Healthcare Law in the First Year After *Loper Bright*

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In Loper Bright Enterprises v. Raimondo*, the Supreme Court overturned the highly deferential* Chevron *standard, which instructed courts to defer to agency interpretations of the statutes they administer, including on complex scientific or technical questions arising therein.* Loper Bright *overruled that forty-year-old landmark case, leading commentators to predict a rush of litigation challenging health-related regulations as unlawful. While challenges to the most controversial interpretations—such as whether the nondiscrimination provisions in the Affordable Care Act protect healthcare tied to sexual orientation—have indeed been brought, in general the healthcare landscape has not yet been substantially unsettled by* Loper Bright*. Using a comprehensive analysis of court opinions and case filings, this essay lays out* Loper Bright*'s presence (or, more often, absence) in major health cases, including litigation over laboratory-developed tests, generic drugs, Title X funding for abortion counseling and referrals, and more. It situates* Loper Bright *in the context of larger trends in health policy, such as the current presidential administration's decision not to enforce many Biden-era rules, the slimming down of executive agencies (including the U.S. Department of Health and Human Services), and a new skepticism about scientific expertise.*

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Introduction

In June 2024, the U.S. Supreme Court overturned its most-cited decision on scientific and administrative expertise: *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[1] For forty years, the *Chevron* decision instructed courts to let federal agencies like the U.S. Department of Health and Human Services (HHS) exercise discretion in interpreting the gaps and ambiguities in statutory regimes Congress charged them with implementing, whether that meant adjusting Medicare's reimbursement formulas[2] or interpreting the Affordable Care Act's nondiscrimination provision to include gender-affirming care.[3] *Loper Bright Enterprises v. Raimondo*, the Court's decision overruling *Chevron*, replaced that approach with one empowering judges to use their own "independent judgment" rather than deferring to agency expertise.[4] Almost two years after *Loper Bright*, this essay assesses how the decision has affected litigation concerning federal health regulations.

I. How *Loper Bright* Altered the Legal Landscape

Before *Loper Bright*, when there were disputes over a statute's reach or if a statutory term was unclear, federal courts routinely looked to the agency charged with implementing the statute for guidance.[5] Forty years before *Chevron*, and eighty years before *Loper Bright*, the Supreme Court decided in *Skidmore v. Swift & Co.* that federal courts should look to agencies' expert views and rely on those views if they were persuasive.[6] In *Chevron*, the Court introduced a stronger form of deference. It held that federal courts *must* defer to agencies' "reasonable" interpretations of ambiguities in the statutes Congress charged them with implementing—even if courts

1. 467 U.S. 837 (1984).

2. *See infra* note 31.

3. C. Joseph Ross Daval, Liam Bendicksen & Aaron S. Kesselheim, *Eroding Judicial Deference to the FDA—Consequences for Public Health*, 388 NEW ENGLAND J. MED. 963, 963-64 (2023); *see infra* note 9.

4. 603 U.S. 369, 412-13 (2024).

5. Daval et al., *supra* note 3, at 964.

6. 323 U.S. 134, 140 (1944) ("[T]he rulings, interpretations and opinions of the [agency] . . . do constitute a body of experience and informed judgment. . . . The weight of such a judgment in a particular case will depend upon . . . all those factors which give it power to persuade . . . .").

themselves might have interpreted those ambiguities differently.[7] The Court explained that when a statute is ambiguous, the choice between reasonable interpretations is a policy decision for the agency, not a court, to make.[8]

This state of affairs had the side effect of building room into statutes for agency action. For scientific agencies like HHS, this regime provided broad latitude for the agency to interpret federal law consistent with its policy priorities and medical advancements. As a result, new presidents could change policies enacted by their predecessors under the same statute. For example, the Affordable Care Act's nondiscrimination provision, section 1557, has flip-flopped across Democratic and Republican administrations to include and exclude protections for reproductive services and gender-affirming care because the statutory term "sex" was deemed ambiguous enough to give HHS room to enforce different interpretations of the word.[9]

