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**FOX VALLEY BUSINESS CONFERENCE**

# The Supreme Court's View of Regulatory Agencies: The Fall of *Chevron* and Related Updates

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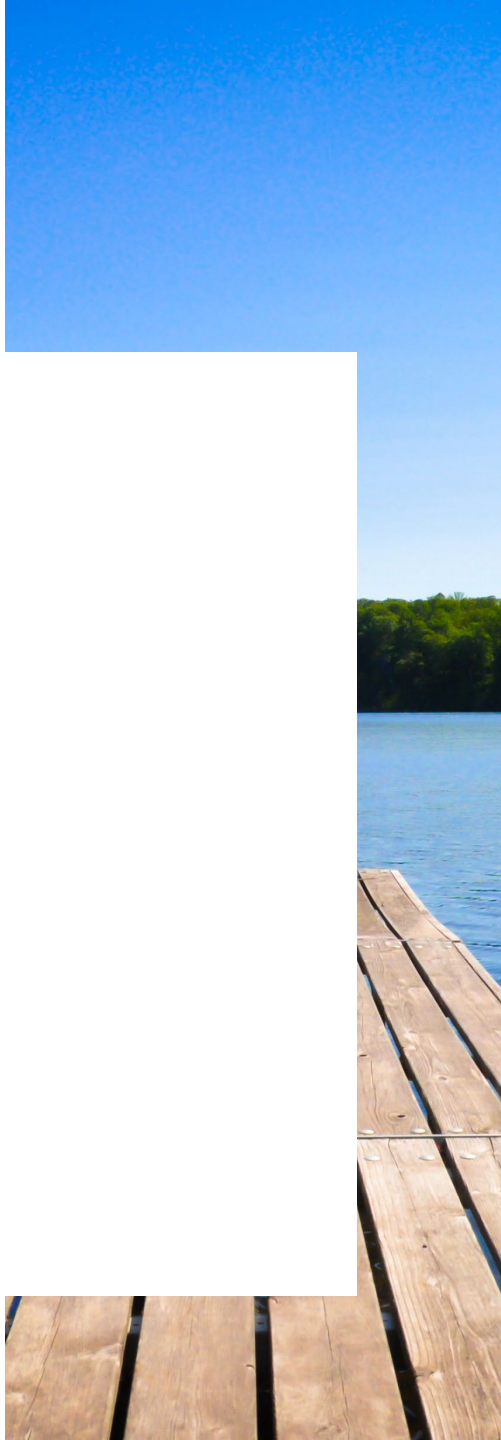
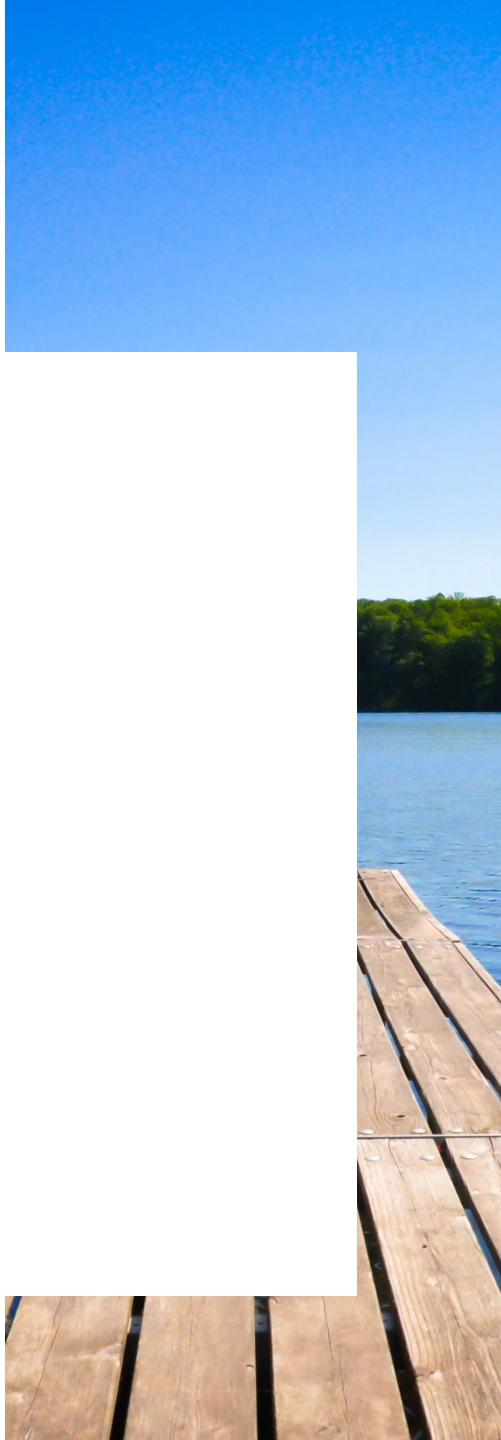


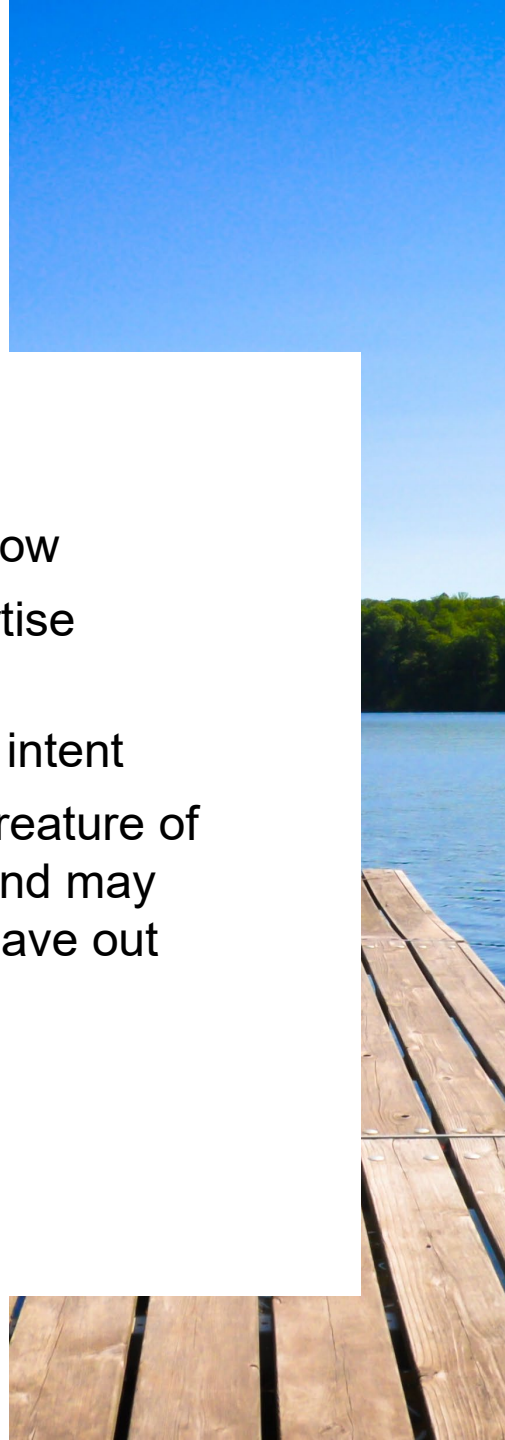
# Agenda

- *Chevron* refresher
- Recent Supreme Court case overturning *Chevron* and Anticipated Implications
- Examples of Impacted Agencies
- Recent Related Supreme Court Cases and Anticipated Implications
- Conclusions and Questions



