SEEN AND UNSEEN: ANALYZING THE STATE OF CHEVRON DEFERENCE—OR LACK THEREOF—IN THE CIRCUITS AFTER AMERICAN HOSPITAL ASSOCIATION AND EMPIRE HEALTH

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Introduction

In administrative law, no case is more famous than *Chevron v. Natural Resources Defense Council*. *Chevron* is the most cited case in administrative law history, cited by thousands of cases and law review articles.[1] In *Chevron*, the Supreme Court created a two-step inquiry for how federal courts should analyze administrative agency rulemaking and interpretation of laws. [2] First, a court must ask whether Congress has "directly spoken to the precise question at issue."[3] If Congressional intent is clear, judicial inquiry ends; "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[4] Second, if the court determines Congress has "not directly addressed the precise question at issue," and the statute from which the agency derives its powers is "silent or ambiguous," the court asks whether the agency's answer is based on a "permissible construction of the statute."[5]

Under *Chevron*'s two-part test, deference is typically afforded to administrative decisions unless the decision is unreasonable.[6] The resulting test provides a useful and straightforward process for resolving statutory ambiguity. In doing so, the Court vaulted *Chevron* to a place of paramount importance within the Court's canon. Given the relative simplicity of—and a plethora of citations to—the "*Chevron* doctrine," one has good reason to believe that *Chevron* occupies a secure place for years to come, but appearances can be deceiving, and there is more to *Chevron* than meets the eye.

In June 2022, the Supreme Court decided two challenges to administrative rulemaking that seemed tailor-made for *Chevron* application and analysis—*American Hospital Association v. Becerra* and *Becerra v. Empire Health Foundation*. Both parties in each case and multiple justices repeatedly invoked *Chevron* during oral arguments. However, in the final analysis, the Court conspicuously avoided

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1 Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 612 (2014).

2 Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

3 *Id*.

4 *Id*.

5 *Id*. at 842-43.

6 *Id.* at 845.

mention of *Chevron* in both cases, instead opting to utilize language matching part one of the *Chevron* test—applying the traditional tools of statutory interpretation, such as textual analysis.[7] The Court's decision to omit mention of *Chevron* analysis and elevate other methods of reviewing administrative agency statutory interpretations represents the potential erosion of a seminal decision, leaving *Chevron*'s continued viability in question.

In the aftermath of these decisions, several U.S. Courts of Appeals, including the Fifth, Ninth, and District of Columbia Circuits, examined cases involving the amount of deference courts should grant to administrative agencies.[8] In reaching their conclusions, these Circuits appear to believe that *AHA* and *Empire Health* operate outside of the classic *Chevron* two-step deference framework, even though *Chevron* has not been overruled.[9] To resolve these discrepancies and clarify the parameters of judicial deference, the Court should take the next opportunity to clarify whether *Chevron* is still good law.

Part I of this note will provide an overview of the history of judicial review of administrative agency decision-making and statutory interpretation before *Chevron*. Part II will summarize the Court's *Chevron* decision and briefly state arguments supporting and opposing the framework. Part III will examine the Court's decisions in *AHA* and *Empire Health*, making note of the Court's explicit *Chevron* omission. Part IV will evaluate U.S. Courts of Appeals decisions after *AHA* and *Empire Health* to determine how lower courts fit these cases into the broader canon of administrative law. Finally, Part V will briefly outline *Loper Bright Enterprises v. Raimondo,* a case the

[7] Am. Hosp. Ass'n. v. Becerra, 142 S.Ct. 1896, 1903 (2022) ("HHS's preclusion argument lacks any textual basis.").

Becerra v. Empire Health Found. for Valley Hosp. Med. Ctr., 142 S.Ct. 2354, 2368 (2022) ("Text, context, and structure all support calculating the Medicare fraction HHS's way.").

[8] Bp. Am., Inc. v. FERC, 52 F.4th 204, 210 (5th Cir. 2022); Diaz-Rodriguez v. Garland, 55 F.4th 697, 705 (9th Cir. 2022); Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives, 45 F.4th 306, 313 (D.C. Cir. 2022).

[9] Bp. Am., Inc. v. FERC, 52 F.4th 204, 210 (5th Cir. 2022); Diaz-Rodriguez v. Garland, 55 F.4th 697, 705 (9th Cir. 2022); Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives, 45 F.4th 306, 313 (D.C. Cir. 2022).

Supreme Court will hear in early 2024.[10] There, the petitioner is explicitly asking the Court to overrule *Chevron*.[11]

I. Before Chevron

Federal courts have long granted administrative agencies deference for many of their legal conclusions and interpretations.[12] However, the extent to which courts granted deference was—and still is—a source of contention.[13] In *Gray v. Powell*, the Supreme Court advanced a framework for deference that centers around the type of legal interpretation the court exercises.[14] Abstract questions of law required *de novo* review, in which judges could apply the ordinary tools of statutory interpretation, such as language, structure, and legislative history.[15] Conversely, the *Gray* Court held that lower courts should grant agencies much latitude in their interpretations of questions of fact and application of law.[16]

This pattern of the Supreme Court emphasizing distinctions between the types of deference granted to an agency continued in *NLRB v. Hearst Publications, Inc*.[17] There, the Court deferred to the National Labor Relations Board's "broad" determination that newsboys fell within its definition of "employee."[18] The Court first engaged in *de novo* statutory interpretation to determine the meaning of "employee" under the Wagner Act.[19] After undertaking this review, the Court granted deference to the NLRB's interpretation that newsboys were "employees," stating that "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the

10 45 F.4th 359, 363 (D.C. Cir. 2022), cert. granted in part sub nom. Loper Bright Enterprises v. Raimondo, 143 S. Ct. 2429 (2023).

11 *Id*.

12 GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 571 (8th ed. 2019).

13 *Id*.

14 *Id*. at 575; *see also* Gray v. Powell, 314 U.S. 402, 415-16 (1941) (Court applying a plain language interpretation in its *de novo* review).

15 LAWSON, *supra* note 12, at 574-75.

16 *Id.*

17 322 U.S. 111, 131-32 (1944), *overruled in part by* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992).

18 *Id.*

19 *Id.* at 120-29.

reviewing court's function is limited."[20] According to the Court, NLRB's determination was to be respected if it was warranted by the record and had a "reasonable basis in law."[21] The Court reasoned that "Congress entrusted" agencies with the power to use their expertise and that daily "experience in the administration of the statute gives [NLRB] familiarity with the circumstances and backgrounds" of employer-employee relationships and other employment-related matters.[22]

Deferential distinctions between abstract questions of law and factual interpretations continued in *O'Leary v. Brown-Pacific-Maxon, Inc*.[23] There, the Court analyzed the meaning of "in the course of employment" within the Harbor Workers' Compensation Act in the context of an employee's death while on the clock.[24] The Court agreed with the agency's statutory interpretation of "in the course of employment." Still, it did not mention any deference to the agency in the process.[25] At the same time, the Court determined that the question of whether the particular employee's actions leading up to his death were "in the course of employment" was inappropriate "for independent judicial ascertainment."[26] The Court determined that broad deference to the agency's interpretation was in order.[27]

The framework in *Gray*, *Hearst*, and *O'Leary* provided the typical format for judicial analysis of agency statutory interpretations that largely continued until the Court's 1984 decision in *Chevron*.[28]

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20 *Id*. at 131.

