The EPA in the Age of *Chevron* Deference Ambiguity and Decline

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ABSTRACT

In 1984, the Supreme Court decided Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc., *dramatically changing the trajectory of administrative law for decades to come. However, in recent years the* Chevron *doctrine has been on the decline. The Supreme Court has not referenced* Chevron *by name in an opinion since 2016. However, the Supreme Court has not yet overruled* Chevron*, even when it has had the chance to in recent terms. Instead, the Court has remained silent, leaving agencies hanging in the balance. This Note aims to answer questions arising from the current state of* Chevron *ambiguity and decline with a particular focus on the EPA. The Note will address whether the Supreme Court's shift regarding* Chevron *affects how the EPA drafts briefs and promulgates rules and what the EPA should do in the future in anticipation of further* Chevron *decline, especially at the Supreme Court. The Supreme Court officially overruled* Chevron *in* Loper Bright Enterprises v. Raimondo *and* Relentless, Inc. v. Department of Commerce *in June 2024, after substantive work on this Note was complete.*

This Note begins to answer these questions through a qualitative analysis of both case examples and EPA rules. The Note will provide background in Part I about both the success and recent decline of the Chevron *doctrine generally, and more specifically within the EPA. Part II will analyze how both litigation and rulemaking at the EPA have potentially changed with regard to* Chevron *since the last time the Court found* Chevron *deference in 2016. Part III argues that the EPA should continue to make changes to its rule drafting and proposes potential substantive and procedural changes that the agency should make at the drafting phase if its goal is to make aggressive agency actions that survive judicial review. The Note concludes with a look ahead to the future in a post-*Chevron *world.*

TABLE OF CONTENTS

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INTRODUCTION

In 1984, the Supreme Court decided *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc*., dramatically changing the trajectory of administrative law for decades to come.[1] By the 1990s, the familiar *Chevron* two-step framework was a cornerstone of administrative law doctrine, one which agencies increasingly relied on to justify courts giving deference to their actions.[2] But the dominance of *Chevron* has come into question in recent years as the Court grows more resistant to the administrative state, leaving agencies that rely on *Chevron* in limbo.[3] *Chevron* is still good law, but how much longer will it stand a chance of winning the day in the appellate courts? The dubious state of the *Chevron* doctrine affects agencies on the back end of their actions in litigation over such action, but also affects the front end of agency action in rule drafting. What are agencies doing now given the decline of *Chevron*? What should they do in the future?

1. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

2. Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 276 (2014) [hereinafter Merrill].

3. *See* James Kunhardt & Anne Joseph O'Connell, *Judicial Deference and the Future of Regulation*, BROOKINGS (Aug. 18, 2022), https://perma.cc/L2XV-SJKS.

With particular focus on the Environmental Protection Agency (EPA), this Note sheds light on these questions by analyzing the rise and fall of *Chevron* deference, exploring where *Chevron* stands now, and looking to its future. Part I provides background about both the success and recent decline of the *Chevron* doctrine generally, and more specifically within the EPA. Part II analyzes how litigation and rulemaking at the EPA have changed since the last time the Court granted *Chevron* deference in 2016. First, Part II.A uses two case studies of § 209 of the Clean Air Act (CAA) and § 211 of the CAA to highlight how the EPA's litigation strategy has changed as the Court's adherence to the *Chevron* doctrine has diminished. Part II.B shows how the EPA's rulemaking has changed thus far as *Chevron* deference dwindles. Part III posits potential substantive and procedural changes that the EPA should make at the rule drafting phase to rely less on *Chevron* so that the agency's actions are both challenged less and more likely to survive judicial review. Part IV concludes, explaining that if the EPA wants aggressive agency action to survive judicial review in the future, it should consider making changes—like the ones presented in this Note—to its rule drafting process.

