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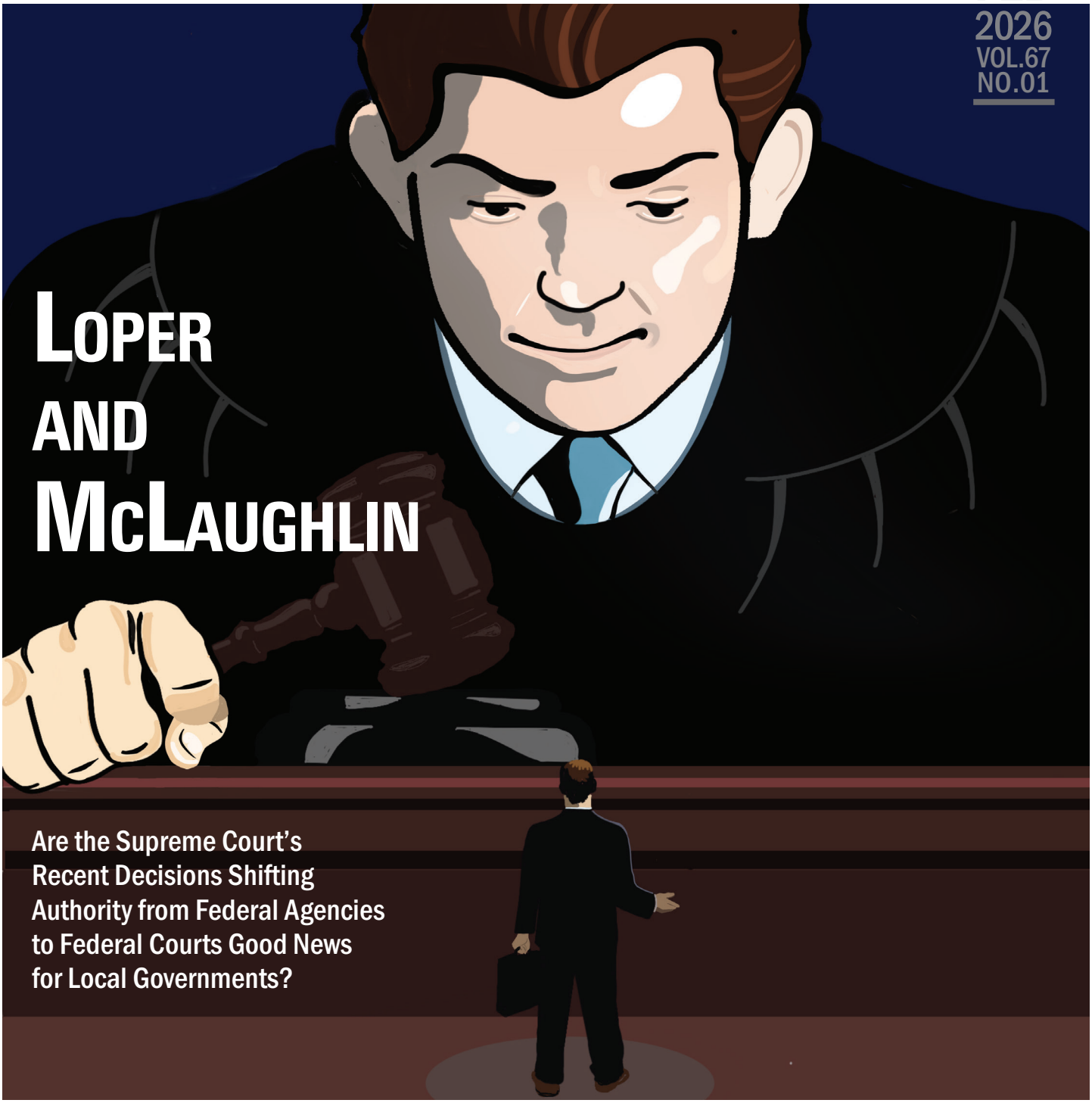

LOPER AND MCLAUGHLIN

Are the Supreme Court's Recent Decisions Shifting Authority from Federal Agencies to Federal Courts Good News for Local Governments?

