Office of Congressional Workplace Rights

Office of the General Counsel

LOPER BRIGHT IN ACTION: JUDICIAL REVIEW OF AGENCY ACTIONS FEBRUARY 26, 2025

Introduction

On June 28, 2024, the Supreme Court issued its decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). The decision fundamentally altered administrative law by overturning *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) and holding that courts of appeal may not defer to administrative agencies' interpretations of statutes when the statute is ambiguous. While *Loper Bright*'s full impact is far from settled, and the impact on employment law in the legislative branch even less so, this outline discusses how six federal courts applied *Loper Bright* in the months after it was issued. Our analysis of each case highlights how the court interpreted *Loper Bright*'s directive to "exercise their independent judgment in deciding whether an agency acted within its statutory authority." 603 U.S. at 412.

Recap of *Loper Bright*

In *Chevron*, the Supreme Court created a two-step process for courts to review administrative actions. First, courts assessed "whether Congress has directly spoken to the precise question at issue" and if Congress had done so, the inquiry ended. If the court determined that the statute was ambiguous, however, the court deferred to the agency's interpretation as long as it was "based on a permissible construction of the statute." The Court in *Loper Bright* overruled *Chevron*, holding that, under the Administrative Procedure Act, "Courts may not defer to an agency interpretation of the law simply because a statute is ambiguous." 603 U.S. at 412. Without the general deference to agency action afforded by Chevron, *Loper Bright* directs reviewing courts to focus their review on § 706 of the APA, and "decide all relevant questions of law" while also "set[ting] aside action, findings, and conclusions, found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706.

Loper Bright acknowledges that courts owe agencies deference in policymaking and factfinding decisions, but not in questions of law. The Court explained, "When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." 603 U.S. at 395. There is, according to the Court, a "single, best meaning" of every statute and it is the court's job – not the agency's – to find it. *Id.* at 400.

In the exercise of their judgment, courts "may – as they have from the start – seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance' consistent with the APA.'" *Id*. at 394 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).[1]

Loper Bright also explained that statutes may authorize agencies "to exercise a degree of discretion" and acknowledged that many statutes do just that. *Id.* at 394. Statutes do this by expressly delegating to an agency the authority to define statutory terms, by empowering a agency to "fill in the details" of a statutory scheme, or by allowing it "to regulate subject to the limits imposed by a term or phrase that 'leaves agencies with flexibility.'" *Id.* at 395. "When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, 'fix[ing] the boundaries of [the] delegated authority,' and ensuring the agency has engaged in 'reasoned decisionmaking' within those boundaries," (citations omitted).[2]

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[1] It is important to distinguish between *Chevron* deference, which required deference to agencies' interpretation of ambiguous statutes, and *Auer* deference, which requires deference to agencies' interpretations of ambiguous provisions in their own regulations. In *Auer v. Robbins*, 519 U.S. 452 (1997), the Supreme Court established that an agency's interpretation of its own regulation is worthy of deference unless it is plainly erroneous or inconsistent with the regulation. The Supreme Court reiterated and clarified *Auer* most recently in *Kisor v. Wilkie*, 588 U.S. 558 (2019). *Kisor* was cited with approval in *Loper Bright* and was not overruled in that decision. *Loper Bright* at 374. *Loper Bright* had no impact on *Auer* deference, which is still good law. *See*, *e.g.*, *United States v. Kukoyi,* 126 F.4th 806, 815-16 (2d Cir. 2025); *United States v. Bright*, 125 F.4th 97, 102 (4th Cir. 2025); *United States v. McIntosh*, 124 F.4th 199, 204 (3d Cir. 2024); *Bell v. DeJoy*, No. 24-1478, 2024 WL 4948846, at *3 (7th Cir. Dec. 3, 2024); *United States v. Charles*, No. 22-5424, 2024 WL 4554806, at *13 (6th Cir. Oct. 23, 2024); *United States v. Peralta*, No. 23-13647, 2024 WL 4603297, at *2 (11th Cir. Oct. 29, 2024) ("while the Supreme Court mentioned *Kisor* several times in *Loper Bright*, it never said it had overruled it, which is unsurprising since the two cases involve different types of deference – *Loper Bright* addressed agency interpretation of statutes, whereas *Kisor* involved agency interpretation of its own regulations.").

[2] For a detailed analysis of the *Loper Bright* decision and its implications for the judiciary, executive branch agencies, and Congress, see BENJAMIN M. BARCZEWSKI, CONG. RSCH. SERV., R48320, *LOPER BRIGHT ENTERPRISES V. RAIMONDO* AND THE FUTURE OF AGENCY INTERPRETATIONS OF LAW (2024), https://crsreports.congress.gov/product/pdf/R/R48320.