21 *Id*.

22 *Id.* at 130.

23 340 U.S. 504, 505-09 (1951).

24 LAWSON, *supra* note 12, at 576.

25 *Id*.

26 *Id*. at 577; *O' Leary*, 340 U.S. at 507-09.

27 LAWSON, *supra* note 12, at 577; *O'Leary*, 340 U.S. at 507-09.

28 However, the Court did not grant deference to agencies' statutory interpretations in all instances. In some cases, the Court ignored an agency's interpretation and substituted its own interpretation instead. *See* Packard Motor Car Co. v. NLRB, 330 U.S. 485, 492 (1947), *superseded by statute as stated in* NLRB v. Town & Country Elec., Inc., 516 U.S. 85 (1995); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 269, 279 (1974). This history is one interpretation of the degree of judicial deference to administrative agencies before *Chevron*. For further discussion on this interpretation, see LAWSON, *supra* note 12, at 570-85. However, others disagree with this history. *See* Kent Barnett & Christopher J. Walker*, Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 10-11 (2017) (in which the authors argue the Supreme Court alternated between three different regimes of deference to agency interpretations before *Chevron*).

II. Chevron v. Natural Resources Defense Council, Inc.

Chevron amounted to a landmark decision that forever changed how courts would review statutory interpretations by federal administrative agencies. In justifying its holding, the Court created ripple effects still felt today.

In 1984, the United States Supreme Court heard a challenge to an Environmental Protection Agency (EPA) decision to allow states to treat all pollution-emitting devices within a singular industrial grouping as though they were ensconced within a single "bubble." [29] The Court sought to determine whether EPA's decision to treat such devices in this manner was based on a "reasonable construction of the statutory term 'stationary source.'"[30] Reversing the Court of Appeal's judgment, the Court held that EPA's decision was permissible and that the lower court mistakenly adopted a "static judicial definition of the term 'stationary source' when it had decided that Congress itself had not commanded that definition."[31] The Court, in an opinion by Justice Stevens, then outlined a 2-part test to determine when an administrative agency's statutory construction is permissible.[32]

First, the Court emphasized that lower courts must ask "whether Congress has directly spoken to the precise question at issue."[33] If Congressional intent is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[34] Second, if a court recognizes that "Congress has not directly addressed the precise question at issue," the court must not "simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation."[35] If the statute in question "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the

29 Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 840 (1984).
30 *Id*.
31 *Id*. at 842.
32 *Id*. at 842-43.
33 *Id.* at 842.
34 *Id.* 842-43.
35 *Id.* at 843.

statute."[36] The central inquiry of this test, the Court stressed, is not to determine whether an agency's statutory-based regulation is "inappropriate."[37] Rather, courts must determine if an agency's regulation is a "reasonable policy choice for the agency to make."[38]

In its decision, the Court justified the need for its new test. The Court stated that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer…."[39] The Court also emphasized that it has consistently upheld judicial deference to agency interpretations of law.[40] The fact that an agency may occasionally or repeatedly change its interpretation of a statute—and subsequent regulations set forth to enforce it—does not mean that courts should afford no deference to an agency's interpretation of a statute.[41] Instead, the Court stressed that "to engage in informed rulemaking," agencies "must consider varying interpretations and the wisdom of its policy on a continuing basis."[42] The Court provided its 2-part test to accomplish these goals.

In the years following *Chevron*, the doctrine spread to every corner of administrative law, touching all conceivable fields.[43] While many across the ideological and legal spectrum have pledged support for *Chevron*, others call for its replacement.[44] Supporters of *Chevron* argue that the framework creates a simplified process for judicial review of agency action, puts decision-making authority in the hands of various subject-matter experts in administrative agencies, and shifts accountability away from life-tenured judges to executive branch officials.[45] Contrarily, opponents of *Chevron* argue that the doctrine grants too much leeway to unelected bureaucrats and shifts

36 *Id*.

37 *Id*. at 845.

38 *Id*.

39 *Id.* at 844.

40 *Id*.

41 *Id.* at 863.

42 *Id*. at 863-64.

43 Thomas M. Cull, *Chevron Under Siege the Future of Chevron Deference in Congress and the Courts,* 26 S.C. LAW. 27, 27 (2019).

44 *Id*.; *see also* Ronald A. Cass, *Chevron—Complicated Start to Finish*, 23 FED. SOC. REV. 265, 265-66 (Oct. 2022).

45 Cull, *supra* note 43, at 27; Cass, *supra* note 44, at 265-66.

too much power from the judicial branch to the executive branch, undermining the judiciary's authority to "say what the law is."[46]

Supporters and detractors each received much food for thought when the Supreme Court announced its decisions in *AHA* and *Empire Health* in June 2022. The notable absence of any direct reference to *Chevron* in these decisions raises questions of how much deference courts must afford administrative agencies and whether deference is appropriate in the face of judicial review.[47]

III. American Hospital Association and Empire Health

In June 2022, the Supreme Court decided two cases challenging Department of Health and Human Services (HHS) administrative Medicare-related rules in *American Hospital Association v. Becerra* and *Becerra v. Empire Health Foundation*.[48] While the two cases concerned specific and concentrated HHS Medicare guidelines, the resulting decisions impact all areas of administrative law. The omission of *Chevron* citations in the Court's decisions raises questions about the future validity of the two-part test.

a. American Hospital Association

In *American Hospital Association v. Becerra*, the American Hospital Association challenged an HHS outpatient Medicare prescription drug reimbursement policy for hospitals.[49] Pursuant to the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, HHS is required to set reimbursement rates on an annual basis for certain outpatient prescription drugs provided by hospitals to patients.[50] Under the statute, HHS maintains two options to set the reimbursement rates for specified prescription drugs. Option one dictates that "if HHS has conducted a survey of hospitals' acquisition

46 Cull, *supra* note 43, at 27 (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

47 *See generally* Am. Hosp. Ass'n. v. Becerra, 142 S.Ct. 1896 (2022); Becerra v. Empire Health Found. for Valley Hosp. Med. Ctr., 142 S.Ct. 2354 (2022).

48 Am. Hosp. Ass'n v. Becerra, 142 S.Ct. 1896 (2022); Becerra v. Empire Health Found., for Valley Hosp. Med. Ctr., 142 S.Ct. 2354, 2360 (2022).

49 *See generally Am. Hosp. Ass'n*, 142 S.Ct. 1896 (2022).

