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What Does the End of the “Chevron Doctrine” Mean to Charitable Nonprofits?

By: Steven M. Woolf

At the end of this year’s term, the Supreme Court rejected a 40-year rule that required judicial deference to the subject matter expertise of federal departments and agencies when interpreting statutory requirements in regulations. The ruling in [*Loper Bright Enters v. Raimondo*](#) could upend administrative law on federal regulations on everything from food and drug safety, clean air and water, to health care, civil rights, worker rights and safety, education, transportation safety, and more. Specifically, the Court overturned its ruling in [*Chevron USA, Inc. v NRDC*](#), which had required judges to defer to federal agencies’ interpretations of law. While it is unclear the extent to which *Loper Bright* will impact nonprofit organizations in the immediate future, the decision will likely result in more challenges to federal rulemaking which will in turn delay or alter reforms and relief for people charitable organizations serve. It is also expected that Treasury Department and Internal Revenue Service interpretations of the tax law will come under increased scrutiny by the courts as well.

The Supreme Court's new judicial standard of review

Under the 1984 *Chevron* decision, courts used a two-part test when deciding lawsuits challenging whether federal agencies properly applied the law as Congress intended when the agencies issued regulations and other pronouncements: (1) Did Congress directly decide the “precise question at issue”?, and (2) If not, was the agency’s interpretation permissible (or reasonable)?

The new holding in *Loper Bright* means judges need only ask one question: Is the agency’s interpretation consistent with the law? While courts are permitted to give respectful attention to an agency’s view, they no longer need to defer to that view. Many predict that this end of deference will open the “flood gates” to lawsuits challenging even the most mundane regulations. Another likely result is the expansion of aggressive forum-shopping as opponents to agency regulations hunt for judges predisposed to ruling in their favor and then file their lawsuits in those courts.

Nonprofits as employers after *Loper Bright*

Recently, the U.S. Department of Labor, the National Labor Relations Board, and the Equal Employment Opportunity Commission, among other agencies, have been actively issuing regulations on a variety of workplace issues that impact nonprofits as employers. These have included rules narrowing the so-called “white collar” exemption from overtime pay, classification of workers as independent contractors, and union representation, as well as rules regarding age and disability discrimination. The number of legal challenges to these and other areas of employment law will likely increase in the near future as business and partisan interests move swiftly to test how far judges will go in applying their new power under the *Loper Bright* decision.

As a indication of congressional interest in the changing rules for reviewing regulations, House Education and the Workforce Committee Chair Foxx (R-NC) already sent letters to the [Department of Education](#) and [Department of Labor](#) demanding information on agency rules that may come under review. The letter gave the departments until the end of July to provide a list of actions that would

have been eligible for *Chevron* deference, and another list of the final rules that may be impacted by the Court's overruling.

Student loan relief at greater risk (than before)

Pending litigation is already challenging a new Biden administration regulation [extending Title IX protections to transgender students](#) and prescribing how schools must respond to accusations of sexual assault and harassment. The rules, which were set to take effect on August 1, have been temporarily blocked by [several](#) federal courts; the new ruling from the Supreme Court makes it even harder for the Administration to prevail.

Tax law and *Loper Bright*

Another area that is expected to be impacted is tax law, including provisions of interest to nonprofits and their donors. Challenges to tax regulations issued by the Treasury Department and the Internal Revenue Service are already among the most litigated federal agency rulings – perhaps because such interpretations frequently involve the definition of and the interrelationship between complex statutory language. In rare cases, especially in areas of complexity such as in the taxation of estates and trusts, Congress authorizes Treasury and the IRS to issue so-called “legislative” regulations which normally have the legal effect of a statute. The validity of such regulations is almost always granted strong legal deference under a *Chevron* analysis. The vast majority of tax regulations, however, are deemed to be interpretive in nature and the Supreme Court has upheld the application of the *Chevron* doctrine to so-called “reasonable interpretations” of tax statutes.

Judicial deference to Treasury and the IRS can be expected to be *significantly less likely* under any *Loper Bright* analysis. For example, the expansion of the definition of “donor-advisor” to include personal investment advisors in the proposed Donor Advised Fund regulations had already been [criticized as faulty statutory interpretation](#) under the *Chevron* doctrine. It seems likely that a judge applying the *Loper Bright* analysis would also declare such a proposal as too broad and rule the proposed regulations invalid.

Further application?

Other types of IRS pronouncements such as those in the areas of the employee retention tax credit could also be subject to challenge as plaintiffs and courts apply *Loper Bright*. Indeed, one such lawsuit alleging the IRS “unlawfully issuing legislative rules that were in violation of the Administrative Procedures Act,” was recently filed in Federal District Court in Arizona (see [Stenson Tamaddon, LLC v. IRS](#)). Filed before the issuance of the *Loper Bright* decision, this claim could be expected to be bolstered by the adoption of this recent Supreme Court decision.

Bottom line: Many observers believe that *Loper Bright* will impact all three branches of the Federal government. Congress is expected to draft more detailed legislation and strive to make “legislative intent” clearer and less ambiguous. Courts will become more active in interpreting and potentially nullifying administrative actions. Executive branch departments and agencies will become deliberate in issuing the necessary guidance that interprets legislation.

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