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Alerts

[Commentary] A Trilogy of U.S. Supreme Court Decisions Empower Regulated Entities to Challenge Agency Regulations and Actions

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In a trilogy of cases decided at the end of this term, the United States Supreme Court made significant changes to the administrative law terrain by:

1. eliminating *Chevron* deference;
2. requiring administrative agencies to adjudicate at least some matters involving the imposition of civil fines in federal court as opposed to "in-house;" and
3. limiting the number of challenges that are barred by the general statute of limitations in the Administrative Procedures Act (APA) by ruling the limitations period begins to run when the plaintiff sustained an injury, not when the regulation was published.

Federal regulations and administrative agencies impact the daily lives of regulated entities and the American people in enumerable ways, large and small. On June 28, 2024, the U.S. Supreme Court ended *Chevron* deference in *Loper Bright Enterprises v. Raimondo, Secretary of Commerce.* Administrative agencies and the regulations they promulgate have benefited from *Chevron* deference since 1984.

There is general agreement that regulated entities will, in many instances, fare better in challenging some regulations in the wake of *Loper Bright*. *Loper Bright* was the most publicized of the three decisions issued by the U.S. Supreme Court late in the term, which diminished the power of administrative agencies. But the Court's decisions in *Jarkesy* and *Corner Post* also pack powerful punches at administrative agencies.

Notwithstanding these decisions, agencies remain very powerful and enjoy significant advantages over regulated entities. We examine all three decisions below and consider their impact in general and on insurers and Environmental, Social, and Governance (ESG) in particular.

The Power of the Regulatory State

The regulatory or administrative state wields enormous power and influence in the United States. These agencies reside in the Executive Branch and are delegated authority by Congress to issue rules, regulations, licenses, and establish rates. Reportedly, there are now over 400 federal departments and agencies.

The number of regulations, the size of the Code of Federal Regulations (which contains all finalized rules and regulations), the scope of regulations, and the costs of compliance with these regulations have all increased significantly over the decades. The Federal Register totaled 61,308 pages in 2017 (which was down from the all-time high of 95,894 pages in 1993) and swelled back up to 86,356 pages in 2020.

In 2021, the Biden Administration promulgated over 3,250 regulations in contrast to 81 laws passed by Congress, meaning agencies accounted for over 97 percent of new laws adopted in the United States. It has been estimated that regulatory compliance and the economic impact of regulation exceed $1.9 trillion annually.

Perhaps more problematic than the number and costs of regulations is the power of agencies to promulgate laws that lack majority support by the general public. Agencies pass regulations that would not withstand media scrutiny, that would not garner sufficient public support to survive the legislative process, and that could have adverse consequences for the reelection of United States Representatives, Senators, and the President.

Indeed, Chief Justice Roberts' dissent in the *City of Arlington v. FCC*, 569 U.S. 290 (2013) compared administrative agencies to tyranny:

> "One of the principal authors of the Constitution famously wrote that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison). Although modern administrative agencies fit most comfortably within the Executive Branch, as a practical matter they exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to [*313] have [**1878] violated their rules. The accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government" *City of Arlington v. FCC, 569 U.S. 290, 312-313*.

As the Chief Justice aptly noted, "hundreds of federal agencies [are] poking into every nook and cranny of daily life."

Government bureaucrats who run these agencies and promulgate these regulations having the force and effect of law are not elected by voters. Many are not even appointed by the President and confirmed by the Senate. Many believe that bureaucrats are sometimes unaccountable to elected officials and may even frustrate the efforts and agendas of elected officials.

The U.S. Supreme Court decision in *Loper Bright* does not abolish agencies or substantially limit their general rule-making power when properly delegated to them by Congress. It does, however, provide a meaningful check on agencies by ending court deference to agencies in interpreting ambiguous law.

The *Loper Bright* Decision Ends Chevron Deference

Writing the 6-3 majority opinion, Chief Justice Roberts put an end to the *Chevron* deference sometimes afforded to administrative agencies by courts in interpreting ambiguous law. Justice Roberts set the stage by noting since the Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), the Court sometimes required courts to defer to agency interpretations of the statutes those agencies administer—even when a reviewing court reads the statute differently.

Where *Chevron* applied*,* a court would first determine whether Congress expressed its intent clearly with respect to the question at issue. If so, Congressional intent would be effectuated. Where the statute is silent or ambiguous with respect to the subject issue, under *Chevron,* the reviewing court was required to defer the agency's interpretation, provided it was based on a "permissible construction" of the statute.