50 *Id.* at 1899.

costs for the drugs, HHS may set the reimbursement rates based on the hospitals' average acquisition costs… and may vary the reimbursement rates for different groups of hospitals."[51] On the other hand, option two states that "if HHS has not conducted such a survey, [it] must instead set the reimbursement rates based on the average sales price charged by manufacturers for the drugs (with certain adjustments), and HHS may *not* vary the reimbursement rates for different groups of hospitals."[52]

Since the Act took effect, HHS has primarily utilized option two when setting outpatient prescription drug reimbursement rates for hospitals.[53] In fact, the only instance in which HHS attempted to employ option one and vary reimbursement rates by hospital group was in 2020, after litigation began.[54] In 2018, HHS decided to lower the reimbursement rates for 340B hospitals serving low-income and rural populations.[55] However, contrary to the Medicare statute, HHS did not first survey hospital acquisition costs for outpatient prescription drugs.[56] Nevertheless, HHS significantly reduced the reimbursement rates for 340B hospitals compared to all other hospitals. Non-340B hospitals' reimbursement rates remained at the traditional rate of approximately 106 percent of the average sales price for each drug; in comparison, the reimbursement rate for 340B hospitals was lowered to 77.5 percent of the average sales price for each drug.[57] Although HHS recognized it had not conducted the required survey to adjust rates, it cited its opinion two statutory authority to "adjust" the average price "as necessary for purposes of" the Medicare statute.[58] The American Hospital Association and other hospital industry groups subsequently challenged HHS's adjusted reimbursement rates, arguing that HHS did not survey all hospital's acquisition costs and, therefore, could not set different reimbursement rates for different groups of hospitals.[59]

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51 *Id*.
52 *Id*.
53 *Id*. at 1900.
54 *See generally id.*
55 *Id.*
56 *Id.*
57 *Id*. at 1901.
58 *Id*.
59 *See generally Am. Hosp. Ass'n*, 142 S.Ct. at 1902.

The U.S. District Court for the District of Columbia ruled for AHA and the other industry groups, holding that HHS exceeded its statutory authority by setting reimbursement rates without conducting a hospital survey.[60] On appeal, the Court of Appeals for the D.C. Circuit reversed, upholding HHS's separate reimbursement rates for different hospital groups.[61] The Court stated that HHS's interpretation of option two was reasonable and that *Chevron* deference was in order.[62]

In briefs for the American Hospital Association and the government at the Supreme Court, both parties invoked *Chevron*. In its brief, AHA argued that *Chevron* could not be cited as a justification for HHS's reimbursement rate reduction because the Medicare statute provides a straightforward bar on adjustments without first conducting a survey.[63] AHA continued by arguing that the unambiguous nature of the statutory language prohibits *Chevron* from entering the arena.[64] Finally, AHA argued that HSS's adjustment decision was an act of legislating, not rulemaking, which is not subject to *Chevron* deference.[65]

In its brief, the government argued the Court should grant HHS broad deference under *Chevron* because this case involved "an *express* delegation of authority to 'the Secretary' to 'calculate and adjust' reimbursement rates 'as necessary for purposes of'" the Medicare statute.[66] The government further argued that HSS adopted its rule through proper channels pursuant to *Chevron* and possessed an express delegation of statutory authority.[67] Finally, the government argued that HHS took permissible factors, such as drug-acquisition

[60] Am. Hosp. Ass'n v. Azar, 348 F.Supp.3d 62, 81 (D.C. 2018), *rev'd*, 967 F.3d 818 (D.C. Cir. 2020), *rev'd and remanded sub nom*. Am. Hosp. Ass'n v. Becerra, 142 S. Ct. 1896 (2022).

[61] Am. Hosp. Ass'n v. Azar, 967 F.3d 818, 828 (D.C. Cir. 2020), *rev'd and remanded sub nom*. Am. Hosp. Ass'n v. Becerra, 142 S. Ct. 1896 (2022).

[62] *Id*.

[63] Brief for Petitioner at 15-16, Am. Hosp. Ass'n v. Becerra, 142 S.Ct. 1896 (2022) (No. 20-1114), 2021 WL 4061327, at 11.

[64] *Id*. at 46-49.

[65] *Id*.

[66] Brief for Respondent at 48, Am. Hosp. Ass'n v. Becerra, 142 S.Ct. 1896 (2022) (No. 20-1114), 2021 WL 4937288, at 23.

[67] *Id*. at 19-20.

costs, into account, rendering its decision not "arbitrary, capricious, or manifestly contrary to the statute" under *Chevron*.[68]

During oral arguments, multiple justices repeatedly asked both parties whether *Chevron* deference applied to this case.[69] With the first question, Justice Thomas asked AHA whether the Court should reject the D.C. Circuit's application of *Chevron* or, if not, whether the Court should overrule *Chevron* entirely. [70] AHA responded that it wished for the Court to reject the D.C. Circuit's application of *Chevron*.[71] Justice Breyer later stated that he believed *Chevron* was the incorrect precedent to apply to this case "because whatever Congress wanted done here, it didn't want to give the agency to choose. They did something definite."[72] Shortly after that, Justice Alito asked AHA whether it wished for the Court to overrule *Chevron*—if the only way to reverse the D.C. Circuit would be to do so—to which AHA replied that it did.[73]

Later in oral arguments, several justices referenced Footnote 9 in *Chevron*, articulating the finality of judicial review and the importance of textual statutory analysis.[74] Justice Kavanaugh asked AHA whether the Court should take *Chevron* Footnote 9 seriously, "that says to apply all the traditional tools of statutory interpretation and construction, and. . . if you do that, you get an answer."[75] AHA responded by arguing that the Court should "exhaust the toolkit, and that requires consideration of context and structure and the overall operation of the statute, the provenance of the statute, all the things that [the Court] would bring to bear."[76] Justice Gorsuch also brought

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[68] *Id.* at 46-49.

[69] Transcript of Oral Argument, Am. Hosp. Ass'n v. Becerra, 142 S.Ct. 1896 (2022) (20-1114), 2021 WL 6051132, at 23.

[70] *Id*. at 3

[71] *Id*. at 5.

[72] *Id*. at 28.

[73] *Id*. at 30.

[74] Chevron, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.… If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

[75] Transcript of Oral Argument, Am. Hosp. Ass'n v. Becerra, *supra* note 69 at 35.

[76] *Id.*

up Footnote 9 in the context of whether this case was superfluous.[77] Justice Gorsuch stated that "in a lot of circumstances where we don't have *Chevron* applicable and have competing statutory problems. . . we go down and apply all the tools of statutory interpretation, as *Chevron* Footnote 9 says and you've endorsed, and we come up with an answer."[78] Justice Gorsuch further articulated that he did not believe this case implicated the Major Questions Doctrine, another test determining the appropriate deference to administrative agency statutory interpretations.[79]

During questioning directed at the government, Justice Barrett asked the government how they wished to define *Chevron*, with the government answering that their "principal submission" is that the Court need not apply *Chevron* deference because the government's statutory interpretation was the correct one.[80] The government argued that while this case "fits clearly within the doctrinal box of" *Chevron*, an "existential broad *Chevron* question" did not exist.[81] Justice Barrett stated that this case "might be just an interpretive question" and represented a "classic problem of statutory interpretation that a court should resolve. . . as opposed to one that reflects some sort of delegation to the agency."[82] The government responded by arguing that "a clear delegation to the agency" existed and that "the Court has many times deferred to HHS in interpreting Medicare statutes."[83] The government did not think deference was necessary.[84] Finally, during questioning by Justice Gorsuch and Justice Kavanaugh, the government was unable to precisely define how much ambiguity was enough to trigger judicial deference and argued that while the statutory analysis conducted by the D.C. Circuit was "done within the *Chevron* framework," it was "an interpretation that doesn't ultimately require *Chevron* deference."[85]

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77 *Id.* at 69.
78 *Id*. at 70.
79 *Id.* at 31.
80 *Id.* at 62.
81 *Id*. at 65-66.
82 *Id*. at 67-68.
83 *Id*. at 68.
84 *Id*.
85 *Id.* at 73, 76.

