August 2024

Case Explainer: *Loper Bright Enterprises v. Raimondo*[1]

Jane Perkins and Sarah Somers

In *Loper Bright Enterprises v. Raimondo*, the Supreme Court overruled a 40-year-old precedent requiring courts to defer to agency interpretations in certain circumstances.[2] This case explainer summarizes *Loper Bright* and discusses implications for implementation of the Medicaid Act.

Summary of the Case

Loper Bright addressed the legality of federal regulations regulating fishery management. The Court did not determine whether the regulations were legal, but considered the broader question of whether the 1984 decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* should be overturned.[3]

Chevron established a two-step test for courts to use when deciding whether to defer to an administrative agency's interpretation of a statute. First, courts were required to determine whether Congress "had directly spoken to the question at issue."[4] If Congress's intent was clear, "that [was] the end of the matter," and courts would apply the statute, rejecting any agency interpretations to the contrary.[5] If the court found the statute was silent or ambiguous

[1] Produced, in part, with a grant from the Training Advocacy Support Center (TASC), which is sponsored by the Administration on Community Living (ACL), the Substance Abuse and Mental Health Services Administration (SAMHSA), the Rehabilitation Services Administration (RSA), and the Social Security Administration (SSA). TASC is a division of the National Disabilities Rights Network (NDRN).
[2] *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2254 (2024). While this case explainer refers only to *Loper Bright*, the Court's opinion also decided a companion case, *Relentless, Inc. v. Dep't of Commerce.*
[3] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
[4] *Id.* at 842.
[5] *Id.* at 843, n. 9, n. 11.

about the question, *Chevron* required the court to defer to the agency that was authorized to interpret the statute if it had made a "permissible" interpretation of the statute—even if the court would not have interpreted the statute the same way.[6] "*Chevron* deference" was justified because agencies were empowered to "fill in statutory gaps" and had the necessary expertise and policy experience to do so.[7]

By a 6-3 margin, *Loper Bright* overturned *Chevron*. Chief Justice Roberts' majority opinion criticized *Chevron* as fostering "unwarranted instability in the law, leaving those attempting to plan around agency action in an eternal fog of uncertainty."[8] He found *Chevron* was not only "unworkable" but also interfered with the fundamental duty of courts to decide questions of law and interpret statutory provisions.[9]

The Court, first, tied its holding, to founding documents stating that it is the judiciary that has the responsibility to decide cases.[10] It then focused on the wording of the Administrative Procedures Act (APA), "which delineates the basic contours of judicial review of [agency] action" and directs courts to determine questions of law and "hold unlawful and set aside agency action, findings, and conclusions . . . not in accordance with law."[11] (The *Chevron* Court had not mentioned the APA.)

The *Loper Bright* majority noted that the APA does not explicitly direct courts to defer to agencies when determining questions of law, and as a result, "the deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA."[12] In the majority's view, while agencies may have technical and policy expertise, they are not more qualified to determine a statute's meaning than a court.[13] It is courts that understand that, "no matter how impenetrable," statutes have a "single, best meaning. That is the whole point of having written

---

[6] *Id.* at 863.
[7] *Id.* at 843-44.
[8] *Loper Bright*, 144 S. Ct. at 2272.
[9] *Id.* at 2257, 2265.
[10] *Id.* at 2257 (citing The Federalist No. 37 at 236 (J. Cooke ed. 1961) (J. Madison), stating that new laws would be "more or less obscure and equivocal" until their meaning" was settled "by a series of particular discussions and adjudications," and Article III of the Constitution, which "assigns to the Federal Judiciary the responsibility and power to adjudicate cases and controversies") (cleaned up); *see also Id.* (citing *Marbury v. Madison*, 1 Cranch 137, 177, 2 L. Ed. 70 (1803)).
[11] *Id.* at 2261 (citing 5 U.S.C. §§ 701-706).
[12] *Id.* at 2263, 2265.
[13] *Id.* at 2266.

statutes." [14] And, the Court added: "[E]very statute's meaning is fixed at the time of enactment."[15]

The Court concluded:

> *Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect this delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.[16]

Finally, the Court brushed aside concerns that overturning *Chevron* would call into question the holdings of thousands of cases, stating that those cases remain good law. "The holdings of those cases are lawful . . . and still subject to statutory stare decisis despite our change in interpretive methodology."[17] Reliance on *Chevron* does not, in and of itself, constitute "special justification" for overruling a case.[18]

Implications for Medicaid

Congress authorized the Secretary of the Department of Health and Human Services (Secretary) to promulgate regulations to implement the Medicaid Act.[19] The Secretary, acting through the Centers for Medicare & Medicaid Services (CMS), also approves state Medicaid plans and applications for waivers and issues sub-regulatory guidance, such as letters to state Medicaid directors. Thus, *Loper Bright* will affect how Medicaid laws are implemented and enforced by the federal agency and, of course, how they are interpreted by courts.

