend regulatory regimes to give federal agencies *increased* discretion and regulatory authority.

In the next few years, categories of agency expertise are likely to emerge, and the distinction between arbitrary and capricious review and statutory interpretation may become critical to whether individual agency regulatory decisions survive judicial review in certain federal courts. To use an environmental law example, while it may be the courts' prerogative to decide

245. *E.g.*, Moctezuma-Reyes v. Garland, 124 F.4th 416, 420–23 (6th Cir. 2024) (giving the Board of Immigration Appeals no deference, including *Skidmore* deference, and eschewing precedent in favor of its own independent duty to interpret the statute, albeit upholding the agency's decision anyway).

246. *E.g.*, China Unicom (Ams.) Operations, Ltd. v. FCC, 124 F.4th 1128, 1138–48 (9th Cir. 2024) (upholding the FCC's in revoking a Chinese company's authority to offer telecommunications services on grounds of national security and lack of trustworthiness on the grounds that statutory silence implied authority to revoke as well as to issue such authorizations).

what "best available technology economically achievable" *means* under the Clean Water Act,[247] it remains—at least for the moment—the EPA's duty to decide which technology in each regulated industry fits that definition and to create discharge limits based on the technologies it identifies. The *Loper Bright* Court's strong adherence to the APA has this silver lining: arbitrary and capricious review is both highly deferential to federal agencies[248] and clearly grounded in the APA itself.[249]

247. Under the Clean Water Act, "best available technology economically achievable" (BAT or BATEA) is the technological basis for effluent limitations on dischargers of toxic and nonconventional pollutants from point sources subject to regulation and for pretreatment requirement for entities that send their waste to sewage treatment plants, set on an industry-by-industry basis. 33 U.S.C. § 1311(b)(2). "[S]uch effluent limitations shall require the elimination of discharges of all pollutants if the Administrator [of the EPA] finds, on the basis of information available to him . . . that such elimination is technologically and economically achievable for a category or class of point sources . . . ." *Id*. For a court that wants to find it, therefore, there is an express delegation to the EPA to exercise discretion in setting these standards, but the factfinding used to decide what qualifies as BATEA should be subject to arbitrary and capricious review, not *Chevron* deference.

248. *E.g.*, FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1158 (2021) ("The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency. A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." (citation omitted)).

249. 5 U.S.C. § 706(2).