Despite AHA's request for the Court to overrule the D.C. Circuit's application of *Chevron*, the Court—in a unanimous opinion by Justice Kavanaugh—did not mention *Chevron* or the D.C. Circuit's *Chevron* analysis.[86] The Court instead reached its decision to invalidate HHS's statutory interpretation of reimbursement rates by "employing the traditional tools of statutory interpretation. . . ."[87] Primarily, the Court looked to the text of the statute to determine that HHS acted unlawfully when it reduced 340B hospitals' reimbursement rates without a survey.[88]

Justice Kavanaugh expressly stated that the Medicare statute does not permit different reimbursement rates absent a survey of all hospitals.[89] Based on the text and structure of the statute, since "HHS did not conduct a survey of hospitals' acquisition costs, HHS acted unlawfully by reducing the reimbursement rates for 340B hospitals."[90] Justice Kavanaugh pointed out that HHS's interpretation would make the survey prerequisite for varying reimbursement rates by hospital group irrelevant and would transform the provision of the statute that "precisely details the requirements for surveys of hospitals' acquisition costs" into inconsequential language.[91] Accordingly, the D.C. Circuit was reversed, and the case was remanded for further proceedings.[92]

The Court's lack of *Chevron* discussion in its analysis raises questions about *Chevron*'s continued legitimacy. Without mentioning *Chevron*, the Court arguably appeared to undertake a *Chevron* step one analysis: it applied the traditional tools of statutory interpretation to determine whether Congress had directly spoken to the precise question at issue.[93] However, because the Court did not say it was undertaking *Chevron* analysis at any point, it could be argued that the Court did not undertake such analysis.

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86 *See generally* Am. Hosp. Ass'n v. Becerra*,* 142 S.Ct. 1896 (2022).

87 *Id.* at 1906.

88 *Id*.

89 *Id*. at 1904.

90 *Id*.

91 *Id*. at 1905.

92 *Id.* at 1906.

93 *Id*. at 1902-03.

b. Empire Health

In *Empire Health*, the Court faced the challenge of how HHS counts patients who qualify for Medicare Part A when the program is not paying for part or all of their hospital treatment.[94] The Medicare program provides government-funded health insurance to all individuals once they turn 65 or have received federal disability benefits for 24 months.[95] These benefits include coverage for hospital care, known as Part A benefits.[96] When hospitals treat high percentages of low-income Medicare patients, HHS reimburses them at high rates compared to hospitals that do not.[97]

The Medicare statute, 42 U.S.C. § 1395ww(d)(5)(F)(vi)(I), outlines a formula for how HHS is to reimburse hospitals that treat a large percentage of low-income patients.[98] First, HHS measures the proportion of a hospital's Medicare patients with low incomes, identified by their entitlement to welfare benefits.[99] Second, HHS measures the proportion of a hospital's patients who are not entitled to Medicare and have low incomes, as identified by their Medicaid eligibility.[100] These proportions are identified as the "Medicare fraction" and the "Medicaid fraction."[101] The Medicaid program provides health insurance to all low-income individuals, regardless of age or disability.[102]

HHS determines the proportion of a hospital's Medicare and Medicaid fractions by undertaking a statutorily required calculation.[103] The Medicare fraction, at issue in this case, is calculated by dividing the number of patient days accrued by hospitalized low-income Medicare patients from the number of all patient days accrued by hospitalized Medicare patients.[104] After completing the

94 Becerra v. Empire Health Found., for Valley Hosp. Med. Ctr., 142 S.Ct. 2354, 2360 (2022).

95 *Id*. at 2359.

96 *Id.*

97 *Id*. at 2358.

98 *Id*.

99 *Id*. at 2359.

100 *Id.* at 2359.

101 *Id*.

102 *Id*.

103 *Id.*

104 *Id*. at 2360.

calculation, HHS adds the Medicare fraction to the Medicaid fraction to determine the exact hospital reimbursement rate.[105] For most hospitals, the effect of these calculations is a lower Medicare fraction, decreasing payments to qualifying hospitals.[106]

In 2004, HHS promulgated a regulation that granted entitlement of Medicare Part A benefits to patients whom Medicare insures but did not pay for on a given day of hospitalization.[107] As long as a hospitalized patient met the statutory criteria for Medicare eligibility, the patient would be counted as a Medicare patient, whether or not Medicare insured them.[108] Moreover, if the patient were low-income, they would be counted as a low-income Medicare patient, regardless of who provided their health insurance.[109] The regulation added more Medicare patients to the Medicare fraction, reducing the total hospital reimbursements by HHS.[110] Even though more low-income patients were added to the fraction, the increase in Medicare-eligible patients lowered most hospitals' reimbursement rates.[111]

Empire Health challenged HHS's regulation as inconsistent with the statutorily determined fraction descriptions.[112] The U.S. District Court for the Eastern District of Washington held that "[n]either the plain language of 42 U.S.C. § 1395ww nor the statutory purpose demonstrates a clear and unambiguous Congressional intent for the meaning of the phrase 'entitled to benefits under [Medicare] part A.'"[113] The District Court further found that "Congress provided no express guidance regarding how Medicare Part A patient-days should be counted" and determined that, under *Chevron*, the Court should

105 *Id.* at 2360.

106 *Id*. at 2361.

107 Becerra., 142 S.Ct. at 2361; *see also* Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 2005 Rates, 69 Fed. Reg. 48916 (Aug. 11, 2004).

108 *Becerra v. Empire Health Found.*, 142 S.Ct. at 2361.

109 *Id*.

110 *Id.* at 2368 (Kavanaugh, J., dissenting).

111 *Id.* at 2361 (majority opinion).

112 *Id.*

113 Empire Health Found., for Valley Hosp. Med. Ctr. v. Price, 334 F. Supp. 3d 1134, 1152 (E.D. Wash. 2018), *aff'd on other grounds sub nom*. Empire Health Found., for Valley Hosp. Med. Ctr. v. Azar, 958 F.3d 873 (9th Cir. 2020), *rev'd and remanded sub nom*. Becerra v. Empire Health Found., for Valley Hosp. Med. Ctr., 142 S.Ct 2354 (2022), and *rev'd and remanded sub nom*. Empire Health Found., for Valley Hosp. Med. Ctr. v. Azar, No. 18-35845, 2022 WL 17411382 (9th Cir. Dec. 5, 2022).

defer to HHS's construction of the statute.[114] However, the rule was vacated on procedural grounds.[115]

On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed the District Court's ruling on the payments-calculation question but affirmed its judgment in favor of Empire Health on other grounds.[116] The Ninth Circuit singled out two different statutory phrases: "entitled to [Medicare]" and "eligible for [Medicaid]." It held that "a patient simply meets the Medicaid statutory criteria"—regardless of whether "Medicaid actually paid" for a given service on a given day.[117] The Ninth Circuit also determined that the statutory language related to Medicare seeks to determine whether a person is "entitled to" (not "eligible for") benefits, meaning that even patients who are 65 or older are not "entitled to [Medicare Part A]" benefits within the statutory definition for any hospital stay, or part of a stay, that Medicare is not paying for.[118] Finally, the Ninth Circuit applied *Chevron* analysis and deference through circuit precedent to determine that the rule met procedural requirements.[119] However, the Ninth Circuit determined that the regulation contravened the unambiguous statutory text and circuit *Chevron* precedent by removing a word from the regulation.[120]

In briefs to the Supreme Court, Empire Health and the government cited *Chevron* on multiple occasions. The government's brief argued that HHS's interpretation of the fraction within the statute reflects "a reasonable construction of the statute" entitled to deference.[121] According to the government, this was a minimal basis for upholding the government's interpretation because the government

114 *Id*. at 1153.