The reviewing courts in each case applied *Chevron* to resolve in favor of the government challenges to the same agency rule. The National Marine Fisheries Service (NMFS) administers the Magnuson-Stevens Fishery Conservation and Management Act (MSA) pursuant to delegation from the Secretary of Commerce (SEC). Pursuant to this scheme, councils developed fishery management plans, which NMFS approves and promulgates as final regulations.

A plan may require that one or more observers be on board domestic vessels to collect data necessary for the conservation and management of the fishery. The MSA specifies three groups that must cover the costs associated with observers:

1. foreign fishing vessels operating within the exclusive economic zone;
2. vessels participating in certain limited access privilege programs; and
3. vessels within the jurisdiction of the North Pacific Council.

The MSA expressly caps the relevant fees at two or three percent of the value of fish harvested on the vessels for the latter two categories. The MSA does not address whether Atlantic herring fishermen may be required to bear costs associated with any observers that a plan may mandate.

The NMFS fully funded the observer coverage the New England Fishery Management Council required in its plan for the Atlantic herring fishery. In 2013, the council proposed amending its fishery management plans to empower it to require fishermen to pay for observers if federal funding became unavailable.

Several years later, the NMFS promulgated a rule approving the amendment. Petitioners are family businesses that operate in the Atlantic herring fishery. In February 2020, they challenged the Rule under the MSA, which incorporates the Administrative Procedure Act (APA), 5 U. S. C. §551 *et seq.* They argued that the MSA does not authorize NMFS to mandate that they pay for observers required by a fishery management plan. In one case, the district court granted summary judgment to the government.

It concluded that the MSA authorized the Rule but noted that even if these petitioners' "arguments were enough to raise an ambiguity in the statutory text," deference to the agency's interpretation would be warranted under *Chevron*. A divided panel of the D. C. Circuit affirmed. The majority addressed various provisions of the MSA and concluded that it was not "wholly unambiguous" whether NMFS may require Atlantic herring fishermen to pay for observers and deferred to the agency's interpretation as a "reasonable" construction of the MSA.

In the companion case, petitioners Relentless Inc., Huntress Inc., and Seafreeze Fleet LLC, owners of two vessels that operate in the Atlantic herring fishery, filed a suit challenging the Rule as unauthorized by the MSA. The First Circuit affirmed the ruling of the district court in favor of the government.

The First Circuit concluded that the agency's interpretation of its authority to require at-sea monitors who owners of regulated vessels pay for does not exceed the bounds of the permissible. It purported to apply *Chevron but* did not explain which aspects of its analysis were relevant to which of *Chevron*'s two steps. The U.S. Supreme Court granted *certiorari* in both cases, limited to the question of whether *Chevron* should be overruled or clarified.

In ending *Chevron* deference, Chief Justice Roberts mainly relied upon the fundamental principle of judicial review to support the Court's decision that interpretation of the law is within the province of courts–not administrative agencies. He pointed out that the framers of the Constitution envisioned that the final interpretation of the laws would rest within the province of the courts.

The U.S. Supreme Court first embraced this understanding in *Marbury v. Madison,* one of the first cases law students will study in constitutional law class. In *Marbury*, Chief Justice Marshall declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is." 1 Cranch 137. Precedent teaches that whatever respect an executive branch interpretation was due, a judge is not bound to adopt the construction given by the head of a department.

Next, Chief Justice Roberts turned to the Administrative Procedures Act ("APA") enacted in 1946. He noted the APA serves "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices" *United States v. Morton Salt Co.* 338 U.S. at 632. According to Chief Justice Roberts, the

APA itself addresses the issue before the Court:

In addition to prescribing procedures for agency action, the APA delineates the basic contours of judicial review of such action. Section 706 directs that '[t]o the extent necessary to decision and when presented, 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.' 5 U. S. C. §706.

Id. at *Loper Bright Enters. v. Raimondo*, Nos. 22-451, 22-1219, 2024 U.S. LEXIS 2882, at *32-33 (June 28, 2024).

The APA requires courts to hold unlawful and set aside agency actions, findings, and conclusions that are not in accordance with the law. Chief Justice Roberts concluded:

> "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. It specifies that courts, not agencies, will decide "*all* relevant questions of law" arising on review of agency action, §706 (emphasis added)—even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it. And it prescribes no deferential standard for courts to employ in answering those legal questions. That omission is telling, because Section 706 *does* mandate that judicial review of agency policymaking and factfinding be deferential. See §706(2)(A) (agency action to be set aside if 'arbitrary, capricious, [or] an abuse of discretion'); §706(2)(E) (agency fact-finding in formal proceedings to be set aside if 'unsupported by substantial evidence')."