I. THE HISTORY OF *CHEVRON* IN COURTS AND AT THE EPA

Chevron, decided in 1984, announced a new two-step framework for granting deference to an agency's action when the agency interprets its governing statute.[4] Under this framework, courts first ask at *Chevron* step one "whether Congress has directly spoken to the precise question at issue."[5] "If the intent of Congress is clear," then the inquiry stops there, and the agency "must give effect to the unambiguously expressed intent of Congress."[6] However, if a court determines that the statute is ambiguous, then it must move on to step two and ask whether the agency has reasonably interpreted the statute.[7] "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency" at step two.[8] In the years following *Chevron*, the two-step doctrine expanded exponentially, becoming a hallmark of administrative law that many governmental agencies, including the EPA, have continuously relied on to justify their rulemaking and adjudicatory actions.[9]

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4. *Chevron*, 467 U.S. at 842–44.
5. *Id.* at 842.
6. *Id.* at 843.
7. *Id.*
8. *Id.* at 844.
9. *See* Kunhardt & O'Connell, *supra* note 3 (finding that many Obama-era EPA rules cite heavily to *Chevron*, whereas *Chevron* has only been mentioned in three EPA rules during the first two years of the Biden administration); *see also* Stephen M. Johnson, *The Brand X Effect: Declining* Chevron *Deference for EPA and Increased Success for Environmental Groups in the 21st Century*, 69 CASE W. RES. L. REV. 65, 67, 69, 83–85 (2018) (citing empirical studies that found a high success rate for the EPA in *Chevron* cases in the 1990s).

A. BACKGROUND ON *CHEVRON* DEFERENCE

The familiar *Chevron* two-step framework became increasingly more prominent at the courts since 1984, prompting a pattern of agency success that continued for many years.[10] However, skepticism of *Chevron* has been on the rise lately, especially at the current Supreme Court.[11]

1. The Rise and the Fall of *Chevron* Deference

The Court applied the *Chevron* framework beginning in the 1985-86 Term.[12] Studies suggest different empirical findings—and reasons for those findings—about the scope of *Chevron* at the Supreme Court in the years following the decision. For instance, Thomas Merrill found that at the end of the 1980s, the Supreme Court applied the *Chevron* framework in about 40% of deference cases, and by the early 1990s, that rate had sharply increased to about 60%.[13] Merrill posits a "reverse-migration hypothesis" to explain *Chevron*'s rise from "obscurity," suggesting that *Chevron*'s prominence at the Supreme Court is due to its initial prominence at the D.C. Circuit.[14] Conversely, William Eskridge and Lauren Baer's study concluded that there was not a "*Chevron* revolution" because, when analyzing all Supreme Court administrative deference cases from 1984-2006, *Chevron* only played a small part in the "continuum of deference" used by the Supreme Court to decide statutory interpretation cases, while other deference regimes and "ad hoc judicial reasoning" (that is, no deference regime at all) were used in most cases.[15] Eskridge and Baer found "no clear guide as to when the Court will invoke particular deference regimes, and why"[16] but did find that,

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10. *See infra* sections I.A.1, I.B.

11. *See, e.g.*, Michigan v. EPA, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (emphasizing that *Chevron* takes power that should belong to the courts and gives it to agencies); *see also* Kent H. Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1441–43 (2018) ("An increasing number of judges, policymakers, and scholars have advocated eliminating or narrowing Chevron deference.") [hereinafter Barnett & Walker]; Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2154 (2016) (reviewing ROBERT A. KATZMAN, JUDGING STATUTES (2014)) (criticizing certain applications of *Chevron* as "indeterminate" and "antithetical to the neutral, impartial rule of law").

12. *See* Merrill, *supra* note 2, at 276.

13. *Id.*; *see also* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 982–83 (1992) ("[T]he *Chevron* framework is used in only about half the cases that the Court perceives as presenting a deference question.") [hereinafter Merrill, *Judicial Deference*].

14. Merrill, *supra* note 2, at 277 (explaining that promotions of judges, like Antonin Scalia, and law clerks from the D.C. Circuit to the Supreme Court explain why the prominence of *Chevron* at the D.C. Circuit translated to rising rates of the use of the *Chevron* framework at the Supreme Court).

15. 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, 1090 (2008) (finding that in all the 1,014 statutory interpretation cases at the Supreme Court between 1984 and 2006, only 8.3% applied the *Chevron* framework and 53.6% of them did not apply any deference regime).