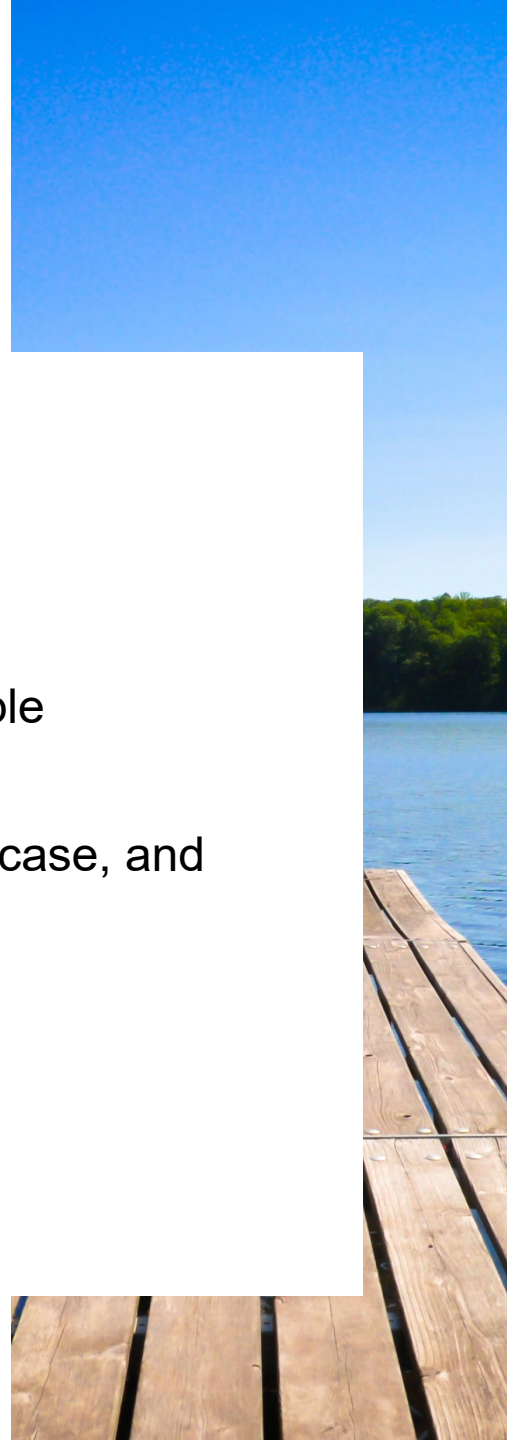
# *Chevron* Refresher
# Agency Origin Story

- **Organic Act**
  - Statute enacted by Congress, signed by President
  - Creates agency
  - Delegates authority to agency
- **Agency**
  - Executes statutes via:
    - Rulemaking
    - Authority granted by Congress
    - Rules, regulations, guidance
  - Adjudication
    - Agency tribunals
- **Why?**
  - Congress is slow
  - Industry expertise
  - Carrying out congressional intent
  - Statutes are creature of compromise and may intentionally leave out details



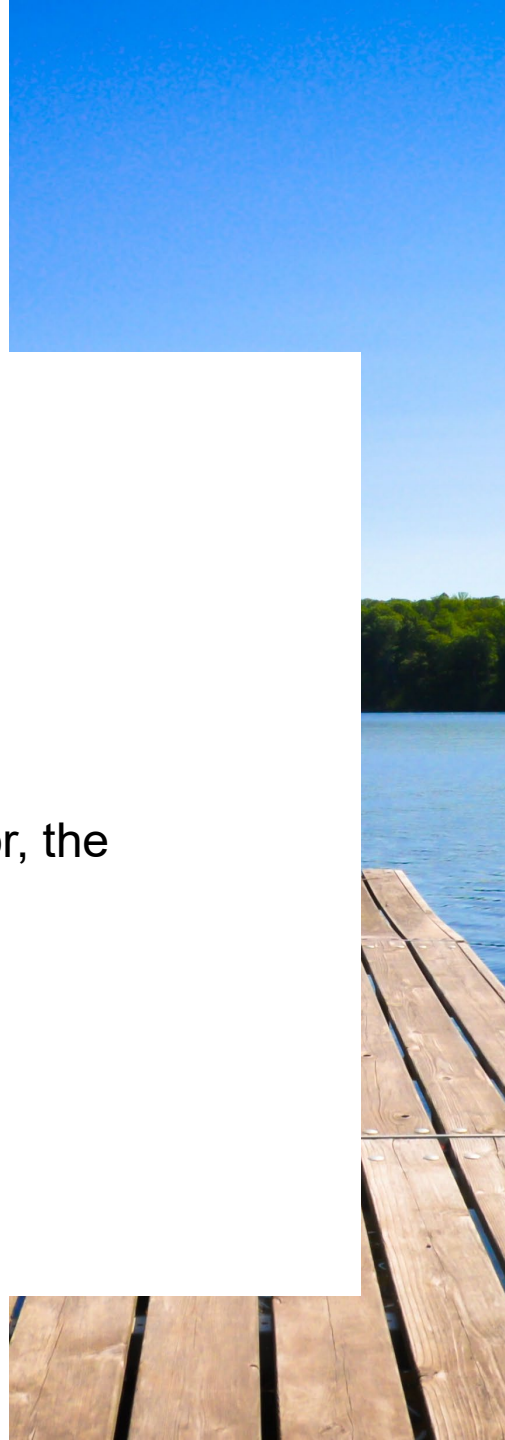
# *Chevron* Overview

- *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)
- Standard of review where language of statute is silent or ambiguous
- Heightened deference to agencies
  - A court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by [the agency charged with administering the statute]"
  - A "a court is prohibited from resolving the legal question itself as it would in any other case, and instead must defer to the agency's interpretation"



# *Chevron* In Action

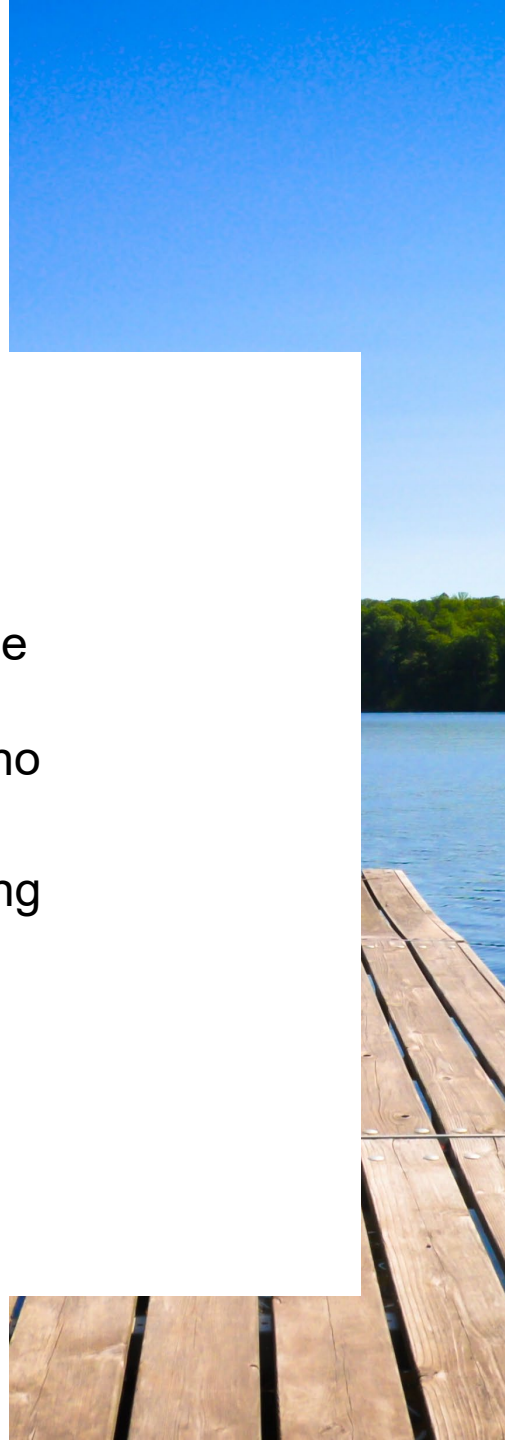
- Asks
  - Is there ambiguity in statute? Is the statute silent?
  - If so, *Chevron* deference applies and defers to a reasonable agency reading
- Cited in 18,000+ decisions over 40 years
- Agencies fill in statutory gaps
- “A hideous behemoth that has escaped its restraints and is wreaking havoc on its creator, the courts, the Constitution, and the American public”
  - Hickman, Hahn, 81 OH. ST. L.J. 611 (2020)



