
Loper Bright in Action: Judicial Review of Agency Actions
Office of Congressional Workplace Rights
Office of the General Counsel
February 26, 2025
advancing workplace rights, safety & health, and accessibility in the legislative branch
OFFICE OF CONGRESSIONAL WORKPLACE RIGHTS
UNITED STATES CONGRESS

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Welcome

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Presenters

- Hillary Benson, Deputy General Counsel
- Dynah Haubert, Associate General Counsel
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Overview

- Recap of *Loper Bright Enterprises v. Raimondo*
- Selected federal cases reviewing agency actions post-*Loper Bright*

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Loper Bright Recap

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Judicial review under *Chevron*

Chevron USA, Inc. v. NRDC, 467 U.S. 837 (1984) was the seminal administrative law case for forty years, establishing how courts should defer to administrative agencies' interpretations of the laws Congress directed them to administer. *Chevron*'s two-step test was:

1. Did Congress directly speak to the precise question at issue? If so, the Court would decide whether the agency acted within Congress' delegation. If not…
2. Courts would defer to the agency's interpretation of an ambiguous statute as long as the agency's interpretation was "based on a permissible construction of the statute."

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Loper Bright overturns *Chevron*

- *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024)
- The Supreme Court interpreted the Administrative Procedure Act (APA) to mean that courts' responsibility is to "independently interpret the statute."
- *Loper Bright* directed reviewing courts to focus on the plain text of section 706 of the APA, 5 U.S.C. § 706, which states in relevant part:
  - Courts decide all questions of law and constitutionality;
  - Courts must set aside agency action, findings, and conclusions which are arbitrary, capricious, an abuse or discretion, or otherwise not in accordance with law.

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Judicial review after *Loper Bright*

- The Court permitted lower courts to "respect" and, depending on the facts of each case, rely on an agency's interpretation of the statute, per its previous decision in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), but in most cases the agency's interpretation of a statute is not owed deference and cannot bind the court.
- The Court recognized three instances where an agency interpretation of a statute may be entitled to deference: (1) when the statute expressly delegates to an agency the authority to define statutory terms; (2) when the statute empowers an agency to "fill in the details" of a statutory scheme; or (3) when a statutes allows an agency to regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility.
- In these instances, the APA requires a court to independently interpret the delegation language in the statute to determine the boundaries of the delegated authority and whether the agency has engaged in "reasoned decisionmaking" within those boundaries.

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What does *Loper Bright* mean for us?

- So far we don't know what impact, if any, *Loper Bright* will have on the legislative branch.
- There have been no district or circuit court decisions applying *Loper Bright* to an OCWR action.
- While we rely on Administrative Procedure Act principles, the OCWR's regulations are each approved by Congress before going into effect.

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Mayfield v. DOL

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Mayfield v. U.S. Dep't of Labor, 117 F.4th 611 (5th Cir. 2024)

The Fifth Circuit analyzed the Department of Labor's Minimum Salary Rule under *Loper Bright*.

- FLSA 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).
- DOL has issued a Minimum Salary Rule for 80 years setting a minimum salary required to qualify for the exemption.
- In 2019, DOL issued a new Rule raising this minimum salary from $455 a week to $684 a week.
- Restaurant owner Robert Mayfield sued, arguing that the 2019 rule exceeded DOL's statutorily conferred authority or else violated the nondelegation doctrine.
- Applying *Chevron*, the district court granted DOL's motion for summary judgment, and Mayfield appealed.

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Mayfield v. U.S. Dep't of Labor, cont'd

The Fifth Circuit held that DOL had the statutory authority to promulgate the Minimum Salary Rule.

- Because there is an uncontroverted, explicit delegation of authority, *Loper Bright* dictates that the court must determine whether the Rule was within the outer boundaries of that delegation.
- The court examined the text of the explicit delegation and determined that the action that DOL took when it promulgated the Rule is consistent with the dictionary definitions of "define" and "delimit," so this action was within the scope of its authority.
- The Rule does not arbitrarily impose a new requirement by using salary when the statute only speaks of duties. Adding an additional characteristic is consistent with the power to define and delimit (but such power is not unbounded).