After making a few general observations, this section discusses some of the implications for Medicaid.

First, the *Loper Bright* majority based its decision, in part, on the need to quell *Chevron*'s fog of uncertainly for those planning around agency action. The Court was referring to the ability of agencies to flip a previous interpretation of a statute, so long as the agency's

---

[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] 42 U.S.C. § 1302.

reading was a permissible one. But while *Loper* will reduce that type of uncertainly, it has not ended uncertainty. It has simply shifted the source of the uncertainly from federal agencies to the courts. What is more, this uncertainly could be magnified because of the highly politicized nature of some courts and associated judge shopping—as illustrated by cases being filed by Republican-led states in district courts in Texas, with appeal to the Fifth Circuit.

Second, *Loper Bright* does not represent a 180-degree turn away from agency deference. It does *not* require the court to reject the agency's position.

Third, deference has always been a double-edged sword. Application of *Chevron* did not always lead courts to defer to the agency's action. In numerous cases, courts did *not* defer to CMS's regulatory interpretation either because they determined, at *Chevron* step-1, that the statute was unambiguous or because they concluded, at step-2, that the agency interpretation was not permissible.[20] Courts also applied *Chevron* to approvals and disapprovals of sub-regulatory documents such as state Medicaid plans; in some cases deferring,[21] but others not.[22] Looked at as a whole, some of these decisions favored Medicaid beneficiaries while others did not.

That said, as already noted, *Loper Bright* will certainly affect enforcement of the Medicaid Act in the courts and by the federal agency. As this early date, considerations for Medicaid advocacy include the following:

1. When assessing the meaning of a Medicaid provision, deference will continue to play an important role. Courts will continue to defer to permissible agency interpretations, even though they are no longer obligated by *Chevron* to do so. Courts are likely to continue to

[20] *See, e.g., Lawrence + Memorial Hosp. v. Burwell*, 812 F.3d 257, 268 (2d Cir. 2016) (applying *Chevron* but finding statute not ambiguous); *Geisinger Comm'ty Med. Ctr. v. Sec'y U.S. Dep't of Health and Hum. Servs.*, 794 F.3d 383, 395 (3d Cir. 2015) (same); *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 158 (2013) (Medicare regulation); *Belleview Hosp. v. Leavitt*, 443 F.3d 163, 175 (2d Cir. 2006) (Medicare regulation). *See also Texas v. United States*, 300 F. Supp. 3d 810, 850 (N.D. Tex. 2018) (applying *Chevron* and deferring to one regulation and refusing to defer to another as an unreasonable interpretation); *rev'd on other grounds*, *State v. Rettig*, 987 F.3d 518 (5th Cir. 2021).

[21] *See, e.g., Christ the King Manor, Inc.* v. *Sec'y, Dep't of Health and Hum. Servs.*, 730 F.3d 291, 307 (3d Cir. 2013) (collecting cases); *Harris v. Olszewski*, 442 F.3d 456, 468-9 (6th Cir. 2006); *Asante v. Azar*, 656 F. Supp. 3d 185 ,194 (D.D.C. 2023) (on appeal); *see also Ohio Dep't of Medicaid v. Price*, 864 F.3d 469 (6th Cir. 2017) (deferring to state plan disapproval); *see also, e.g., Santa Rosa Mem. Hosp. v. Kent*, 236 Cal. App. 5th 811, 825 (2018) (according "considerable weight" to approval); *Rosen v. Goetz*, 410 F.3d 919, 927 (6th Cir. 2005) (giving "substantial" deference).

[22] *See, e.g., Hoag Memorial Hospital Presbyterian v. Price,* 866 F.3d 1072, 1080 (9th Cir. 2017).

apply the 80-year-old precedent announced in *Skidmore v. Swift & Co.*[23] Chief Justice Roberts' *Loper Bright* opinion favorably mentions *Skidmore* five times, and Justice Kagan's dissenting opinion expressly notes that *Skidmore* will apply in future cases [24] This makes sense because the Supreme Court does not overrule by implication, and neither *Loper Bright* nor any other case has overruled *Skidmore*.