# *Chevron* is Overturned

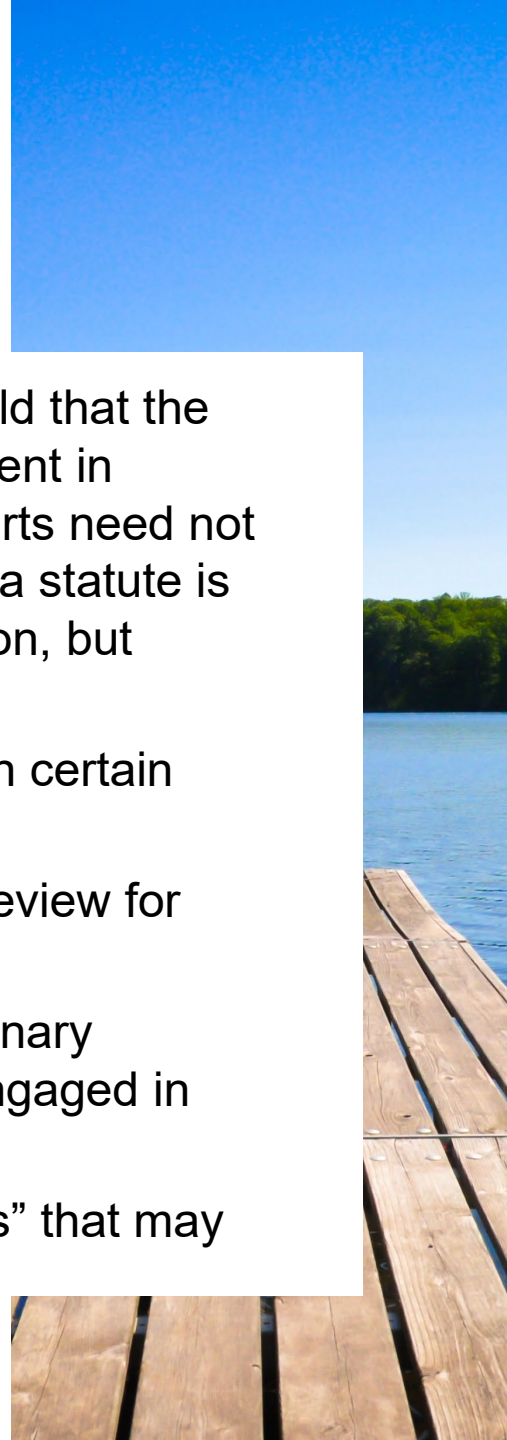
## *Loper Bright Enterprises v. Raimondo*

- Overturned *Chevron v. NRDC*
- Means that courts are no longer compelled to give deference to reasonable agency interpretation of ambiguities in federal statutes
- Two New England fishing companies appealed the D.C. Circuit's ruling that applied *Chevron* deference to uphold the National Marine Fisheries Service's interpretation of the Federal Magnuson-Stevens Act (the "Act") as requiring fishermen to pay for the use of compliance monitors on certain fishing boats, even though the federal law is silent on who must pay.
- Petitioners used the case as a vehicle to present a broader challenge to *Chevron*, arguing that the doctrine has led to excessive deference to federal agencies, resulting in overregulation, the abdication of judicial responsibility to interpret statutes, and the unwarranted imposition of regulatory enforcement costs.



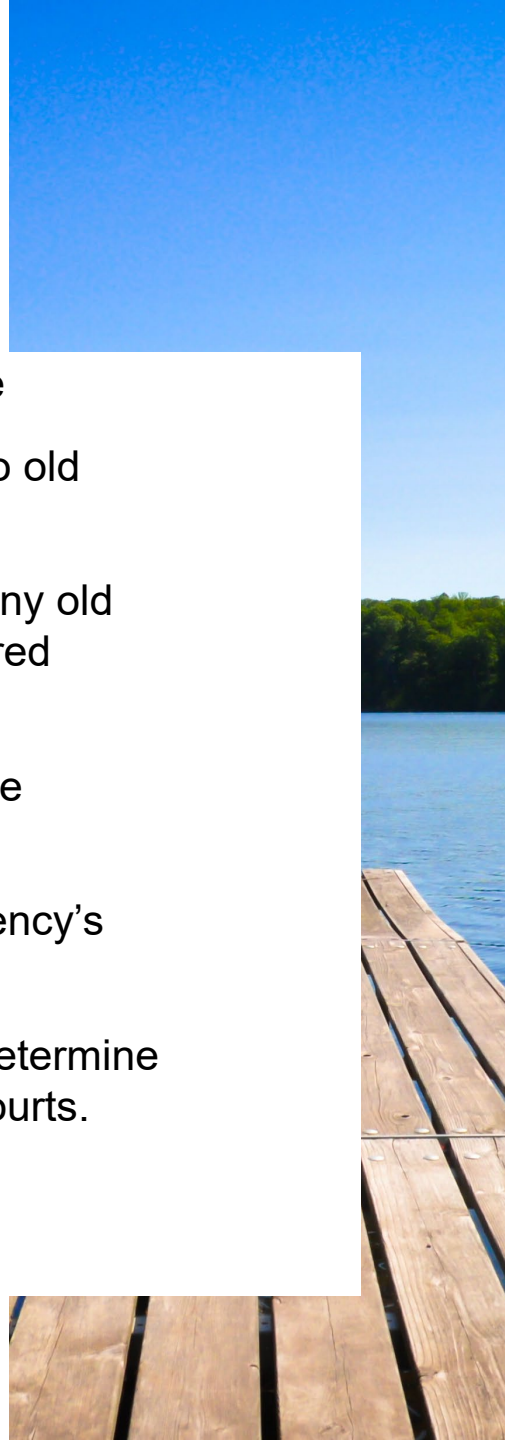
# *Loper Bright* - Recap

- The decision: The *Loper Bright* Court majority firmly rejected *Chevron* deference and held that the Administrative Procedure Act (APA) requires courts to exercise their independent judgment in deciding legal questions that arise in reviewing agency action. As the majority held, "courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous." (Note that petitioners also asserted a violation of Article III of the Constitution, but Court did not make that finding.)
- Importantly, however, *Loper Bright* noted that deference may still be afforded agencies in certain instances.
  - First, the Court observed that the APA expressly mandates a deferential standard of review for agency policy-making and fact-finding.
  - Second, *Loper Bright* explained that some statutes are best read to delegate discretionary authority to an agency, in which case a court's role is to merely ensure the agency "engaged in 'reasoned decisionmaking'" within that authority."
  - Lastly, *Loper Bright* reaffirmed that an agency's "expertise" remains "one of the factors" that may make an agency's interpretation persuasive. *Skidmore* review.



