

## FEATURE STORY

## Federal Courts Grapple with Implications of *Loper Bright*

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A federal circuit court remanded a challenge to the environmental, social, and governance (ESG) rule from the Department of Labor (DOL) relating to investing in defined contribution retirement plans after the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, which overturned the [Chevron](#) doctrine. [ABA Litigation Section](#) leaders agree that litigation in a post-*Loper Bright* world will require clients to be patient as federal courts and agencies grapple with litigation strategies without *Chevron* deference.

### *Loper Bright* and *Chevron* Deference

For nearly 40 years, litigants and courts were bound by *Chevron*, which held that a two-step inquiry was required to resolve an agency's statutory interpretation. If a court concluded that a statute was silent or ambiguous, the court was required to defer to the agency's reasonable construction of that statute on the premise that Congress intended the agency to resolve that ambiguity. In *Loper Bright*, a six-justice majority held that the Court's 1984 decision in *Chevron* was "fundamentally misguided" and in conflict with the Administrative Procedure Act's directive that courts (not agencies) decide "all relevant questions of law" arising out of a review of agency action, including the construction of ambiguous statutory terms.

In *Loper Bright*, a group of commercial fishermen filed two actions against the National Marine Fisheries Service after the service promulgated a rule that required industry members to fund at-sea monitoring programs that cost approximately \$710 per day. Under the Magnuson-Stevens Fishery Conservation and Management Act of 1976, regional councils are authorized to set certain standards for fishing off the coast of the United States, and vessels may be required to have monitors to ensure that the fishing activity is in line with any set standards. However, the statute does not address whether fishermen are required or may be required to bear any associated costs relating to activity monitoring. The fishermen argued that the Magnuson-Stevens Act did not authorize the service to create the monitoring requirements and that the service failed to follow proper rulemaking procedures. They argued that the statute expressly identified three categories of vessels required to pay for observers, so the agency did not have statutory authority to add another group that must pay.

Two separate district courts dismissed the fishermen’s challenge to the agency’s rule, and the U.S. Court of Appeals for both the First Circuit and the District of Columbia Circuit affirmed the district courts’ rulings based on the *Chevron* doctrine. The Supreme Court granted certiorari and overruled the *Chevron* doctrine, finding that the Administrative Procedure Act “incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions.” The Court rejected the “presumption” of agency expertise in interpreting statutes, holding that while an agency may inform a court based on facts within the agency’s expertise, resolving statutory ambiguity is within the court’s power. The Supreme Court also rejected the notion that *Chevron* promoted uniformity based on its application over the years and further held that stare decisis did not require the Court to maintain *Chevron*, as *Chevron* had proved “unworkable” with many sub-steps and exceptions. The majority stressed that previous cases holding “specific agency actions are lawful” would still be subject to stare decisis. The case was then vacated and remanded.

## **Fifth Circuit Remands ESG Rule Following *Loper Bright***

In [\*Utah v. Su\*](#), the Fifth Circuit remanded a challenge to the DOL’s ESG rule for investing in defined contribution retirement plans after the Supreme Court’s issuance of *Loper Bright*. The case involved a group of 26 states and other interested parties including corporations, trade associations, and individuals that had filed an action against the DOL, arguing that the ESG rule conflicted with the plain language of the Employee Retirement Income Security Act (ERISA) and was therefore invalid under the Administrative Procedure Act. The case focused on the question of “[w]hat investment duties does ERISA prescribe and proscribe for plan fiduciaries?”

The DOL released a final rule that attempted to guide ERISA fiduciaries on when they may consider “collateral benefits when making investment decisions on behalf of the pension plans they manage.” According to the DOL rule, an ERISA fiduciary may consider “the economic effects of climate change and other environment, social, or governance factors in the event that competing investment options equally serve the financial interests of the plan.” In other words, the DOL’s rule allows ERISA fiduciaries to consider ESG objectives “when there is a purported tie between two or more investment options.”

While the DOL disclaimed reliance on *Chevron* in its briefing, arguing that the district court should affirm the agency’s rulemaking without any deference, the district court relied on *Chevron* and upheld the DOL’s interpretation. Eleven days after the Fifth Circuit heard oral argument in the appeal of the district court decision, the Supreme Court decided *Loper Bright*, which “discarded *Chevron* and pared back agencies’ leeway to interpret their own statutory

authority.” Based on the “upended legal landscape,” the court vacated and remanded *Utah v. Su* back to the district court, so that the district court could “reassess the merits.”

The Fifth Circuit further relied on a “modest and relatively uncontroversial practice” that the court should adhere to its normal practice “when intervening Supreme Court precedent affects a case pending before [the court] on direct appeal: that is, vacate the judgment below and remand for reconsideration in light of the new decision.” This practice, the Fifth Circuit held, reflects two basic premises: (1) that changes in precedent apply to pending cases on appeal and (2) that appellate courts, like the Fifth Circuit, “sit as courts of review, not first view.” While there is no prohibition in Article III or elsewhere that affirmatively prohibits courts of appeals like the Fifth Circuit from answering legal questions in the first instance, “we seldom do so, opting to break out of our appellate mold only when, for example, a failure to address the issue would lead to an incorrect result or a miscarriage of justice.”

The court was cognizant that vacating and remanding in light of intervening precedent had certain “drawbacks.” For example, the court referenced the idea that parties may get the “impression that we are just kicking the can down the road” and that there are considerations of judicial economy and efficiency. However, while these considerations are valuable, they have “never been pursued at all costs[.]” The Fifth Circuit’s concern with the “[o]rderly observation of the appellate process” and the important preservation of the “independence of the district judge, as well as the special role that individual plays in our judicial system” led the court to conclude that “the circuit at large would be better served by the slight delay occasioned by remanding to the district court for its reasoned judgment.”