115 *Id*. at 1163, 1165 (final rule vacated under the Administrative Procedure Act, 5 U.S.C. §§ 553(b), 553(c), for lack of a proper notice and comment opportunity and a finding that the final rule was not the logical outgrowth of the proposed rule).

116 Empire Health Found., for Valley Hosp. Med. Ctr. v. Azar, 958 F.3d 873, 887 (9th Cir. 2020), *rev'd and remanded sub nom.* Becerra v. Empire Health Found., for Valley Hosp. Med. Ctr., 142 S.Ct. 2354 (2022).

117 *Id.* at *885.*

118 *Id*.

119 *Id*. at 885-86.

120 *Id*. at 886-87

121 Brief for Petitioner at 26, Becerra v. Empire Health Found., for Valley Hosp. Med. Ctr., 142 S.Ct. 2354 (2022) (No. 20-1312), 2021 WL 3931359, at 14.

maintained that it had the better interpretation to begin with.[122] Moreover, the government stressed that the Sixth Circuit had previously determined that HHS's interpretation was a reasonable construction of the Medicare statute, under *Chevron*.[123]

In its brief, Empire Health argued that the Court should reject the government's request for deference, since Congress created a distinct formula within the statute that HHS could not deviate from.[124] Empire Health also argued that even if HHS had not forfeited any deference claims, its rule still conflicted with the plain text of the statute.[125] Empire Health continued, arguing that the traditional tools of statutory construction indicated that its interpretation of the statute was the best reading and only reasonable.[126]

During oral arguments, justices repeatedly asked both parties questions as to the appropriate methods of agency review and whether *Chevron* governed this case. When questioning the government, Justice Thomas asked how "entitled to" should be construed in terms of its "ordinary meaning."[127] Chief Justice Roberts further stated that he believed this case signified an instance where the Court "ought to be particularly precise in interpreting the language Congress used without any gloss added by the agency."[128] Justice Sotomayor and Justice Alito each asked the government if it should be afforded *Chevron* deference. Justice Sotomayor also stated that she did not see how to give the government *Chevron* deference under the circumstances.[129] In response to both Justices, the government argued that it should be entitled to *Chevron* deference.[130]

When questioning Empire Health, Justice Kagan inquired about the importance of the statutory language, the government's reading of such language, and the Congressional intent behind the statute.[131]

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122 *Id*.

123 *Id*. at 42.

124 Brief for Respondent at 23, Becerra v. Empire Health Found., for Valley Hosp. Med. Ctr., 142 S.Ct. 2354 (2022) (No. 20-1312), 2021 WL 4864777, at 12.

125 *Id*. at 6.

126 *Id*. at 6, 28.

127 *Id.* at 2.

128 *Id*. at 10.

129 *Id*. at 14, 16, 23-24.

130 *Id*. at 24.

131 *Id*. at 39.

Responding to a question from Justice Alito about Congressional intent, Empire Health stated that "the language speaks for itself" and that the statute is "quite prescriptive" since "Congress went out of its way in the statutory language. . . to define what universe of patients would be subject to" Medicare entitlements.[132] Additionally, Justice Kagan asked Empire Health what meaning it should give to the Medicare formula.[133] Empire Health responded that the Court should not grant *Chevron* deference, invalidate the formula, and evaluate the statute by "giving words their ordinary meaning."[134] Finally, Justice Breyer asked questions implicating a textual analysis and stated that he had an "awful qualm about using *Chevron* here."[135] Responding to one of Justice Breyer's questions, Empire Health noted that the statutory language was clear, and *Chevron* need not be applied.[136]

As in *American Hospital Association,*[137] the Court in *Empire Health* reached its decision without explicitly employing *Chevron* analysis. Justice Kagan's majority opinion and Justice Kavanaugh's dissenting opinion discuss traditional tools of statutory interpretation, such as analyzing the legislative intent, "ordinary meaning," and "text, context, and structure" of the statute.[138]

According to Justice Kagan, the statute's "ordinary meaning. . . does not exactly leap off the page."[139] However, when viewed through the lens of a specialist, the "text and context" of the Medicare statute supports HHS's interpretation.[140] Justice Kagan stated that "the Medicare statute explicitly identifies which individuals are 'entitled to hospital insurance benefits under part A'—all people who meet the basic statutory criteria."[141] Justice Kagan ultimately determined that Empire Health's interpretation would diminish the

132 Transcript of Oral Argument at 5, Becerra v. Empire Health Found., for Valley Hosp. Med. Ctr., 42 S.Ct. 2354 (2022) (No. 20-1312), 2021 WL 6051134, at 46-47.

133 *Id.* at 52.

134 *Id.*

135 *Id*. at 43-45, 60.

136 *Id*. at 45.

137 *See generally* Am. Hosp. Ass'n v. Becerra*,* 142 S.Ct. 1896 (2022).

138 Becerra v. Empire Health Found., for Valley Hosp. Med. Ctr., 142 S.Ct. 2354, 2368 (2022).

139 *Id.* at 2362.

140 *Id*.

141 *Id*.

Medicare benefits Congress formalized into law.[142] The Court ultimately upheld calculating the patient formula HHS's way, holding that "individuals 'entitled to [Medicare Part A] benefits' are all those qualifying for the program, regardless of whether they are receiving Medicare payments…" during a hospital stay.[143]

Justice Kavanaugh, joined by three other Justices, dissented. According to Justice Kavanaugh, the dispute over HHS's use of the Medicare formula is resolved simply by reading the statutory language.[144] Throughout Justice Kavanaugh's dissent, he applied a thorough textual analysis, pointing out what he believed to be the key phrases and relevant language of the Medicare statute.[145] For example, he emphasized that statutory phrases like "entitlement to have payment made" and "for such days" limited HHS's ability to provide Medicare reimbursement to patients on days that Medicare was not the primary payor.[146] After undertaking his textual analysis, Justice Kavanaugh determined that "[b]oth statutory text and common sense point to" the conclusion that patients are not entitled to have Medicare pay for hospitalized days if the patient could not have Medicare pay for them under the statute.[147]

On its face, neither Justice Kagan's majority opinion nor Justice Kavanaugh's dissent conflicts with the principles of *Chevron* deference. While the justices disagreed over the meaning of the relevant statutory language, both opinions reached their conclusions by evaluating the statute to determine whether Congress directly spoke to the question at issue. This, for all intents and purposes, is *Chevron* step one.

However, trouble lies in determining whether the Justices intended to use the full weight of *Chevron* in their analysis. The Justices may have intended to answer the problem using the *Chevron two-step* framework. Once they found the question answered at step one, it is possible the Justices decided to end the inquiry and reach their decision. Alternatively, the Justices might have agreed that *Empire*

142 *Id.* at 2362-64.
143 *Id.* at 2368.
144 *Id.* at 2368-69 (2022) (Kavanaugh, J., dissenting).
145 *Id*. at 2369-70.
146 *Id*. at 2369.
147 *Id*. at 2370.