In the decades after *Chevron* was decided, however, the Court's accommodating vision of agency discretion lost favor. Critics of the administrative state brought strategic challenges to *Chevron* and other legal doctrines supporting agencies' ability to interpret statutes, especially in novel areas, without express direction from Congress.[10] New appointments on the U.S. Supreme Court reshaped that bench into one increasingly concerned with broad administrative delegations and the size and power of the executive branch.[11]

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7. Chevron U.S.A. Inc. v. NRDC, Inc., 467 U.S. at 844 ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

8. *Id.* at 866.

9. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31376, 31384 (May 18, 2016) (discussing discrimination on the basis of pregnancy termination as well as gender identity, defined as "an individual's internal sense of gender, which may be different from an individual's sex assigned at birth," and expressly referencing nonbinary identities); Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37160, 37161-62 (June 19, 2020) (rolling back 2016 changes related to, *inter alia*, pregnancy termination and gender identity, and stating that the changes were "legislative" and exceeded HHS's authority); Nondiscrimination in Health Programs and Activities, 89 Fed. Reg 37522, 37556 (May 6, 2024) (reinstating pregnancy termination and gender identity as covered forms of discrimination on the basis of sex).

10. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125-26, 160 (2000) (holding that Congress had not "unambiguously expressed" the intent to delegate to FDA the authority to regulate tobacco, a "policy decision" of "economic and political significance"); West Virginia v. EPA, 597 U.S. 697, 721 (2022) (citing *Brown & Williamson* as the origin of the "major questions doctrine" and holding that EPA lacked the authority to issue rules intended to shift energy production away from coal-powered plants—a decision of economic and political significance—because the Clean Air Act contains no express delegation of that authority); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. 109, 112-13 (2022) (staying an Occupational Safety and Health Administration rule requiring large companies to mandate that employees vaccinate themselves against Covid-19 or obtain weekly tests).

11. *See, e.g.*, Gundy v. United States, 588 U.S. 128, 157 (2019) (Gorsuch, J., dissenting) (laying out a revived, stronger form of the nondelegation doctrine and drawing from the framers three "guiding principles" for permissible delegation, including that Congress may authorize another branch to "fill up the details" after it has made a policy decision); *Nat'l Fed'n of Indep. Bus.*,

The Court chipped away at *Chevron* before overruling it in *Loper Bright*. For example, the Court began enforcing the "major questions doctrine" during the COVID-19 pandemic to curb executive authority.[12] The major-questions doctrine provides that courts may not presume Congress delegated authority to agencies on questions of major political or economic importance unless Congress expressly says so.[13] What counts as a "major question" has shifted over time and is still unclear. During the pandemic, for example, the Supreme Court used the rule to hold that Congress had not given the Occupational Safety and Health Administration the power to compel COVID-19 vaccination or testing in the workplace, even though Congress delegated the agency broad power to protect workers from hazards to their health.[14] Building on this move, the Supreme Court embraced a vision of cabined and closely supervised agency decision-making in *Loper Bright*. The Court not only ended the *Chevron*-deference regime but also took the position that every statute can have only one "single, best meaning," and that such meaning must be decided by a court, not an agency.[15] This ended new presidential administrations' ability to reinterpret statutes and effectively created a race to the courthouse to "lock in" a single, best interpretation of a statute.

Although the Court made clear that *Loper Bright* did "not call into question prior cases that relied on the *Chevron* framework," it suggested that litigants might still challenge those outcomes.[16] Litigants today can argue that while an earlier case was properly decided for the agency because a statute was ambiguous and *Chevron* counseled deference, the best reading of the statutory term cuts the other way, requiring a new holding under *Loper Bright*'s rule that the single best meaning now controls.

