Does *Loper Bright* Apply to the Clean Air Act?

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In Loper Bright Enterprises v. Raimondo*, the Supreme Court renounced the principle that courts should defer to agencies' reasonable resolutions of ambiguities in the statutes they administer in unqualified terms. In concluding that* Chevron *deference was and always had been unlawful, the Court relied on section 706 of the Administrative Procedure Act of 1946 (APA), which describes the scope of review for judicial review of agency action. But several important federal statutes, including the Clean Air Act and the National Labor Relations Act, provide for judicial review of some agency decisions outside of the APA, and, crucially, do not contain the APA language that the Court found decisive in deeming interpretive deference unlawful. There is a serious question whether* Loper Bright *applies at all to judicial review of agencies' interpretive judgments in statutory contexts that do not involve the APA.*

In this Article, I focus specifically on the possibility that Loper Bright *does not apply to judicial review of most of the rulemaking that occurs under the Clean Air Act. I argue that, by its own terms,* Loper Bright *does not apply to most of the rules issued under the Clean Air Act because the Clean Air Act's provision on judicial review does not include the part of the APA deemed central in* Loper Bright.

It remains unclear, however, whether courts will seriously consider the possibility that Loper Bright *does not apply to all administrative challenges raising interpretive issues. In that event, the courts must grapple with the fact that* Loper Bright *unsettles their longstanding assumptions about the appropriateness of holding litigation over a prior administration's interpretive judgments in abeyance based on a new administration's intention to revisit them. The general practice of suspending litigation while a new presidential administration pursues a different path is a questionable holdover from the* Chevron *era. The analysis presented here has particular significance for the D.C. Circuit's decisions suspending litigation over every one of the most important Clean Air Act rules issued in the Biden administration.*

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Introduction

The Supreme Court spoke in unqualified terms when, in *Loper Bright Enterprises v. Raimondo*,[1] it renounced *Chevron v. NRDC*,[2] and with it the principle that courts should defer to agencies' reasonable resolutions of ambiguities in the statutes they administer. "*Chevron* is overruled," the Court declared.[3] As Justice Gorsuch put it in a concurring opinion, "[T]he Court places a tombstone on *Chevron* no one can miss."[4] Sealing the impression that *Loper Bright* extirpated *Chevron*-style deference across the board, much of the academic commentary in the wake of the decision has focused on whether and in what circumstances agencies' interpretations of the statutes they administer are eligible for respectful consideration—not *Chevron*-style deference—from the courts.[5] Scholars have not suggested that there is a class of cases that exists wholly outside of *Loper Bright*'s reach.[6]

The Supreme Court's own reasoning, however, appears to limit *Loper Bright*'s domain. In concluding that *Chevron* deference was and always had been unlawful, the Court relied on section 706 of the Administrative Procedure Act of 1946 (APA),[7] which describes the scope of review for judicial review of agency action.[8] In particular, the Court zeroed in on section 706's instruction that "the reviewing court shall decide all relevant questions of law" and "interpret constitutional and statutory provisions."[9] The majority opinion reads as though the APA, or a facsimile of the APA, applies in all administrative-law cases. But several important federal statutes, including the Clean Air Act and the National Labor Relations Act, provide for judicial review of some agency decisions outside of the APA, and, crucially, do not contain the APA language that the Court found decisive in deeming interpretive deference unlawful.[10]

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1. 603 U.S. 369 (2024).
2. 467 U.S. 837 (1984).
3. 603 U.S. at 412.
4. *Id.* at 417.
5. *See, e.g.*, Kristin E. Hickman & Amy J. Wildermuth, *Harmonizing Delegation and Deference After* Loper Bright, NYU L. REV. (forthcoming 2025) (on file with author); Kristin E. Hickman, *Anticipating a New Modern* Skidmore *Standard*, 74 DUKE L.J. ONLINE 111 (2025); Thomas W. Merrill, *The Demise of Deference—And the Rise of Delegation to Interpret?*, 138 HARV. L. REV. 227 (2024).
6. Even Professor Merrill's otherwise comprehensive and indispensable discussion of the legal landscape in the wake of *Loper Bright* does not mention the possibility that there will be non-APA cases in which *Loper* does not apply. *See generally* Merrill, *supra* note 5.
7. 5 U.S.C. § 706 (2024).
8. 603 U.S. at 390, 391-94, 398-99.
9. 5 U.S.C. § 706 (2024).
10. 42 U.S.C. § 7607(d)(1) (2024); 29 U.S.C. § 160(f) (2024).

There is a serious question whether *Loper Bright*, by its own terms, applies at all to judicial review of agencies' interpretive judgments in statutory contexts that do not involve the APA. In this Article, I focus specifically on the possibility that *Loper Bright* does not apply to judicial review of most of the rulemakings that occur under the Clean Air Act. As amended in 1977, the Clean Air Act contains a bespoke provision on judicial review, which, for twenty-one specified categories of air-pollution regulations, explicitly kicks out the APA in favor of an alternative framework for judicial review.[11] This provision excludes the statutory language the Court emphasized in *Loper Bright.* Before the 1977 amendments, the D.C. Circuit had embraced a practice of deferring to the Environmental Protection Agency's (EPA) interpretations of the Clean Air Act. On the Supreme Court's own view of the APA as reflected in *Loper Bright*, it is reasonable to conclude that, by excluding the APA language central to the Court's decision in *Loper Bright*, the 1977 amendments to the Clean Air Act codified the D.C. Circuit's deferential practice in reviewing rules issued under that statute.

The analysis presented here could affect the deregulatory ambitions of the Trump administration in the context of air pollution. EPA is planning to revoke a suite of air-pollution rules issued in the Biden administration. These rules address deadly particulate-matter emissions; dangerous emissions of air toxics from power plants and chemical facilities; interstate air pollution that subjects citizens of downwind states to unhealthy air quality; and greenhouse-gas emissions from power plants, cars, trucks, and oil-and-gas facilities. The legal interpretations underlying these Biden era rules should be eligible for judicial deference.