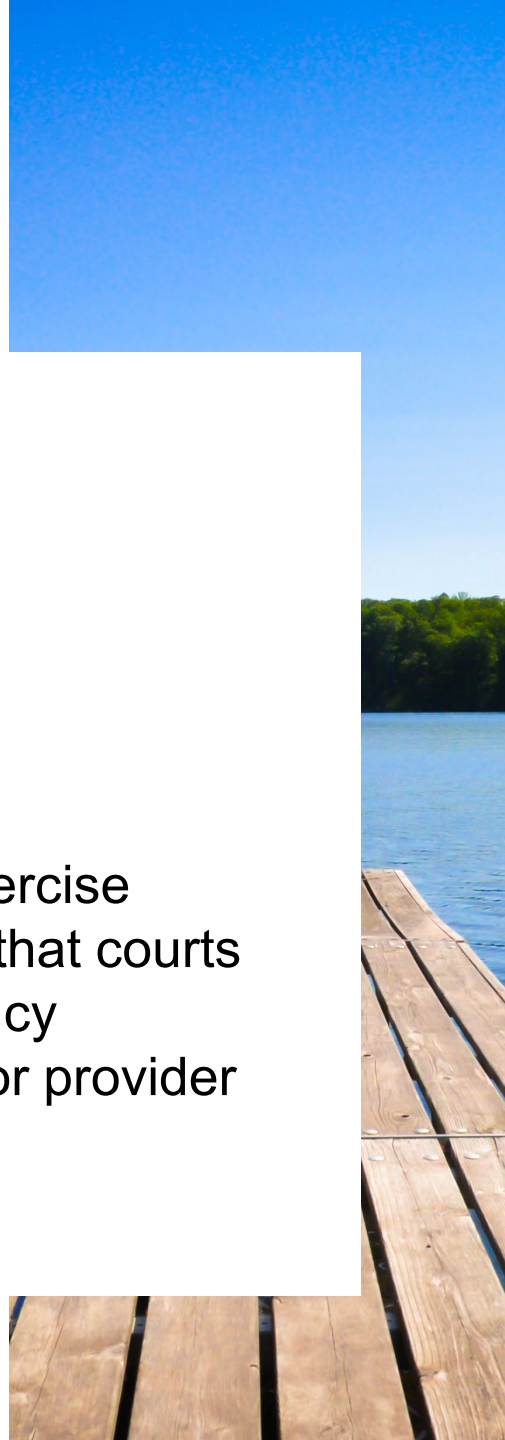
# Implications of *Loper Bright*

- ***More Legal Challenges:*** Many agency interpretations of congressional statutes are vulnerable
- Expect increase in litigation challenging federal agency regulations, including new challenges to old regulations, upending established law
- Justice Jackson's *Loper* Dissent – fearing "tsunami of lawsuits" where "[a]ny new objection to any old rule … be entertained and determined de novo by judges who can now apply their own unfettered judgment as to whether the rule should be voided"
  - *Loper Bright* expressly stated that it "does not call into question prior cases that relied on the *Chevron* framework," so prior decisions affirming regulations should be stable.
  - Going forward, *Loper Bright* means that courts have no "thumb on the scale" in favor of agency's legal positions, and so litigants may view *Loper Bright* as increasing their odds of success.
  - At the same time, this may create more uncertainty for providers and suppliers who must determine how to comply with new regulations under challenge and pending, sometimes in multiple courts.



# Implications of *Loper Bright*

- ***Agency Behavior***:
  - Consider strength of interpretation?
    - May be difficult to preview given caseloads, etc.
  - Consider impact of adverse ruling
  - Slower more cautious rulemaking
  - Less ability to create new programs and impose new requirements
- ***Inconsistent Decisions by Courts:*** Because *Loper Bright* directs courts to exercise independent judgment rather than defer to agency's interpretations, we expect that courts in different areas of the country may reach differing conclusions regarding agency regulations. This may make certain geographic locations more advantageous for provider and supplier operations or expansions.



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# Examples of Impacted Agencies

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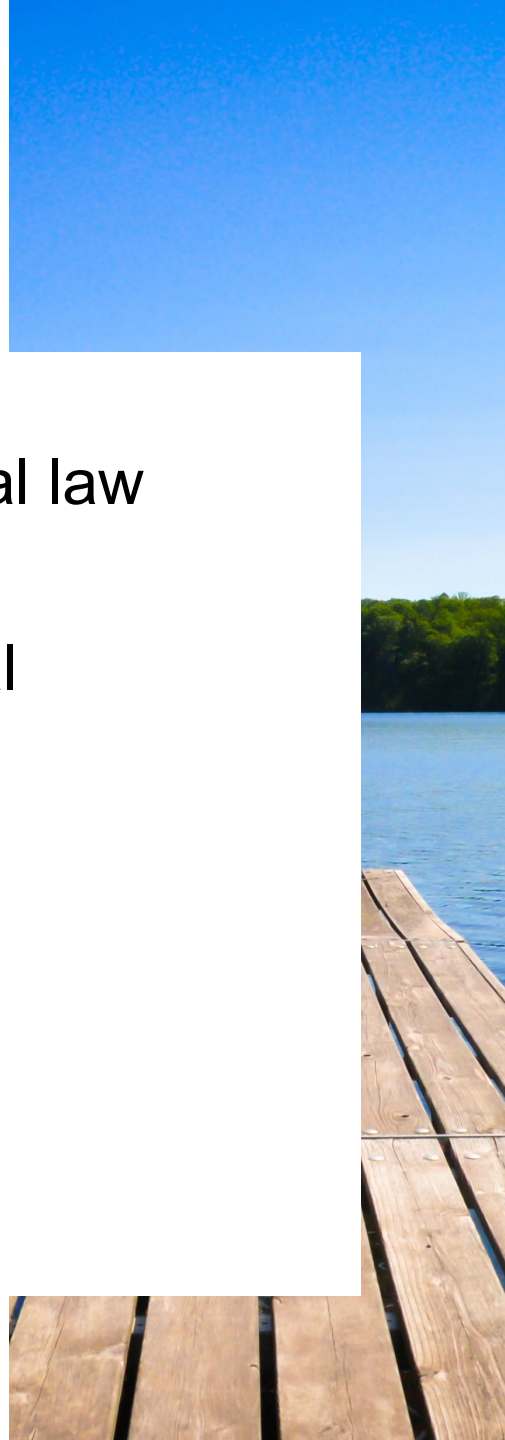
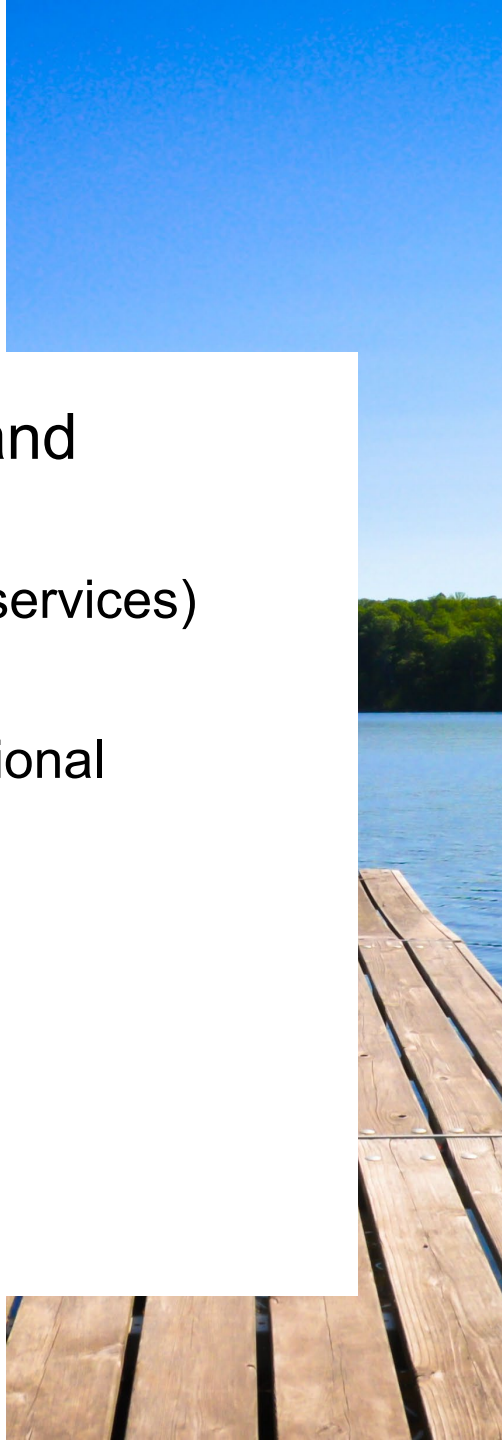
# United State Environmental Protection Agency (EPA)

- Hard to address emerging problems and science in environmental law where statutes are decades-old
- Current environmental regulations effectuate broad congressional statutory language and some go beyond
- Uncertainty and likely litigation for manufacturers
- *Ohio v. EPA*