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Mayfield v. U.S. Dep't of Labor, cont'd

The court expressed some skepticism at the utility of *Skidmore* deference under *Loper Bright*.

- It 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."
- "[I]f *Skidmore* deference does any work, it applies here."

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Moctezuma-Reyes v. Garland

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

The Sixth Circuit held that deference to the Board of Immigration Appeals' (BIA) interpretation of the "exceptional and extremely unusual hardship" standard of the Immigration and Naturalization Act (INA) was not warranted.

- The statute authorizes the Attorney General to cancel a removal if four factors are satisfied, including if "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).
- 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).
- In 2018, DHS initiated a removal proceeding against Moctezuma-Reyes, a Mexican citizen who illegally entered the U.S. in 2005. His application for cancellation was denied because he did not satisfy the hardship factor.

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Moctezuma-Reyes v. Garland, cont'd

Though it held that deference to the BIA's interpretation of the "exceptional and extremely unusual hardship" standard was not warranted, the Sixth Circuit affirmed the denial of cancellation, holding that Moctezuma-Reyes' sons would not suffer exceptional and extremely unusual hardship upon his removal.

- The BIA is statutorily vested by the INA with discretion over the ultimate decision of whether to cancel a removal if someone satisfies the eligibility criteria, but the criteria themselves do not contain discretionary language when it comes to determining eligibility.
- The court independently assessed the provision's meaning and concluded that "exceptional and extremely unusual hardship" means hardship significantly different from or greater than that normally resulting from removals; this aligns with the BIA's interpretation from 2001.

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Restaurant Law Center v. DOL

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***Restaurant Law Ctr. v. U.S. Dep't of Labor*, 120 F.4th 163 (5th Cir. 2024)**

Restaurant groups challenged the DOL's 2021 Final Rule regarding the employer tip credit under the Fair Labor Standards Act.

- The FLSA allows employers to claim a "tip credit" – i.e., to pay tipped employees less than the minimum wage as long as their tips make up the difference.
- 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 define "engaged in an occupation."
- DOL's Final Rule defined "engaged in a tipped occupation" as "when the employee performs work that is part of the tipped occupation" and established three categories of work: (1) directly tip-producing work, (2) directly supporting work, and (3) work not part of the tipped occupation.
- Employers could not claim the tip credit if the employee spent more than 20% of their time or more than 30 minutes at a time doing supporting work, and not at all for work not part of the tipped occupation.

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Restaurant Law Ctr. v. U.S. Dep't of Labor, cont'd

The Fifth Circuit held that the Final Rule was not a reasonable interpretation of the statute.

- The FLSA gives DOL broad authority to issue regulations, but section 203 does not delegate authority to DOL to define specific terms.
- Pre-*Loper Bright*, the district court applied *Chevron*, found the phrase "engaged in an occupation" to be ambiguous, and deferred to DOL's interpretation.
- No longer bound by the *Chevron* framework, the court "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."
- Applying contemporary dictionary definitions, the court determined that "'engaged in an occupation' closely resembles 'employed in a job.'" By focusing on the words "engaged in" rather than "occupation" and focusing on discrete tasks rather than the job as a whole, DOL's argument in support of the Final Rule is based on "an ambiguity of its own making."

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Restaurant Law Ctr. v. U.S. Dep't of Labor, 120 F.4th 163 (5th Cir. 2024)

The Fifth Circuit also held that the Final Rule was arbitrary and capricious.

- *Loper Bright* requires that the court fix the boundaries of delegated authority and ensure that the agency has engaged in reasoned decision making within those boundaries.
- Focusing on the nexus between duties and tips, rather than the relationship of the duties to the occupation, discounts many core duties of the employees' jobs and leads to strange results.

Holding: The court granted summary judgment for the restaurant groups and vacated the rule insofar as it modified the tip credit provision.

Note:

- Although the Supreme Court in *Loper Bright* advised courts to consider "interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time," the Fifth Circuit cautioned that courts are not bound by longstanding agency practice if it conflicts with the statutory text.