The Chief Justice acknowledged that courts may 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. Skidmore v. Swift & Co. 323 U.S. at 134, 140.]. *Id*. at *Loper Bright Enters*, 2024 U.S. LEXIS 2882, at *47.

According to the Chief Justice, the deference that *Chevron* requires of courts cannot be squared with the APA. *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. He rejected the arguments offered for deferring to agencies to resolve statutory ambiguities, including that agencies have subject matter expertise regarding the statutes they administer, deferring to agencies promotes the uniform construction of federal law, and resolving statutory ambiguities may involve policymaking best left to political actors, rather than courts.

He pointed out that Congress expects courts to handle technical statutory questions and courts have the expertise in interpreting law. *Id*. at *Loper Bright Enters*., 2024 U.S. LEXIS 2882, at *113-14 (Kagan, J., dissenting) (citing *Smiley v. Citibank* (South Dakota), N. A., 517 U. S. 735, 740-741, 116 S. Ct. 1730, 135 L. Ed. 2d 25 (1996)) Justice Thomas concurred, writing separately to underscore his view that *Chevron* deference also violates our Constitution's separation of powers. Justice Gorsuch wrote a separate concurring opinion regarding *stare decisis*.

Justise Kagan dissented and was joined by Justice Sotomayor and Justice Brown-Jackson. According to Justice Kagan, Congress would usually prefer that the responsible agency, not a court, resolve ambiguities:

> "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; court shave 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. We defer, the Court has explained, 'because of a presumption that Congress' would have 'desired' the agency (rather than the courts)" to exercise "whatever degree of discretion" the statute allows."

The Pendulum Has Been Swinging Away From *Chevron* Deference for Some Time

The 2013 dissent of Chief Justice Roberts, joined by Justice Kennedy and Justice Alito, in *City of Arlington* foreshadowed the elimination of *Chevron* deference. Over the past two terms, the nation's high court stepped up its efforts to address agency overreach.

As discussed below, the court has been using the "major issues doctrine" to erode *Chevron* deference. The U.S. Supreme Court itself had not employed *Chevron* deference since 2016, and Chief Justice Roberts thought it made sense to free lower courts from its restraints.

Last year, Congress took a stab at ending *Chevron* deference. Specifically, on June 15, 2023, the House of Representatives passed the Separation of Powers Restoration Act of 2023 (SOPRA). The bill, which was never enacted into law, which would have eliminated *Chevron* deference about a year before the U.S. Supreme Court overruled *Chevron*. Though not a basis for the result in *Loper Bright*, SOPRA at least evinced the intent of the current House of Representatives not to continue *Chevron* deference.

The Supreme Court Limits Agency Power to Try Cases "In-House" in *SEC v. Jarkesy*

The day before deciding *Loper Bright*, the Supreme Court issued its ruling in *Securities and Exchange Commission v. Jarkesy*,, 2024 U.S. LEXIS 2847, 2024 WL 3187811. The decision did not involve *Chevron* deference but rather interposed restrictions on the agencies' ability to adjudicate disputes before their courts.

Shortly after the passage of the Dodd-Frank Act, the SEC initiated an enforcement action for civil penalties against investment adviser George Jarkesy, Jr. and his firm, Patriot28, LLC, for alleged violations of the antifraud provisions contained in federal securities laws. The SEC decided to adjudicate the matter in-house and determined that Jarkesy and Patriot28 violated securities law and levied a civil penalty of $300,000.

Jarkesy and Patriot28 petitioned for judicial review. The Fifth Circuit vacated the SEC's order on the ground that adjudicating the matter in-house violated the defendants' Seventh Amendment right to a jury trial. The Supreme Court granted *Certiorari*.

In a 6-3 decision written by Chief Justice Roberts, the Supreme Court affirmed, holding that when the SEC seeks civil penalties against a defendant for securities fraud, the Seventh Amendment entitles the defendant to a jury trial, and the agency must bring proceedings in federal court.

The Court held that the "public rights" exception to Article III jurisdiction–which allows Congress to assign certain matters for decision to any agency without a jury (*e.g.*, certain customs and immigration laws)–does not apply because the present action does not fall within any of the distinctive areas involving governmental prerogatives where the Court has concluded that a matter may be resolved outside of an Article III court, without a jury. In the case *sub judice*, the SEC targeted the same basic conduct as common law fraud, which is a private as opposed to public right.