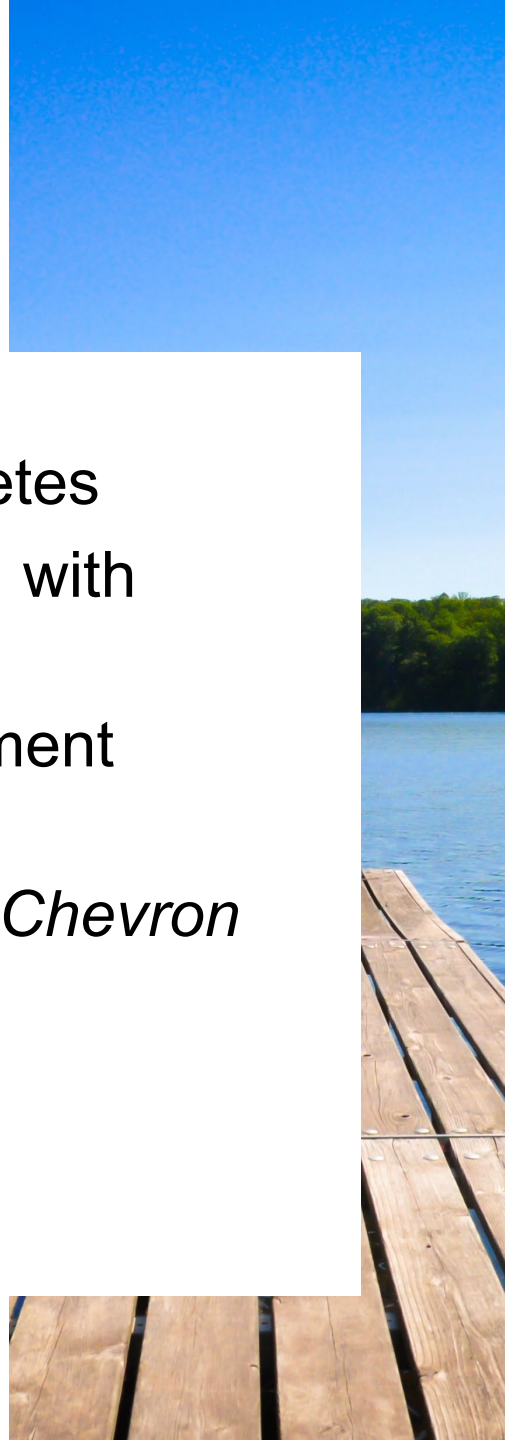
# Department of Health & Human Services (HHS)

- HHS oversees federal health care programs, including Medicare and Medicaid
  - HHS regulations govern much of today's healthcare landscape (coverage of services)
  - Medicare currently covers more than 67 million beneficiaries
  - Medicare spending comprised 12% of federal budget in 2022 and 21% of national healthcare spending in 2021
- HHS promulgates a myriad of rules under general wording in congressional legislation
  - For example, minimum-staffing requirements, reimbursement rules



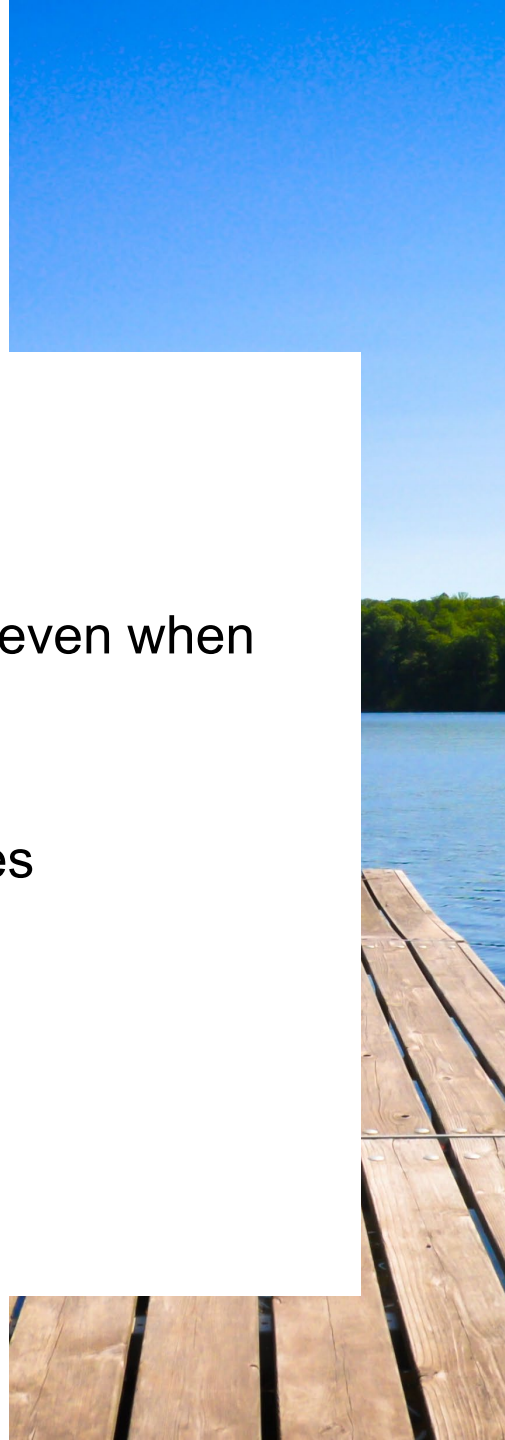
# Federal Trade Commission (FTC)

- Non-competes: *Loper* will likely sink the FTC's ban on non-competes
- HSR Act: Federal courts frequently rely on *Chevron* in connection with FTC rules governing mergers
- Section 5 FTC Act: FTC heavily relies on *Chevron* for its enforcement powers regarding unfair competition and deceptive acts
- Antitrust Enforcement: Federal courts have generally not applied *Chevron* to substantive antitrust statutes like Sherman Act, Clayton Act



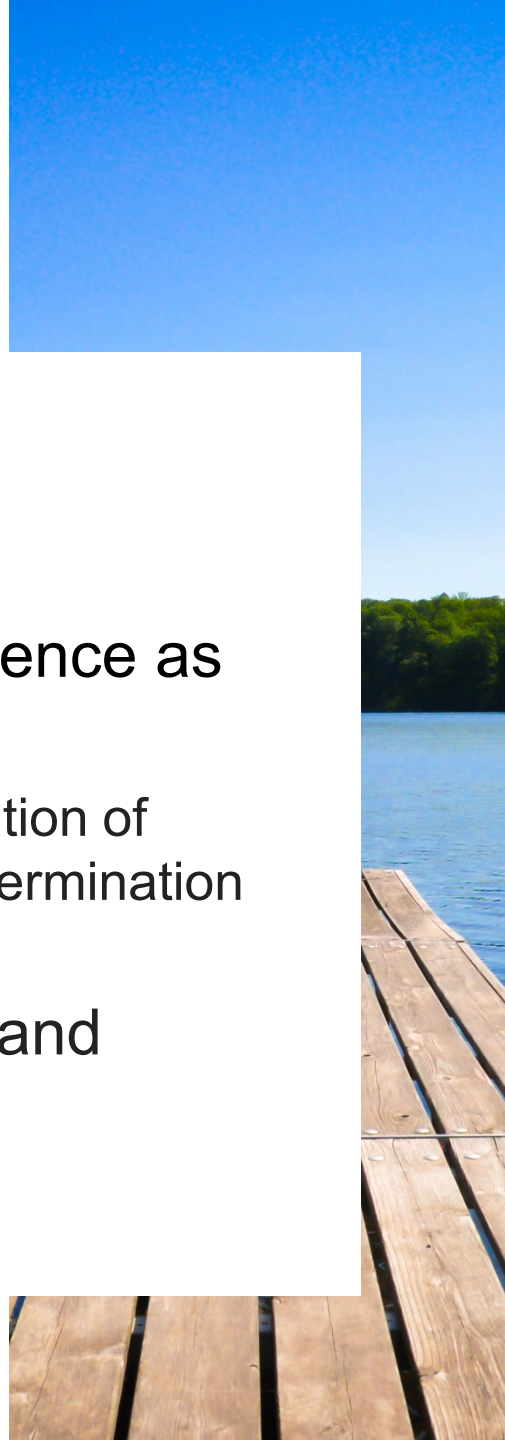
# Occupational Health & Safety Administration (OSHA)

- OSHA creates and enforces workplace safety regulations
  - Authority is derived from the Occupational Safety and Health Act (OSH Act)
  - Some courts have granted *Chevron* deference to interpretations of OSH Act, even when in the form of “citations” issued for alleged safety violations
- Potential impacts:
  - Restrained rule-making authority to address emerging workplace safety issues
  - Diminished impact of OSHA’s “interpretive guidance”
  - Enhanced defenses to citations
  - Strengthened pending legal challenges to the new “Walk Around Rule”
  - Congress develops expertise on workplace safety issues?