Selected Decisions Applying *Loper Bright*

Below is a representative sample of cases decided after the issuance of the *Loper Bright* decision. Although not all of these decisions concern labor and employment matters, they are worth considering, as they demonstrate the approaches that various courts and judges are taking when called upon to assess the validity of agency rules and decisions in the absence of the *Chevron* framework. *Mayfield i*s an example of a court finding that a statute granted the agency a degree of discretion, which led to a conclusion that deference should be given to the agency's interpretation. *Moctezuma-Reyes* is an example of a court finding that the statute did not grant the agency discretion to interpret the statutory language, and therefore the traditional methods of statutory construction would be used to find the meaning of the language. *Restaurant Law Center* is a good example of how *Loper Bright* has changed the law: the trial court applied *Chevron* and granted summary judgment to the Department of Labor, allowing the contested rule to take effect, whereas the Court of Appeals reversed based on *Loper Bright* and vacated the rule. *Teche Vermilion* is an example of a trial court granting a preliminary injunction after applying *Loper Bright* under circumstances where *Chevron* might well have precluded a showing of a likelihood of success. *Union Pacific* is an example of a case where, while the agency was granted discretion in the setting of rates, it exceeded the bounds of this discretion in the way it set the rates. Finally, *Metropolitan Area EMS Authority* is an example of how overturning *Chevron* can lead to a change in Circuit Court rules that were based on *Chevron.*

Mayfield v. U.S. Department of Labor, 117 F.4th 611 (5th Cir. 2024)

Here, the Fifth Circuit analyzed the Department of Labor's Minimum Salary Rule under *Loper Bright* and determined that DOL had statutory authority to promulgate the Rule.

Facts and History: The Fair Labor Standards Act exempts from its minimum wage and maximum hour requirements several types of workers, including "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). Known as the "EAP Exemption" or the "White Collar Exemption,'' this provision gives the DOL Secretary the power to "define[] and delimit[]" the "terms" of the exemption. For more than 80 years, DOL has repeatedly issued a Minimum Salary Rule that prevents workers from qualifying for this exemption if their salary falls below a specified level.

In 2019, DOL issued a new Minimum Salary Rule, raising the minimum salary required to qualify for the exemption from $455 a week to $684 a week. Robert Mayfield, the owner of 13 Texas fast food restaurants, sued DOL, arguing that the 2019 rule exceeded DOL's statutorily conferred authority – that the DOL lacks, and has always lacked, the authority to define the EAP exemption in terms of salary level – or else violated the nondelegation doctrine. Applying *Chevron,* the district court granted DOL's motion for summary judgment, and Mayfield appealed.

Holdings and Reasoning: The Fifth Circuit affirmed, finding that Congress explicitly delegated to DOL statutory authority to promulgate the Minimum Salary Rule, and that the Rule was within the outer boundaries of that delegation. It held that:

1. The major questions doctrine did not apply.

    - "[I]n certain extraordinary cases, both separation of powers principles and practical understanding of legislative intent make [the court] reluctant to read into ambiguous statutory text the delegation claimed to be lurking there. To convince [the court] otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to clear congressional authorization for the power it claims." 117 F.4th 611 at 616 (quoting *West Virginia v. EPA,* 597 U.S. 697, 723 (2022)).

    - This doctrine limits the power of agencies to make decisions on politically or economically significant issues, and requires that Congress clearly authorize agencies to take such actions.

    - The court found that this case did not have any indicators that would trigger the doctrine: the case was not one of vast political or economic significance; DOL had not intruded into the domain of state law; and the Rule was not a new assertion of authority by DOL, but one it had continuously asserted since 1938.

2. DOL had the statutory authority to promulgate the Minimum Salary Rule.

    - There is an uncontroverted, explicit delegation of authority: the statute exempts "any employee employed in a bona fide executive, administrative, or professional capacity … as such terms are defined and delimited from time to time by regulations of the Secretary[.]" 29 U.S.C. § 213(a)(1).

    - Because there is such a delegation, *Loper Bright* dictates that the court must determine whether the Rule was within the outer boundaries of that delegation.

        - "Where, as here, Congress has clearly delegated discretionary authority to an agency, we discharge our duty by 'independently interpret[ing] the statute and effectuat[ing] the will of Congress subject to constitutional limits.' This means that we must 'independently identify and respect [constitutional] delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA.' Doing so requires using 'all relevant interpretive tools' to determine the 'best' reading of a statute; a merely 'permissible' reading is not enough." 117 F.4th at 617 (quoting *Loper Bright*) (internal citations omitted).

        - Mayfield argued that the Rule exceeded DOL's authority by arbitrarily imposing a new requirement that lacked a textual basis because the statute only speaks of duties. The court disagreed and discussed how using salary as a criterion for EAP status actually has a strong textual foundation. It also explained that adding an additional characteristic is consistent with the power to define and delimit, but such power is not unbounded – a characteristic with no rational relationship to the statute, or one that differs so broadly in scope from the original that it effectively replaces it, would raise serious questions.

- The role of *Skidmore* deference

    - In *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Supreme Court explained that agency interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its 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." 323 U.S. at 140. *Loper Bright* endorses this.

    - The court here expressed some skepticism at the utility of *Skidmore* deference under *Loper Bright*: "it seems that either the agency's interpretation is the best interpretation (in which case no deference is needed) or the agency's interpretation is not best (in which case it lacks persuasive force and is not owed deference)." 117 F.4th at 619. The court did not have to grapple with that issue in this case, however, "because DOL's interpretation of the statute is 'best' based on traditional tools of statutory interpretation and without reliance on deference of any kind." *Id.* at 619-20.