16. *Id.* at 1091.

in some subject areas (including environmental litigation), the Court invoked *Chevron* most often when it did choose to invoke a named deference regime.[17] Despite empirical disagreement regarding the scope of *Chevron* at the Court, studies agree that when the Court applied *Chevron*, agencies had relatively high success rates.[18]

After this pro-*Chevron* period in the 1990s,[19] the Court decided *Christensen v. Harris County*, *United States v. Mead Corporation*, and *Barnhart v. Walton*, altering the scope of *Chevron* deference by creating the so-called *Chevron* "step zero."[20] The step zero doctrine narrowed the scope of *Chevron* deference by excluding "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law"—from receiving *Chevron* deference; but, those informal actions may still be entitled to *Skidmore* deference—a lower form of deference—if certain factors are met.[21] The Court also articulated factors in *Barnhart* that may make such informal agency actions eligible for *Chevron* deference.[22] The *Barnhart* factors slightly expanded *Chevron*'s applicability at step zero. Nonetheless, *Barnhart* and other step zero cases added another layer of complexity to the *Chevron* analysis, which likely contributed to agencies' lower success rates in subsequent cases applying the *Chevron* framework.[23]

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17. *Id.* at 1138–39 (finding that when the Court invoked a deference regime in environmental cases, it invoked *Chevron* 26.3% of the time—more than any other deference regime—but noted that still the Supreme Court "disposed of over 70% of these cases without invocation of the *Chevron* two-step").

18. *Id.* at 1091, 1142 (finding that agencies won when *Chevron* was applied 76.2% of the time, indicating "some positive correlation" with agency win rates and *Chevron* in comparison to cases where the Court applied another or no deference regime); Christopher H. Schroeder & Robert L. Glicksman, Chevron, State Farm*, and EPA in the Courts of Appeals during the 1990s*, 31 ENV'TL. L. REP. NEWS & ANALYSIS 10371, 10372 (2001) (finding that the EPA won in 67% of *Chevron* cases in the 1990s compared to a 60% win rate in 1986–1987); Merrill, *Judicial Deference*, *supra* note 13, at 981, tbl.1 (finding the agency view was accepted in 70.0% of Supreme Court decisions from 1984 through 1990 involving a deference question).

19. *See* Shroeder & Glicksman, *supra* note 18, at 10372.

20. Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000); United States v. Mead Corp., 533 U.S. 218, 226–27 (2001); and Barnhart v. Walton, 535 U.S. 212, 222 (2002) together established the *Chevron* step zero doctrine. *See* Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 777 (2008); *see also* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).

21. *Christensen*, 529 U.S. at 587; *see also Mead*, 533 U.S. at 235 (holding that even when the agency action is not eligible for *Chevron* deference, it is not barred from receiving *Skidmore* deference). *Skidmore* deference may be given to agencies based on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

22. *Barnhart*, 535 U.S. at 222 ("[T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.").

23. Czarnezki, *supra* note 20, at 777; *see also* Sunstein, *supra* note 20, at 191.

Still, agencies were relatively successful in *Chevron* cases well into the start of the twenty-first century, particularly at the circuit courts. In a study of all *Chevron* cases at federal courts of appeals from 2003–2013, Kent Barnett and Christopher Walker found that "agency interpretations were significantly more likely to prevail under *Chevron* deference (77.4%) than *Skidmore* deference (56.0%) or, especially, de novo review (38.5%)."[24] In deference cases, agencies won nearly 25% more often when courts applied *Chevron* compared to the cases where *Chevron* was not applied.[25] Importantly, the study drew a distinction between *Chevron* at the circuit courts and at the Supreme Court, where the agencies had lower success rates.[26] This pattern suggests that, even in those years, the Supreme Court was already more skeptical of *Chevron* compared to the circuit courts.[27]