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Teche Vermilion Sugar Cane Growers Ass'n Inc. v. Su

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***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)**

Sugarcane farm operators challenged the DOL's final rule regarding wage rates for certain temporary foreign workers.

- Plaintiffs employ temporary foreign workers admitted to the United States under H-2A agricultural worker visas, as part of a program created by the Immigration and Nationality Act of 1952 (INA).
- DOL must 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). The statute does not specify how DOL is to prevent these adverse effects. As relevant to this case, DOL has chosen to do this by establishing Standard Occupational Classification ("SOC") codes and calculating adverse effect wage rates ("AEWRs") for each SOC.
- DOL has considerable discretion in setting AEWR methodology, as long as the temporary foreign workers and domestic workers are "similarly employed."

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Teche Vermilion Sugar Cane Growers Ass'n Inc. v. Su, cont'd

In a 2023 final rule, DOL 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 an SOC code that includes non-agricultural heavy truck drivers.

- Plaintiffs argued that H-2A sugarcane workers and other heavy truck drivers are not "similarly employed" and should not share an SOC classification.
- Relying on dictionary definitions, the court determined 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, 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."
- Citing expert testimony, the court concluded that several factors likely made the DOL's interpretation of "similarly employed" in this context unreasonable: the jobs were not sufficiently comparable in terms of duration, work environment, tasks, or employee qualifications and credentials. Rather, DOL's classification seemed to be based solely on the type of equipment used.

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Teche Vermilion Sugar Cane Growers Ass'n Inc. v. Su, cont'd

The court granted the plaintiffs' requested preliminary injunction, finding that they were likely to succeed on the merits of their challenge to the final rule.

- Because the sugarcane workers were not "similarly employed" to other workers in the same classification, DOL likely exceeded its statutory authority.
- The final rule was also likely arbitrary and capricious, because DOL failed to consider or reasonably explain its decision. "[T]he 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."
- The court distinguished other district court opinions that had found the same provision of the final rule to be within the scope of DOL's authority, because those cases had been decided under the *Chevron* framework prior to *Loper Bright*.

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Union Pacific Railroad Co. v. STB

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***Union Pacific R.R. Co. v. Surface Transp. Bd.*, 113 F.4th 823 (8th Cir. 2024)**

Union Pacific appealed to the Eighth Circuit to challenge a Surface Transportation Board rule establishing how the Board determined shipping rates on railroad lines.

- The Surface Transportation Board resolves rate disputes between railroads and shippers by "prescribing" a maximum after "giving due consideration" in a "full hearing." 49 U.S.C. §§ 10701(d)(2), 10704(a)(1)
- Historically, the Board's onerous rules required shippers to design a hypothetical competitor railroad and forecast their competing price offer.
- The Board proposed a new rule, the Final Offer Rate Review, which forced it to decide between the parties' final offers.

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Union Pacific R.R. Co. v. Surface Transp. Bd., cont'd

The Eighth Circuit overturned the Final Offer Rate Rule.

- The court found that the rule was "not in accordance with law" per the APA because the FORR goes beyond the Board's statutory authority.
- Reviewing the plain language of the statute, the court held that deciding between two offers is not a "full hearing." There is no burden of proof, which is required in order to be an "adjudication" under the APA.
- The statute requires the Board to "prescribe," but choosing one offer over another is not a prescription.
- The decision faithfully adheres to the Supreme Court's direction in *Loper Bright* for independent review: the Eighth Circuit does not address the agency's statutory interpretation or arguments on appeal.

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Metropolitan Area EMS Authority v. Secretary of Veterans Affairs

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Metro. Area EMS Auth. v. Sec'y of Veterans Affs., 122 F.4th 1339 (Fed. Cir. 2024)

The Federal Circuit overturned a VA rule about payments to ambulance contractors. The two relevant statutory provisions were:

- 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).

- The VA issued a new rule allowing less-than-actual reimbursement for all transportation, including going to "another place." The VA interpreted the two sections of the statute to refer to the same types of transportation.
- Ambulance companies petitioned the Federal Circuit for review of the rule.