    - But, "if *Skidmore* deference does any work, it applies here." *Id.* at 620. DOL has consistently issued Minimum Salary Rules for over 80 years and began doing so immediately after the FLSA was passed, and Congress has amended the FLSA numerous times without questioning the Minimum Salary Rule – all of which goes to the weight given to an agency's interpretation under *Skidmore*.

3. DOL's exercise of its authority to issue the Rule did not violate the nondelegation doctrine.

    - The intelligible-principle test (used to determine if Congress has provided sufficient guidance when delegating authority) requires Congress to set out guidance that delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. The Supreme Court has said that this is not a demanding standard.

    - Here there were at least two principles guiding the delegation of authority to DOL: the FLSA's statutory directive to eliminate substandard labor conditions, and the text of the EAP exemption.

The court in this case applied *Loper Bright* and found that since the statute contained an uncontroverted, explicit delegation of authority to the DOL, it had to determine whether the Rule was within the outer boundaries of that delegation. The court found that it was. Under *Chevron*, the end result would likely have been the same, but it would have been reached by way of *Chevron's* requirement that courts "give[] controlling weight" to agency interpretations where "Congress has explicitly left a gap for the agency to fill … unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron,* 467 U.S. at 843–44.

The court discussed the *Skidmore* deference endorsed in *Loper Bright*, and found that DOL's interpretation of the EAP exemption was entitled to *Skidmore* deference, but expressed doubt that *Skidmore* deference was actually useful under *Loper Bright.*

***Moctezuma-Reyes v. Garland*, 124 F.4th 416 (6th Cir. 2024)**

In this case, the Sixth Circuit affirmed the decision of the Board of Immigration Appeals (BIA) denying Mr. Moctezuma-Reyes's application for cancellation of removal on the basis of exceptional and extremely unusual hardship to his minor sons.

Facts and History: Moctezuma-Reyes was a Mexican citizen who illegally entered the U.S. in 2005 and has since lived in Michigan with his family, including his two young sons who are U.S. citizens. The Department of Homeland Security initiated removal proceedings against him in 2018.

The Attorney General may cancel a removal if four factors are satisfied. When Moctezuma-Reyes applied for cancellation of removal, the Immigration Judge (IJ) denied his petition, concluding that he did not satisfy the fourth factor, "removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1229b(b)(1)(D). The BIA affirmed the IJ's decision, and Moctezuma-Reyes appealed to the Sixth Circuit.

Holdings and Reasoning: The Sixth Circuit affirmed, finding that deference to the BIA's interpretation of § 1229b(b)(1)(D) was not warranted because the statute does not contain an explicit delegation. It held that:

1. Deference to the BIA's interpretation of the statutory "exceptional and extremely unusual hardship" standard was not warranted.

    - If a statute has express language that confers discretion on an agency to interpret a broad standard, *Loper Bright* explains that the court's role is to independently interpret the statute and effectuate the will of Congress subject to constitutional limits.

        - Although the BIA, exercising power delegated to it by the Attorney General, is statutorily vested by the Immigration and Naturalization Act (INA) with discretion over the ultimate decision of whether to cancel a removal if a noncitizen is eligible for cancellation, § 1229b(b)(1)(D) contains no such discretionary language when it comes to determining whether the noncitizen is eligible in the first place.

        - Per *Loper Bright*, delegations that may call for deference pair broad language (like "appropriate" or "reasonable") with words that expressly empower the agency to exercise judgment.

        - E.g., a provision of the Clean Water Act empowering the EPA to establish pollution limits that "in [its] judgment" protect "public health."

        - Broad language alone should no longer be considered an implicit delegation to an agency warranting deference.

    - Since section 1229b(b)(1)(D) does not contain language vesting the BIA with discretion to determine the meaning of "exceptional and extremely unusual hardship," the court must independently assess the meaning of that standard.

2. "Exceptional and extremely unusual hardship" means hardship significantly different from or greater than that normally resulting from removals.

    - The court looked at dictionary definitions of "exceptional" and "unusual" and saw that both essentially mean "rare." The court reasoned that a hardship can be "extremely rare" either in terms of the degree or the type of hardship. It concluded that the standard means "hardship sustained by a deported alien's qualifying relatives that's significantly different from or greater than the hardship that a deported alien's family normally experiences." That is, the baseline must be the hardship associated with all deportations, which may be severe, yet not rare, but in fact expected – like separation from loved ones and loss of financial or educational opportunities.

    - The court's independent assessment of the statute's meaning was the same as the agency's interpretation: the BIA has interpreted the standard as requiring that the person to be deported "establish that his qualifying relatives would suffer hardship that is substantially different from, or beyond, that which would normally be expected from the deportation of an alien with close family members here." *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 65 (BIA 2001).

3. Moctezuma-Reyes's sons would not suffer exceptional and extremely unusual hardship upon his removal.

    - The financial and emotional difficulties that his two young sons would face because of his removal are typical results of removal, not rare ones.

