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"Hubris Squared": What SCOTUS Decision Gutting Deference to Public Agencies Means for Health Care Protections

The last days of the Supreme Court of the United States' (SCOTUS) term brought some blockbuster decisions with far reaching implications for federal agencies charged with regulating health care. In an expected but still monumental move, SCOTUS issued a decision in *Loper Bright vs. Raimondo* overruling decades of precedent under which courts gave deference to agency interpretation of federal statutes the agency was charged with enforcing. The case is already reverberating in the health policy sphere, where federal regulations often bring clarity and force to vague statutory provisions and where in-depth scientific expertise and evaluation provide a critical check on corporate power. Read on to learn more about how this decision could impact access to health care, including for people with complex and chronic conditions.

What Was at Issue in the Case and How Did the Court Rule?

Plaintiffs in *Loper Bright* were a group of New England fishing companies who challenged the validity of a rule issued by the National Marine Fisheries Service (NMFS). Plaintiffs claimed that the rule – which required fisheries themselves to pay for monitoring mandated by a federal statute – went beyond the scope of the statute and was an overreach of federal agency authority. Lower federal district courts and appeals courts had upheld the rule as allowable and a reasonable interpretation of the federal statute by the NMFS. In reaching this conclusion, the lower courts relied on a decades-old legal doctrine known as "*Chevron* deference." *Chevron* deference is a 40-year-old legal doctrine under which courts have deferred to reasonable agency interpretations of ambiguous statutes in certain circumstances.

SCOTUS overruled the lower court decisions in *Loper Bright* and, in doing so, explicitly nixed *Chevron* deference,

What is *Chevron* Deference?

Chevron deference refers to a 1984 SCOTUS decision that upheld a federal Environmental Protection Agency regulation implementing the Clean Air Act. In upholding the regulation at issue in that case, SCOTUS embraced a two-step process for deciding whether an agency action was permissible: (1) the court should first look to whether Congress' intent under the statute is clear, and (2) if the statute is ambiguous, the court defers to the agency's interpretation of the statute if that interpretation is reasonable. This process presumes that agencies have more expertise than courts in interpreting often technical areas of regulatory law. Since 1984, *Chevron* has been cited by federal courts more than 18,000 times in decisions over whether a federal regulation was permissible.

holding that the doctrine violated the federal Administrative Procedures Act (APA), a vast statute that outlines the authority of agencies to adopt regulations and the standards for judicial review of agency action. The majority opinion – penned by Chief Justice John Roberts – asserted that the APA requires courts, not agencies, to interpret what a statute means. The court may consider an agency's interpretation when a statute is ambiguous, but is not obligated to defer to the agency interpretation.

The decision marks a new era of judicial review of public agency action, in which courts have more power to overturn agency decisions especially when the statute underlying the agency's action is broad or ambiguous. The sheer breadth of judicial power ushered in by the decision prompted Justice Elena Kagan to quip in her scathing dissent that "[i]f opinions had titles, a good candidate for today's would be Hubris Squared."

In a one-two punch to public agency deference, SCOTUS issued another ruling at the tail end of this term – *Corner Post, Inc. v. Board of Governors of the Federal Reserve System* – which greatly expanded the ability of plaintiffs to sue agencies long after a regulation has been adopted. The Court ruled that the statute of limitations (which limits how long a plaintiff has to file a lawsuit) for challenging a federal rule begins to run not when an agency action occurs, but when a plaintiff is injured by the action, which could be many years after a regulation became final. *Loper Bright*, coupled with *Corner Post* and other court cases that erode public agency power, means we will likely see a spate of new legal challenges to federal regulations.

What Does *Loper Bright* Mean for Section 1557?

Loper Bright has already impacted enforcement of federal rules designed to protect people from discrimination in health care. The Section 1557 final rule issued in May included specific language clarifying that 1557's prohibition on sex-based discrimination includes discrimination on the basis of transgender status. However, on July 3, 2024—just two days before the new 1557 regulations would have come into effect—a federal district court in the Southern District of Mississippi postponed the effective date of the gender identity provisions of the regulation and prohibited federal enforcement of these provisions nationwide. Federal district courts in Texas and Florida also issued injunctions along the same lines, with the Eastern District of Texas postponing the effective date for the *entire* rule in Texas and Montana, and the Middle District of Florida postponing the effective date of the part of the rule interpreting "on the basis of sex" to include transgender status. All three of these decisions cited the *Loper Bright* decision in noting that the HHS interpretation of section 1557 was no longer entitled to deference. Another coalition of states has also been emboldened to challenge the 1557 final rule. As these court cases proceed through appeals, there is clearly a strong case to be made to preserve the sex-based discrimination interpretation that HHS used in the rule. But it also clear that the end of *Chevron* deference opens up new avenues for legal challenges and empowers an increasingly active judiciary to substitute its judgment for that of HHS.

What Does the Decision Mean for Health Care Regulations Moving Forward?

A post-*Chevron* world could give rise to new threats and considerations for the host of health care regulations on which consumers depend:

- **More legal challenges**. The *Loper Bright* and *Corner Post* decisions give a boost to entities seeking to challenge a federal regulation, inviting further judicial scrutiny of agency action and empowering an increasingly activist federal judiciary to substitute its judgement for that of federal agency expertise. *Loper Bright* has already been cited in federal lawsuits and district court decisions involving plaintiff challenges to the Biden Administration's rule interpreting Section 1557, the Affordable Care Act's (ACA's) sweeping non-discrimination provision. (See sidebar for details.)

- **Slower and more defensive federal rulemaking**. Federal agencies will likely need more time to ensure that every federal regulation has a

specific nexus to statutory authority to insulate rules from litigation that could strike them down. Industry interests pushing deregulation may further gum up the works by overloading federal agencies with reams and reams of technical comments, all of which must be carefully considered to ensure that agencies are acting within the bounds of both the APA and the authorizing statute. Thus, we can likely expect longer rulemaking decision times. This could particularly impact implementation of major new health care statutes such as the Inflation Reduction Act's drug pricing and Medicare plan design provisions, which require a slew of federal rules to give details and contours to implementation. In addition, the loss of deference to agencies could discourage even sympathetic administrations from pushing the envelope as far as the boundaries of their statutory authority allows in favor of greater protections for consumers—for example, in the context of Section 1557.

- **Uncertainty**. A major consequence of the Court's decisions is to throw uncertainty into the public agency rulemaking system upon which consumers and regulated entities rely for consistent expectations of rights and responsibilities. Coupled with a bend toward more sweeping judicial decisions that include nationwide injunctions, we can expect a pall of uncertainty over many federal regulations, especially those that involve sensitive topics like reproductive health care access and LGBTQ access. This could be particularly disruptive for access to health care, where regulations dictate so many of the rules of the road for issues ranging from how the ACA marketplaces run, to Medicaid and Medicare reimbursements, to drug approvals.

At the same time, it is worth remembering that *Chevron* deference did not always work in favor of individuals and groups seeking to advance health care access and promote the rights of systemically marginalized groups. Instead, the doctrine simply identified the circumstances in which an agency's decisions would be entitled to deference, regardless of any ideology underlying the decision. If Trump wins a second term in November 2024 and proceeds to reverse important interpretations of the ACA, the Social Security Act, and other federal statutes governing health care, we can expect significant pushback through litigation—as we saw during the first Trump Administration. Advocates should be prepared to use *Loper Bright* to their advantage in a similar litigation push, should that become necessary.

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