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Metro. Area EMS Auth. v. Sec'y of Veterans Affs., cont'd

- During the notice and comment stage, no one challenged the VA's statutory authority to issue this rule.
- The VA argued that an absence of comments precluded this post-hoc lawsuit, as the D.C. Circuit has held.
- Citing *Loper Bright*, the Federal Circuit rejected the VA's contention that the argument was forfeited. *Loper Bright* gave the court independent authority to review agency action regardless of what issues came up during the notice and comment stage.

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Metro. Area EMS Auth. v. Sec'y of Veterans Affs., cont'd

- On the merits, the Federal Circuit found that the rule exceeded the statute's direction and was therefore "not in accordance with law."
- The court analyzed the plain language of the statute to determine that the VA was only permitted to offer a lesser reimbursement when the transportation was "to or from a Department facility by ambulance."
- Because the rule allowed for a lower rate of reimbursement for other locations and methods, it went beyond the authority granted by Congress. The court arrived at this conclusion by looking at "the provisions of the whole law."

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Questions?

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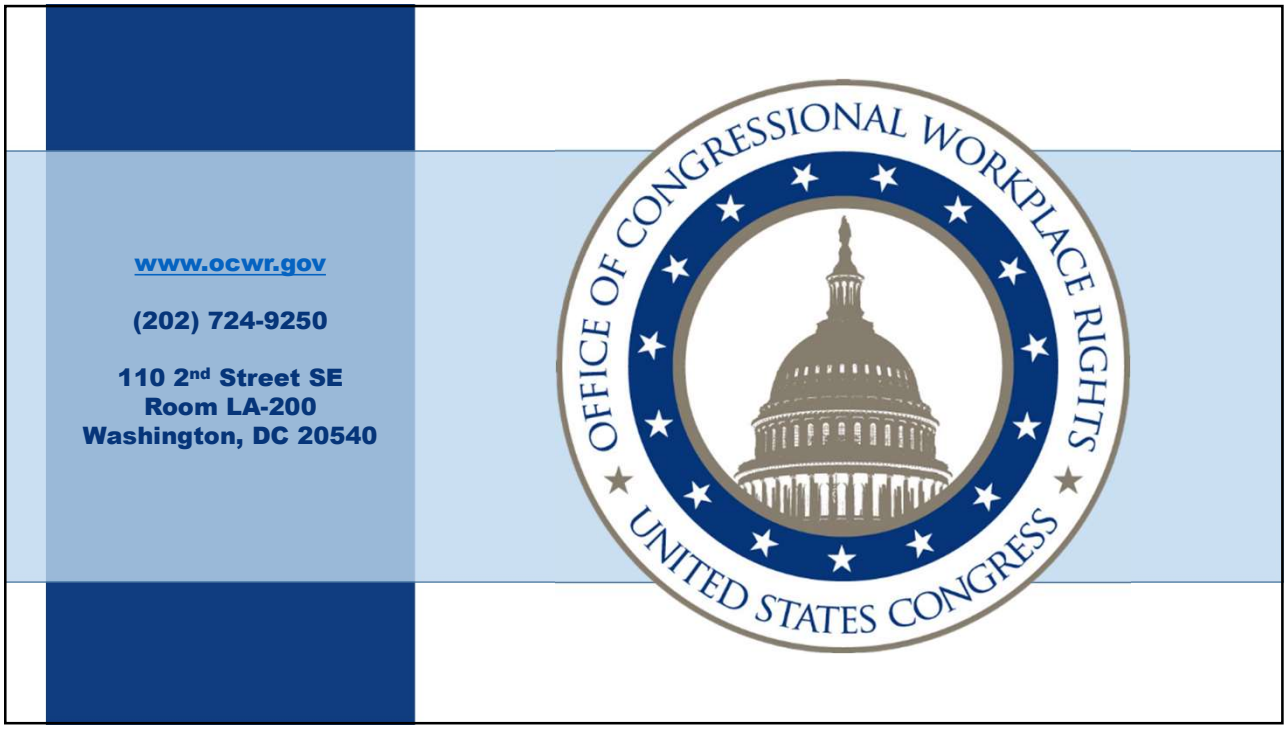
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