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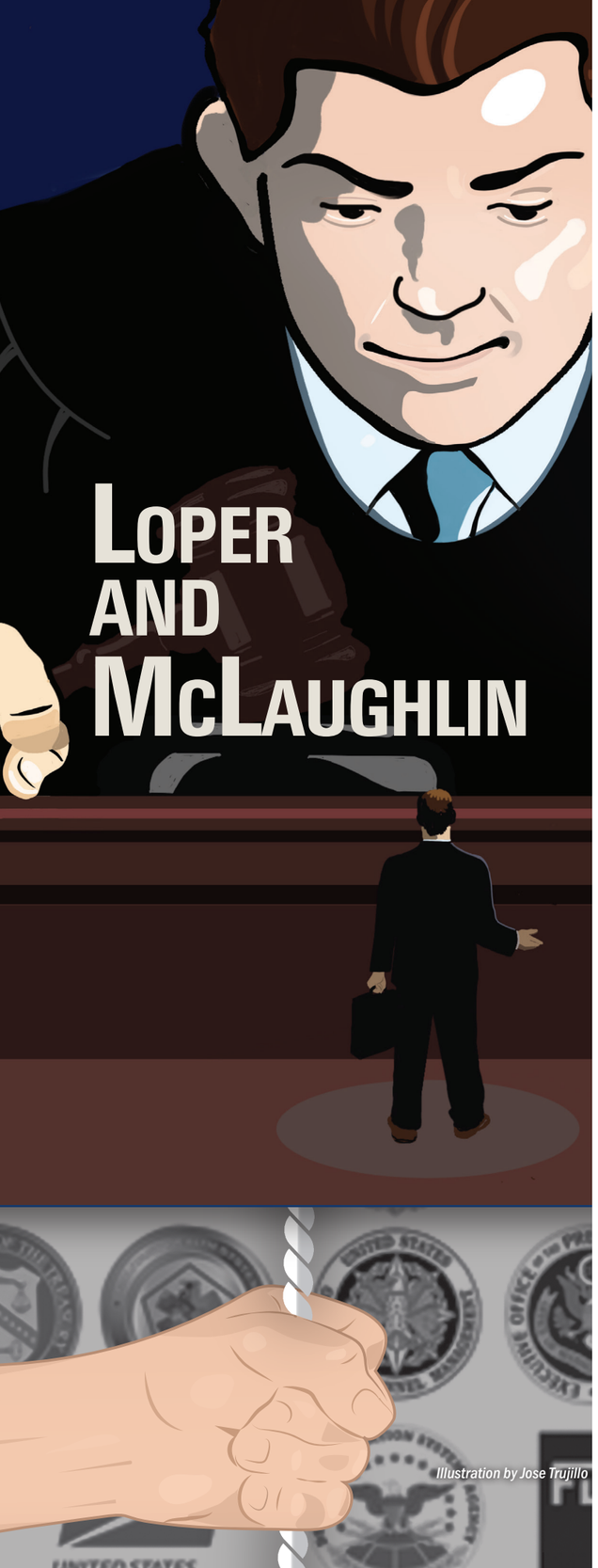

Illustration by Jose Trujillo

Are the Supreme Court's Recent Decisions Shifting Authority from Federal Agencies to Federal Courts Good News for Local Governments?

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In the past eighteen months, the Supreme Court has rendered two decisions that have rewritten the respective roles of a federal court and a federal agency in construing that agency's governing statute. In one, *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024), the Court held that courts owe no deference to an agency's interpretation of its governing statute, overruling the longstanding *Chevron* doctrine, under which courts must give deference to an agency's construction of any ambiguous language in its governing statute.[1] In the other, *McLaughlin Chiropractic Assocs. v. McKesson Corp*., 606 U.S. 146 (2025), the Court held that a federal district court is not bound by an agency's interpretation of its governing statute in a subsequent enforcement action relating to that statute.

Taken together, these two decisions shift significant authority for construing federal agency statutes from the agency to the courts. Generally speaking, that shift benefits a party seeking to overturn or collaterally challenge an agency decision, such as that of the Federal Communications Commission (FCC). Before other federal agencies and departments, such as the Environmental Protection Agency or the Surface Transportation Board, the answer may vary more.

This article provides an overview of the *Loper* and *McLaughlin* decisions. It assesses how they might impact local governments' ability to blunt federal agency actions preempting local authority, using FCC decisions as examples. We review how the courts have applied the two cases so far and conclude, on balance, that the decisions should improve local governments' prospects of overturning or avoiding preemptive actions by federal agencies, but whether they will in a particular case will depend heavily on the facts, forum, and posture of the dispute.