Unfortunately, however, the D.C. Circuit—the only court with jurisdiction over most rules issued under the Clean Air Act[12]—has begun to address the implications of *Loper Bright* for cases involving the Clean Air Act in two ways that are mutually inconsistent, and each wrong on the law. First, immediately after *Loper Bright* came down, the D.C. Circuit concluded, with little analysis, that *Loper Bright* applied to the review of a rule issued under the Clean Air Act.[13] That ruling was, in my view, mistaken, given the special judicial-review provision of the Clean Air Act; the legal interpretations underlying Biden era air-pollution rules should be eligible for judicial deference. Second, in accordance with a practice that emerged while *Chevron* reigned, the D.C. Circuit has held in abeyance the litigation challenging the major Biden era air-pollution rules, to allow the Trump administration to undo those rules without managing litigation over them at the same time. The general practice of holding litigation in abeyance while a new presidential administration pursues a different path is, however, a questionable holdover from the *Chevron* era. If the D.C. Circuit persists in applying *Loper Bright* to cases under the Clean Air Act, then the court must

11. 42 U.S.C. § 7607(d) (2024).
12. *Id.* § 7607(b)(1).
13. U.S. Sugar Corp. v. EPA, 113 F.4th 984, 991 n.7 (D.C. Cir. 2024).

grapple with the fact that *Loper Bright* undermines its practice of routinely holding litigation in abeyance when a new administration says it is reconsidering its views.

Part I of this Article analyzes the Supreme Court's decision in *Loper Bright*. Part II parses the Clean Air Act's provision on judicial review and argues that *Loper Bright* does not apply to judicial review of rules that fall under this provision. Part III explores the incongruities between *Loper Bright* and the practice of holding litigation in abeyance after a presidential turnover.

I. *Loper Bright* and the APA

Writing for the majority in *Loper Bright*, Chief Justice Roberts began his substantive discussion of the case by arguing that the founding constitutional vision for our government was that the courts—not federal agencies—were meant to be the expounders of statutory meaning.[14] He wrote: "To ensure the 'steady, upright and impartial administration of the laws,' the Framers structured the Constitution to allow judges to exercise that judgment independent of influence from the political branches."[15] In expounding on the essentialist powers and duties of the courts, the Chief Justice seemed to be making way for a holding that *Chevron* deference violated the constitutional separation of powers insofar as it installed implementing agencies as the interpreters of first resort for ambiguous statutes.

Soon enough, though, Roberts swerved away from his reflections on the founding constitutional vision and turned to the Administrative Procedure Act of 1946, which he deemed "the fundamental charter of the administrative state."[16] Roberts canvassed the text, purpose, context, and legislative history of the APA, and reached a stark conclusion: "The deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA."[17]

The Court relied on section 706 of the APA in concluding that *Chevron* was and always had been unlawful. Section 706 sets out the parameters for judicial review of the agency actions covered by the APA. Chief Justice Roberts focused on the opening sentence of section 706, which provides: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[18]

After quoting this passage, the Chief Justice declared: "The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by

14. Loper Bright Enter. v. Raimondo, 603 U.S. 369, 384-88 (2024).
15. *Id.* at 385 (quoting THE FEDERALIST No. 38 (Alexander Hamilton)).
16. 603 U.S. at 392 (quoting Kisor v. Wilkie, 588 U.S. 558, 580 (2019) (plurality opinion)).
17. *Id.* at 396.
18. 5 U.S.C. § 706 (2024).

applying their own judgment."[19] The "thus" is the tell in this sentence, indicating that Roberts believed that the text of section 706 spoke for itself.

To bolster his reading of section 706, Roberts added fillers to the statutory text. In explaining his conclusion that section 706 forbade *Chevron* deference, he italicized the "all" in section 706 (as in, "*all* relevant questions of law"); wrote in a qualifying clause ("courts, *not agencies*" decide questions of law); treated the remedy specified in section 706 (instructing courts to "set aside" unlawful actions) as if it affected the standard of review; and asserted that section 706 mandates "deferential" review for "policymaking" and "factfinding" (and not for legal interpretations), although the words "policymaking" and "factfinding" do not appear in section 706.[20]

Then Roberts played a trump card: his earlier discovery of a "settled pre-APA understanding" that deciding legal questions was "exclusively a judicial function."[21] This discovery, in Roberts's view, supported a presumption that Congress "surely" would have spoken explicitly if it had intended to embrace deferential review for questions of law.[22] Legislative subtlety in requiring or allowing a deferential posture for judicial review of agencies' legal interpretations would not suffice. In addition, given Roberts's perspective on the historical context, even the usual kinds of inferences one might draw from adjacent statutory provisions became inadmissible. The majority brushed aside the dissent's argument that section 706's explicit call for de novo review of some administrative decisions, but not others, suggested that Congress had not meant to condone de novo review in the context of legal issues.[23] "Some things," Chief Justice Roberts declared, "go without saying."[24] With these paired interpretive moves, Roberts at once declared statutory silence both insufficient and sufficient on the question of interpretive deference.

Without the Court's trump card based on its understanding of the founding vision of courts' powers and duties, it would have been hard to argue that section 706 of the APA made *Chevron*-style deference unlawful from the start. Contrary to the Chief Justice's intimation, the words of section 706 do not speak for themselves. To "decide questions . . . of law" might mean interpreting a statute without deferring to what the agency has said about it. Or it might mean deciding, as *Chevron* instructed, whether a statute clearly forecloses an agency's interpretation and whether, if not, the interpretation is a reasonable interpretation of the statute. In both cases, the Court is deciding "questions of law." A central question in scholarly debates leading up to *Loper Bright* was which of these two

19. 603 U.S. at 391-92.
20. *Id*.
21. *Id.* at 392.
22. *Id.*
23. *Id.* at 464.
24. *Id.* at 392 n.4 (quoting Bond v. United States, 572 U.S. 844, 857 (2014)).

plausible readings of the APA was better.[25] Chief Justice Roberts answered the textual debate by declaring that there could be no textual debate.