Under *Skidmore*, agency interpretations "made in pursuance of official duty" and "based upon . . . specialized experience" provide informed judgment to which courts . . . [can] properly resort for guidance."[25] When deciding the weight to be given to the interpretation, courts are to weigh various factors that include "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade." [26]

Due to CMS's extensive history promulgating regulations and issuing sub-regulatory documents, a significant body of case law applies *Skidmore* in Medicaid cases. For this reason, since 2008, the National Health Law Program has published a *Medicaid Advocate's Guide to Deference*.[27] The case citations in the *Guide* show that courts have taken the lesser *Skidmore* deference seriously, usually deferring to CMS when the agency action was taken fairly contemporaneously with the statute's enactment and when the action reflects agency care, consistency, formality, and expertise.

2. Agency action taken pursuant to an express delegation of authority from Congress should be respected by the courts. *Loper Bright* recognizes that Congress can "expressly delegate to an agency the authority to give meaning to a particular statutory term."[28] According to the Court, in these situations "courts must respect the delegation, while ensuring that the agency acts within it."[29]

   There are dozens of provisions in the Medicaid Act that expressly delegate authority to the Secretary of Health and Human Services. For example, when the Medicaid Act was enacted, authority was delegated to the Secretary of Health and Human Services to

---

[23] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).
[24] *Loper Bright*, 144 S. Ct. at 2259, 2262, 2265, 2267; *id*. at 2262-63, 2309 (Kagan, J., dissenting).
[25] *Skidmore*, 323 U.S. at 139-40.
[26] *Id.* at 140, quoted in *Loper Bright*, 144 S. Ct. at 2257, 2258.
[27] Nat'l Health Law Prog., *A Medicaid Advocate's Guide to Deference* (2008, updated Jan. 2017, supplemented 2024) (available from NHeLP, NC).
[28] *Id*. at 2263 (cleaned up) (noting that Congress may also empower an agency to "fill up the details of a statutory scheme" or to regulate using terms or phrases (*e.g.*, "as appropriate or reasonable") that leave the agency with "flexibility").
[29] *Id*. at 2261.

"make and publish such rules and regulations, not inconsistent with this [Social Security Act] chapter, as may be necessary to the efficient administration of the functions with which [the Secretary] is charged under this chapter."[30] Also at the time of enactment, Congress expressly conferred authority on the Secretary to review and approve state Medicaid plans as a condition of a state receiving federal Medicaid payments.[31] The content of these plans is tied to an extensive list of specific statutory requirements, including to operate the plan statewide, ensure that medical assistance is furnished with reasonable promptness, extend Medicaid to individuals who fall within mandatory and state-opted coverage groups, and to provide fair hearings to those whose claims are denied or not acted on promptly.[32] Under *Loper Bright*, regulations and agency actions issued by the Secretary to implement these express delegations should be given deference unless they fall outside the scope of the delegation and thus violate the APA because they are manifestly contrary to the statute, arbitrary and capricious in substance, or procedurally defective.

Other express delegations of authority to the Secretary include to:

- establish requirements for coverage of out of state services, 42 U.S.C. § 1396a(a)(16);
- prescribe requirements with respect to third party liability, *id*. §§ 1396a(a)(25)(A), (I);
- promulgate regulations to prohibit payments for health-care acquired conditions, *id*. § 1396b-1;
- determine requirements for written plans of care for patients in Intermediate Care Facilities (ICFs), *id*. § 1396a(a)(31);
- define inpatient psychiatric hospital service settings for individuals under age 21, *id*. § 1396d(h);
- make determinations regarding payments to states for the proper and efficient administration of the state plan, *id*. § 1396b;
- determine "nominal" copayment amounts, *id.* § 1396o;
- decide how nursing facilities will assess residents' functional capacity, *id*. § 1396r(b)(3)(A),
- establish reporting compliance requirements with Early and Periodic Screening, Diagnostic and Treatment for children under age 21, *id*. § 1396a(a)(43)(D);
- decide correction plans for ICFs with deficiencies; id. § 1396 r-3;

[30] 42 U.S.C. § 1302.
[31] 42 U.S.C. § 1396-1 ("The sums made available under this section shall be used for making payment to State which have submitted, and had approved by the Secretary, State plans for medical assistance.").
[32] *Id*. at § 1396a(a) (listing requirements for state Medicaid plans).