The Court did note in *Loper* that Congress could still delegate power to agencies to "fill up the details," and that it could signal delegation by using words that imply discretion, like "reasonable," when charging agencies with developing standards.[17] But Congress's intent to delegate must be stated clearly in the statute—ambiguity alone does not indicate that Congress meant for an agency to make a policy decision—and, as noted, any

595 U.S. at 124 (Gorsuch, J., concurring) ("Why does the major questions doctrine matter? It ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives. If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress.").

12. *Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 117 (striking down OSHA's vaccine-or-test mandate for large employers and noting that "[w]e 'expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance'" (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 764 (2021) (per curiam)).

13. *See* West Virginia v. EPA, 597 U.S. at 721.

14. *Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 117-20.

15. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 400 (2024).

16. *Id.* at 412.

17. *Id.* at 395.

agency's attempt to take on "major questions" through broad delegations will be met with skepticism.[18] The Court also implied in *Loper Bright* that the weaker form of deference announced in *Skidmore* might remain an appropriate vehicle to bring expert views into litigation.[19]

II. *Loper Bright* and Fear of Disruption

The combination of *Loper Bright* and the major-questions doctrine led some commentators to expect a seismic shift in agency operations.[20] Contrary to those expectations, parties challenging health agencies' actions invoked *Loper Bright* sparingly in the first year following the decision. Of the over four-thousand citations to *Loper Bright* that appeared in court opinions or case filings within a year of the decision, only a few hundred were in litigation involving a federal health agency.[21] Most courts that cited the opinion did so in passing or stated that it did not impact their decisions, often citing other precedent—such as the fact a court previously interpreted a statute one way—as controlling or significant.[22]

One explanation for this phenomenon is that courts and litigants had anticipated the death of *Chevron*. The Supreme Court last deferred to an agency's interpretation of an ambiguous statute almost ten years ago.[23] Since then, in every decision in which the Supreme Court has been asked to rule on the legality of an agency's action, the Court has purported to make the decision based on its own interpretation of the law, not the agency's. Sometimes that led to agency actions being overruled, but, just

18. *See West Virginia*, 597 U.S. at 721.

19. *See Loper Bright*, 603 U.S. at 402.

20. Lawrence O. Gostin & Adi Radhakrishnan, *The Supreme Court Disempowers Public Health Agencies and Devalues Science*, 5 JAMA HEALTH F. (Sept. 19, 2024), https://jamanetwork.com/journals/jama-health-forum/fullarticle/2824057 [https://perma.cc/P66B-UN2X].

21. Data on file with authors. Using manual searches and the non-AI search query tools on Westlaw Advantage and Bloomberg Law Dockets, the authors identified all citations to *Loper Bright* appearing in court opinions or case filings of any kind between June 28, 2024 and June 28, 2025. Authors then used manual searches and non-AI search query tools to identify and verify citations appearing in litigation involving HHS or a subagency during that period. The Bloomberg Dockets AI tool was used as an additional check to ensure against overlooked citations or cases, but it was not used as a primary means of data identification or verification.

22. *See, e.g.*, Novartis Pharms. Corp. v. Becerra, No. 24-CV-02234 (DLF), 2024 WL 4492072, at *7 (D.D.C. Oct. 15, 2024) ("The Court rejects Novartis's argument that *Bristol-Myers Squibb* is no longer good law in the wake of *Loper Bright*. In *Bristol-Myers Squibb*, the D.C. Circuit relied on its own interpretation of § 355(j)(2)(A)(v), rather than deferring to FDA's reading under *Chevron* step two." (internal citations omitted)). The number of relevant citations was lower than expected, given how frequently HHS and its subagencies are involved in litigation. More surprising, however, was how few courts expressly incorporated *Loper Bright* into their analyses.