The skepticism of some members of the current Court is evident in recent opinions that directly question the validity of *Chevron*. For instance, in 2015, Justice Thomas harshly criticized *Chevron* in his *Michigan v. EPA* concurrence: "*Chevron* deference precludes judges from exercising [their] judgment, forcing them to abandon what they believe is 'the best reading of an ambiguous statute' in favor of an agency's construction. It thus wrests from Courts the ultimate interpretative authority to 'say what the law is,' and hands it over to the Executive."[28] One year later, Justice Gorsuch directly questioned the constitutionality of *Chevron*, asserting that *Chevron* "permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."[29] Since then, other conservative Justices who are also critical of the administrative state have joined Justice Thomas and Justice Gorsuch on the Court, causing distaste toward *Chevron* to shift from concurrences to majority opinions.[30]

2. *Chevron* Deference at the Supreme Court Today

Chevron deference remains in a dubious and ambiguous state today. In recent Terms, the Supreme Court has stayed unexpectedly silent on *Chevron* even when the parties' briefs and lower court opinions both employed the traditional two-

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24. Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 5–6 (2017) [hereinafter Barnett & Walker, Chevron *in the Circuit Courts*].

25. *Id.* at 7–8 (noting agency win rates varied significantly by agency and subject matter as well as by circuit).

26. *Id.* at 6–7.

27. Although the Court has been relatively less deferential to agencies in *Chevron* cases compared to circuit courts, the Court continued to strengthen *Chevron* deference as late as 2013, applying it to interpretations concerning the scope of the agency's own jurisdiction. Lisa Heinzerling, *How Government Ends*, BOSTON REV. (Sept. 28, 2022), https://perma.cc/MF3L-N5XM.

28. Michigan v. EPA, 576 U.S. at 761 (Thomas, J., concurring) (citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005); Marbury v. Madison, 1 Cranch 137, 177 (1803)).

29. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

30. *See infra*, section I.A.2.

step framework.[31] Additionally, the Supreme Court's articulation of the major questions doctrine in the 2022 Term added another layer of uncertainty to the agency deference regime.[32]

The Court last granted *Chevron* deference in 2016,[33] and after that, it has decided several cases at step one (determining that the statutes were unambiguous).[34] However, recent decisions like *American Hospital Association v. Becerra* (*AHA*) and *Becerra v. Empire Health Foundation* (*EHF*) have left agencies confused because the Court did not directly reference *Chevron* at all despite predictions that it would.[35]

In *AHA*, the Court evaluated the Department of Health and Human Services' (HHS) interpretation of the Medicare Prescription Drug, Improvement and Modernization Act of 2003, which requires HHS to reimburse hospitals for certain outpatient prescription drugs provided to Medicare patients.[36] The statute provides two methods of reimbursement: 1) "if HHS has conducted a survey of hospitals' acquisition costs for the drugs, HHS may set the reimbursement rates based on the hospitals' average acquisition costs . . . and may vary the reimbursement rates for different groups of hospitals," and 2) "if HHS has not conducted such a survey, HHS must instead set the reimbursement rates based on the average sales price charged by manufacturers for the drugs (with certain adjustments), and HHS may *not* vary the reimbursement rates for different groups of hospitals."[37] The petitioners brought this suit after HHS substantially reduced the reimbursement for Section 340B hospitals, which serve low-income and rural communities, without first conducting a survey.[38] HHS argued it had implicit authority to reduce the reimbursement rates by hospital group because § 1833(t)(14)(A)(iii)(II) of the Act allows the agency to "calculate and adjust" the average price of each drug "as necessary for the purposes of this [statute]."[39]

The question presented in *AHA* was "[w]hether the statute affords HHS discretion to vary the reimbursement rates for that one group of hospitals when . . . HHS has not conducted the required survey of hospitals' acquisition costs."[40] The Supreme Court decided that HHS did not have statutory authority to "set different rates for different groups of hospitals"—that is, 340B hospitals—even though the

31. *See generally* Kunhardt and O'Connell, *supra* note 3.

32. *Id.*

33. Cuozzo Speed Techs., LLC v. Lee, 579 U.S. 261, 280 (2016) (holding that the regulation represents a reasonable exercise of rulemaking authority given from Congress to the Patent Office).

34. *See* Kunhardt and O'Connell, *supra* note 3.

35. Am. Hosp. Ass'n v. Becerra, 596 U.S. 724 (2022); Becerra v. Empire Health Found., for Valley Hosp. Med. Ctr., 597 U.S. 424 (2022); *see* also Kunhardt and O'Connell, *supra* note 3 (noting that the Court did not even reference *Chevron* to explain the lower court holdings, which relied on *Chevron*).