- determine Secretary-approved benchmark coverage for benchmark benefit plans, *id*. § 1396u-7(b)(1)(D); and
- establish drug rebate policies for coverage of outpatient prescription drugs, *id*. § 1396r-8.

3. *Loper Bright* does not mean that the federal agency cannot exercise discretion. However, when exercising discretion, CMS must take great care to explicitly tie its policies and actions to the words of the Medicaid Act and avoid justifying its policies with selective references to only parts of the statute.

4. *Loper Bright* does not concern the federal agency's responsibility to determine the facts and apply the law to the facts. Nor does it affect the standard of review that courts apply to an agency's fact finding. Under that standard, the agency's findings of fact can be set aside for only certain designated reasons, for example if they are "arbitrary and capricious" or "unsupported by substantial evidence."[33]

The table below, from Georgetown Law Center Professor David A. Super, summarizes these points:

What Changed and What Stayed the Same[34]

Type of Agency Decision	Before *Loper Bright*	After *Loper Bright*
Determine Facts	Deference unless is arbitrary and capricious	Deference unless is arbitrary and capricious
Interpret Law	Deference unless is arbitrary and capricious	Court decides anew
Apply Law to Facts	Deference unless is arbitrary and capricious	Deference unless is arbitrary and capricious
Exercise Discretion	Deference unless is arbitrary and capricious	Deference unless is arbitrary and capricious

Thus, it will continue to be absolutely crucial for interested parties to submit comments on proposed policies to CMS during notice and comment periods. As before *Loper Bright*, these comments must work to make a strong administrative record supporting

[33] 5 U.S.C. § 706.
[34] David A. Super, Georgetown Univ. L. Ctr, *Power Point Presentation: Public Protections after Loper Bright* (July 17, 2024).

the commenters' point of view, through evidentiary support (*e.g.*, research, data) and/or examples from lived experiences.

5. *Loper Bright* is sure to spark legal challenges to cases that applied *Chevron* deference and agency regulations in general. Citing statutory stare decisis, the *Loper Bright* Court said that "[m]ere reliance on *Chevron* cannot constitute a special justification for overruling a such a holding."[35] That does not mean, however, that plaintiffs will not argue that these cases were wrongly decided.

   Relatedly, plaintiffs—as has been the case all along—can argue that regulations violate the APA because they are inconsistent with, or not authorized by, the Medicaid Act. *Loper Bright* is likely to infuse some plaintiffs with renewed vigor. Indeed, this is already happening. In *Texas v. Becerra*, the district court recently cited *Loper Bright* in its opinion finding that Texas is likely to succeed on its APA claim challenging Biden Administration Medicaid managed care regulations that prohibit discrimination based on gender identity.[36] CMS argued that multiple Medicaid Act provisions authorize the regulation.[37] However, the court found that

   > [n]othing cited gives CMS the authority to prohibit discrimination on the basis of gender identity—and effect the kind of sweeping social policy change the agencies attempt here. The Court is confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.[38]

   And while *Texas v. Becerra* concerns newly finalized regulations, *Loper Bright* can also apply to long-standing regulations. In fact, the Court has opened the door to challenges aimed at older regulations. Just after *Loper Bright* was announced, the Court decided *Corner Post v. Board of Governors of the Federal Reserve System*.[39] That case considered the statute of limitations (SOL) for challenging agency rules under the APA

---

[35] 144 S. Ct. at 2273.
[36] *Texas v. Becerra*, No. 6:24-cv-211-JDK, 2024 WL 3297147, at *8 (E.D. Tex. July 3, 2024) (discussing 89 Fed. Reg. 37,522, 37,691-9292 (*codified at* 42 C.F.R. §§ 438.3(d)(4), 438.206(c)(2), 440.262, 440.260(b)(3), 460.112(a)). The case also challenges regulations implementing Title IX.
[37] *Id*. (discussing 42 U.S.C. § 1396a(a)(4), requiring states to employ "such methods of administration ... as are found by the Secretary to be necessary for the proper and efficient operation of the plan," and 42 U.S.C. § 1396a(a)(19), requiring states to operate their programs in a manner consistent with "the best interests of the recipients").
[38] *Id*. (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).
[39] *Corner Post v. Board of Governors of the Federal Reserve System*, 144 S. Ct. 2240 (2024).

and unanimously agreed that a six-year SOL applies. However, by the same 6-3 lineup as in *Loper Bright*, the Court also held that the SOL starts to run on the date of injury to the plaintiff, not the date the rule was finalized. As the dissent notes, this gives "every new entity in a regulated industry its own personal statute of limitations to challenge longstanding regulations," potentially causing all involved to have to adjust operations, "since any rule (no matter how well settled) might be subject to alternation."[40] As a further additional complication, new entities can be created for the purpose of challenging an agency action. On the other hand, Congress can also expressly define the SOL in the APA or in the Medicaid Act itself, as a period shorter than six years.