23. Cuozzo Speed Techs. v. Lee, 579 U.S. 261, 276-83 (2016); *see also Loper Bright*, 603 U.S. at 406 (citing *Cuozzo* as the "most recent occasion" that the Court "deferred to an agency interpretation under *Chevron*").

as often, it resulted in agency actions being affirmed on different grounds.[24] The lower courts took note, and some started moving away from *Chevron* deference even before *Loper Bright* was decided.[25]

It is also possible that the Trump Administration's efforts to repeal health-related regulations have blunted the short-term impact of *Loper Bright.* Cases brought during the Biden Administration involving agency discretion that might have invoked *Loper Bright* have recently been dropped because the Trump Administration decided not to defend the challenged rules. For example, HHS withdrew an appeal of a nationwide stay of a rule prohibiting gender discrimination in federally funded health programs under the ACA's nondiscrimination provisions, section 1557, after the Trump Administration assured the plaintiff states that it would not enforce the rule.[26] And the FDA did not appeal a district court's decision that it lacked the authority to regulate laboratory-developed tests.[27] Litigants' use of *Loper Bright* as a tool in legal fights over health-care regulation may increase in the next year, however, as states and organizations begin to challenge implementation of the One Big Beautiful Bill Act.[28]

A. Relitigating Old Questions

Across those cases over the first year since *Loper Bright* in which parties have tried to relitigate key public-health-related opinions decided under *Chevron,* courts largely determined that pre-*Loper Bright* precedents still control or ended up deciding matters on other grounds. Parties have, for example, attempted to relitigate previous decisions that, under *Chevron*, had upheld efforts to regulate the use of Title X grants for abortion

24. *See, e.g.*, Biden v. Missouri, 595 U.S. 87, 93 (2022) (upholding a U.S. Department of Health and Human Services interim final rule, which required healthcare facilities receiving Medicare or Medicaid funds to ensure that their nonexempt staff are vaccinated against COVID-19, on the ground that "Congress has authorized the Secretary to impose conditions on the receipt of Medicaid and Medicare that 'the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services'" (internal citations omitted)).

25. Daval et al., *supra* note 3.

26. Joint Stipulation to Dismiss Appeal, Tennessee v. Kennedy, No. 24-60462 (5th Cir. Mar. 2025); *see* Ian Lopez, *HHS Drops Appeal of Block on Transgender Health Bias Rule*, BLOOMBERG LAW (Mar. 14, 2025, 12:19 PM EDT), https://news.bloomberglaw.com/health-law-and-business/hhs-drops-appeal-of-block-on-transgender-health-bias-rule; *see also* Brief for Defendants-Appellees, Florida v. Dept. Health & Hum. Servs., No. 25-12095 (11th Cir. Jan. 26, 2026) (arguing that plaintiffs' appeal should be dismissed as moot because the President issued two executive orders contrary to the Rule and the *Tennessee* court's universal vacatur, which the federal government did not appeal).

27. Nyah Phengsitthy, *FDA Skips Move to Revive Suit Over Agency's Lab Test Authority*, BLOOMBERG LAW (Jun. 2, 2025, 11:37 AM EDT), https://news.bloomberglaw.com/health-law-and-business/fda-skips-move-to-revive-suit-over-agencys-lab-test-authority.

28. *See Health Provisions in the 2025 Federal Budget Reconciliation Law*, KFF (Aug. 22, 2025), https://www.kff.org/medicaid/health-provisions-in-the-2025-federal-budget-reconciliation-law [https://perma.cc/EX3T-BFPH].

counseling and referrals,[29] initiatives to allow generic drugs to come to market sooner,[30] and payments to hospitals serving disproportionately poor patient populations.[31]

For example, Title X governs federal grants to state reproductive health providers.[32] The statute has been a focal point of controversy for decades. Depending on the presidential administration in power, HHS has variably banned, allowed, or required state providers receiving Title X funds to offer nondirective counseling and abortion referrals upon request.[33] In 1991, the Supreme Court found that the relevant statutory language was ambiguous under *Chevron* because Congress did not "directly address the issues of abortion counseling, referral, or advocacy," approving an HHS rule prohibiting state providers from offering those services.[34] As such, HHS could either allow or prohibit the use of Title X funds to pay for abortion counseling and referrals. From 2000 to 2019, HHS required Title X grantees to provide nondirective abortion counseling and referrals.[35] The first Trump Administration reversed course, again prohibiting grantees from offering abortion referrals and making nondirective counseling optional.[36]