Health signified a new rule or exclusion from *Chevron*, which could explain why the majority chose not to substantially discuss principles of deference. Finally, the Justices could have decided that it would be best not to engage in a public debate over *Chevron*'s merits and instead omit any mention of the framework.

Given the lack of any reference to *Chevron* in *AHA* and *Empire Health* and the Court's minimal discussion of deference, it is unclear which choice the Justices ultimately made. A deferential framework that only incorporates *Chevron* step one and the traditional tools of statutory interpretation would undoubtedly change the judicial inquiry. Rather than deciding if an agency decision is reasonable or not, based on the statutory text, the new inquiry would be whether the agency interpretation is correct and statutorily accurate. This new inquiry results in a decreased role for administrative agencies—and an increased role for courts—in determining the reasonableness of agency interpretations.

For now, determining what AHA and Empire Health mean for analyzing agency interpretations of law falls to the U.S. Courts of Appeals. In doing so, the courts began to shed light on the status of *Chevron* deference and the role played by courts in reviewing agency interpretations of law.

IV. Subsequent Caselaw

In the aftermath of *AHA* and *Empire Health*, the U.S. Courts of Appeals examined several administrative agency decisions with an eye on how to apply judicial deference appropriately. In doing so, the courts reached two different conclusions. On one hand, some courts (such as the Ninth Circuit) evaluated deference to administrative agency decisions post *AHA* and *Empire Health* under the traditional two-step *Chevron* framework. On the other hand, other courts (such as the Fifth Circuit) ignored the *Chevron* framework and applied the traditional tools of statutory interpretation, citing *AHA* and *Empire Health*. To resolve this dispute, the Supreme Court should clarify whether *Chevron* is still binding on lower courts.

In *Diaz-Rodriguez v. Garland*, the Ninth Circuit relied on *Chevron* deference despite stating that *AHA* exists outside the deferential

framework.[148] In *Diaz-Rodriguez*, the court examined whether an alien convicted of child endangerment under California law was removable under the Immigration and Naturalization Act (INA) for committing a "crime of child abuse, child neglect, or child abandonment."[149] The court underwent a lengthy examination of the language and structure of the INA, scrutinized ordinary definitions of the words in question, inspected other federal statutes, and evaluated state criminal codes to determine that the phrases "child abuse" and "child neglect" were ambiguous.[150] The court, citing *Chevron* step one, stated that it had applied traditional tools of statutory construction to determine that "child abuse" and "child neglect" could have multiple definitions. The phrases could mean either "conduct that puts a child at risk of serious harm by someone who may have only temporary responsibility for a child's care" or "limited to offenses where the perpetrator has a mens rea of at least recklessness and engages in conduct that actually injures a child" (abuse) and offenses "that can be committed only by a parent or legal guardian" (neglect).[151]

After determining the phrases in question were ambiguous, the Ninth Circuit applied step two of *Chevron* and examined whether the Board of Immigration Appeals' (BIA) interpretation of the INA was reasonable.[152] Ultimately, the court determined that the BIA's interpretation of the phrase "crime of child abuse, child neglect, or child abandonment" was reasonable.[153] As a result, the court concluded the agency's interpretation must be afforded deference.[154] The dissent, however, argued that *Chevron* deference should not be granted because the INA "unambiguously exclude[d]" the offense of child endangerment.[155]

148 55 F.4th 697, 705 (9th Cir. 2022).

149 *Id*. at 706.

150 *Id*. at 708-27.

151 *Id*. at 723.

152 *Id*. at 727. The BIA is an appellate administrative body charged with reviewing immigration judge decisions.

153 *Diaz-Rodriguez,* 55 F.4th at 735 (9th Cir. 2022). The BIA's definition was "any offense involving an intentional, knowing, reckless, or criminally negligent act or omission (including acts or circumstances that create a substantial risk of harm to a child's health or welfare) that constitutes maltreatment of a child or that impairs a child's physical or mental well-being, including sexual abuse or exploitation." *Id.* at 729.

154 *Id*. at 735.

155 *Id*. at 747.

In a footnote to the majority's opinion, the court acknowledged that *Chevron's* relevance moving forward is uncertain and noted that several Supreme Court justices have called for *Chevron* to be re-examined or narrowed.[156] The court then cited *AHA* to point out that the Supreme Court "has sometimes reversed an agency's interpretation of a statute without citing *Chevron*."[157] However, the court stated that *Chevron* must be applied in this instance because it is bound by Supreme Court precedent until told otherwise.[158]

Here, the Ninth Circuit interpreted *AHA* as a case that cut against *Chevron* deference principles. The Ninth Circuit indicated that *AHA* departs from the deferential framework instead of constituting part one of *Chevron*.[159] Nevertheless, the Ninth Circuit justified its decision to use *Chevron* by noting that the Supreme Court has not overruled it.[160] Despite its decision, the Ninth Circuit clearly believes that *Chevron's* future is uncertain, and the case will likely be constrained or outright overruled in the near future.

In *BP Am., Inc. v. FERC*, the Fifth Circuit reviewed an enforcement action brought by the Federal Energy Regulatory Commission (FERC) against various British Petroleum America-related entities (BP).[161] The enforcement action consisted of a $20 million civil penalty levied by FERC after an investigation determined that BP used market manipulation to take advantage of disarray within the natural gas industry following Hurricane Ike's landfall in 2008.[162] After a rehearing before FERC, the Commission upheld the original penalty against BP, and BP petitioned the Fifth Circuit for review.[163]

In its review, the Fifth Circuit stated that when "interpreting statutes, it is seldom appropriate to seize on single words or phrases; instead, statutory interpretation requires consideration of the statutory scheme as an integrated whole. The context provided by surrounding language or statutory provisions can illuminate the meaning of an

156 *Id*. at 728 n.30.
157 *Id*.
158 *Diaz-Rodriguez,* 55 F.4th at 728.
159 *Id*. at 728 n.30.
160 *Id.*
161 52 F.4th 204, 210 (5th Cir. 2022).
162 *Id*.
163 *Id*. at 213.

otherwise cryptic passage."[164] The court then looked to the language of the governing statute, the Natural Gas Act (NGA), 15 U.S.C. § 717(b), to find that FERC maintains authority over "the transportation [or sale] of natural gas in interstate commerce," but does not have authority over intrastate transactions.[165] The NGA states FERC's delegated authority despite FERC's contention that § 717c-1 gave it authority to punish BP's scheme since the scheme was "in connection with" interstate transactions by affecting the overall market price of natural gas.[166] The Fifth Circuit reasoned that the NGA creates clear distinctions between interstate transactions, which fall within FERC's jurisdiction, and intrastate transactions, which reside outside FERC's authority.[167] The court stated that the "textual analysis and relevant precedent compel the conclusion" that FERC "cannot exercise its jurisdiction merely because a manipulative scheme may affect the prices of interstate natural gas trades."[168]

In a footnote supporting this point, the court explained that "[a]n agency's interpretation of its governing statute, when ambiguous, implicates the two-step *Chevron* framework. . . [b]ut there is no need to go through such steps when a statute unambiguously forecloses an agency's position. . . in such a case, we simply follow the statutory command."[169] The court cited *AHA* and *Esquivel-Quintana v. Sessions* to support its contention.[170] The citation to *AHA* indicates the Fifth Circuit potentially believes *AHA* exists outside of *Chevron* analysis, as it references *AHA* as articulating a different process of reviewing agency decision-making. Similar conclusions were reached in *Esquivel-Quintana v. Sessions*.[171]