1. The Cases

Loper

The issue before the Court in *Loper* was whether the *Chevron* doctrine – under which courts are required to defer to an agency's interpretation of ambiguous statutory language in its governing statute as long as it "'is based on a permissible construction of the statute'"[2] – should be overruled. In a 6-3 decision, the Court held:

> *Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA [Administrative Procedure Act] requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.[3]

In other words, on questions of statutory interpretation, courts must review agency decisions *de novo*, just as an appeals court would review a trial court's decision on such questions.

In response to the argument that its decision might call into question the continuing validity of thousands of court decisions upholding agency actions on *Chevron* deference grounds, the Court majority replied:

> [W]e do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology. Mere reliance on *Chevron* cannot constitute a "'special justification'" for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, "just an argument that the precedent was wrongly decided." That is not enough to justify overruling a statutory precedent.[4]

The general implication of *Loper* is that federal agency decisions (such as those of the FCC) will be more vulnerable to successful court challenges than they have been in the past. Indeed, the decision opens up the possibility that, where a preexisting agency decision was upheld on *Chevron* deference grounds, a party could file a rulemaking petition with the agency seeking to overturn the rule at issue, and if the agency denies the petition, appeal that decision to a circuit other than the one that previously upheld the rule to address the issue *de novo*.

McLaughlin

McLaughlin presented the question of whether, in a federal district court lawsuit involving the Telephone Consumer Protection Act (TCPA),[5] the district court was required by the Hobbs Act, 28 U.S.C. §§ 2342, 2344, 2349, to follow FCC decisions construing the TCPA. The Hobbs Act provides that the federal courts of appeal have exclusive jurisdiction to review decisions of the FCC (as well as other federal agencies and departments). Prior to *McLaughlin*, it was generally thought that the Hobbs Act precluded subsequent collateral attacks on an agency's decision.[6]

In another 6-3 decision, the *McLaughlin* Court held otherwise:

> In an enforcement proceeding, a district court must independently determine for itself whether the agency's interpretation of a statute is correct. District courts are not bound by the agency's interpretation, but instead must determine the meaning of the law under ordinary principles of statutory interpretation, affording appropriate respect to the agency's interpretation.[7]

Although *Loper* addresses the standard of review of an agency's decision while *McLaughlin* addresses the preclusive effect of agency decisions in subsequent litigation, the common theme of both is apparent: to elevate the authority of the courts to construe administrative agency statutes *de novo*, and to diminish not only the authority of agencies to construe their governing statutes, but also the precedential reach of agency decisions construing those statutes.

2. Why It Matters

The potential impact of *Loper* and *McLaughlin* on FCC decisions purporting to preempt local government right-of-way and land use authority can be seen by assessing what effect those cases would have had on earlier cases involving local government appeals of FCC decisions construing 47 U.S.C. § 332(c)(7), the wireless siting provision of the Communications Act.

One example is *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290 (2013) (*Arlington II*), *aff'g*, 668 F.3d 229 (5th Cir. 2012) (*Arlington I*). The *Arlington* decisions arose from local governments' appeals of a 2009 FCC declaratory ruling that relied on the FCC's general authority under 47 U.S.C. § 154(i) to construe the phrase, "reasonable amount of time," in Section 332(c)(7)(b)(ii) to empower the FCC to impose presumptive deadlines (a/k/a "shot clocks") on local governments to act on wireless facility siting applications. On appeal, local governments argued that the FCC's ruling was inconsistent with Section 332(c)(7)(A), which barred the FCC from relying on its authority outside of Section 332(c)(7) to construe Section 332(c)(7), and with Section 332(c)(7)(B)(v), which gave the courts, not the FCC, jurisdiction over Section 332(c)(7)(B)(ii) issues. The Fifth Circuit sided with the FCC on *Chevron* grounds.[8] The Supreme Court granted certiorari on the question of whether *Chevron* deference applies to an agency's determination of its own jurisdiction and held that it does, affirming the Fifth Circuit's decision.[9]

In his *Loper* concurring opinion, Justice Gorsuch cited the Court's *Arlington II* decision as a clear instance of *Chevron*

overreach: "[U]nder the *Chevron* regime, … executive agencies may effectively judge the scope of their own lawful powers."[10] Whether erasing the *Chevron* deference relied on to uphold the FCC in the *Arlington* cases would have changed the outcome is unknown. But what is clear is that the FCC's ruling at issue in the *Arlington* cases would have been subject to more exacting scrutiny under *Loper* than it was under *Chevron*.