In 2021, HHS replaced the first Trump Administration's rule banning abortion referrals with a new rule requiring state providers to offer abortion referrals in addition to nondirective counseling.[37] After the Supreme Court decided *Dobbs v. Jackson Women's Health Organization*,[38] which overturned *Roe v. Wade*,[39] Tennessee refused to offer abortion-related

29. Tennessee v. Becerra, 131 F.4th 350, 366-67 (6th Cir. 2025); Oklahoma v. U.S. Dep't of Health & Hum. Servs., 107 F.4th 1209, 1225 (10th Cir. 2024); *see* Ohio v. Becerra, 87 F.4th 759, 765 (6th Cir. 2023).

30. *See* Novartis Pharms. Corp. v. Becerra, No. 24-cv-02234, 2024 WL 4492072, at *7 (D.D.C. Oct. 15, 2024).

31. *See* Advoc. Christ Med. Ctr. v. Azar, No. 17-cv-1519, 2022 WL 2064830, at *8-9 (D.D.C. Jun. 8, 2022) (conducting a full *Chevron* analysis and upholding HHS's interpretation of the statutory provision at issue at step two); Advoc. Christ Med. Ctr. v. Becerra, 80 F.4th 346, 354 (D.C. Cir. 2023) (finding that HHS "offered the correct interpretation" and so declining to "consider[] any question of *Chevron* deference"); Advoc. Christ Med. Ctr. v. Kennedy, 605 U.S. 1, 17-18 (2025) (discussing HHS's interpretation without mentioning *Chevron*, *Loper Bright*, ambiguity, or deference); Brief for the Respondent at 44-46, *Advoc. Christ Med. Ctr.*, 605 U.S. 1 (No. 23-715) (drawing from language in *Loper Bright* and *Skidmore* to argue that HHS's interpretation is "due respect"); Reply Brief for Petitioners at 21, *Advoc. Christ Med. Ctr.*, 605 U.S. 1 (No. 23-715) (arguing, citing *Loper Bright*, that HHS's interpretation should be given no deference because the statute at issue relates to Social Security, not Medicare, and accordingly HHS cannot claim technical expertise).

32. 42 U.S.C. §§ 300(a), 300a-4(a)-(b) (2024); *see Tennessee v. Becerra*, 131 F.4th at 357.

33. *Ohio v. Becerra*, 87 F.4th at 765-67.

34. Rust v. Sullivan, 500 U.S. 173, 185 (1991).

35. *Tennessee v. Becerra*, 131 F.4th at 357; *Ohio v. Becerra*, 87 F.4th at 766-67.

36. Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714, 7788-89 (Mar. 4, 2019).

37. Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 Fed. Reg. 56144, 56178-79 (Oct. 7, 2021).

38. 597 U.S. 215 (2022).

39. 410 U.S. 113 (1973).

services under Title X, citing its new abortion ban, and litigation ensued.[40] In Tennessee's challenge to the HHS rule, the Sixth Circuit discussed *Loper Bright* at length and held that its prior decision upholding another Title X rule in a 2023 case was binding.[41] Even if it were not, the court decided that the "single, best meaning" of the statutory provision at issue permitted the HHS rule.[42] Other courts have taken a similar approach to challenges to *Chevron*-era decisions, holding that prior courts relied on their own interpretations of statutes or that agencies' interpretations aligned with their "single, best meaning."[43]

B. Litigating New Questions Under Loper Bright

Loper Bright has also affected courts' scrutiny of novel regulatory efforts by health agencies. For example, over the past few years, the FDA has become increasingly concerned about the public-health threat of laboratory-developed tests—tests developed, made, and used by a single laboratory to diagnose or treat a medical condition.[44] When thousands of patients used laboratory-developed tests, such as autism biomarker tests, without clear evidence of their clinical utility, faulty results caused the patients to both receive unnecessary care and forgo needed treatments.[45] So, in 2024, the FDA issued a new rule clarifying that laboratory-developed tests were medical devices, thereby subjecting them to FDA regulation.[46]

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40. *See Tennessee v. Becerra*, 131 F.4th at 358-59.