    - Other factors weighed against reversing the BIA's determination: his ability to work in Mexico and the fact that his adult daughter (a DACA recipient who helped support the family) was employed helped mitigate the financial hardship, and his sons had a support structure in the U.S. and no "compelling special needs in school." 124 F.4th 416 at 424 (quoting *Monreal*, 23 I. & N. Dec. at 63)

The court in this case explained that under *Loper Bright*, deference to the BIA's interpretation of the "exceptional and extremely unusual hardship" standard was not warranted because the statute does not contain express language conferring discretion on the BIA, and the court must instead independently interpret the statute. Since the court's independent assessment of the statute squared with the BIA's interpretation, the outcome of this case is the same under *Loper Bright* as it likely would have been under *Chevron* – affirmance of the BIA's decision to deny

Moctezuma-Reyes' cancellation request. Under *Chevron*, however, it would have been reached in a different manner. Section 1229b(b)(1)(D) would be considered an implicit delegation to the BIA, and in such cases *Chevron* provided that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron,* 467 U.S. at 844. Thus, the court would have been required to defer to the BIA.

***Restaurant Law Center v. U.S. Department of Labor*, 120 F.4th 163 (5th Cir. 2024)**

In this case the Fifth Circuit determined that the DOL's Final Rule restricting when employers may claim a "tip credit" for "tipped employees" was not a reasonable interpretation of the Fair Labor Standards Act, and also that the Final Rule was arbitrary and capricious. The court therefore vacated the Final Rule and granted summary judgment in favor of the restaurant industry organizations that had challenged it.

Facts and History: The FLSA generally requires that employees be paid a minimum wage, but it allows employers to pay less than the minimum wage to tipped employees as long as their tips make up the difference. 29 U.S.C. § 203(m)(2)(A). This benefit to employers, which has existed since 1966, is known as the "tip credit."

The FLSA defines "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." 29 U.S.C. § 203(t). The statute does not, however, define what it means to be "engaged in an occupation." After years of issuing regulations and sub-regulatory guidance, in 2021 the DOL issued a Final Rule defining what it means to be "engaged in a tipped occupation" and putting limits on how much of an employee's time can be spent doing tasks that support their tipped work, but do not themselves constitute tipped work, in order for the employer to claim the full tip credit. Under the Final Rule, an employer "may only take a tip credit for work performed by a tipped employee that is part of the employee's tipped occupation."

The Restaurant Law Center and the Texas Restaurant Association sued in December 2021, seeking to permanently enjoin DOL's enforcement of the Final Rule. The district court denied the injunction and granted summary judgment for DOL, applying the *Chevron* analysis and determining that the term "engaged in an occupation" was ambiguous and that the Final Rule was a reasonable interpretation of that term. The district court also held that the Final Rule was neither arbitrary nor capricious, and not subject to the major questions doctrine. The employer groups appealed, and while the appeal was pending, the Supreme Court issued its decision in *Loper Bright*.

Holdings and Reasoning:

The Fifth Circuit invalidated the Final Rule under two different theories: first, that it runs contrary to the clear statutory text of the FLSA and is therefore not in accordance with law; and

second, that "because it imposes a line-drawing regime that Congress did not countenance, it is arbitrary and capricious."

1. The Final Rule is not a reasonable interpretation of the FLSA's tip credit provision, and is in fact contrary to the text of the statute.

    - The court did not discuss the FLSA's delegation of rulemaking authority to DOL, only stating broadly that "DOL is authorized to promulgate rules interpreting and clarifying the FLSA." 120 F. 4th at 166 (citation omitted). The court devoted several paragraphs to summarizing the *Loper Bright* decision, but did not discuss any distinction between the court's role in interpreting broad or narrow delegations of authority. Rather, the court stated that *Loper Bright* overruled *Chevron*, and "In its place, the Court has instructed that we are to return to the APA's basic textual command: 'independently interpret[ing] the statute and effectuat[ing] the will of Congress.' Courts are constantly faced with statutory ambiguities and genuinely hard cases. But 'instead of declaring a particular party's reading "permissible" in such a case, courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity.'" *Id*. at 171 (quoting *Loper Bright*, 603 U.S. at 395, 400).

    - The Fifth Circuit agreed with the district court that "[t]he dispute in this case turns on the meaning of the statutory phrase 'engaged in an occupation' and the term 'occupation,' both of which are used in the definition of 'tipped employee' but are undefined in the FLSA." However, as *Loper Bright* dictates, the court need not go through the steps of *Chevron*, but rather "We must parse the text of the FLSA using the traditional tools of statutory interpretation[,]" beginning with the principle that "Terms that the statute leaves undefined should be given their ordinary, contemporary, common meaning." *Id*. at 171.

    - Dictionary definitions of "engaged" and "occupation" from the 1950s and 1960s – i.e., contemporary with the addition of the tip credit to the FLSA – indicate that "'engaged in an occupation' most naturally indicates a focus 'on the field of work and the job as a whole,' rather than on specific tasks. In other words, 'engaged in an occupation' closely resembles 'employed in a job.'" *Id*. at 172.