36. *Am. Hosp. Ass'n*, 596 U.S. at 726–27.

37. *Id.* at 727.

38. *Id.*

39. *Id.* at 731.

40. *Id.* at 727.

text and structure of the statute permitted HHS to adjust the average price as necessary without first conducting a survey.[41] The opinion thoroughly analyzed the agency's statutory interpretation and ultimately found that HHS's interpretation would "make little sense" given the statute's structure because the agency would never have to conduct a survey if it could adjust reimbursement rates for certain groups of hospitals.[42] The opinion concluded that "after employing the traditional tools of statutory interpretation, [the Court] do[es] not agree with HHS's interpretation of the statute."[43]

The Court's silence on *Chevron* came as a surprise: the briefs presented the opportunity for the Supreme Court to overrule *Chevron* if it wanted to. In their brief, the petitioners argued that there was no role for *Chevron* in the Court's analysis and asserted that if the statute's reimbursement clause could be reasonably read in the manner HHS had interpreted it, "then this Court would be required to confront whether *Chevron* continues to be good law."[44] The petitioners urged that "the Court would have to decide whether to continue to indulge the fiction that Congress implicitly delegated to the agency the power to adopt that interpretation merely based on ambiguity in the word 'adjust[]'—even though the agency's reading plainly is not the best interpretation of the statutory text."[45] The agency responded in its brief by arguing that although "the government can prevail without any deference to its interpretation under *Chevron* . . . such deference is warranted," and "this case involves an *express* delegation of authority to 'the Secretary' to 'calculate[] and adjust[]' reimbursement rates 'as necessary for purposes of'" the statute.[46] Moreover, the D.C. Circuit held in the decision below that HHS was entitled to *Chevron* deference and that the agency's statutory interpretation was reasonable.[47] Thus, the Court not only ignored the petitioners' explicit argument in their brief for the Court to review whether *Chevron* was good law, but it also overturned the D.C. Circuit's decision below that granted *Chevron* deference without ever mentioning *Chevron*.[48]

Similarly in *EHF*, the Supreme Court did not cite *Chevron,* but in that case, the Court narrowly upheld HHS's action in a 5-4 decision.[49] Under the Medicare

41. *Id*. at 725.
42. *Id*. at 737.
43. *Id*. at 739.
44. Br. for the Pet'rs at 46, *Am. Hosp. Ass'n*, 596 U.S. 724 (No. 20-1114), 2021 WL 4061327, at 22.
45. *Id.*
46. Br. for the Resp'ts at 48, *Am. Hosp. Ass'n*, 596 U.S. 724 (No. 20-1114), 2021 WL 4937288 at 23 (citing *Cuozzo Speed Techs.* 136 S. Ct. at 2144, the last time the Court granted *Chevron* deference to an agency).
47. Am. Hosp. Ass'n v. Azar, 967 F.3d 818, 834 (D.C. Cir. 2020), *rev'd and remanded sub nom. Am. Hosp. Ass'n v. Becerra*, 596 U.S. 724 (2022).
48. Although studies have shown that the Court does not always apply *Chevron* when it could apply, the decision by the Court to ignore *Chevron* here is salient given the explicit call to address whether *Chevron* is still good law. *See* Eskridge & Baer, *supra* note 15, at 1125 (noting that the Court applied *Chevron* only one-quarter of the time that it could have from 1984–2006); *see also* Barnett & Walker, Chevron *in the Circuit Courts*, *supra* note 24, at 4.
49. Becerra v. Empire Health Found., for Valley Hosp. Med. Ctr., 597 U.S. 424, 445 (2022).