## The Fifth Circuit Acted with Discretion

“*Loper Bright* is the core reason for the Fifth Circuit’s decision—without that intervening change in the law, the Fifth Circuit would not have resolved the case the way it did,” says [Jennifer Fischell](#), Washington, DC, Co-Chair of the Litigation Section’s [Appellate Practice Committee](#). “The Fifth Circuit applied what it called the ‘modest and relatively uncontroversial’ principle that appellate courts are courts of ‘review’ and not ‘first view,’” she adds. “That principle is not new—courts of appeals have long been hesitant to decide issues that the district court didn’t reach,” explains Fischell. “Other courts of appeals might exercise their discretion differently in similar cases. Appellate courts are generally more willing to address issues not addressed below when they are pure legal questions, like the statutory-interpretation question the Fifth Circuit chose to remand on here.”

“Perhaps anticipating the *Loper Bright* decision, the government had not advocated for deference and had advocated for upholding [the] regulation under a plain language reading of

the statute,” says [Joseph V. Schaeffer](#), Pittsburgh, PA, Co-Chair of the Section’s [Pretrial Practice & Discovery Committee](#). “So, the Fifth Circuit said ‘we could reach the merits issue right now on review, but we are not a court of first review and are a court of appellate review, and it’s more appropriate to send the case back to the district court,’” he explains. “This was interesting because it involved an intervening change in the law, and how to apply the intervening change of the law when a case is on appeal is complicated at best,” notes Schaeffer. “For parties that have an administrative law decision that is pending before the appeals court that was decided under *Chevron*, [they] should be advised that the case may be coming back to be resolved under *Loper Bright*.” Schaeffer further cautions that while this advice would be “immediate,” parties should know that “the era of deference is over [and there is an] opportunity for a seismic shift for administrative law jurisprudence.”

## **The Court’s Decision to Remand Will Take Time**

“The way the Fifth Circuit applied *Loper Bright* here was not particular to ERISA,” says Fischell. “It applied a general rule that appellate courts don’t typically decide matters that the district court hasn’t resolved first. So appellate courts will sometimes remand for reconsideration where there has been an intervening change in law,” she advises. “In this case at least, the Fifth Circuit’s *Loper Bright* remand will delay resolution. The case was remanded in July...with supplemental briefing.... Then the district court will have to rule, and then it will have to go back to the Fifth Circuit. That takes time,” explains Fischell.

### **Forum Shopping and Circuit Splits May Increase after *Loper Bright***

*Chevron* “deference allows for uniformity whereas de novo interpretation of statutory language allows every district court to make a decision,” suggests Schaeffer. “It will be interesting to see whether it leads to more dissimilarity across the circuits with contradictory decisions. Certainly the possibility is there much more than it was under *Chevron*,” he says. “What will be interesting to see is how much commodity is given to decisions by the first actor [as litigants seek favorable results in conservative or liberal circuits]. There may be a little forum shopping as litigants seek the court’s interpretation,” opines Schaeffer. “The risk of course is always that you spend a lot of time and money to achieve no substantive result in your favor, or worse that you make bad law, but I think that having the de novo statutory review certainly gives plaintiffs a more favorable playing field than under *Chevron*,” he says.

## ***Loper Bright*’s Impact on Administrative Law**

“What is unknown is how *Loper Bright* will impact the regulatory process,” notes Schaeffer. “Under *Chevron* the agencies had the ability to be more flexible than they do now. So, if one of

the consequences of *Loper* might be that agencies rein themselves back in, then perhaps it won't have that big of an effect on the increase or amount of litigation as opposed to what the agencies did before *Loper*, where under *Chevron* they took positions that reflected extensions and perhaps derogations from statutory text," he adds. "Now agencies have to play within the four corners of the metaphorical sandbox," observes Schaeffer. They can no longer say we think this is what Congress intended and you have to give us deference. Now they have to go through the statutory analysis that a reviewing court is likely to go through, which in many cases will result in a narrowing or paring back of regulations," he says.

"Whether *Loper Bright* will have a broader effect on the way agencies litigate, and courts resolve, cases like this one remains to be seen. ERISA is a complex statute, so courts might struggle more, and take longer, to interpret it without the benefit of *Chevron* deference," says Fischell. "*Loper Bright* will mean that, once the judiciary resolves the meaning of a particular statutory provision, it wouldn't change administration to administration unless Congress changed the law itself," she explains.

## Advising Clients in a Post-*Loper Bright* World

"We're all originalists now. [The decision is] centered on an originalist framework and *Loper Bright* fits hand in glove with that framework," says Schaeffer. "The Fifth Circuit's decision in this case stated a strong version of the traditional rule that appellate courts should not decide issues in the first instance," he adds.

"If you have clients in the Fifth Circuit eager for prompt resolution of their cases, they should know that this decision increases the odds of a limited remand, and the delay that comes with that, if there is an important issue the district court has not addressed first," explains Fischell.

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## Related Resources

- Nancy G. Ross, Erin K. Cho, Brantley Webb, Eric A. White, Kaushik K. Goswami, and Jennifer L. Weinberg, "[ERISA Cases in a Post-Chevron World](#)," *Labor & Employment L. Section Employee Benefits* (Oct. 1, 2024).
- Sean Donahue, "[Reckoning with Chevron and Everything After](#)," *Section of Environment, Energy & Resources Trends* (Jan. 2, 2024).