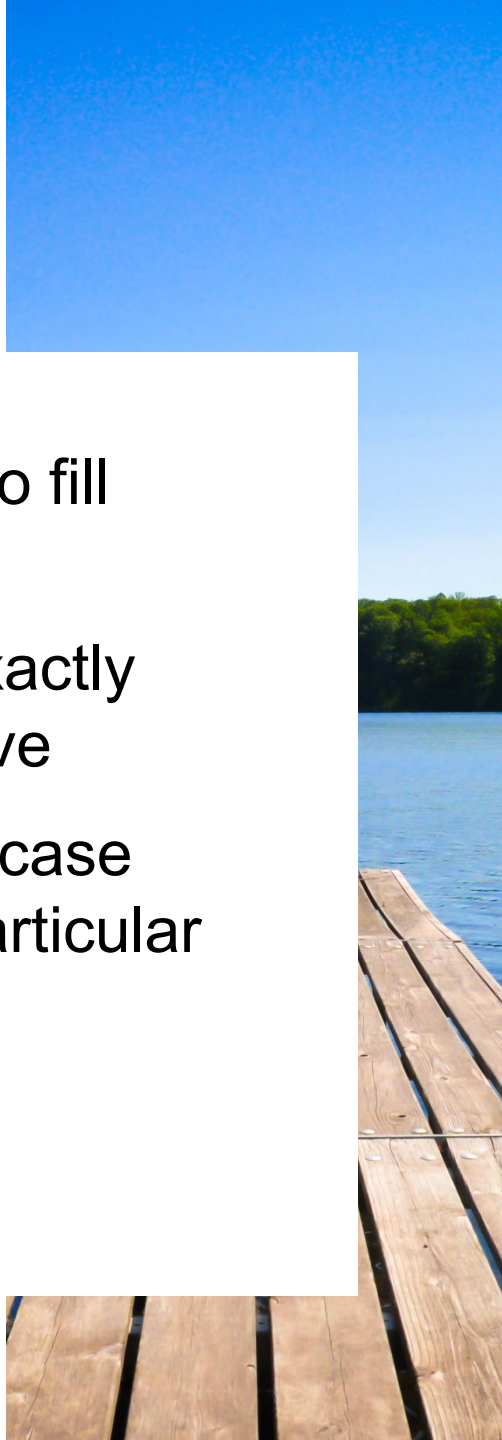
# National Labor Relations Board (NLRB)

- Courts invoke *Chevron* less frequently with NLRB decisions
  - DC Circuit invoked *Chevron* 40 times in 1,150 post-*Chevron* NLRB cases
- While not relying on *Chevron*, courts have given NLRB wide deference as experts on developing labor policy
  - For example, *NLRB v. Hearst Publications, Inc.* deferred to NLRB's interpretation of National Labor Relations Act's definition of "employee" because agency's determination was supported by factual record and had reasonable basis in law
- Nevertheless, a leg up for employers when challenging decisions and regulations in court



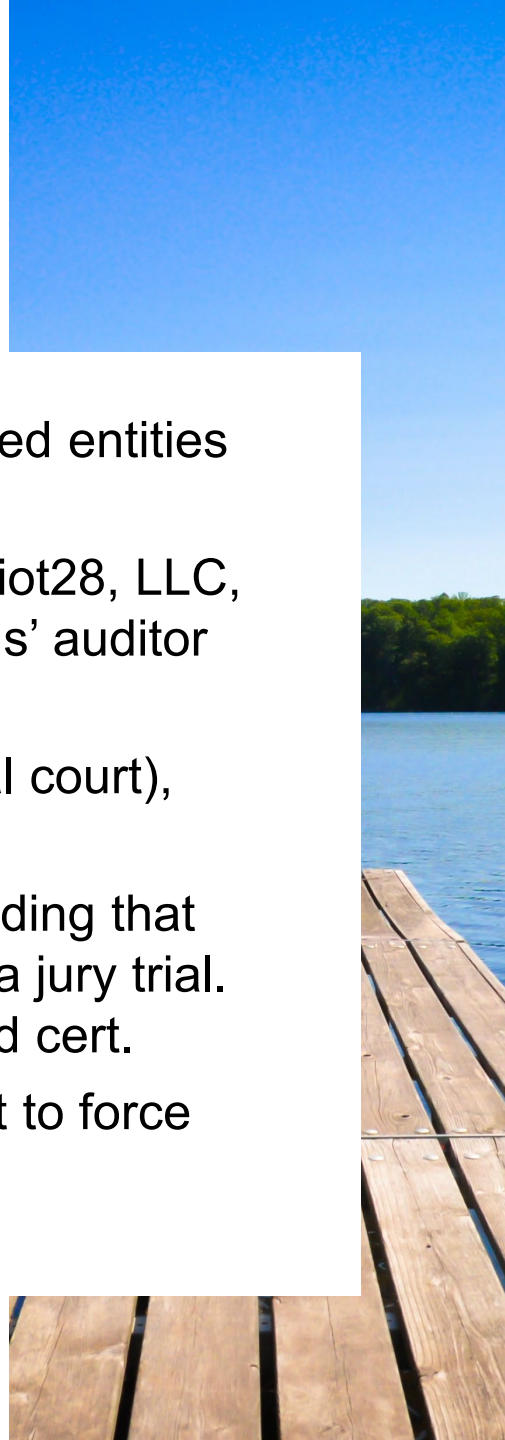
# Congressional Response

- Congress has been famously gridlocked, encouraging agencies to fill gaps
- Expect Congress to write more explicit instructions that lay out exactly how agencies will implement them or what authority agencies have
- Congress could revive *Chevron* by amending APA or on case-by-case basis expressly delegating interpretive authority to agencies in particular statutory provisions



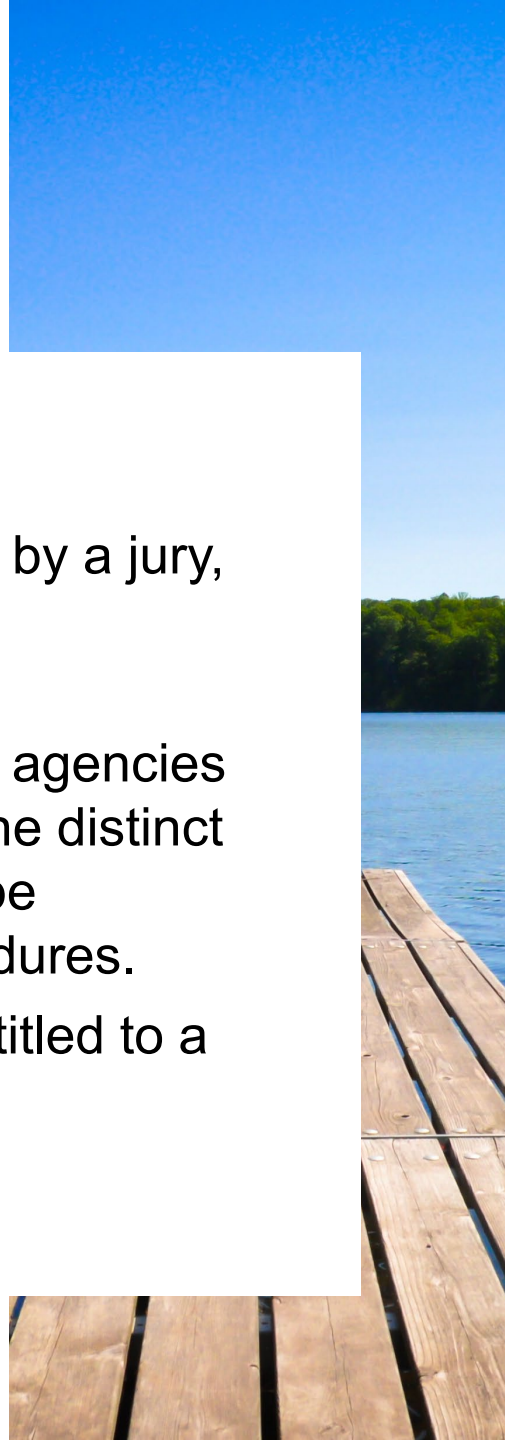
# *SEC v. Jarkesy*

- After the 2010 Dodd-Frank Act, the SEC could obtain civil penalties against unregistered entities based upon agency proceedings rather than requiring federal court process.
- The SEC brought an enforcement action in 2013 against George Jarkesy, Jr. and Patriot28, LLC, alleging misrepresentation of investment strategies, lying about the identify of the funds' auditor and prime broker, and inflating the funds' [alleged] value to collect larger fees.
- The SEC brought an administrative proceeding before an ALJ (not a jury trial in federal court), and the ALJ ordered civil monetary penalties against both parties.
- The parties petitioned for judicial review; the 5th Circuit vacated the final ALJ order, holding that the administrative action violated the U.S. Constitution's Seventh Amendment right to a jury trial. The 5th Circuit denied a request for rehearing en banc, and the Supreme Court granted cert.
- The Question for the Court: Can the SEC be permitted under the Seventh Amendment to force parties to be tried before the agency rather than a jury in federal court?