statute, once a person turns sixty-five or has received federal disability benefits for over twenty-four months, she is "entitled" to receive Part A Medicare benefits.[50] Medicare pays hospitals a fixed rate for covered patients, subject to certain adjustments, including the "disproportionate share hospital" (DSH) adjustment.[51] To calculate the DSH adjustment, HHS adds two fractions that capture two different low-income populations: 1) the Medicare fraction, which measures "a hospital's senior (or disabled) low-income population" and 2) the Medicaid fraction, which measures "a hospital's non-senior (except for disabled) low-income population."[52] The statute requires that the denominator of each fraction is the "total number of the hospital's patient days" for a fiscal year.[53] If both fractions add up to 15% or more, then the hospital gets the DSH adjustment to its Medicare rate.[54]

At issue in *EHF* was how to count patients in these fractions who meet the statutory requirements for Medicare Part A at times when Medicare does not cover their hospital treatment.[55] The question presented was: "Are patients whom Medicare insures but does not pay for on a given day 'entitled to [Medicare Part A] benefits,' for purposes of computing a hospital's disproportionate-patient percentage?"[56] In 2004, HHS issued a regulation stating that the DSH fraction calculations should include those patients, which decreased DSH payments because the new beneficiaries were added to the Medicare fraction denominator.[57] The respondent challenged this regulation as inconsistent with the statute.[58]

The Ninth Circuit disagreed, holding that the word "entitled" in the statute meant that even if a patient qualified for Medicare Part A benefits, she was not "entitled to [Medicare Part A] benefits" that Medicare was not paying for.[59] Similar to the D.C. Circuit's decision in *AHA*, the decision in the Ninth Circuit rested on the traditional *Chevron* framework.[60] The government's brief at the Supreme Court argued then that the agency deserved *Chevron* deference,[61] but the respondents did not mention *Chevron* at all in their brief, even when arguing that the agency's rule was not an exercise of agency expertise.[62] Ultimately, the

50. *Id*. at 428 (citing 42 U.S.C.A. § 426(a)-(b)).
51. *Id*. at 429.
52. *Id*. at 429–30.
53. *Id*. at 430–31 (citing 42 U.S.C.A. § 1395ww(d)(5)(F)(vi)(I)-(II)).
54. *Id*. at 431.
55. *Id*. at 431 (explaining that there are many reasons why a hospital may not pay for treatment for a patient who is entitled to Medicare Part A, such as a hospital stay extending more than ninety days).
56. *Id*. (citing 42 U.S.C.A. § 1395ww(d)(5)(F)(vi)(I)-(II)).
57. *Id*. at 432–33.
58. *Id*. at 433.
59. *Id*. (alteration in original).
60. Empire Health Found. for Valley Hosp. Med. Ctr. v. Azar, 958 F.3d 873, 884–87 (9th Cir. 2020), *rev'd and remanded sub nom. Becerra v. Empire Health Found., for Valley Hosp. Med. Ctr*., 597 U.S. 424 (2022) (determining that the statute was unambiguous and that the agency's rule violated the statute's meaning).
61. Br. for Pet'r at 26, *Empire Health Found*., 597 U.S. 424 (No. 20-1312).
62. *Id*.

Supreme Court did not directly address the *Chevron* arguments presented in the Ninth Circuit opinion and the petitioner's brief and did not cite *Chevron* once in the opinion.[63]

In addition to its silence on *Chevron* in *AHA* and *EHF*, the Supreme Court has further altered the agency deference regime through its solidification of the major questions doctrine as a stand-alone doctrine rather than an exception to *Chevron* deference.[64] The major questions doctrine as articulated in 2022 in *West Virginia v. EPA* requires that, in "'extraordinary cases' in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority," the burden shifts to the agency to "point to 'clear congressional authorization' for the authority it claims."[65] This articulation shifted major questions from an exception to *Chevron* deference, as it had been treated in prior cases including *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*,[66] to a separate starting point for the deference inquiry where "the Court will not sustain a major regulatory action unless the statute contains a clear statement that the action is authorized."[67] This adds an additional barrier to agency deference that agencies must overcome even to ultimately receive *Chevron* deference.[68]

AHA and *EHF* exemplify the current era of *Chevron* deference: one of confusion and doubt. It is unclear why the Court chose to remain silent on *Chevron* in these cases given the decisions below and the parties' briefs at the Supreme Court. Notably, the Court did not announce a new deference standard, nor did it endorse another doctrine (like *Skidmore*) that should apply. Although some circuits have said that they will continue to adhere to the *Chevron* framework until it is explicitly overruled,[69] in light of *Chevron*'s instability, agencies naturally must consider how much they can rely on the doctrine when drafting regulations.