    - DOL created a requirement that in order to be "engaged in" a tipped occupation, the employee must be performing duties connected to the pursuit of tips. However, the court explained that "DOL's argument rests on an ambiguity of its own making"; just because the statute does not define what it means to be "engaged in an occupation" that does not automatically confer upon the agency the right to depart from the ordinary meaning of those terms.

    - To adopt the DOL's definition would create certain paradoxes. For example, under the limitations set by the Final Rule, if an employee spends more than 30 minutes at a time conducting work that only supports tipped work but is not in itself tipped work – such as a waiter setting and bussing tables, rather than directly serving customers – the restaurant cannot claim the tip credit for any of that work performed past the 30-minute mark. As the court explained, "At minute 31, a server who has been 'setting and bussing tables' is no longer engaged in her tipped occupation even though the

duty itself has not changed. … But the term 'occupation' does not mean how often a person performs a task." *Id*. at 173 (emphasis in original) (internal quotations and citations omitted).

- Moreover, "This problem is especially driven home by the Final Rule's treatment of idle time. Time that a server spends idle during a slow shift, for example, is defined as directly supporting work subject to the 20-percent and 30-minute limits. Therefore, if the server is idly standing by to serve customers for 21 percent of his workweek, or for 31 continuous minutes, he is no longer engaged in his occupation and is no longer a tipped employee for the duration of that excess time. What occupation, then, would he be engaged in?" (internal citations omitted)

2. The Final Rule is arbitrary and capricious.

   - In approaching the question of whether a particular regulation is arbitrary and capricious, "Even without *Chevron*, we understand that courts are still to conduct a similar arbitrary-and-capricious analysis in 'fix[ing] the boundaries of ... delegated authority and ensuring the agency has engaged in reasoned decisionmaking within those boundaries.'" 120 F.4th at 175 (quoting *Loper Bright*, 603 U.S. at 395).

   - DOL argued that it was permissible, for purposes of drawing a line between when an employer is or isn't entitled to the tip credit, to focus on the nexus between an employee's duties and the production of tips. The restaurant industry appellants countered that section 203(t) "ties the applicability of the tip credit solely to whether an employee is performing the tasks making up her occupation" and that it was therefore impermissible for the Final Rule to consider those duties' relationship to *pursuing tips*, rather than their relationship to the *occupation*.

   - The court agreed with the appellants, because "The 'line' that DOL has drawn discounts many core duties of an occupation when those duties do not themselves produce tips. This is not what § 203(t) directs DOL to consider. If a core duty of a server is bussing and setting up tables, the server is undoubtedly engaged in his occupation. It does not matter whether he is tipped or not for those duties." Indeed, the term "tipped occupation" does not appear anywhere in the FLSA but is rather a concept introduced by DOL.

   - This focus on the nexus between duties and tips can lead to strange results, such as where a single employee performing the exact same duty might or might not qualify for the tip credit depending on context – for example, a bartender retrieving a bottle of beer from the storeroom at the request of a tip-paying customer is performing a tip-producing task, whereas a bartender retrieving a case of beer from the storeroom is performing merely "directly supporting work" under the Final Rule.

   - "In summary, we hold that the Final Rule is arbitrary and capricious because it draws a line for application of the tip credit based on impermissible considerations and contrary to the statutory scheme enacted by Congress." 120 F.4th at 177.

The Fifth Circuit therefore reversed the district court's grant of summary judgment for the DOL, and rendered summary judgment in favor of the restaurant industry appellants. Consistent with the requirements of the APA and Fifth Circuit precedent, the court also vacated the Final Rule "insofar as it modifies 29 C.F.R. § 531.56 as promulgated in 1967." *Id*.

Notably, although the Fifth Circuit in this case acknowledged that "courts are well-advised to consider agency 'interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time[,]'" *id*. at 174 (quoting *Loper Bright*, 603 U.S. at 394), it went on to caution that simply because an interpretation has stood for a long time does not mean that courts must defer to it: "But while longstanding agency practice might have the 'power to persuade,' it has never had the 'power to control.' Nor can we permit agency practice to defeat a statute's text by 'adverse possession.'" *Id*. (internal quotations and citations omitted).

***Teche Vermilion Sugar Cane Growers Ass'n Inc. v. Su,* — F. Supp. 3d —, No. 6:23-CV-831, 2024 WL 4246272 (W.D. La. Sept. 18, 2024), *opinion clarified*, No. 6:23-CV-831, 2024 WL 4729319 (W.D. La. Nov. 7, 2024).**

In this case a federal district court determined that the DOL's final rule regarding wage rates for certain temporary foreign workers was not a reasonable statutory interpretation, and that it was arbitrary and capricious. The court granted the plaintiffs a preliminary injunction, finding that they were likely to succeed on the merits of their challenge to the final rule.

Although this case has not yet resulted in a decision on the merits, the court's analysis of the plaintiffs' likelihood of success offers insight into how district court judges are handling challenges to agency regulations in the wake of *Loper Bright*.