Another example is the Ninth Circuit's decision in *City of Portland v. U.S.*, 969 F. 3d 1020 (9th Cir. 2020). There, the court largely upheld FCC orders relying on 47 U.S.C. §§ 253 and 332(c)(7) to adopt rules limiting local authority to regulate the placement of small wireless facilities in local right-of-way. Among other things, the rules imposed presumptive caps on what localities could charge for allowing small wireless facilities to be installed in the right-of-way and adopted shot clocks within which localities were required to act on applications to place such facilities in the right-of-way. Local governments argued that these and other requirements were inconsistent with the language of Sections 253 and 332(c)(7), but the court relied on *Chevron* to uphold the FCC. As with the *Arlington* cases, the question arises whether the outcome of the *Portland* case would have been different under *Loper* than under *Chevron*.

McLaughlin also raises questions about the future reach of the *Arlington* and *Portland* cases. Most disputes over whether a particular local requirement is preempted by Section 253(a) or 332(c)(7)(B) are resolved in individual federal district court cases where a communications service provider sues to challenge the local requirement.[11] Communications industry members often rely on the FCC's orders at issue in *Arlington* and *Portland*, arguing that they are binding on all courts under the Hobbs Act. That is no longer true under *McLaughlin*.

3. How is it going thus far?

Loper has been heralded as a massive change in administrative law, while *McLaughlin* has traveled a bit more under the radar. Given the significant changes and the potential impact these cases could have had on prior rulings, it is interesting to note that so far, we have seen important opportunities but not a massive sea change. Much of the impact of these cases will likely occur in the future and depend upon lawyers' skilled use of them in litigating agency rulings.

Loper

While *Loper* was cited 400 times in the first six months of its existence[12] and 1,975 times as of late December 2025,[13] the ultimate impact of the decision is still unclear. Some experts have called it a "Rorschach test inside a crystal ball."[14] We have not seen a clear tilt toward or against upholding agency decisions. For example, one analysis of the first six months of opinions under *Loper* found that newer regulations were more likely to be overturned than older rules, but that agency actions were upheld more than 60% of the time.[15] Although statistics are only one measure to evaluate the impact of a single court decision, at least one quantitative study of the impact of *Chevron* deference in 2017 found overall agency win rates of around 71 percent under *Chevron* deference compared to 39 percent win rate when *Chevron* did not apply under *de novo* review in the U.S. circuit courts. That research contrasted with earlier scholarship that found little impact in the Supreme Court based on whether it relied on *Chevron*.[16] While these two data sets do not provide an exact apples-to-apples comparison, at a rough level, they reveal a modest reduction in agency success rates after *Loper*, but not a radical change.

The Supreme Court and appellate cases that have applied *Loper* in FCC cases have diverged. Perhaps the most prominent agency loss is one of the lead examples cited by scholars and the Supreme Court: the FCC's flip-flop on the regulatory classification of broadband internet service.[17] The Sixth Circuit concluded the FCC's most recent foray – ruling that broadband internet service was a "telecommunications service" rather than an "information service" – was not the "best" interpretation of the law, rejecting the FCC's effort to impose consumer protections on the technology.[18] Of the remaining eight cases with a substantive application of *Loper* to review agency actions, however, the FCC has been overturned completely once[19] and partially twice.[20] Local governments hoping to win at the FCC will have more opportunities to follow suit, but must make arguments grounded in the statutory interpretation guidance set forth by *Loper*.[21]

The less-than-overwhelming difference in the outcomes of court reviews of agency actions after *Loper* may be due, in part, to the Supreme Court equivocating a bit—for example, the Court's recent identification of where *Loper* has less force. In *Seven County*, the Court cautioned, "when an agency exercises discretion granted by a statute, judicial review is typically conducted" under the APA's more deferential, arbitrary-and-capricious standard, which asks, "only whether the agency action was reasonable and reasonably explained."[22] The Court cited the agency's very technical line-drawing and its determinations of relevant facts.[23] Challengers to agency decisions will do better fighting about statutory language, not facts, under the Supreme Court's new administrative law precedent.

