

United States Senate

WASHINGTON, DC 20510

July 11, 2024

Honorable Xavier Becerra
Department of Health and Human Services
200 Independence Avenue SW
Washington, D.C. 20201

Dear Secretary Becerra,

We write to inquire how your agency will apply the Supreme Court’s decision in *Loper Bright Enterprises v. Raimondo*.¹ As you are aware, the Court recently decided *Loper Bright*, which overruled the *Chevron* doctrine, whereby courts show considerable deference to your agency’s formal interpretation of ambiguous terms in the statutes your agency is tasked with administering.² Your agency has published 11,497 of final rules since the year 2000. As your rules will be viewed with new scrutiny, we have formed the Senate’s post-*Chevron* working group to investigate the impacts of *Loper Bright* and chart a path forward.

We believe that agencies should hew closely to the text of duly enacted laws, and we welcome the end of *Chevron* deference. However, some commentators have suggested that overruling *Chevron* could deprive your agency of needed flexibility.³ Under this view, your agency must fill gaps in, or otherwise stretch the language of, laws to execute programs and meet your mission, including where it touches on public health and safety.⁴ The Solicitor General, the executive branch’s official representative before the Court, has associated your agency with this view.⁵

While the impact of *Loper Bright* is yet to play out in lower courts, your agency undoubtedly uses its preferred interpretation of ambiguous statutory provisions – and by extension *Chevron* deference – to justify both internal and formal legal positions, claims of authority, and actions flowing from these claims. For this reason, your agency should not ignore forecasts of *Loper Bright*’s possible far-reaching impact. Instead, your agency should take steps to understand how its programs and mission might be affected, and take steps to ensure that your agency is, in all instances, prepared to serve the American people consistent with the law.

Congress is an essential partner in these efforts. Since the *Chevron* doctrine concerns your agency’s ability to assert authority beyond that expressly delegated by statute, Congress has a unique role relative to the ongoing implementation of agency programs following the Court’s decision. Cooperation from your agency is key to our determination of where, if at all, statutory authorities should be supplemented to bring the plain text of the

¹ *Loper Bright Enters. v. Raimondo*, 22-451, ___ S.Ct. ___ 2024 WL 3208360 (2024)

² *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)

³ Jagdish Sheth & Daniel Ombres, *Loper Bright and Relentless: Ending Judicial Deference to Cement Judicial Activism in the Courts*, Center for American Progress (Jan. 10, 2024), <https://www.americanprogress.org/article/loper-bright-and-relentless-ending-judicial-deference-to-cement-judicial-activism-in-the-courts/>.

⁴ *Id.*

⁵ *Loper Bright Enters. v. Raimondo*, No. 22-451, Argument Tr. at 47, line 12 (U.S. Jan. 17, 2024)

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United States Code in-line with your agency's preferred interpretation. Additionally, Congress is responsible for understanding what steps your agency plans to address potentially impacted programs post-*Loper Bright*.

Since information sharing with Congress is essential to this partnership and to appropriately addressing any concerns your agency might have, we ask that your agency answer the following questions:

1. Did your agency, including its adjudicative bodies, conduct a review of ongoing adjudications that may be impacted, including on appeal, by the *Loper Bright* decision modification of agency rulemaking?
 - a. If so, please list the adjudications you have identified which may be impacted.
 - b. If a review of adjudications is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the adjudications you have identified to-date which may be impacted.
 - c. If not, why hasn't your agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?
2. Has your agency conducted a review of ongoing civil enforcement actions that may be impacted, including on appeal, if *Chevron* is abrogated or significantly narrowed by the *Loper Bright* decision?
 - a. If so, please list the civil enforcement actions you have identified which may be impacted.
 - b. If a review is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the recently civil enforcement actions you have identified to-date which may be impacted.
 - c. If not, why hasn't the agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?
3. Has the agency conducted a review of on-going⁶ rulemakings that may be impacted if *Chevron* is abrogated or significantly narrowed by the *Loper Bright* decision?
 - a. If so, please list the ongoing rulemakings you have identified which may be impacted.
 - b. If a review is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the on-going rulemakings you have identified to-date which may be impacted.
 - c. If not, why hasn't your agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?
4. Has your agency conducted a review of recently final⁷ rules that may be impacted if *Chevron* is abrogated or significantly narrowed by the *Loper Bright* decision?
 - a. If so, please list the recently final rules you have identified which may be impacted.
 - b. If a review is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the recently final rules you have identified to-date which may be impacted.

⁶ For the purpose question 3., "on-going" includes any item that appears in either of the two (2) most recent versions of the Unified Regulatory Agenda that has yet to progress to a final rule, interim final rule, or direct final rule published in the *Federal Register*.

⁷ For the purpose of question 4., "recently final" includes any final rule, interim final rule, or direct final rule published in the *Federal Register* from January 21, 2021 to the present.

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- c. If not, why hasn't your agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?

We understand that your agency may have prepared for the Court's decision in *Loper Bright* in other ways. In this case, it's important for our oversight to identify and understand this work. For this reason, please answer the following questions:

5. Please describe any other work that your agency did to prepare for the decision in *Loper Bright*, including when that work commenced, its status, and key insights produced from this work.
6. If your agency hasn't done other work, please explain why. If other work is planned, please describe the nature of that work, the date it will commence and the date your agency estimates it will conclude.
7. Please describe any guidance your agency has received from the Office of Management and Budget, the White House, or any other executive branch entity related to the core issues of *Loper Bright*, agency deference, the separation of powers, and your agency's authority.

Providing this information in a timely fashion is essential to facilitate Congress' exercise of its constitutional authority to legislate in response to evolving judicial doctrine regarding agency implementation of those laws already on the books.

For this reason, to the extent any responsive information is potentially covered by attorney-client privilege, we request that your agency exercise its prerogative to waive the privilege. If, however, your agency declines to provide any or all responsive information due to attorney-client privilege, please specify the questions and subparts for which responsive information is being withheld under this privilege as part of a privilege log.

If responsive information is withheld under any other privilege, please include each assertion of privilege in the privilege log with similar specificity.

We request answers by August 2, 2024. Thank you in advance.

Sincerely,

The Post-*Chevron* Working Group

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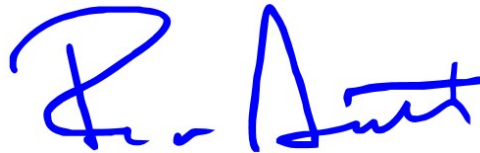
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