Facts and History: The plaintiffs in this case are four sugarcane farm operators that employ or plan to employ temporary foreign workers who are admitted to the United States under H-2A agricultural worker visas. The H-2A program was created by the Immigration and Nationality Act of 1952 (INA), which tasks the DOL with creating the regulatory framework for the program. Among other things, the DOL is required to ensure that hiring temporary foreign workers to perform agricultural work "will not adversely affect the wages and working conditions of workers in the United States similarly employed." 8 U.S.C. § 1188(a)(1)(B). However, the statute does not tell the DOL *how* to prevent such adverse effects.

The regulatory framework under the INA includes certain wage requirements for employees. All occupations in the United States are assigned Standard Occupational Classification (SOC) codes, which are defined by the nature of the jobs. The DOL calculates adverse effect wage rates (AEWRs) for each applicable SOC, which effectively establishes a minimum wage for H-2A visa workers and domestic workers performing the same work.

In February 2023 the DOL issued a final rule entitled "Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States," 88 FR 12760-01. Among other things, the final rule based the AEWR for H-2A workers who haul sugarcane from the field to the processing plants using heavy or tractor-trailer trucks on the wage rates for a SOC code that includes non-agricultural heavy truck drivers,

which meant that sugarcane growers were required to pay those employees a significantly higher wage than they had previously.

The sugarcane operators filed this lawsuit in the Western District of Louisiana to challenge the relevant provision of the final rule, and also moved for a preliminary injunction to stop enforcement of the contested provision.

Holdings and Reasoning: The plaintiffs raised several different bases and alternative arguments supporting their claims, most of which are not relevant to our discussion. The impact of the *Loper Bright* decision is felt in the court's analysis of the plaintiffs' motion for a preliminary injunction, so that is our focus. The question facing the court was whether the plaintiffs were likely to succeed in their challenge to the H-2A sugarcane hauler categorization provision in DOL's final rule. With respect to that question, the court held as follows:

1. The final rule likely exceeds DOL's statutory authority.

    - Because the statute does not specify how DOL is to carry out its mandate – i.e., to ensure that hiring temporary foreign workers will not adversely affect domestic workers' wages and working conditions – and because it also does not define the term "similarly employed," "[c]ourts have held that the statute grants discretion to the DOL to implement a regulatory regime to address that question." 2024 WL 4246272 at *15. The DOL exercised that authority to implement regulations adopting the AEWR methodology, and the court appears to consider DOL as having considerable discretion, explaining that "the statute does not dictate the methodology that the DOL must use to determine the AEWR or otherwise limit the DOL to using a particular survey... The only statutory constraints are the boundaries set by section 1188(a)(1)(B)." *Id*. at *16. However, those statutory constraints must be respected: "If the DOL adopts an AEWR methodology that exceeds the boundaries set by the statute, the agency's action is unlawful." *Id*. at *15.

    - For purposes of this case, the analysis of whether the DOL's methodology exceeded the boundaries set by the statute hinged on the term "similarly employed" in 8 U.S.C. § 1188(a)(1)(B). In other words, as long as its methodology for determining AEWRs is based on workers who are similarly employed, the agency's decision would be within the bounds of its delegated authority. The court elaborated on the boundaries of DOL's statutory authority: "While section 1188(a)(1)(B) does not require that the DOL base the AEWR on average wage rates for jobs or occupations that are the same or identical, the statute requires that the jobs be sufficiently comparable that the wage rates and working conditions of the H-2A job at issue can adversely impact the wage rates and working conditions of domestic workers employed in the non-H-2A job. Otherwise, the AEWR would have no correlation to whether the employment of an H-2A worker adversely impacts similarly employed domestic workers. Absent this correlation, the AEWR methodology set forth in the Final Rule exceeds the scope of section 1188(a)."

    - Here, DOL argued that sugarcane workers who use heavy trucks or tractor-trailers to haul sugar cane from the fields to the processing plants were similarly employed to

other workers who drive the same types of vehicles, including long-haul interstate truckers and others.

- Citing several dictionary definitions, the court explained that "The word 'similarly' as used in the statute can be fairly read to mean 'having characteristics in common,' 'very much alike,' or 'alike in substance or essentials.' Accordingly, the statute does not require that workers be employed in identical or the same jobs. However, the term 'similar' has to be read in the context of the statute and its purpose. The purpose of section 1188(a)(1)(B) is to ensure that the employment of H-2A workers does not adversely affect the wages or working conditions of domestic workers who are similarly employed. Accordingly, an H-2A job must have sufficient common characteristics with a non-H-2A job that the wages and working conditions of one job impact the wages and working conditions of the other. Putting it another way, if the nature of the work, qualifications, and experience required for jobs performed by two groups of workers are sufficiently different, the wages and working conditions of one group of workers is not likely to adversely affect the wages and working conditions of the other group of workers." 2024 WL 4246272 at *16.