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63. *Empire Health Found.,* 597 U.S. 873.

64. *See* West Virginia v. EPA, 142 S. Ct. 2587 (2022); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 264 (2022).

65. West Virginia v. EPA, 142 S. Ct. at 2595 (2022).

66. In *MCI Telecommunications Corporation v. AT&T Co.*, 512 U.S. 218, 224 (1994), the Court held that the Federal Communications Commission's decision to make tariff filing optional for all nondominant long-distance common carriers was outside of the Commission's statutory authority to "modify any requirement made by or under . . . this section." The Court found that the Commission's change in policy was "the heart of the common-carrier section of the Communications Act" and therefore too major of a change to be considered a "modification." *Id.* at 229.

67. Sohoni, *supra* note 64, at 264.

68. *Id.* at 266.

69. *See, e.g.*, Diaz-Rodriguez v. Garland, 55 F.4th 697, 728 n.30 (9th Cir. 2022) ("We recognize the future of the *Chevron* deference doctrine has been called into question. In recent years, several justices have called for the Court to reexamine *Chevron* deference or proposed narrowing its scope . . . Further, the Court has sometimes reversed an agency's interpretation of a statute without citing *Chevron* . . . But we remain bound by past decisions of the Supreme Court until it overrules those decisions . . . so we must apply *Chevron* where relevant.").

Beyond this, agency counsel will have to consider major questions as a separate doctrine in addition to *Chevron*.[70] Combined with the recent endorsement of the major questions doctrine, the Court's silence on *Chevron* marks the current era as one of *Chevron*'s decline, shifting interpretive power away from agencies and to the courts.

B. *CHEVRON* DEFERENCE AND THE EPA

The EPA has consistently relied on *Chevron* and has, until recently, been largely successful in attaining deference. In the 1990s, the EPA had great success attaining *Chevron* deference.[71] In a 2001 study, Christopher Schroeder and Robert Glicksman analyzed *Chevron* deference in EPA cases in federal courts of appeals from 1986–1987 and from 1991-1999.[72] They found that there was an increase in EPA success rate from 60% to 67% of cases, a decrease in reverse and remand cases from 35% to 21%, and an increase in remand-only cases from 5% to 12%, suggesting "an increase in affirmances due to more deference to agency determinations" (deemed a "*Chevron* effect").[73] Additionally, Schroeder and Glicksman noted that the EPA had a great success rate at step two, with the Court affirming 92% of the EPA's interpretations.[74] The study also found the *Chevron* framework was explicitly invoked almost universally in cases involving challenges to statutory interpretations.[75] Overall, this study demonstrates an era of *Chevron* success for the EPA, during which courts expressed great deference to the agency's expertise.[76]

In 2018, Stephen Johnson updated 2001 Schroeder and Glickman study by evaluating *Chevron* deference success after hostility toward the doctrine had grown.[77] Johnson analyzed all federal circuit court decisions involving *Chevron* challenges to EPA actions from 2000-2016.[78] He found that the rate at which

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70. Sohoni, *supra* note 64, at 263–64.

71. *But see* Eskridge & Baer, *supra* note 15, at 1120–21 (noting that the Supreme Court was "highly deferential to agency interpretations *before Chevron*;" before 1984, the Supreme Court "had already announced *Chevron*-like or *Chevron*-lite deferential approaches in . . . environmental law," and after the Supreme Court decided *Chevron*, it was only applied in a small minority of cases).

72. Schroeder & Glicksman, *supra* note 18, at 10372 (noting that 1986–1987 was deliberately chosen because it was a period relatively soon after *Chevron* had been decided).

73. *Id*. at 10372.

74. *Id*. at 10377, 10382 (noting that the agency lost more frequently at step one, which was a common pattern among other agencies, likely because judges are more likely than the agencies to commit themselves to finding clear statutory meaning).

75. *Id*. at 10373 (noting that *Chevron* was cited in 86% of such cases and would have been appropriate to cite in only three of the remaining seventeen cases in the sample).