Roberts did the same in asserting that section 706's instruction to courts to "interpret constitutional and statutory provisions" must mean that agencies get no deference for their interpretations of statutes because they get no deference for their interpretations of the Constitution.[26] The statute doesn't say this. It merely gives the courts two interpretive obligations without saying what they each entail.

The Court's rendering of the history of judicial review of agencies' legal interpretations was key to both the Court's preliminary analysis on the founding constitutional vision for the federal courts and to the Court's analysis of the APA. One might even say that the Court's interpretation of the APA may have been tacitly propelled by a desire to avoid confronting the question whether *Chevron* deference violated the constitutional separation of powers. The concurring opinions of Justices Thomas and Gorsuch took this issue head-on and concluded that *Chevron* deference did indeed run afoul of the separation of powers.[27] But the Chief Justice's majority opinion did not say this. Indeed, Professor Cass Sunstein has interpreted the majority opinion to have "firmly (and crucially)" rejected the idea that the Constitution forbids Congress to grant interpretive authority to administrative agencies.[28]

If the foundation of the decision in *Loper Bright* was statutory rather than constitutional, then Congress could pass legislation rejecting *Loper Bright* in whole or in part. It could amend the APA to revoke the language that the Court found persuasive in *Loper Bright*, and it could amend individual statutes to call for judicial deference to agencies' interpretive judgments in particular contexts.

In addition, and more important for present purposes, if *Loper Bright* rejected *Chevron* on statutory grounds, then the courts will need to acknowledge the possibility that agencies' interpretations of existing statutes that do not use the APA framework for judicial review may escape *Loper Bright* entirely. I turn to this issue next, in the context of the Clean Air Act.

II. The APA and the Clean Air Act

Roberts's opinion for the Court in *Loper Bright* seems to take as given that the APA, and in particular section 706 of the APA, governs judicial review in all cases challenging agencies' interpretations. The opinion speaks in unqualified

25. *Compare* Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1642 (2019) ("[T]he text of the APA does not resolve the *Chevron* question."), *with* Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 788 (2010) ("[*Chevron*] appears inconsistent with the APA's judicial review provisions.").

26. 603 U.S. at 392.

27. *Id.* at 413-16 (Thomas, J., concurring); *id.* at 420-23, 429-35 (Gorsuch, J., concurring).

28. Cass R. Sunstein, *Our* Marbury*:* Loper Bright *and the Administrative State*, 74 DUKE L.J. 1893, 1902 (2025) ("[T]he Court firmly (and crucially) rejected the view that Congress lacks the constitutional authority to grant interpretive authority to agencies." (footnote omitted)).

and all-encompassing terms.[29] It does not appear to make room for continued debate about the ongoing vitality of *Chevron* deference in any context.

It is true that the APA is the default legal framework governing the process for decisions by administrative agencies and setting out the parameters for judicial review of those decisions. It is the statute of statutes, if you will, in administrative law. It is also true, however, that Congress is free to establish a different set of rules for administrative procedure and judicial review. The APA itself says as much, stipulating that statutes passed after the APA can supersede or modify the APA (if they do so explicitly), and that the APA's provisions on agency processes and judicial review "do not limit or repeal additional requirements imposed by statute or otherwise recognized by law."[30] The APA, in other words, makes explicit room for administrative frameworks outside of the APA.

What happens if a federal statute explicitly provides for an alternative framework for judicial review outside the APA *and* excludes the statutory language that the Court in *Loper Bright* found decisive in overruling *Chevron*? Is it still acceptable, after *Loper Bright*, for courts to grant robust, *Chevron*-style interpretive deference to the agency that implements such a statute? The Supreme Court did not address this possibility in *Loper Bright*, and its unqualified language about the death of *Chevron* seemed to deny such a possibility. But statutes that provide an avenue for judicial review outside the APA and exclude the critical statutory language in *Loper Bright* do exist, and they raise important questions about the scope of *Loper Bright*'s holding.

The Clean Air Act is one of those statutes. In the 1977 amendments to section 307 of the Clean Air Act, Congress explicitly provided that judicial review under section 706 of the APA "shall not apply" to "actions to which this subsection applies."[31] Section 307(d) as amended contains a list of twenty-one specific federal air-pollution rules to which section 706 of the APA "shall not apply."[32]

Moreover, although section 307(d)(9) replicates several of the parameters for judicial review specified in section 706 of the APA, it excludes the very language that the Court relied on in *Loper Bright* to declare that *Chevron* deference was, and had always been, unlawful. In specifying the scope of judicial review for a large number of EPA rules under the Clean Air Act, Congress did not tell courts to "decide all relevant questions of law" or instruct them to "interpret constitutional or statutory provisions."[33] Congress did not even tell courts to "set aside" agency conclusions "found to be unlawful," as the APA

29. 603 U.S. at 412-13 ("*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires.").

30. 5 U.S.C. § 559 (2024).

31. 42 U.S.C. § 7607(d)(1) (2024).

32. *Id.* § 7607(d)(1)(A)-(V).

33. 5 U.S.C. § 706 (2024).

does[34] and as the Court mentioned in passing in *Loper Bright*.[35] Instead, section 307 merely states that courts "*may* reverse" unlawful agency actions.[36] The statutory language that the Court relied on in rejecting *Chevron* deference simply does not appear in the Clean Air Act.