41. *See id.* at 364 ("[W]hile *Loper Bright* opens the door to new challenges based on *new* agency actions interpreting statutes, it forecloses new challenges based on specific agency actions that were already resolved via *Chevron* deference analysis.").

42. *See id.* at 364-65 ("Applying *Loper Bright*, the best reading of § 1008 permits both neutral, non-directive counseling and referrals.").

43. See *supra* note 22; Vanda Pharms., Inc. v. FDA, 766 F. Supp. 3d 85, 99 (D.D.C. 2025) ("Courts have consistently interpreted the exception to permit approval of generic labels with changes resulting from the generic manufacturer's otherwise permissible design choices and shown to maintain the drug's safety and effectiveness. That interpretation is in keeping with the FDA's longstanding position and practice, and it comports with the core purposes of the FDCA's requirements for ANDA approval."); Doe v. U.S. Dep't of Health & Hum. Servs., No. 1:24-CV-49-MJT-CLS, 2024 WL 4984444, at *2-3, *14 (E.D. Tex. Oct. 1, 2024) (arguing that *Loper Bright* did not warrant overturning a prior case because the court had explicitly said that deference was "not determinative").

44. Daniel G. Aaron, Eli Y. Adashi & I. Glenn Cohen, *The US FDA's New Rule for Regulating Laboratory-Developed Tests*, 5 JAMA HEALTH F. 1, 1 (2024).

45. Rachel E. Sachs, Joshua M. Sharfstein & Patricia J. Zettler, *Judicial Invalidation of the FDA's Laboratory-Developed Test Rule—Legal and Public Health Consequences*, 392 NEW ENG. J. MED., May 7, 2025, at 1, 2; FOOD & DRUG ADMIN., THE PUBLIC HEALTH EVIDENCE FOR FDA OVERSIGHT OF LABORATORY DEVELOPED TESTS: 20 CASE STUDIES 23-24 (Nov. 16, 2015), https://wayback.archive-it.org/7993/20171115144712/https://www.fda.gov/downloads/AboutFDA/ReportsManualsForms/Reports/UCM472777.pdf [https://perma.cc/M6GZ-93D4].

46. Medical Devices; Laboratory Developed Tests, 89 Fed. Reg. 37286, 37444-45 (May 6, 2024).

Industry trade associations and developers of laboratory-developed tests sued, citing *Loper Bright*.[47] In 2025, a federal district judge invalidated the FDA's rule nationwide.[48] In the *Chevron* era, a federal court may well have held that the federal Food, Drug and Cosmetic Act's broad definition of "devices" gave FDA discretion to determine that its authority covered laboratory-developed tests. In the *Loper Bright* era, by contrast, the court gets to decide for itself. The district court struck down the FDA's effort, and held instead that the plain language of the statute mandated the opposite result.[49] The Trump Administration did not appeal.[50] Notably, in drafting the rule, HHS emphasized the single best reading of the statute rather than its expert judgement, illustrating that *Loper Bright* has affected how agencies themselves will draft and support their own rules going forward—although in this case, the agency's effort to frame its rulemaking in this way did not persuade the court.[51]