6. Congress and the federal agency will need to change business as usual. Congress already received that wake-up call in 2022, when the Court announced the "major question doctrine."[41] Under this standard, regulations that involve a major question of deep economic and political significance are not valid unless Congress has delegated absolutely clear authority to the agency to promulgate the rule. The requirement is "not just that Congress speak, but that Congress yell."[42] The need to yell now extends to regulation drafting in general.

   It is not clear whether Congress could amend the APA to re-impose *Chevron*-type deference. As noted above, the Chief Justice suggested that constitutional separation of powers principles could prohibit that.[43] In a concurring opinion, Justice Thomas was more certain: "I write separately to underscore a more fundamental problem: *Chevron* deference also violates our Constitution's separation of powers."[44]

   For its part, the administrative agency will need to develop the ability to use the power Congress has delegated promptly, as soon after a statute's enactment as possible. As a corollary, the agency will need to be wary of promulgating policies that are not tied closely to the words of the statute and reflect the statute as a whole. It could be a mistake for the agency to rely upon old statutes to implement regulations that introduce broad, new purposes that are not specified in the statute and that were not evident at

---

[40] *Id*. at 2481 (Jackson, J., dissenting).
[41] *See West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). For discussion see, Jane Perkins & Erica Turret, *Delegation of Rulemaking Authority in Light of the "Major Questions Doctrine"* (Feb. 15, 2023), https://healthlaw.org/resource/delegation-of-rulemaking-authority-in-light-of-the-major-questions-doctrine/.
[42] Mila Sohoni, *The Major Question Quartet*, 136 HARV. L. REV. 262, 283 (2022).
[43] 144 S. Ct. at 2257.
[44] *Id*. at 2274 (Thomas, J., concurring).

the time of the statute's enactment. That said, if CMS wants to be active, it must fight any tendency to be timid.

Unfortunately, another case from the term could give the federal agency additional pause when it considers enforcement actions. That case, *Securities and Exchange Commission v. Jarkesy,* involved administrative review of fraud allegations by an administrative law judge where the judge exercised his authority under the statute to impose a civil money penalty.[45] With the same 6-3 majority as *Loper Bright* and *Corner Post*, the Court held the civil money penalties were a legal remedy and, as a result, the Seventh Amendment right to jury trial attached, depriving the agency of the ability to impose financial penalties. This case could affect the federal Medicaid enforcement because several Medicaid Act provisions authorize the Secretary to impose civil money penalties when, for example:

- private contractors disclose private information,[46]
- nursing facilities violate patient protection and other provisions of the Nursing Home Reform Act;[47]
- drug manufacturers provide false information about drug pricing or product information;[48] and
- managed care organizations falsify or misrepresent information given to the Secretary.[49]

7. Congress, CMS, and beneficiary advocates will need to closely monitor how other stakeholders react to *Loper Bright*. Some states—as Texas has already shown—are sure to aggressively challenge agency actions they do not like. Those from the business sector (*e.g.*, managed care entities, drug companies, and health care providers) will have to decide which is more important to them—averting the risk of legal challenges or balking at perceived over-regulation.

Conclusion

Loper Bright is, with reason, receiving a great deal of attention. However, in the months and years ahead, it will be important to be clear about what *Loper Bright* does not do. *Loper Bright* does not require courts to reject agency actions and regulations that interpret the Medicaid Act. It does not affect an agency action taken pursuant to and consistent with

[45] *Securities and Exchange Commission v. Jarkesy*, 144 S. Ct. 2117 (2024).
[46] 42 U.S.C. § 1396w-2(c).
[47] *Id*. at § 1396r(h).
[48] *Id*. at § 1396r-8((b)(3).
[49] *Id*. at § 1396b(m).

unambiguous Medicaid provisions. *Loper Bright* does not affect deference to agency policies that result from, and are within the confines of, an express delegation of authority from Congress. Finally, *Loper Bright* does not concern the federal agency's responsibility to determine the facts and apply the law to the facts. Nor does it affect the deferential standard of review that courts apply to an agency's fact finding. In other words, the sky is not falling and CMS and health advocates should not act as though it were.