Thus, courts should not take it as given that *Loper Bright* applies to the rules specified in section 309(d) of the Clean Air Act. The Supreme Court had every opportunity to rest its decision on the Constitution rather than the APA, and thus to make its holding applicable beyond APA cases, but it chose not to do so. Even if it remains unclear whether the Court would, if pressed, actually hold that, as a constitutional matter, Congress lacks the power to require judicial deference to agencies' interpretations, it is perfectly clear that the Court did not decide this in *Loper Bright*. Where the APA does not apply, as in the twenty-one specific circumstances identified in section 307(d)(1) of the Clean Air Act, *Loper Bright* does not tell courts how to resolve the interpretive questions that may arise in those settings.

Does that mean *Chevron*-style deference is still valid under the Clean Air Act? Unless and until the Supreme Court tells us otherwise, the answer should be yes. Well before *Chevron*, the D.C. Circuit had developed a principle of strong judicial deference to the interpretive judgments of agencies, including EPA, that administered complex statutes.[37] The D.C. Circuit was particularly consistent in applying this principle to EPA's interpretive judgments under the Clean Air Act.[38] This principle was well established by the time Congress amended the Clean Air Act in 1977 to displace the APA for judicial review of many Clean Air Act regulations and to replace it with a judicial-review provision that excluded the APA's language telling courts to decide all questions of law and to interpret statutory provisions. It is unlikely that Congress failed to appreciate what it was doing. In 1975, Senator Dale Bumpers had introduced a bill that would have amended the preamble to section 706 of the APA by providing for de novo review of all questions of law and stipulating that there should be no presumption of the validity of rules or regulations.[39] The choice between deference-granting review provisions and deference-denying provisions was on Congress's mind, so to speak, at the time it amended the Clean Air Act in 1977. It is hard to escape the conclusion that, in kicking out the APA for judicial review of many air-pollution rules in the 1977 Clean Air Act amendments, Congress was choosing to codify a principle of strong deference to EPA's interpretations of the statute.

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34. *Id.* § 706(2).

35. Loper Bright Enter. v. Raimondo, 603 U.S. 369, 391-92 (2024).

36. 42 U.S.C. § 7607(d)(9) (2024) (emphasis added).

37. *See, e.g.*, Nat'l Ass'n of Neighborhood Health Ctrs. v. Mathews, 551 F.2d 321, 334 (D.C. Cir. 1976) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration . . . ." (quoting Udall v. Tallman, 380 U.S. 1, 16 (1965))).

38. *See, e.g.*, Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1147 (D.C. Cir. 1980) (quoting Red Lion Broad. v. FCC, 395 U.S. 367, 381 (1967)); Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir. 1976).

39. Ronald M. Levin, *Judicial Review and the Bumpers Amendment: Report in Support of Recommendation 79-6*, ADMIN. CONF. U.S. 565, 565-66 (1979).

The possibility that the 1977 Clean Air Act amendments ratified rather than rejected *Chevron*-style deference is strengthened rather than weakened if the Supreme Court's interpretation of section 706 of the APA in *Loper Bright* is correct. If Congress did indeed intend to call for a strong principle of independent judicial interpretation in section 706 by using the words "decide all relevant questions of law" and "interpret . . . statutory provisions," as *Loper Bright* held, then Congress's choice to omit those terms in the 1977 Clean Air Act amendments is highly significant. Congress is, after all, presumed to know the content of existing law. By the Supreme Court's lights, section 706 deliberately used this language to codify what the Court saw as an unbroken, constitutionally informed history of independent judicial review of statutory meaning. Congress deliberately excluded that language in the 1977 amendments to the Clean Air Act, during a period when the D.C. Circuit—the only court with authority to review most EPA air regulations[40]—embraced fulsome deference to agencies' interpretations.[41] On the Supreme Court's theory of the weighty meaning of the first sentence of section 706, Congress's decision to exclude that sentence from section 307(d) of the Clean Air Act clearly indicates a desire to reject the judicial hegemony the Court embraced in *Loper Bright*.

In *Loper Bright*, the Court evinced no awareness that the Clean Air Act has a bespoke provision for judicial review, one that kicks out the APA for judicial review of many air-pollution regulations. In fact, although the Court sniped at its own decision in *Chevron* for not "mentioning the APA,"[42] it is not clear that the APA applied in *Chevron* itself.[43] By the time *Chevron* was decided, section 307(d)(1)(J) of the Clean Air Act had expelled judicial review under the APA with respect to "the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title" and with respect to "the promulgation or revision of regulations under Part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility)."[44] The regulation at issue in *Chevron* changed the requirements for plans to implement the national air-quality standards set under the Act.[45] In addition, one of the central purposes of the regulation was to align the permitting requirements for areas that were not yet attaining the national air-quality standards with the permitting requirements for sources in areas that were attaining these standards (known as "prevention of significant deterioration" areas).[46] The regulation at issue in *Chevron* was certainly adjacent to, even if not

40. 42 U.S.C. § 7607(b)(1) (2024).

41. GAF Corp. v. Occupational Safety & Health Rev. Comm'n, 561 F.2d 913, 915 (D.C. Cir. 1977); Forester v. Consumer Prod. Safety Comm'n, 559 F.2d 774, 783 (D.C. Cir. 1977).

42. Loper Bright Enter. v. Raimondo, 603 U.S. 369, 397 (2024).

43. For an argument to this effect, offered in *Loper Bright*, see Brief *Amicus Curiae* of Environmental Defense Fund in Support of Respondents at 17 n.10, Relentless, Inc. v. Dep't of Com., 144 S.Ct. 417 (Dec. 22, 2023) (No. 22-129).

44. 42 U.S.C. § 7607(d)(1)(B), (J) (2024).

45. Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 50766, 50771 (1981).

46. *Id.* at 50767.

expressly within, two of the categories of rules subject to judicial review under section 307(d).