Justice Sotomayor filed a dissent, joined by Justice Kagan and Justice Brow-Jackson. According to Justice Sotomayor's dissent, "the Constitutionality of hundreds of statutes may now be in peril, and dozens of agencies could be stripped of their power to enforce laws enacted by Congress."

The Statute of Limitations Does Not Accrue Until the Plaintiff Sustains Injury

On the last day of the term, the Supreme Court issued its decision in *Corner Post v. Board of Governors of the Federal Reserve System*, 2024 U.S. LEXIS 2885, *(July 1, 2024).* In this final case of the trilogy increasing the ability of regulated entities and individuals to challenge agency action, the Court held that the default six-year statute of limitations for challenging federal agency actions begins to run when the plaintiff is injured by a final agency action, *not* when the final agency action is published. The 6-3 decision authored by Justice Coney-Barrett allows decades-old regulations to be challenged.

Corner Post, a truck stop that opened in 2018, challenged Regulation II of the Federal Reserve Board, which was introduced in 2011. Regulation II capped debit card interchange fees at $0.21 per transaction and 0.05% of the transaction’s value.

The district court dismissed the suit as time-barred, and the Eighth Circuit affirmed, holding that the statute of limitations begins to run when a regulation is published, the rule followed by the majority of U.S. Courts of Appeal. As the Federal Reserve Board published Regulation II in 2011, the lower courts held that the time to challenge the regulation expired in 2017, a year before Corner Post existed and processed its first debit card transaction.

Justice Brown-Jackson dissented along with Justice Sonia Sotomayor and Justice Kagan). Justice Jackson believed that the majority’s reasoning was fundamentally flawed and inconsistent with the Court’s prior decisions. According to Justice Jackson, the decision "means that there is effectively no longer any limitations period for lawsuits that challenge agency regulations on their face" and that litigants could "game the system by creating new entities or finding new plaintiffs whenever they blow past the statutory deadline."

Justice Jackson predicts that this decision, coupled with *Loper Bright,* will "wreak havoc on Government agencies, businesses, and society at large" and lead to a "tsunami of lawsuits" challenging agency regulations.

Living in a Post-*Chevron* World

Justice Jackson is likely correct that the number of lawsuits challenging administrative agency regulations will increase significantly, at least in the short term. The Supreme Court recognized that it is the role of courts and not administrative agencies to interpret statutes. In so doing, it has provided an avenue for regulated persons and entities to limit agency authority and abuses through litigation. It also interposed a measure of checks and balances on agencies consistent with the type of government envisioned by the framers.

Loper Bright’s ending of *Chevron* deference unquestionably is a significant development. The decision will empower regulated entities and provide greater incentive for them to litigate by improving their chances of prevailing where the issue involves regulation in areas in which the agency does not have expressly delegated authority.

There has been some reported research suggesting that courts have frequently involved *Chevron* deference and that in such cases, agencies have prevailed over 77 percent of the time, which is an increase in the agency win rate of more than 23 percent in cases in which *Chevron* deference was applied as compared to cases in which *Chevron* deference was not applied.

In addition, regulated entities may experience some upstream advantage by achieving greater influence as part of the rulemaking process insofar as agencies afford greater weight to their comments.

In the wake of *Loper Bright*, doubt may be cast on the validity of some existing agency interpretations and regulations that rely on broad or ambiguous statutory language. However, the Supreme Court majority made clear that its decision does not invalidate prior cases decided under *Chevron*.

Many believe that some of the broader, more far-reaching regulations may be at risk without *Chevron* deference, but many long-settled regulations will survive. Many federal agencies have been preparing for the elimination of *Chevron* deference since the Supreme Court granted review in *Loper Bright.* They are honing their reasons to support newly promulgated regulations and others they believe to be at risk.

It remains to be seen whether *Loper Bright* will effectuate a sea-level change or merely result in a modest decrease in agency power. Congress retains the ability to delegate authority to federal agencies but must make such intent to delegate clear. Many times, the delegation of authority or the expression of congressional intent to allow agencies to "gap fill" will be expressed and clear.

In such instances, *Loper Bright* does nothing to invalidate such delegation. Many cases before *Loper Bright* did not apply *Chevron* deference. Also, in several instances, parties impacted by regulations may not have the funds or time to litigate against agencies with seemingly unlimited resources.