- The court then considered the record evidence, including the testimony of several subject matter experts, and concluded that several factors made the DOL's interpretation of "similarly employed" in this context unreasonable, because the jobs were not sufficiently comparable that the wage rates and working conditions of the H-2A job at issue could adversely impact the wage rates and working conditions of domestic workers employed in the non-H-2A jobs. *Id*. at *19-20. These factors included:

    - Duration – many non-farm heavy and tractor-trailer truck drivers work full time, year-round, whereas the sugarcane workers who drive trucks only do so for a few months during harvest season;

    - Work environment – the sugarcane workers only drive short distances to bring the sugarcane from the field to the processing facility, but the SOC code also applies to interstate truckers who drive much longer distances, and drivers who operate in densely populated urban areas;

    - Tasks – the sugarcane workers perform a variety of other harvest-related tasks while not driving, whereas the other jobs in this category do not list farm-related tasks; and

    - Credentials – the other truck drivers in this category are required to hold a commercial driver's license (CDL) and are subject to federal regulations on training, whereas the sugarcane workers are exempt from those requirements.

- There was no evidence in the record that DOL had considered the extent to which the wages and working conditions of H-2A sugarcane truck drivers affected the wages and working conditions of the much broader group of domestic, non-farm transportation workers. "In the end, the DOL appears to ground its new AEWR methodology—at least as it applies to sugarcane truck drivers—solely on the type of

equipment used by these workers without considering the broader question of whether the wages and working conditions of one group will have any impact on the wages and working conditions of the other group, which is what section 1188 requires." *Id*. at *20.

2. The final rule is likely to be found arbitrary and capricious.

    - As an alternative to the argument that DOL had exceeded its statutory authority in promulgating the final rule, the plaintiffs argued that the final rule was arbitrary and capricious in violation of the APA. As the court summarized:

        - An agency action is generally considered arbitrary and capricious if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id*. at *21 (internal citations omitted).

        - The reasoning on which an action was based must be articulated by the agency at the time the decision was made, and not developed after the fact. The reasoning need not be perfectly clear, but it is sufficient so long as the agency's path may reasonably be discerned. *Id*. at *22 (internal quotations and citations omitted).

    - The court determined that the contested provision of the final rule was indeed arbitrary and capricious. Referencing its analysis from earlier in the opinion when it discussed the reasons why the DOL had exceeded its statutory authority, the court reiterated that "the record does not reflect any attempt by the DOL to analyze the differences in the 'work performed, skills, education, training, and credentials' of these two groups of workers. Nor does the record reflect that the DOL analyzed or even considered whether the wages and working conditions of H-2A workers has any effect on the broader, more diverse pool of non-farm heavy and tractor-trailer truck drivers. Instead, the DOL appears to focus entirely on the type of equipment used by the two groups of workers."

The court distinguished the opinions of two other district courts that had considered similar challenges to the final rule and found it to be within the scope of DOL's authority. Critically, both of those opinions had been issued before the Supreme Court decided *Loper Bright*, so the courts had applied the *Chevron* framework and deferred to DOL's interpretation of the statute. However, exercising independent judgment as *Loper Bright* requires, the court in this case reached a different conclusion.

Note: the court later issued an order clarifying certain aspects of this opinion, but the post-*Loper Bright* statutory interpretation analysis is not relevant to that clarification.

***Union Pacific Railroad Co. v. Surface Transportation Board*, 113 F. 4th 823 (8th Cir. 2024), *reh'g denied*, 2024 WL 5058697 (8th Cir. Dec. 10, 2024)**

In this case, the Eighth Circuit overturned a rule from the Surface Transportation Board that changed how the Board determined shipping rates on railroad lines. The court held that the new rule conflicted with the Board's statutory duties by removing any requirements for analysis or a hearing before determining the appropriate rate. Moreover, the court took seriously the directive to independently review the agency's statutory interpretation: the decision did not address or consider the Board's justification for the rule or its arguments on appeal.

Facts and History: Congress created the Surface Transportation Board to resolve rate disputes between railroads and shippers. For years, the Board used a costly and time-consuming test that required shippers to design a hypothetical competitor railroad and project the price that railroad would offer to compete with the existing railroad's offer. 113 F. 4th at 828. In 2015, Congress amended the statute and directed the Board to "maintain 1 or more simplified and expedited methods for determining the reasonableness of challenged rates." *Id.* (citing 49 U.S.C. § 10701(d)(3)). The statute nonetheless requires the Board hold a "full hearing" and "give due consideration" to specific factors to determine a reasonable maximum rate. *Id.* at 829 (citing 49 U.S.C. §§ 10701(d)(2), 10704(a)(1)).

In response, the Board adopted the Final Offer Rate Review (FORR) rule, requiring the Board to decide between the two parties' final offers. 113 F.4th at 830. The rule requires the Board to choose one offer or the other based on certain factors and "appropriate economic principles." *Id.* at 831. The Board may not attempt to modify the offers or seek compromise. *Id.* The Board based the FORR on Major League Baseball's arbitration procedures. *Id.* at 830.

Holdings and Reasoning: Union Pacific and railroad associations sued, alleging that the FORR had no basis in the Board's originating statute, was unconstitutionally vague, and was arbitrary and capricious. 113 F.4th 828.