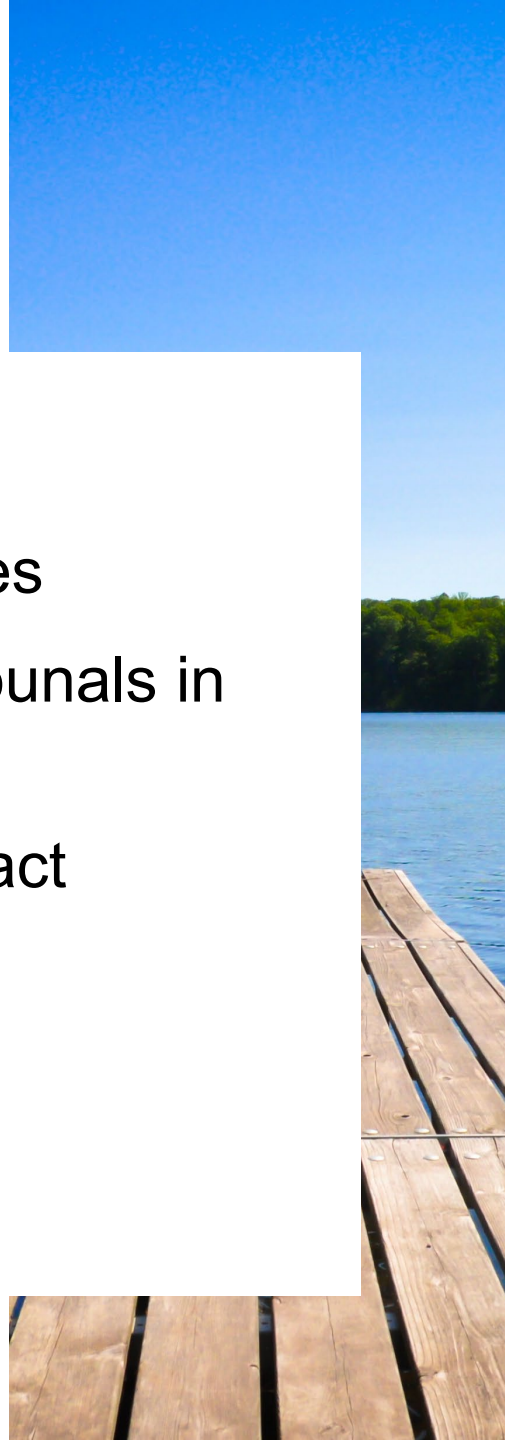
# ***Jarkesy*** - Recap

- The Supreme Court's decision:
  - SEC's antifraud provisions replicate common law fraud, which must be heard by a jury, because the available civil penalties are punitive rather than restorative or compensatory.
  - Art. III jurisdiction allows Congress to assign certain matters to administrative agencies for adjudication in lieu of a jury trial; the SEC process did not fall into any of the distinct areas of exception and in light of the Seventh Amendment, Congress would be disallowed from removing them from constitutionally mandated judicial procedures.
  - The conclusion: the Seventh Amendment applies, and Jarkesy et al. were entitled to a jury trial.



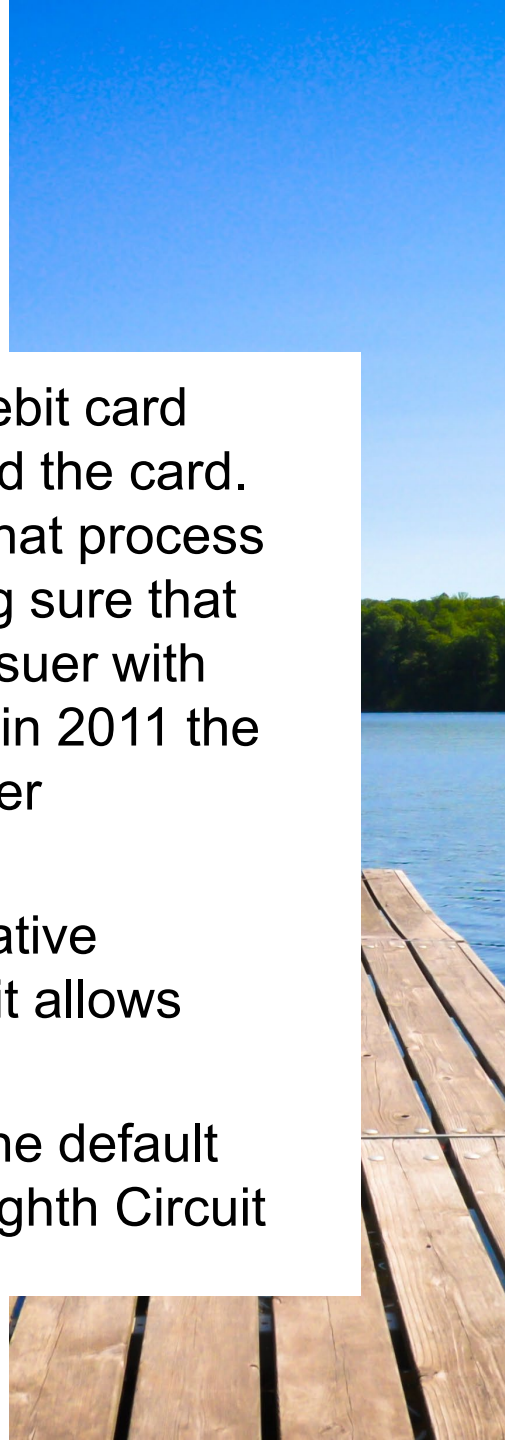
# Implications of *Jarkesy*

- Unclear which Federal agencies will be affected
- Seventh Amendment does not require jury trials in state civil cases
- May call into question the constitutionality of agency in-house tribunals in some or all cases
  - Cost-benefit of appearing before non-expert triers of law and fact



# *Corner Post v. Federal Reserve Board*

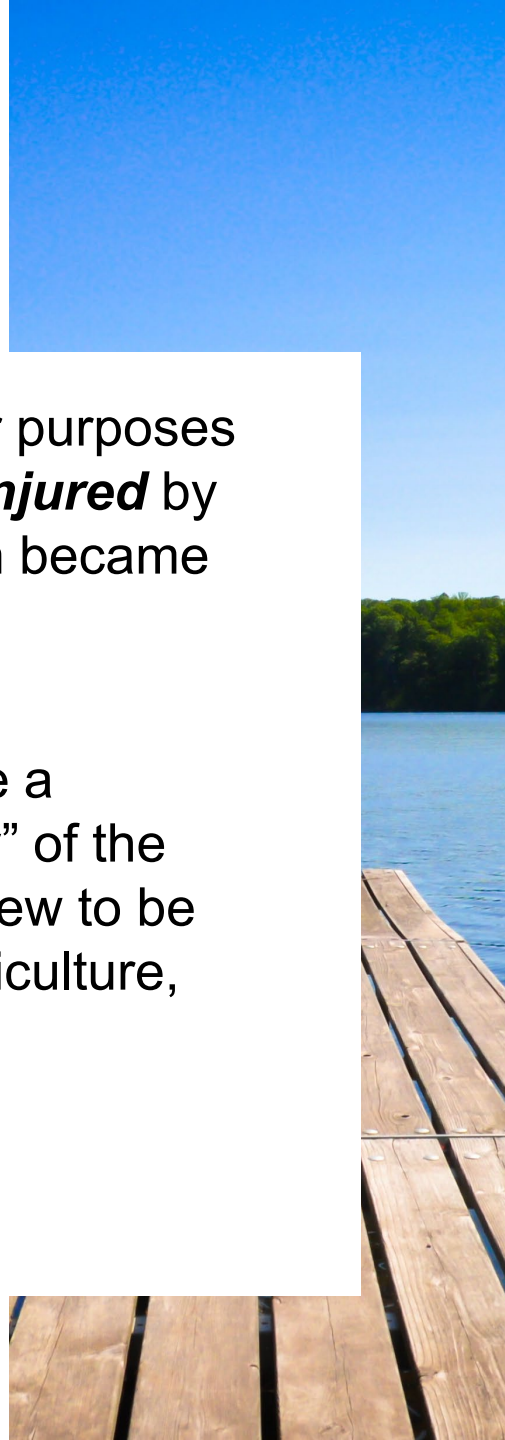
- Corner Post, like most merchants, accepted debit cards as a form of payment. Debit card transactions require merchants to pay an “interchange fee” to the bank that issued the card. The fee amount is set by the payment networks (such as Visa and MasterCard) that process the transaction. In 2010 Congress tasked the Federal Reserve Board with making sure that interchange fees were “reasonable and proportional to the cost incurred by the issuer with respect to the transaction.” 15 U. S. C. §1693o–2(a)(3)(A). Discharging this duty, in 2011 the Board published Regulation II, which sets a maximum interchange fee of $0.21 per transaction plus .05% of the transaction’s value.
- In 2021, Corner Post joined a suit brought against the Board under the Administrative Procedure Act (APA). The complaint challenged Regulation II on the ground that it allows higher interchange fees than the statute permits.
- The District Court dismissed the suit as time barred under 28 U.S.C. § 2401(a), the default six-year statute of limitations applicable to suits against the United States. The Eighth Circuit affirmed.