III. Some Deference May Remain

The courts, however, have not eschewed deference entirely. In the first year after *Loper Bright*, the Court itself looked to longstanding agency interpretations for guidance numerous times. Interestingly, in each case, the Court did so without mentioning by name the very standard it applied—the pre-*Chevron*, softer-deference regime under *Skidmore*.[52] One of those cases was a healthcare case, *Braidwood v. Kennedy*, in which the Court upheld the constitutionality of the Affordable Care Act's regime for requiring zero-cost coverage of certain preventive-care services.[53] There, the Court followed the pattern it had followed in cases all term, interpreting the statute itself and then looking to the agency interpretation as evidence that the Court had gotten it right—each time not mentioning

47. Complaint ¶¶ 123, 130, Ass'n for Molecular Pathology v. FDA, No. 24CV00824 (E.D. Tx. Aug. 19, 2024), 2024 WL 4136813. Plaintiffs also characterized the suit as a "classic major questions case." *Id.* ¶ 130.

48. Am. Clinical Lab'y Ass'n v. FDA, 776 F. Supp. 3d 554, 584-85 (2025).

49. *Id.* at 579.

50. *See supra* note 26.

51. *See supra* note 46, at 37354 ("[T]he FD&C Act as a whole supports the conclusion that the Agency has authority for this rulemaking. . . . Congress did not key the 'device' definition to any particular type of entity and did not limit FDA's enforcement authorities to particular actors . . . . Instead, it delegated broad authority and crafted exemptions from certain requirements as appropriate. Consequently, the best reading of the FD&C Act is that it contains no carveout for laboratories, and Congress has enacted legislation supporting that interpretation." (citations omitted)).

52. *See infra* note 54.

53. *See* Kennedy v. Braidwood Mgmt., 606 U.S. 748, 793-94 (2025); Abbe R. Gluck, *Expertise After* Chevron*: A Potentially Pyrrhic Victory on Executive Control Over Preventive Care*, SCOTUSBLOG (July 14, 2025), https://www.scotusblog.com/2025/07/expertise-after-chevron-a-potentially-pyrrhic-victory-on-executive-control-over-preventive-care [https://perma.cc/FM6S-XELA] ("The court now insists, in what many view as a revival of *Skidmore*, that it is construing the statute independently but looks to a consistent agency interpretation as evidence of the correctness of that interpretation.").

Skidmore, even though the *Loper Bright* majority opinion itself referenced *Skidmore*'s survival seven times. One of us has labeled the Court's practice "shadow *Skidmore*."[54] As such, Court-watchers cannot be sure whether the Court's continuing practice of using the agency view as something like a post-interpretation "gut check" is merely a transitional phenomenon, as courts gain comfort making these decisions alone, or whether courts will continue to utilize expert views in challenges involving statutory interpretation. The Term about to conclude has not yet shed additional light on this question.

Across the lower courts, application of *Skidmore* or its shadow version has been even more uneven. The U.S. Courts of Appeals for the Sixth and Eleventh Circuits issued divided opinions on whether *Skidmore* survives *Loper Bright* in the first year after the decision. Nearly every other circuit has invoked *Skidmore* positively post-*Loper Bright*. Some federal appellate judges, however, have argued that continuing to apply *Skidmore* is an impermissible back-door path to reviving a form of *Chevron* deference.[55]

Skidmore's invocation has been uneven across subject matters. Cases in areas like immigration have seen *Skidmore* frequently invoked, but very few health-related cases in the circuit courts have applied it, expressly or not. One exception was *Jazz Pharmaceuticals, Inc. v. Kennedy*,[56] a dispute over the meaning of the phrase "same drug" in the Orphan Drug Act that affected the enforcement of that law's seven-year market exclusivity period for rare-disease drugs. There, the D.C. Circuit only noted in passing that the FDA's "longstanding view" of the Act was persuasive authority "at most," citing both *Loper* and *Skidmore*.[57] Another was *Vanda Pharmaceuticals v. FDA*,[58] a case involving rules for generic drug approval. There, the D.C. District Court did much more than mention *Skidmore* in passing—it discussed FDA's longstanding approach to generic drugs at length,

54. *See* Abbe R. Gluck, *A Year After* Loper Bright*: Textualism, Shadow* Skidmore*, and a New Major Questions Exception*, SCOTUSBLOG (Oct. 16, 2025), https://www.scotusblog.com/2025/10/a-year-after-loper-bright-textualism-shadow-skidmore-and-a-new-major-questions-exception [https://perma.cc/QST8-M4BD]. (Gluck thanks Yale Law School student Samarth Desai for helping to come up with this label.) *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 388, 394, 399, 402 (2024).