Notably, the question whether section 307(d) applied to the regulation challenged in *Chevron* came up during EPA's comment period for the regulation, with ambiguous results. Environmentalists faulted EPA for failing to provide the factual basis for its proposal, as required by section 307(d)(3)(A) of the Clean Air Act.[47] The agency responded by tentatively stating that this requirement did not apply to its regulation because the regulation did not fit within any of the categories specified in section 307(d)(1).[48] The regulation did not promulgate a state implementation plan, EPA explained, but instead set out requirements for state plans implementing the air-quality standards.[49] The agency did not address the possibility that the rule fit within the category related to preventing significant deterioration of air quality. Ultimately, EPA stated that it did not matter if section 307(d) (and not the APA) applied to the rule in *Chevron* because the challengers had not shown they were harmed by EPA's choice of procedures.[50]

The majority in *Loper Bright* saw none of this nuance. It seems to just have assumed that the APA applied in *Chevron* itself and that the Court was remiss to ignore that fact. For all that appears, the Court was unaware that the Clean Air Act prescribes a different framework for judicial review than the APA does, and that this framework, rather than the APA, may have governed judicial review in *Chevron*. The Court's apparent ignorance of the basic parameters of a major American statute, one that was at the heart of *Chevron* itself and has been before the Court in dozens of high-profile cases, merits lament. However, whether or not the Court was cognizant of the details of judicial review under the Clean Air Act, the Clean Air Act's rejection of the APA framework for judicial review opens up the argument that *Loper Bright* does not apply to judicial review of the rules specified in section 307(d) of the Clean Air Act.

The inapplicability of *Loper Bright* to the Clean Air Act could be of great significance. Every one of the air-pollution rules that appears on EPA Administrator Lee Zeldin's list of rules to undo—what Mr. Zeldin calls "the biggest deregulatory action in US history"[51]—fits within one of the twenty-one categories of regulatory activity referenced in section 307(d)(1). The existing National Ambient Air Quality Standards for particulate matter, the Good Neighbor Plan for addressing interstate air pollution, standards for greenhouse-gas emissions from power plants and oil-and-gas facilities under section 111 of the Clean Air Act, technology-based standards for air toxics from power plants and ethylene-oxide commercial sterilizers under section 112, and emission

47. *Id.* at 50770.

48. *Id.*

49. *Id.*

50. *Id.* at 50770 n.9.

51. *EPA Launches Biggest Deregulatory Action in U.S History*, U.S. ENV'T PROT. AGENCY (Mar. 12, 2025), https://www.epa.gov/newsreleases/epa-launches-biggest-deregulatory-action-us-history [https://perma.cc/FWY4-3JQR].

standards for cars and trucks are all in the agency's crosshairs, and they all are subject to judicial review under that section.[52] These air-pollution rules, moreover, comprise the bulk of the Trump administration's overall deregulatory priorities for EPA. According to my analysis of *Loper Bright*, these Biden era rules—all now facing legal challenges in the D.C. Circuit—should be subject to judicial review under the strong principle of interpretive deference codified in section 307, rather than under the judge-centric review prescribed in *Loper Bright*.

So far, however, that is not how the D.C. Circuit has approached *Loper Bright* in the context of the Clean Air Act. In the immediate aftermath of *Loper Bright*, a three-judge panel cursorily ruled that *Loper Bright*'s instruction to courts to interpret statutes independently "controls EPA interpretations of the Clean Air Act reviewed under its judicial-review provision, 42 U.S.C. § 7607(d)(9)," and that de novo review applies to these interpretations.[53] The judges reached this conclusion, they said, "because judicial review under the Clean Air Act is 'essentially the same' as judicial review under the APA."[54] They cited the D.C. Circuit's decision in *Ethyl Corp. v. EPA*[55] for this proposition, which itself relied on *Motor Vehicle Manufacturers Association v. EPA*[56] and *Small Refiner Lead Phase-Down Task Force v. EPA*[57] for the same idea. The latter cases harmonized the standards for judicial review under the APA and Clean Air Act based on the conclusion that the standard for judicial review under the Clean Air Act was "taken directly from" the APA: "The standard for substantive judicial review of EPA action under the Clean Air Act is taken directly from the APA: The court may reverse only if EPA's action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[58]

The problem for the D.C. Circuit's analysis is that the Clean Air Act's provision on judicial review is *not* entirely "taken directly from" the APA: it excludes section 706's preamble language instructing courts to "decide all relevant questions of law" and to "interpret . . . statutory provisions." It also excludes the language instructing courts to "set aside" unlawful rules. And the only "parallel APA provision" that the D.C. Circuit cites in these cases is section 706(2)(A) of the APA—which does not, according to *Loper Bright*, speak to

52. *See* 42 U.S.C. § 7607(d)(1)(A), (B), (C), (K) (2024).
53. U.S. Sugar Corp. v. EPA, 113 F.4th 984, 991 & n.7 (D.C. Cir. 2024).
54. 113 F.4th at 991 n.7 (quoting Ethyl Corp. v. EPA, 51 F.3d 1053, 1064 (D.C. Cir. 1995)).
55. 51 F.3d 1053, 1064 (D.C. Cir. 1995).
56. 768 F.2d 385, 389 n.6 (D.C. Cir. 1985).
57. 705 F.2d 506, 519 (D.C. Cir. 1983).
58. *Small Refiners*, 705 F.2d at 519-20 (first quoting Clean Air Act, ch. 360, § 307(d)(9)(A), 69 Stat. 322 (1955) (codified as amended at 42 U.S.C. § 7607(d)(9)(A) (2024)); and then citing 5 U.S.C. § 706(2)(A)) (characterizing section 706 of the APA as the "parallel APA provision" to the Clean Air Act); *see also Motor Vehicle Mfrs. Ass'n*, 768 F.2d at 389 n.6 (citing *Small Refiners* for the proposition that the standard of review under the APA and the Clean Air Act "is the same").

judicial review of agencies' legal conclusions.[59] Now that the Supreme Court has, in *Loper Bright*, unearthed the massive importance of section 706's preamble, earlier cases finding a complete congruence between section 706 of the APA and section 307(d) of the Clean Air Act, without consulting the specific language of the Clean Air Act, are no longer persuasive. The D.C. Circuit should revisit this part of its jurisprudence.