# ***Corner Post*** **–** Decision

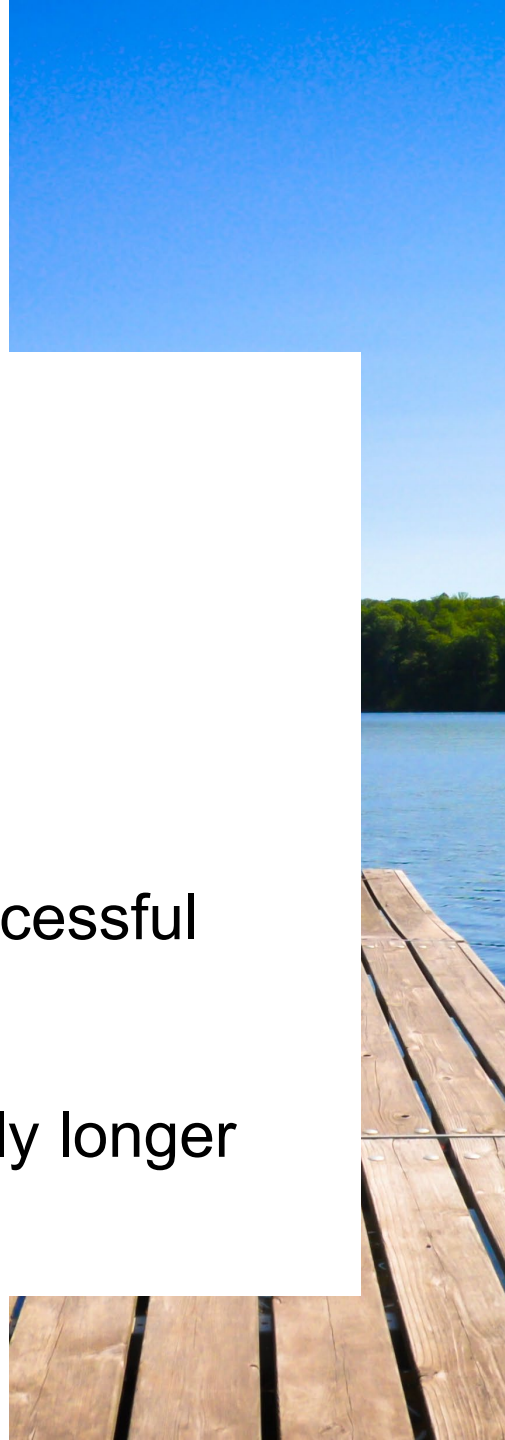
- **Decision**: The Supreme Court held that an APA claim does not accrue [start] for purposes of 28 U.S.C. § 2401(a)'s default 6-year statute of limitations until the plaintiff is ***injured*** by final agency action, not as the Federal Reserve argued, when the agency action became ***final*** under the APA.

- Court contrasted 28 U.S.C. § 2401 with statutes of repose that expressly require a challenge to agency action to be brought within a certain time period after "entry" of the action. See, e.g, Hobbs Act, 28 U.S.C. § 2342, 2344 (requiring petitions for review to be filed within 60 days to challenge certain orders from the FCC, DOT, Dep't of Agriculture, etc.).



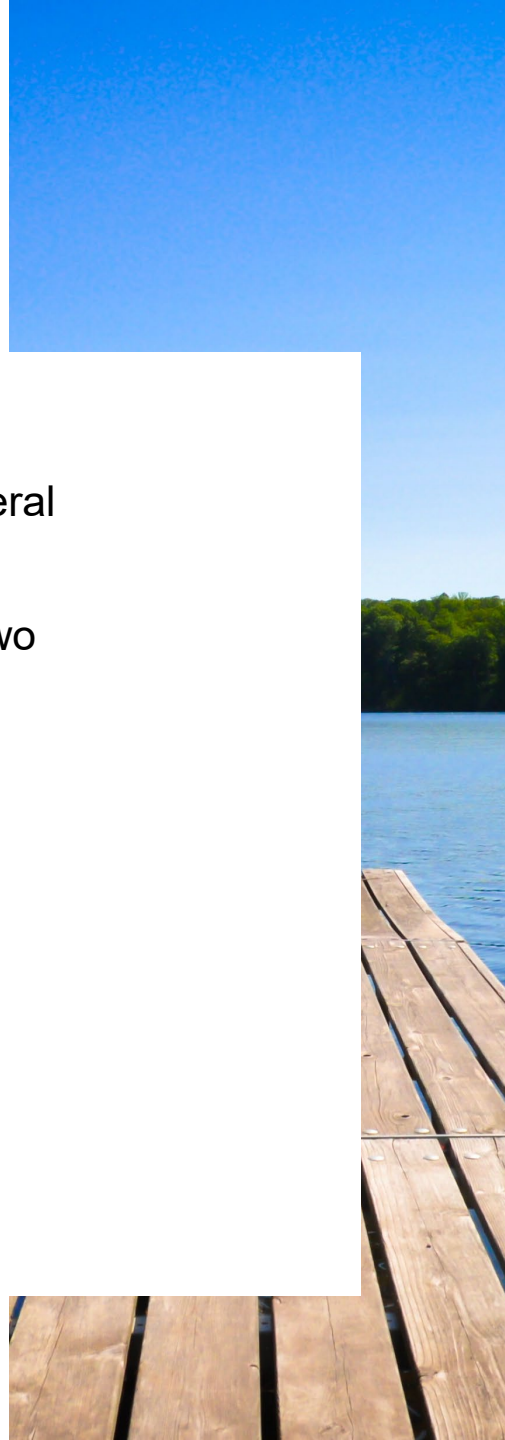
# Implications of *Corner Post*

- All federal agencies, but not all federal laws
- Increasing litigation?
- Agency changes in approach to enforcement?
  - First injury by a "final agency action" on that rule
  - Predicting where facial challenges to a rule are likely to be successful
- Creation of new entities to bring challenges?
- Leaves federal statutes of limitation open to challenges indefinitely longer than previously envisioned



# Conclusions – and Questions?

- Many questions remain!
- The decisions taken together are likely to result in a very different environment for challenges to federal regulations.
- U.S. judges ruled against agencies in most of the 26 rulings in lawsuits targeting regulations in the two months after the US Supreme Court's *Loper Bright* decision
- Remember *Loper* when…
  - Commenting on proposed regulations – lay groundwork for legal challenges.
  - Evaluating impact of new regulations – courts are more open to challenges now.
  - Negotiating with federal agency
  - Carrying out costly and/or extensive obligations at directive of federal agency.
  - Receiving penalty demand from federal agency.
  - Receiving enforcement action from federal agency.



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