Although *Loper Bright* rejects mandatory deference under *Chevron*, the Court observed that federal courts may still "seek aid" from the executive branch, giving careful attention to what the agencies have to say on interpretive matters, particularly where the agency's construction rests on "factual premises" within its expertise. Some courts may see this language as providing an opening to effectively defer to agency interpretation without expressly applying *Chevron* deference.

The ruling emphasizes the importance of clear and explicit delegation of authority from Congress to agencies. This may lead to more detailed and specific statutory language in future legislation and perhaps require Congress to revisit existing legislation. Ideally, Congress would improve its legislative actions by passing legislation that is shorter and more succinct, and that addresses issues with greater precision, leaving less room for agencies to legislate under the guise of rulemaking. There is a risk that Congress could begin inserting broad, *pro forma* delegation language in legislation.

Many commentators have complained that *Loper Bright* reflects the Court's usurpation of power by the judiciary through judicial review at the expense of Congress. Others believe the real shift of power among the three branches of government is Congress's abdication of its legislative function in favor of the executive branch and the assumption of power by administrative agencies unimaginable at the time of the Constitution's drafting.

Agencies and the bureaucrats that run them remain vested with broad powers. Many of their activities are OO and simply not subject to the same sunlight as legislation passed by Congress. Actions and regulations that would not pass muster if subjected to the scrutiny of the legislative process are commonplace in the administrative state.

Also, Congress does not enforce or adjudicate the legislation it passes; administrative agencies enforce and adjudicate the regulations they promulgate. There are many ways in which agencies can influence the nation's policy agenda and legislation through the President and the President's bully pulpit and through the speeches and activities of agency heads and subheads.

Loper Bright is a significant decision, but agencies will continue to wield enormous power and impact Americans significantly. The other two decisions also may benefit those challenging agency activities. Many litigates will benefit by litigating in federal court as opposed to in an agency-controlled forum. And, many litigates whose challenges would be barred before the entity existed or were injured by regulations promulgated years or decades before will welcome the opportunity to assert claims that would be time-barred if the statute of limitations began to run once a regulation is published.

Impact of *Loper Bright* on Insurers

Loper Bright will impact insurers as businesses and regulated entities in the same manner as other businesses and regulated entities. Regulatory actions impact insurers' underwriting, investment, and claims-handling activities, which may impact losses.

Regulatory enforcement actions are a concern for every corporate policyholder, and policyholder lawyers are reminding their clients to review the regulatory environment for risks related to the business and to ensure their insurance programs proactively provide coverage for the related regulatory risk. Policyholders and insurers are keeping their eyes on civil penalties. Many expect an uptick in securities cases that could impact professional liability and D&O policies and increase defense costs.

Traditionally, the regulation of the insurance business has been left to the states. The McCarran-Ferguson Act of 1945 reaffirmed the rights of states to tax and regulate the business of insurance within their respective borders, absent of specific congressional intent to the contrary, and generally excepts insurers from Federal anti-trust laws. However, since the terrorist attacks of September 11, 2001, and increasing with the financial crisis of 2008, insurers have been subject to increasing federal legislation and regulation.

The Federal Insurance Office (FIO) was established by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The FIO is part of the U.S. Department of the Treasury and is headed by a director who is appointed by the secretary of the Treasury. The office provides expertise on insurance matters to the Treasury Department and other federal agencies and engages in international discussions relating to insurance.

However, it is not a regulatory agency, and its authorities do not displace the time-tested, robust state insurance regulatory regime. The FIO is charged with monitoring all aspects of the insurance sector, including identifying activities within the sector that could potentially contribute to a systemic crisis in the broader financial system, the extent to which under-served communities have access to affordable insurance products, and the sector's regulation.

The FIO is authorized to receive and collect data and information on the insurance industry and can enter into information-sharing agreements with state regulators. The FIO can also require an insurer or its affiliate to submit data to the office where it determines the information is not available from any public or regulatory sources. From this perspective, insurers may not face particular direct impacts from *Loper Bright* that differ from companies in other industries.

The Impact of *Loper Bright* on ESG

Even before *Loper Bright*, we wrote a prior alert about the trend of Supreme Court decisions narrowing the power of administrative agencies.

As noted above, before the outright overruling of *Chevron* deference, the Supreme Court began limiting the scope of agency power using the major questions doctrine. On June 30, 2022, for example, the U.S. Supreme Court issued its decision in *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587 (2022).