If, instead, the D.C. Circuit continues to apply *Loper Bright* to cases under the Clean Air Act, it should reconsider its recent decisions holding litigation challenging Biden era air-pollution rules in abeyance in light of the Trump administration's expressed intentions to revisit those rules. These abeyance decisions are, as I argue in the next Section, in considerable tension with the post-*Chevron* world.

III. *Loper Bright* in Presidential Transitions

One question that arises when the presidency changes hands is how to manage litigation challenging the former administration's regulations when the new administration expresses its intention to change them. The courts have long asserted that a court has inherent authority to hold litigation in abeyance where doing so makes sense for reasons of "economy of time and effort for itself, for counsel, and for litigants."[60] Where there is reason to believe, for example, that it may soon be unnecessary to decide a case and where judicial resources can be preserved by suspending work on it, the courts have discretion to hold the case in abeyance for a limited period of time.[61]

In recent years, as presidential transitions have featured the frenzied reversal of many or most of the regulatory decisions of predecessors in office, incoming administrations have made far greater use of the abeyance option to avoid litigation over their predecessors' decisions. Whereas, not many years ago, new presidential administrations asked for abeyance in select cases in the early stages of litigation, the first Trump administration took a more assertive approach, requesting abeyances in scores of cases, even after briefing, and sometimes oral argument, had been completed.[62] The Biden administration then followed the same basic approach.[63]

The courts frequently granted these requests for abeyance of existing litigation.[64] Before *Chevron* was overruled, one could understand this general approach. At that time, the theory and practice of statutory interpretation fit smoothly with the idea that a new administration's plans to revisit its past

59. Loper Bright Enter. v. Raimondo, 603 U.S. 369, 392 (2024) (noting that 5 U.S.C. § 706(2)(A) (2024) refers to judicial review of agency "policymaking" and "factfinding").

60. Landis v. N. Am. Co., 299 U.S. 248, 254 (1936).

61. Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 27 (2019).

62. *Id.* at 28-33.

63. Stephen M. Johnson, *Deregulation: Too Big for One Branch, But Maybe Not for Two*, 53 SETON HALL L. REV. 839, 886 (2013).

64. Noll & Revesz, *supra* note 61, at 30-32.

decisions could easily make existing litigation over those decisions unnecessary and that forestalling such litigation could conserve judicial resources. *Chevron*, after all, not only counseled deference in favor of agencies' interpretive judgments but also blessed agencies' reversals of position on statutory meaning.[65]

Loper Bright has scrambled this balance. The signal holding of *Loper Bright* is that courts, not agencies, are in charge of statutory interpretation. The Supreme Court pronounced that, after *Chevron*, courts must independently interpret statutes,[66] that their task is to find the best interpretation of any given statute,[67] and that there is only one permissible interpretation of any statute, fixed at the moment of the statute's enactment.[68] While the Court permitted courts to "respect" agencies' interpretive judgments in some circumstances, it also forbade courts to render decisions that conflict with their own judgments about statutory meaning: courts, the Supreme Court said, are simply "not at liberty" to do this.[69] "Respect," as the Court put it, "was just that: The views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it."[70]

In this new world, the added value of hearing the interpretive views of a new administration is markedly diminished, whereas the value of knowing a court's views, especially on stubbornly persistent and unsettled statutory questions, is markedly intensified. The statutory questions will ultimately be for the courts, not the agencies, to decide, with the spare possibility that the courts will "respect" the agencies' views in coming to their own conclusions about statutory meaning. This changed dynamic should affect courts' deliberations over whether to abate litigation challenging a former administration's regulatory actions.

Not only did *Loper Bright* put courts, not agencies, in charge of statutory interpretation, but it also expressed disapproval of shifting agency interpretations. *Brand X*[71]—the 2005 Supreme Court decision that required deference for an agency's interpretation even where that interpretation had previously been rejected by the courts—was a prime force behind demands to overrule *Chevron*.[72] In *Loper Bright*, the Court highlighted shifts in agency interpretations as a central reason to undo *Chevron*.[73] After *Loper Bright*, it is strange for an agency to justify abeyance of active litigation over a former administration's rules just by citing its inherent power to change its mind. After

65. Nat'l Cable & Telecomms. Ass'n v. Brand X, 545 U.S. 967, 981-82 (2005).
66. Loper Bright Enter. v. Raimondo, 603 U.S. 369, 394 (2024).
67. *Id.* at 400.
68. *Id.*
69. *Id.* at 387.
70. *Id.* at 386.
71. Nat'l Cable & Telecomms. Ass'n v. Brand X, 545 U.S. 967 (2005).
72. The "Brand X problem," as counsel for *Loper Bright* put it, figured prominently at oral argument in *Loper Bright*. *See* Transcript of Oral Argument at 9-11, 22-24, 59-62, 88, *Loper Bright*, 603 U.S. 369 (No. 22-451).
73. *See Loper Bright*, 603 U.S. at 399, 411.

Loper Bright, an expressed intention to change interpretive positions is actually a danger sign that the new position may flout *Loper Bright*'s expectations.

The transition from the Biden administration to the second Trump administration is the first presidential handover since *Loper Bright*. In managing litigation over Biden era rules in the early months of the new administration, the administration and the courts have often proceeded as if *Loper Bright* never happened.