McLaughlin

Fewer cases have cited *McLaughlin*, but one case demonstrates its potential and limitations for local governments. In *TowerNorth Dev., LLC*, the City of Geneva argued that the district court was no longer bound by an FCC statutory interpretation that was unfavorable to the locality. The Northern District of Illinois ruled that the City was correct, the FCC's interpretation was no longer binding, but still ruled against the City, finding that new evidence the City sought to exclude was relevant under either legal standard.[24] Nonetheless, attorneys in these contexts should not ignore this new opportunity to undercut unfavorable FCC rulings, even though there is no guarantee of overturning an agency interpretation. For example, on two other issues of statutory interpretation under the TCPA, federal district courts have felt free to agree or disagree with the FCC—upholding the FCC's conclusion that cell phone subscribers are covered by the TCPA,[25] but rejecting its conclusion that text messages are covered.[26]

Under both *Loper* and *McLaughlin*, the opportunities are available if FCC precedent is not in your favor, as long as an advocate makes the case that the FCC's rulings are not binding as a matter of law and can present a convincing argument as to why the FCC's interpretation is inconsistent with the statute.

McLaughlin and Issue Preclusion

Municipal attorneys seeking to challenge FCC decisions in federal district court even after they are affirmed pursuant to the Hobbs Act must consider one additional potential legal issue: issue preclusion or estoppel. The *McLaughlin* Court, while expressing sympathy for parties who may need to "somehow predict the future and bring a pre-enforcement challenge"[27] in order to vindicate their concerns, also stated in a footnote that "ordinary estoppel or preclusion principles" could prevent a party from re-litigating "the same question in a future enforcement proceeding."[28] It further cautioned that where a district court is in the same circuit as the court of appeals that decided a Hobbs Act appeal involving the same issue, "the district court may be bound under principles of vertical stare decisis."[29]

The doctrines of estoppel and issue preclusion are complex and cannot be addressed in detail here, but Wright & Miller remind us that collateral estoppel or issue preclusion "effectuate[s] the public policy in favor of minimizing redundant litigation" by barring "the relitigation of issues actually adjudicated, and essential to the judgment, in a prior litigation between the same parties."[30] Parties should consider whether a Hobbs pre-enforcement case could bar relitigation in district court later. At the same time, parties must be cautious not to sit on their hands or waive their rights by failing to participate in a Hobbs Act pre-enforcement challenge because "courts may often foreclose efforts to advance evidence or theories that were not offered in the first suit."[31] Also keep in mind that once an FCC decision is upheld in a circuit court Hobbs Act appeal, its reasoning may have more force. These issues are particularly important for communities concerned about, or considering participating in, two pending FCC dockets that raise the possibility of preempting many local government rules and procedures, including those local governments that the FCC or industry commenters have specifically named and criticized.[32]

Conclusion

Overall, *Loper* and *McLaughlin* should prove helpful to any groups that tend to fare poorly before the FCC, while potentially hurting those that tend to do well before it. That is why major industry groups opposed the outcome in both cases. They tend to do well before the FCC, especially when their opponents are not fellow industry members – such as state and local governments, electric utilities, and consumer advocates. At the same time, the two cases are not producing a sea change in the early days of their application. It will be in the hands of creative and assertive litigators to make the most of the new doors opened by the Supreme Court. ML