1. The Eighth Circuit agreed, holding that the FORR was "not in accordance with law" under the APA because it removed important analytical responsibilities from the Board and eliminated parties' procedural rights. *Id.* at 834.

    - The statute requires the Board to hold a "full hearing," but the FORR fell short of a "full hearing" when it did not assign either party the burden of proof. *Id.* at 838. When the Board allowed itself to choose between two offers, it removed the requirement that the shipper prove anything at all. Without a burden of proof, the FORR is not an "adjudication" under the APA and therefore not a "full hearing" under the Board's originating statute. *Id.* at 837.

    - Moreover, the statute requires the Board to "prescribe the maximum rate" but the FORR limits the Board's ability to prescribe when it mandates choosing between two separate offers. *Id.*

2. The decision cites *Loper Bright* extensively, stating that the reviewing panel "must independently interpret the statute" to determine whether the agency violated it and that

"agency interpretations of statutes . . . are *not* entitled to deference." *Id*. at 833 (emphasis in original).

- In overturning the FORR, the Eighth Circuit did not defer to or even discuss the agency's asserted interpretation of the statute. The Court's analysis starts with the statutory text, compares it to the FORR's language, and concludes that the FORR went too far. The decision omits any consideration of the Board's justification for the FORR or its arguments on appeal for why the rule falls within the statutory text.

- Before *Loper Bright,* the Court would have done a detailed analysis of the Board's rationale for the rule, drawing from the rule itself and its briefing before the Court to determine whether the Board acted reasonably. *See CSX Transp., Inc. v. Surface Transp. Bd.*, 754 F.3d 1056 (D.C. Cir. 2014). In *Union Pacific*, the Court followed *Loper Bright* and acted on its own, without regard for the Board's stated purpose or basis for the FORR.

***Metropolitan Area EMS Authority v. Secretary of Veterans Affairs*, 122 F.4th 1339 (Fed. Cir. 2024)**

In this case, the Federal Circuit rejected a Department of Veterans Affairs rule relating to payments to ambulance contractors. The Court held that, while other Circuits had required petitioners to raise their objections to a rule in the notice and comment period during the *Chevron* era, the newfound independence granted by *Loper Bright* permitted the Court to object as it pleased.

Facts and History: Congress charged the Department of Veterans Affairs with reimbursing transportation companies for the cost of bringing patients to emergency and non-emergency treatment. The statute contains two directives relevant here:

- First, the VA may "pay the actual necessary expense of travel . . . of any person to or from a Department facility or other place in connection with vocational rehabilitation . . . examination, treatment, or care." 38 U.S.C. § 111(a).

- Second, "in the case of transportation of a person to or from a Department facility by ambulance, the Secretary may pay . . . the lesser of the actual charge for the transportation or the amount determined by the fee schedule established [in a separate statute]." 38 U.S.C. § 111(b)(3)(c).

In 2018, the VA Inspector General chided the VA for failing to realize millions of dollars in savings by paying the actual cost for emergency transportation services when the Medicare Fee Schedule (MFS) amount is occasionally cheaper. 122 F.4th at 1342. The VA implemented the IG's recommendation with a new regulation published in November 2020, directing the VA to pay the lesser of the actual charge or the MFS amount for all transportation. *Id.* Before publication, the VA had not received any comments questioning whether the rule exceeded the VA's statutory authority. *Id.* at 1343-44. Ambulance companies subsequently petitioned the Federal Circuit for review of the rule, arguing that it exceeded the VA's authority under the

statute by allowing the VA to reimburse at a rate lower than the actual cost of the trip. *Id*. at 1343.

Holdings and Reasoning: The court applied the APA's standard of review, setting aside an action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Federal Circuit vacated the rule as "not in accordance with law."

1. The Federal Circuit declined to adopt the D.C. Circuit's rule that arguments not raised in the notice and comment period are forfeited, because that rule has underpinnings in *Chevron*. 122 F.4th at 1344.

    - Because *Loper Bright* required courts to independently review whether agency actions were authorized by statute, parties do not have to raise the objection during the notice and comment phase. *Id.*

    - In other words, if courts' review of agency action is truly independent, the court must be free to raise any objection it wishes, regardless of whether or when a litigant raised it.

2. Turning to the merits, the court held that the rule exceeded the bounds of the statute because the statute only allows for a lesser reimbursement when the transportation is "to or from a Department facility by ambulance," not when the transportation goes "to or from a Department facility or other place." When the regulation permits a lesser reimbursement for all treatment, it misreads the statute.

    - The court held that "we understand this difference [between the two statutory sections] to mean Congress in fact intended two different things – indeed, if Congress meant for the phrase 'to or from a Department facility' to be as broad as the phrase 'to or from a Department facility or other place,' it easily could have said so." *Id.* at 1346 (internal citations omitted).

    - The court rejected the VA's argument that "Department facility" is shorthand for "Department facility or other place." *Id.* at 1347. In so holding, the court relied on "canons of construction," which "ordinarily suggest that terms connected by a disjunctive be given separate meanings." *Id.*