In *Esquivel-Quintana v. Sessions,* according to the Fifth Circuit, the Supreme Court determined there is "no need to go through [*Chevron*] steps" when "'the statute, read in context, unambiguously foreclose[d] the [agency's] interpretation.'"[172] These citations, coupled

164 *Id*. at 215.
165 *Id*.
166 *Id.* at 210.
167 *Id*.
168 *Id*. at 217.
169 *Id*. at 217 n. 6.
170 *Id*.
171 Esquivel-Quintana, 581 U.S. 385, 397-98 (2017).
172 *BP Am., Inc., 52 F.4th at 217 n. 6* (quoting Esquivel-Quintana, 581 U.S. 397-98).

together, demonstrate that the Fifth Circuit has likely interpreted *AHA* as operating outside of the *Chevron* framework. According to the court, no parts of *Chevron* analysis are undertaken when a statute unambiguously forecloses an agency's position. This position effectively mirrors step one of *Chevron*, but the Fifth Circuit appears to indicate this is a separate inquiry altogether.

The Court of Appeals for the D.C. Circuit seemingly agreed that *AHA* and *Empire Health* exist outside of the *Chevron* framework in its decision in *Guedes v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*.[173] There, the court reviewed a challenge to a Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) rule that classified "bump stocks" (alterations to a firearm that allow it to fire more rapidly) as "machine guns."[174] ATF revised its definition of "machine guns" under authority delegated to it by the Attorney General pursuant to the National Firearms Act of 1934 and the Gun Control Act of 1968, which gave the Attorney General the power to "prescribe only such rules and regulations as are necessary to carry out the [statutory] provisions." [175] The District Court determined that ATF's interpretation of the statutory definitions of a machine gun was reasonable under *Chevron*, allowing ATF's "bump stock" rule to stand.[176]

On appeal, both parties asked the court to rule without employing a *Chevron* deference analysis.[177] After a multi-year appeals process, the D.C. Circuit determined it did not need to utilize *Chevron* analysis to evaluate ATF's rule. [178] Citing *AHA* and articulating that agency rulemaking can be considered "after employing traditional tools of statutory interpretation," the court stated that discarding *Chevron* in this question was "appropriate."[179] The D.C. Circuit further reasoned that analyzing an agency's statutory interpretation through the lens of *Chevron* deference was inappropriate if a court determined the agency's interpretation was reasonable.[180] The court continued, stating that forgoing *Chevron* analysis was consistent with Supreme

173 45 F.4th 306, 313 (D.C. Cir. 2022).
174 *Id.* at 310.
175 *Id.* at 310-11.
176 *Id.* at 311.
177 *Id.* at 312-13.
178 *Id.*
179 *Id.*
180 *Id.*

Court case law.[181] The court explained, quoting *AHA*, that "employing 'traditional tools of statutory interpretation' to analyze an agency rule, without resort to *Chevron* or any other form of deference to the agency" was acceptable.[182]

The opinions in these U.S. Courts of Appeals cases illustrate that some courts interpret *AHA* and *Empire Health* as involving an inquiry outside the *Chevron* deference framework. These opinions signal that *AHA* and *Empire Health* can be construed as cases where the Supreme Court instructs lower courts to apply traditional tools of statutory interpretation without using *Chevron*.

V. Loper Bright Enterprises, Inc. v. Raimondo

The D.C. Circuit recently ruled on a case that may present the most straightforward opportunity to define *Chevron's* relevance. In *Loper Bright Enterprises, Inc. v. Raimondo*, the court ruled that an agency's interpretation of statutorily granted powers was reasonable and granted *Chevron* deference.[183]

The case centers around authority granted to the Secretary of Commerce and the National Marine Fisheries Service (NMFS) by the Magnuson-Stevens Fishery Conservation and Management Act of 1976.[184] The statute authorizes NMFS to create and implement a comprehensive fishery management program, including "fishery management plans" developed by regional fishery management councils.[185] Fishery councils have the authority to make and amend existing plans that are "necessary and appropriate for the conservation and management of the fishery."[186] Fishery councils may also include specific conservation and management measures that are

[181] *Id.* at 313.

[182] *Guedes,* 45 F.4th at 313-14 (citing Am. Hosp. Ass'n v. Becerra, 142 S.Ct. 1896, 1906 (2022)).

[183] 45 F.4th 359, 365 (D.C. Cir. 2022), *cert. granted in part sub nom*. Loper Bright Enter., v. Raimondo, 143 S.Ct. 2429 (2023).

[184] 45 F.4th 363 (D.C. Cir. 2022), *cert. granted in part sub nom*. Loper Bright Enter., 143 S.Ct. 2429; *see* 16 U.S.C. §§ 1801–1884.

[185] *Id.*

[186] *Id*.

statutorily enumerated and other measures "determined to be necessary and appropriate."[187]

In 2020, the New England Fishery Management Council published a final rule outlining a standardized process for implementing and revising industry-funded conservation monitoring programs in their fisheries.[188] The monitoring program covers half of all herring fishing trips and is funded by NMFS and industry sources.[189] The final rule requires some industry vessel owners to carry an industry-funded monitor and pay the associated costs, potentially reducing their annual returns by approximately 20 percent.[190] Several commercial fishermen challenged the final rule, arguing, among other things, that the Magnuson-Stevens Act did not authorize NMFS to create industry-funded monitoring requirements.[191] The district court granted summary judgment for the government, and the commercial fishermen appealed.[192]

In its analysis, the D.C. Circuit quickly determined that Congress delegated broad authority to NMFS because the agency maintains expertise and experience within a specific industry, and the agency action at issue claims no more extensive power to regulate the national economy.[193] Thus, the court determined that *Chevron* review was appropriate.[194] The court then proceeded through the two-step analysis, concluding that NMFS's statutory interpretation "to allow industry-funded monitoring was reasonable."[195] The dissent also agreed that *Chevron* governed the review of NMFS's authority.[196]

While the majority and dissent agreed that *Chevron* governed, they disagreed over the boundaries that *Chevron* deference creates. According to the majority, *Chevron* instructs that judicial deference is appropriate "if the statute is silent *or* ambiguous with respect to the

187 *Id*. at 363-64.
188 *Id.* at 364.
189 *Id*.
190 *Id*.
191 *Id*.
192 *Id*.
193 *Id.* at 365.
194 *Id*.
195 *Id*. at 365-70.
196 *Id*. at 374.

specific issue" (emphasis added).[197] The dissent, on the other hand, stated that *Chevron* step two should only be reached if "the statute is ambiguous" *and* "Congress either explicitly or implicitly delegated authority to cure that ambiguity."[198] The dissent additionally argued that Congressional silence on a given issue typically "indicates a lack of authority,"[199] and cited cases where the Supreme Court omitted discussion of *Chevron*, including *Empire Health*.[200] However, the majority stated that *Chevron* is still the appropriate test because it has not been overruled.[201]

The commercial fishermen appealed to the Supreme Court, asking the Court to overrule *Chevron* entirely or clarify "that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."[202] On May 1, 2023, the Court granted certiorari, limiting their review to arguments pertaining to whether *Chevron* should be overruled or clarified.[203] In October 2023, the Court consolidated *Loper Bright Enterprises* with *Relentless, Inc., v. Dept. of Commerce*, a case that poses the same *Chevron* question.[204] Oral arguments are expected to occur on January 17, 2024, with a decision anticipated no later than June 2024.[205]

197 *Id*. at 369.