Notes

1. The doctrine is named after *Chevron U.S.A. Inc. v. Nat. Resources Def. Council, Inc*., 467 U.S. 837 (1984), the case where the Court first adopted this deference standard.
2. *Loper*, 603 U.S. at 442 (quoting *Chevron*, 467 U.S. at 843).
3. *Loper*, at 412-13.
4. *Id*. at 412 (citations omitted). Left unanswered, however, is the question whether *stare decisis* binds courts in post-*Loper* cases to follow pre-*Loper* cases relying on *Chevron*, thereby extending *Chevron*'s life. *See Tennessee v. Becerra* 131 F.4th 350, 374 (6th Cir. 2025) (Kethledge dissenting in part) (complaining that in the panel majority's view, "*Chevron* lives on in perpetuity as to any statute that the Supreme Court has ever deemed ambiguous under that doctrine"), *cert pet. pending*, No. 25-162 (U.S. filed Aug. 7, 2025).
5. The TCPA, codified at 47 U.S.C. § 227, is a 1991 amendment to the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq*., the FCC's governing statute.
6. *See, e.g., I.C.C. v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 278 (1987); *F.C.C. v. ITT World Commc'ns, Inc*., 466 U.S. 463 (1984); *Telecomms. Rsch. & Action Ctr. v. F.C.C.*, 750 F.2d 70, 78 (D.C. Cir. 1984).
7. *McLaughlin*, 606 U.S. at 155 (citing *Loper*, 603 U.S. at 402). In *McLaughlin*, the Court clarified that an "enforcement" proceeding includes litigation between private parties in addition to agency actions to enforce its own rules. *Id.* at n.1.
8. *Arlington I*, 668 F.3d at 229, 254-56.
9. *Arlington II*, 569 U.S. at 296-97.
10. *Loper*, 603 U.S. at 433 (Gorsuch, J., concurring) (citing *Arlington II*, 569 U.S. 296-97).
11. 47 U.S.C. § 332(c)(7)(B)(v); *Rancho Palos Verdes, Cal. v. Abrams*, 544 U. S. 113, 115 (2005).
12. Robin K. Craig, *The Impact of Loper Bright v. Raimondo: An Empirical Review of the First Six Months,* 109 Minn. L. Rev. 2671, 2677 (2025), https://scholarship.law.umn.edu/minnlrev/vol109/iss6/4.
13. Westlaw search, citing references of *Loper*, 1,975 citing cases (search run Dec. 23, 2025).
14. Cary Coglianese and Daniel E. Walters, *The Great Unsettling: Administrative Governance After Loper Bright*, Admin. L. Rev., vol. 77, 2025, at 1.
15. Craig, *supra* note 12, at 2723.
16. Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 Mich. L. Rev. 1 (2017), http://repository.law.umich.edu/mlr/vol116/iss1/1 (citing William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 Geo. L.J. 1083, 1142 (2008)).
17. *Loper*, 603 U.S. at 372-73; *see also id.* at 438 (Gorsuch, J. concurring).
18. *In re MCP No. 185*, 124 F.4th 993 (6th Cir. 2025).
19. *Ins. Mktg. Coalition Ltd. v. Fed. Commc'n. Comm'n*, 127 F.4th 303 (11th Cir. 2025).
20. *Zimmer Radio of Mid-Missouri, Inc. v. Fed. Commc'n. Comm'n*, 145 F.4th 828 (8th Cir. 2025)**;** *Gray Television, Inc. v. Fed. Commc'n. Comm'n*, 130 F.4th 1201 (11th Cir. 2025).
21. These criteria include whether the statute is "doubtful and ambiguous," and whether the agency has been consistent over time, and is charged with implementing the statute. *Loper*, 603 U.S. at 385-86.
22. *Seven Cnty. Infrastructure Coal. v. Eagle Cnty., Colo.*, 605 U.S. 168, 179–80 (2025).
23. *Id*. at 180-81.
24. *TowerNorth Dev., LLC v. City of Geneva, Ill.*, No. 22 C 4151, 2025 WL 2767029, at *6 (N.D. Ill. Sept. 29, 2025).
25. *Harriel v. Bealls, Inc.*, No. 8:25-cv-1165-TPB-SPF, 2025 WL 2379617, at *2 (M.D. Fla. Aug. 15, 2025); *Wilson v. Hard Eight Nutrition LLC*, No. 6:25-CV-00144-AA, 2025 WL 1784815, at *4 (D. Or. June 27, 2025).
26. *See Davis v. CVS Pharm., Inc*., No. 4:24-CV-477-AW-MAF, 2025 WL 2491195, at *4 (N.D. Fla. Aug. 26, 2025); *Jones v. Blackstone Med. Servs., LLC*, 792 F. Supp. 3d 894, 901 (C.D. Ill. 2025) n.3.
27. *McLaughlin*, 606 U.S. at 158. *See also B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 148 (2015) (administrative decisions may ground issue preclusion).
28. *McLaughlin*, 606 U.S. at 155 n.3 (2025).
29. *Id.*
30. § 4402 The Terminology of Res Judicata, 18 Fed. Prac. & Proc. Juris. § 4402 (3d ed.) (citation omitted).
31. *Id. See also* § 4417 Defining the Issue Precluded, 18 Fed. Prac. & Proc. Juris. § 4417 (3d ed.).
32. Federal Communications Commission, *Build America: Eliminating Barriers to Wireline Deployments,* Notice of Inquiry, WC Docket No. 25-253, FCC 25-66 (Sept. 30, 2025); *Build America: Eliminating Barriers to Wireless Deployments*, Notice of Proposed Rulemaking, WT Docket No. 25-276, FCC 25-67 (rel. Sept. 30, 2025).