Chief Justice Roberts, in his majority opinion, stated the government–under the major questions doctrine–could not point to "clear congressional authorization" for its manner of regulating greenhouse gases:

> "The decision – particularly its reliance upon the major questions doctrine–signaled the view of the majority of justices that the administrative state may be out of control and that it may be sympathetic to efforts to limit the broad and growing power of unelected government bureaucrats in federal administrative agencies. Stated differently, rather than treating such assertions of power as normal statutory interpretations, in which judges are highly deferential to agency actions, courts may approach extraordinary, novel actions of administrative agencies with far-reaching consequences with a greater degree of skepticism."

On May 25, 2023, the United States Supreme Court issued a ruling in *Sackett v. EPA,* 598 U.S. 651 (2023), narrowing the federal government's authority to regulate bodies of water and effectively upending a Biden Administration rule that recently had recently gone into effect.

The Supreme Court ruled that the federal government's definition of the term "waters of the United States" must be restricted to a water source with a "continuous surface connection" to major bodies of water. The decision was unanimous on the merits; the court split 5-4 on determining how the federal government should define water sources.

As we wrote,

> "[t]hese decisions are consistent with the trend of decisions of the Court – including the Court's decision in *Department of Education v. Brown*, No. 22-535 (June 30, 2023), striking down the Biden Administration's effort to forgive student loan debt – insisting that administrative agency actions particularly major actions be grounded in specific legislative authority to act.

On the whole, these decisions may slow the pace of agency-designed environmental regulation as well as any regulation specific to ESG, but these decisions are not likely to alter the direction or goals of the Biden Administration or to lessen the pressures companies face from stakeholders to undertake ESG efforts irrespective of the status of regulation on point. "

It would appear that *Loper Bright* and the other Supreme Court decisions discussed above will provide regulated entities with greater latitude to challenge the regulations of agencies directed at ESG issues. Where civil penalties are the concern, regulated entities often will be benefited by litigating in federal court.

Insofar as regulations are promulgated by state agencies, the Supreme Court rulings could impact these matters insofar as they may be deemed to be persuasive, particularly where state administrative procedure statutes are predicated on the APA. The SEC decision may be binding on state courts insofar as the decision is predicated upon constitutional rights.

On June 27, 2024, the Supreme Court released its decision in *Ohio v. EPA* , 603 U.S. LEXIS 2846 (2024). In a 5-4 ruling written by Justice Gorsuch, the court enjoined the EPA's implementation of a cross-state smog reduction plan while litigation challenging the EPA's action as arbitrary and capricious proceeds.

The Clean Air Act envisions a collaborative effort between states and the federal government to regulate air quality. When the Environmental Protection Agency sets standards for common air pollutants, states must submit a State Implementation Plan (SIP), providing for the implementation, maintenance, and enforcement of those standards in their jurisdictions. In 2015, the EPA revised its air-quality standards for ozone, triggering a requirement for states to submit new SIPs.

Several years later, the EPA announced its intention to disapprove over 20 SIPs because the agency believed they had failed to address adequate obligations. During the public comment period for the proposed SIP disapprovals, the EPA issued a single proposed Federal Implementation Plan (FIP) to bind all those states.

The D.C. Circuit denied relief to a number of the remaining states and industry groups who challenged the FIP, arguing that the EPA's decision to apply the FIP after so many other states had dropped out was "arbitrary" or "capricious." The Supreme Court granted the applications for a stay, stopping enforcement of the EPA's rule against the applicants pending the disposition of the applicants' petition for review in the D.C. Circuit and any petition for writ of *certiorari,* timely sought.

The Supreme Court found that the applicants were likely to prevail on their claim that the EPA's action was arbitrary or capricious because the agency failed to offer a satisfactory explanation for its action, including a rational connection between the facts found and the choice made, and ignored an important aspect of the problem.

Although the case does not directly address ESG specifically, many observers are questioning whether the Supreme Court has expanded the definition of arbitrary and capricious and whether this will serve as a basis to invalidate some other environmental regulation.

Other market and regulatory forces continue to drive ESG. Put into proper context, in the intermediate term, it is likely that other events, such as the results of the upcoming 2024 l election, will have a more significant impact on ESG.

The U.S. Supreme Court Decisions Have Fundamentally Changed Administrative Law

The trilogy of cases decided by the Supreme Court this term will significantly impact agency power, rulemaking, and adjudicating. However, the extent of the impact will depend, in part, on the actions of agencies, Congress, the President, and the courts. At least in the short term, the level of judicial challenges to agency regulation can be expected to increase.