The Trump administration has asserted a broad prerogative to revisit and, if appropriate, rescind prior regulation. It has argued that a court needs to hear an agency's explanation for its change of heart because the agency's views may be entitled to "great weight."[74] And because courts need agencies' input—input that itself takes time for agencies to crystallize—abeyance is necessary. As I've said, however, changes in agencies' interpretive views are now discouraged, not encouraged, and the new administration has overstated the benefit to be gained from suspending litigation to allow for elaboration of the agencies' new views. Moreover, when parties supporting abeyance argue that abeyance remains appropriate even for statutory questions because *Loper Bright* "should not be interpreted as giving courts a roving license to decide statutory interpretation questions that the agency has not finished assessing,"[75] one might be forgiven for thinking they haven't really absorbed the teaching of *Loper Bright*. A roving license to decide statutory interpretation questions is pretty much exactly what *Loper Bright* gave to the courts.

Despite *Loper Bright*'s unsettlement of the premises for holding litigation in abeyance during a presidential transition, courts are routinely granting the Trump administration's requests to suspend litigation over Biden era rules.[76] Bafflingly, they have done so even where the judges have been presented with, and have deliberated on, the implications of *Loper Bright* for their abeyance practices.[77] The courts have accepted basically identical, generic arguments from the government for suspending litigation when a new administration enters office and wants to change agencies' prior views. The government's briefs supporting its flurry of motions for abeyance have offered few specifics. The government has said little about the nature of the claims being made in the relevant litigation or about the parties' interest in having a definitive judicial resolution of persistent

74. *See, e.g.*, EPA's Motion for Voluntary Remand and Renewed Motion to Hold Case in Abeyance at 9, California Communities Against Toxics v. EPA, No. 24-1178 (D.C. Cir. Mar. 25, 2025).

75. EOSA's Response in Support of EPA's Motion for Voluntary Remand and Renewed Motion to Hold Case in Abeyance, Ethylene Oxide Sterilization Ass'n v. EPA, No. 24-01180 (D.C. Cir. Mar. 31, 2025).

76. For a small subset of the orders granting the Trump administration's motions for abeyance of EPA rules alone, see, for example, Order, Union Carbide v. EPA, No. 24-60615 (5th Cir. July 1, 2025), referring to the regulation of 1-4-dioxane under the Toxic Substances Control Act; Order, Denka Performance Elastomer, LLC v. EPA, No. 24-60351 (5th Cir. June 12, 2025), referring to the regulation of synthetic organic chemicals under the Clean Air Act; and Order, *In re* Nat'l Highway Traffic Safety Admin., No. 24-7001 (6th Cir. Feb. 14, 2025), referring to corporate average fuel-efficiency standards).

77. EPA's Motion for Voluntary Remand and Renewed Motion to Hold Case in Abeyance, *supra* note 74, at 10 ("EPA should be afforded the opportunity to develop and articulate its position on the statutory issues in light of its policy imperatives and expertise.").

statutory disputes. The Trump administration has effectively treated abeyance of existing litigation as a matter of right rather than a matter of judicial discretion, and the courts have acceded to this framing.

The D.C. Circuit's decisions granting abeyance of litigation over Biden-era rules have been particularly head-scratching. The D.C. Circuit has abated litigation over every one of the Clean Air Act rules on EPA Administrator Lee Zeldin's regulatory hit list.[78] The court has abated litigation even where the challengers have raised statutory questions that could dispose of the underlying case;[79] where the statutory questions have persisted across presidential administrations without judicial resolution and where, without a judicial resolution, they will likely continue to persist;[80] and where few judicial resources will be spared because the only thing left for the court to do in the litigation is to issue its decision.[81]

Two cases illustrate the D.C. Circuit's curious willingness to suspend litigation at the request of the new administration. One involves the challenge to the Biden administration's revisions to the National Ambient Air Quality Standards for particulate matter.[82] This case is fully briefed, and the D.C. Circuit heard oral argument on December 16, 2024.[83] The central legal issue in the case is whether EPA exceeded its authority under the Clean Air Act by using a somewhat streamlined process to reconsider the existing standard for particulate

78. Order, North Dakota v. EPA, No. 24-01119 (D.C. Cir. July 18, 2025) (concerning the regulation of toxic emissions from power plants under the Clean Air Act); EPA's Motion to Govern, Texas v. EPA, No. 24-01054 (D.C. Cir. June 9, 2025) (concerning the regulation of greenhouse-gas emissions from oil-and-gas facilities under the Clean Air Act); Order, Kentucky v. EPA, No. 24-01051 (D.C. Cir. May 23, 2025) [hereinafter Order, *Kentucky v. EPA*] (concerning the strengthened national air-quality standard for particulate matter under the Clean Air Act); Order, West Virginia v. EPA, No. 24-1120, (D.C. Cir. April 25, 2025) (concerning emission standards for greenhouse-gas emissions from power plants under Clean Air Act); Order, *California Communities Against Toxics*, No. 24-1178 (D.C. Cir. April 1, 2025) [hereinafter Order, *California Communities Against Toxics*] (concerning the regulation of ethylene-oxide commercial sterilizers under the Clean Air Act); Order, Kentucky v. EPA, No. 24-01087 (D.C. Cir. May 8, 2025) (concerning the regulation of greenhouse-gas emissions from motor vehicles under the Clean Air Act); Order, United Steel, Paper & Forestry, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. EPA, No. 24-1151 (D.C. Cir. May 2, 2025) (concerning the regulation of interstate air pollution under the Clean Air Act).

79. EPA's Motion for Voluntary Remand and Renewed Motion to Hold Case in Abeyance, *supra* note 74, at 2, 4 (arguing for abeyance based on the agency's desire to revisit the central issue of whether EPA had the authority to undertake second residual-risk review under section 112 of Clean Air Act and noting that its reconsideration could result in rescinding the entire rule); Order, *California Communities Against Toxics*, *supra* note 78.

80. Order Holding Case in Abeyance, United Steel, Paper & Forestry, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. EPA, No. 24-1151 (D.C. Cir. Apr. 30, 2025), 2025 U.S. App. LEXIS 105192025, at *8 (Edwards, J., dissenting).