55. *See, e.g.*, Order Denying Rehearing En Banc, Lopez v. Bondi, 151 F.4th 1196, 1198 (9th Cir. 2025) (Bumatay, J., dissenting) ("[I]n denying Lopez's petition, the panel took the extraordinary step of resurrecting *Chevron* under the alias of '*Skidmore* deference.' On issue after issue, the panel consistently sought to find ways to 'respect' the BIA's interpretation of the law instead of simply conducting its own independent statutory analysis. Thus, *Lopez* violated *Loper Bright* in at least three ways—each warranting en banc review.").

56. 141 F.4th 254 (D.C. Cir. 2025).

57. *Id.* at 266; *see also supra* note 43 (citing additional post-*Loper Bright* cases that construe health agencies' views as persuasive but not decisive).

58. 766 F. Supp. 3d 85 (D.D.C. 2025).

concluding that the agency's interpretation of the relevant statutory language was a proper source of guidance for courts and litigants.[59]

Conclusion

The long-term impact of *Loper Bright* in the health landscape remains unclear. While the overruling of *Chevron* deference for federal agencies has produced only relatively modest effects in most health-related cases, it reopened the door for new rulings on some of the most controversial modern healthcare regulations. And *Loper Bright* means that any new court decisions on those controversial regulations (such as which groups are protected by the ACA's nondiscrimination provision) will take on extra import—because *Loper Bright* holds that once a court decides a statute's single best meaning, there is no room for future policy shifts.[60] For controversial regulations, therefore, *Loper Bright* incentivizes races to the courthouse of enormous significance. With respect to more routine questions of statutory interpretation, it is too early to tell how much the lack of formal deference to HHS will affect the outcomes of regulatory challenges.[61] Only time will make clear what the retreat from deference means for future legal battles over the ACA, reproductive and gender-affirming care, federal health spending, and more.

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59. *See supra* note 43; *see also* Order on Cross-Motions for Summary Judgment, Eli Lilly & Co. v. Kennedy, No. 24-cv-01503, 2025 WL 2782580, at *7 (S.D. Ind. Sep. 30, 2025) ("The meaning of 'analogous' is a question of law for the court to decide. . . . However, courts have determined that whether a product is 'similar or comparable to' a protein in the relevant respects is an issue of scientific fact best left to the FDA. . . . Even in the wake of *Loper Bright*, courts are permitted to leave those niche factual questions for the agency to decide." (internal citations omitted)).

60. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 400 (2024) ("[S]tatutes, no matter how impenetrable, do—in fact, must—have a single, best meaning. That is the whole point of having written statutes; 'every statute's meaning is fixed at the time of enactment.'" (quoting Wis. Cent. Ltd. v. United States, 585 U.S. 274, 284 (2018))).

61. The Supreme Court recently heard oral argument in a major preemption case in which the parties debated whether *Loper Bright* applies to agency preemption decisions in their briefs. It remains to be seen, however, whether the Court will opine on the issue in its decision. *See* Brief for the Respondent at 5-6, Monsanto Co. v. Durnell, No. 24-1068 (Mar. 25, 2026), 2026 WL 883125 (arguing that *Loper Bright* applies); Reply Brief for Petitioner at 10, *Monsanto Co.*, No. 24-1068 (Apr. 17, 2026), 2026 WL 1094972 (countering that *Loper Bright* has "zero relevance").