198 *Id*. at 374.

199 *Id.*

200 *Id*. 374 n.16.

201 *Id*. at 369.

202 Petition for Writ of Certiorari, Loper Bright Enter., v. Raimondo, 143 S.Ct. 2429 (2023) (No. 22-451), https://www.supremecourt.gov/DocketPDF/22/22-451/246256/20221110145441811_2022-11-10%20Loper%20Bright%20Cert%20Petition%20FINAL.pdf.

203 Amy Howe, *Supreme Court will consider major case on power of federal regulatory agencies*, SCOTUSBLOG (May 1, 2023), https://www.scotusblog.com/2023/05/supreme-court-will-consider-major-case-on-power-of-federal-regulatory-agencies/.

204 SCOTUSBLOG, *Loper Bright Enterprises v. Raimondo*, (Oct. 27, 2023), https://www.scotusblog.com/case-files/cases/loper-bright-enterprises-v-raimondo.

205 Amy Howe, *Justices schedule major cases on deference to federal agencies,* SCOTUSBLOG (Nov. 17, 2023), https://www.scotusblog.com/2023/11/justices-schedule-major-cases-on-deference-to-federal-agencies/.

Conclusion

In a July 2023 interview with the *Wall Street Journal*, Justice Alito gave his thoughts on *Chevron* and the role of precedent. In the interview, Justice Alito stated he is "not in favor of overruling important decisions just by pretending they don't exist but refusing to say anything about them."[206] While Justice Alito's statement is linked to *U.S. v. Texas*,[207] a case decided in the October 2022 term, his comment certainly seems applicable to—and potentially a reference to—the Court's *AHA* and *Empire Health* holdings.[208] Though Justice Alito did not directly state his opinion on *Chevron's* future, at the very least, we can infer he does not believe *AHA* and *Empire Health* overruled *Chevron*. While questions remain about what he and the other Justices believe the role of *AHA* and *Empire Health* plays in the future of Chevron deference, his statement provides insight into his opinion on *Chevron*'s status in the leadup to *Loper Bright Enterprises*.

Regardless, for the time being, *AHA* and *Empire Health* leave the future of *Chevron* deference uncertain. While the Supreme Court has not explicitly overruled *Chevron*, the early reactions among the Courts of Appeals generally make clear that *AHA and Empire Health* could mark a departure from the doctrine. As the appellate courts' opinions demonstrate, the *Chevron* doctrine's continuing validity is uncertain.

A focal point of the briefing and arguments in *Loper Bright Enterprises* will undoubtedly be whether to leave *Chevron* step two deference unchanged, reduce deference, or eliminate it (and if so, what to replace judicial deference with). Neither *AHA* nor *Empire Health* provide any genuine insight into step two's fate, as none of the opinions reach this step of the analysis.

However, if the Court decides to re-evaluate *Chevron* step one, Justice Kagan's and Justice Kavanaugh's opinions in *Empire Health*

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206 David B. Rivkin Jr. & James Taranto, *Samuel Alito, the Supreme Court's Plain-Spoken Defender*, WALL ST. J. (July 28, 2023, 1:57 PM), https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7.

207 599 U.S. ___ (2023) (holding Texas and Louisiana lacked Article III standing to challenge a U.S. Department of Homeland Security immigration deportation policy).

208 *Id.*

provide clues about possible differing viewpoints among the Justices about how courts should conduct step one statutory interpretation. Under Justice Kagan's approach, when a court reviews a highly technical statute addressed to specialists, as the Medicare statute is, "[it] must be read by judges with the minds of the specialists."[209] In contrast, while Justice Kavanaugh acknowledges the statute's complexity, he emphasizes the importance of reading the statute apart from any specialist viewpoints.[210]

These differences represent starkly different philosophical perspectives at the heart of how judges should conduct statutory interpretation and think. In Justice Kagan's view, courts are instructed to interpret complex statutes impacting specific fields as a specialist or practitioner within that field would. This perspective calls for judges to mentally remove themselves from their established role on the bench and place themselves in the shoes of a specialist within the respective field. On one hand, this perspective allows judges to incorporate other viewpoints into their decisions and consider the practical effects their rulings will have on experts and professionals within their respective fields. On the other hand, this perspective arguably takes judges outside their prescribed role as indifferent referees of the law by allowing them to think as someone else—who is not performing the role of a judge—would.

Contrastingly, under Justice Kavanaugh's approach, the judge must always approach an issue of statutory interpretation by thinking through the lens of a dispassionate and disconnected jurist. To Justice Kavanaugh, there is no role to play for a judge besides that of an indifferent referee. While this perspective provides the sturdiest grounds for judges to exercise their role as decision-makers with legal expertise, it arguably fails to account for the real-world effects of their decisions on the daily practices of those working in the respective fields. If the Court decides to use *Loper Bright Enterprises* as an opportunity to re-evaluate *Chevron* step one, many of these concerns

209 Becerra v. Empire Health Found. for Valley Hosp. Med. Ctr., 142 S.Ct. 2354, 2362 (2022) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536 (1947)).

210 *Id.* at 2368-69 (Kavanaugh, J., dissenting) ("To begin, both parties offer a dog's breakfast of arguments about broad statutory purposes, real-world effects, surplusage, structure, consistent usage, inconsistent usage, agency deference, and the like. But this case is resolved by the most fundamental principle of statutory interpretation: Read the statute.").

will be at the forefront of the Justices' minds as they determine the appropriate boundaries of judicial deference to administrative agencies.

In *Loper Bright Enterprises*, the Supreme Court may take one of several approaches. Under one approach, the Court could choose to overrule *Chevron*, which at least one Court of Appeals expects will occur in the near future.[211] Alternatively, the Court could state that *Chevron* is still good law and opt to distinguish *AHA* and *Empire Health* from the two-step deferential framework. Ideally, either option would clear up ambiguities by answering whether *Chevron* still controls judicial review of agency statutory interpretations. However, the Court has yet another approach available. The Court could continue omitting *Chevron* references and instead continue employing the traditional tools of statutory interpretation when examining challenges to agency rulemaking. Regardless, the Court should take the opportunity presented by *Loper Bright Enterprises* to explain and elaborate on whether *Chevron* is still good law. Clarifying *Chevron*'s status will mitigate any confusion within the lower courts by providing guidance, allowing them to exercise appropriate levels of deference in the future.

AHA and *Empire Health* did not receive nearly the same attention as other cases during the October 2021 Supreme Court term. Nevertheless, their potential implications may be among the most significant regarding how the Court exercises judicial review in the future, as they potentially add more to consider in the *Chevron* analysis. Conversely, amid the lower courts puzzling over *AHA* and *Empire Health* as they face *Chevron* issues with *Loper Bright Enterprises* pending, these cases may represent a stopover on the way to a *Chevron* overhaul. While the exact legacy of these cases is uncertain, it is clear they have already begun to demonstrate their relevance in the field of administrative law. Just how long that relevance lasts and what legacy these cases leave remains to be seen.

211 *See Diaz-Rodriguez,* 55 F.4th,728 n.30.