81. Order, *Kentucky v. EPA*, *supra* note 78 (holding litigation challenging EPA's strengthened air-quality standards for particulate matter in abeyance "pending further order of the court"). Oral argument was held in this case in December 2024.

82. State Petitioners' Nonbinding Statement of Issues at 2, *Kentucky v. EPA*, No. 24-01050 (D.C. Cir. April 5, 2024) (filing a notice of challenge based on whether EPA's new standard for particulate matter exceeds EPA's statutory authority).

83. Courtroom Minutes of Oral Argument, *Kentucky v. EPA*, No. 24-01051 (D.C. Cir. December 16, 2025).

matter and to set a stronger one.[84] This is an important question, given the massive stakes for public health, but it is not an especially complicated one. Even so, the D.C. Circuit granted the Trump administration's request to hold the case in abeyance.[85]

Another curious decision is the D.C. Circuit's abeyance of litigation over EPA's framework for regulating hazardous chemicals under the Toxic Substances Control Act (TSCA).[86] The prerogatives and requirements of this statutory framework have been in dispute since amendments to the Act were passed in 2016. The same interpretive questions have persisted for almost a decade. The case is fully briefed and oral argument was held in April. At oral argument, the question whether to abate the litigation to await the new administration's views took up as much argument time as the merits did.[87] The judges asked pointed questions about the effect of *Loper Bright* on the abeyance calculus.[88] Yet, after argument, the court issued an order granting the abeyance, with Judge Edwards dissenting on the ground that *Loper Bright* gave the court the authority to decide the statutory questions involved in the case "without any deference to the agency's views."[89]

Most abeyance orders, like the stay decisions on the Supreme Court's emergency docket, are not accompanied by an explanation. D.C. Circuit Judge Neomi Rao has, however, offered a glimpse into her views on abeyance decisions. In explaining her vote to grant abeyance of two-year-old litigation over EPA's Biden-era "Good Neighbor Plan" on interstate air pollution, Judge Rao laid out the principles that guide her thinking on abeyance practice during presidential transitions.[90] The discussion is revealing, and troubling, for two reasons. First, Judge Rao did not mention *Loper Bright*, let alone acknowledge that its holding has unsettled prior assumptions about the utility of abating litigation where an agency is changing its position. Yet, at oral argument in the TSCA case just weeks before, she had recognized the importance of *Loper Bright* for the abeyance question.[91] Does her failure to acknowledge *Loper Bright* in her written opinion explaining the factors relevant to abeyance mean that she has decided that *Loper Bright* hasn't changed anything of relevance to this practice? That would be surprising—and useful to know.

Second, Judge Rao explained her principles for abeyance by talking mostly about ripeness, the doctrine that permits courts to hold off judicial review of

84. State Petitioners' Nonbinding Statement of Issues, *supra* note 82, at 2 (filing a notice of challenge based on EPA's decision to undertake "non-statutory reconsideration").

85. Order, *Kentucky v. EPA*, *supra* note 78.

86. Order Holding Case in Abeyance, *supra* note 80.

87. Oral Argument, United Steel, Paper & Forestry, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. EPA, No. 24-1151 (D.C. Cir. Mar. 21, 2025), 2025 BL 148462.

88. *Id.*

89. Order Holding Case in Abeyance, *supra* note 80, at *8 (Edwards, J., dissenting).

90. Order, Utah v. EPA, No. 23-1157 (D.C. Cir. May 2, 2025), 2025 U.S. App. LEXIS 10694, at *53-54 [hereinafter Order, *Utah v. EPA*].

91. Oral Argument, *supra* note 87.

premature legal issues.[92] Although there are similarities between abeyance and ripeness, they are not the same. Rao used her ripeness analogy to argue that, just as the Supreme Court has held in its ripeness cases, harms to regulatory beneficiaries that result from abeyance do not matter in deciding the abeyance question.[93] Judge Rao asserts that parties supporting a government regulation must, in order to defeat abeyance, show "'effects of a sort that would traditionally have counted as harm,' such as requiring parties to do or refrain from certain activities or creating legal rights or obligations."[94] Litigants "defending the regulation of others do not suffer such traditional harms," Judge Rao declared. According to Rao, the litigants (such as states and environmental groups) defending the Biden era air-pollution rules are "defending the regulation of others."[95] Thus, they "do not suffer . . . traditional harms," and therefore the courts need not take their injuries into account in suspending litigation over rules designed to protect them.[96] Little wonder that the D.C. Circuit hasn't skipped a beat in suspending its deliberations over so much of the Biden administration's regulatory agenda: according to Judge Rao, at least, the harms of the people who would have benefited from these rules simply do not count.

Conclusion

I have argued that, by its terms, *Loper Bright* does not apply to most of the rules issued under the Clean Air Act because the Clean Air Act's provision on judicial review does not include the part of the APA deemed central in *Loper Bright*. It remains unclear, however, given the D.C. Circuit's casual dismissal of the possibility that *Loper Bright* does not apply to many Clean Air Act cases, whether the lower courts will seriously take on board the possibility that *Loper Bright* does not apply to all cases raising interpretive issues. If the D.C. Circuit continues to apply *Loper Bright* in Clean Air Act cases, then it must grapple with the fact that *Loper Bright* challenges its longstanding assumptions about the appropriateness of holding litigation over a prior administration's interpretive judgments in abeyance based on a new administration's intention to revisit them. For the Clean Air Act rules that are at the heart of this Article, this means that the D.C. Circuit should either not apply *Loper Bright* to these rules or should lift its litigation holds on the air-pollution rules issued in the Biden administration.

92. *Id.*
93. *See* Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733 (1998).
94. Order, *Utah v. EPA*, *supra* note 90, at *57 n.1 (quoting *Ohio Forestry*, 523 U.S. at 733).
95. Order, *Utah v. EPA*, *supra* note 90, at *57 n.1.
96. *Id.*