76. *Id*. at 10411–12 (explaining that the courts were willing to give expansive deference but still maintained a check at step two where the EPA provided no rational explanation to support its scientific and technical determinations).

77. Johnson, *supra* note 9, at 68.

78. *Id*. The Court decided *Christensen*, *Mead*, and *Barnhardt*, creating *Chevron* "step zero," at the beginning of the range of years analyzed in Johnson's study, which is likely a contributing factor to the study's results. *Christensen v. Harris County*, 529 U.S. 576 (2000), *United States v. Mead Corporation*,

courts affirmed the EPA's decision during this period was 70.9%, a decrease from the 75.7% rate of affirmance in the 1990s.[79] The decrease in deference occurred as the number of challenges resolved at *Chevron* step one increased from 32.7% of challenges in the 1990s to 41.57% during this period.[80] The most notable increase in challenges resolved at step one—increasing from 33% to almost 50%—took place after the *Brand X* decision in 2005.[81] The Johnson study therefore indicates at least a correlation, and perhaps a causal link, between a decrease in agency deference and an increase in resolution at step one. These results demonstrate that the EPA has had diminishing success in *Chevron* deference cases as hostility toward and narrowing of *Chevron* deference has increased. This study took place during years when the Court was still deploying *Chevron*.[82] Thus, it is possible that an update to the 2018 Johnson study in the years after the Supreme Court stopped referencing *Chevron*[83] would show a further decrease in EPA success in *Chevron* deference cases.

II. HOW THE EPA HAS ADJUSTED TO THE DECLINE OF *CHEVRON*

The arc of *Chevron* deference—its distinct rise and decline—has already begun to alter how agencies, including the EPA, act. The EPA is citing *Chevron* less in at least some contexts, and instead has taken alternative approaches, such as supplementing *Chevron* arguments with other arguments to obtain deference (like citing *Skidmore*) or relying on precedent as grounds for deference. As this Part shows, the EPA has begun to alter its argumentation strategies, both in terms of litigation and rule drafting, knowing that the likelihood of agency success using *Chevron* has dwindled.[84]

A. HOW THE EPA'S BRIEFS HAVE CHANGED OVER TIME

Recent scholarship shows that Supreme Court litigators shift their briefs in response to the Supreme Court's current trends. For example, Aaron Bruhl conducted a study that found that as the Supreme Court has moved its statutory

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533 U.S. 218 (2001), and *Barnhart v. Walton*, 535 U.S. 212 (2002) together established the *Chevron* step zero doctrine. *See* Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 777 (2008); *see also* Sunstein, *supra* note 20, at 191.

79. Johnson, *supra* note 9, at 69.

80. *Id* at 70.

81. *Id*. at 70–71 (noting that the "*Chevron* effect" described by Schroeder and Glicksman is likely fading as courts return to more aggressive judicial review of EPA actions).

82. Kunhardt and O'Connell, *supra* note 3.

83. *See Cuozzo Speed Techs*., 579 U.S. 261, 276–77 (2016); Kunhardt and O'Connell, *supra* note 3 (noting that the Supreme Court last mentioned *Chevron* in 2016 in *Cuozzo Speed Techs*.).

84. Although this Note focuses on case and rule examples from the EPA, the same changes and emerging patterns likely exist in other agencies as well.

interpretation in a textualist direction, so have the briefs of Supreme Court litigators.[85] Notably, Bruhl's study concluded that the shift in the Supreme Court briefs occurs through "supplementation" of textualist tools like dictionary definitions "rather than replacement" of all non-textualist tools, like legislative history.[86]

Given these findings, it is plausible, and perhaps likely, that agencies like the EPA have similarly changed their briefs in reaction to the Supreme Court's shift away from *Chevron*. It is also probable that this same pattern has translated to briefs at the federal courts of appeals, especially in cases that are expected to be appealed to the Supreme Court. The following examples—involving the § 209 California waiver and the § 211 small refinery exemption—track the changes over time in the EPA's appellate and Supreme Court briefs, looking at the qualitative significance of *Chevron* in the briefs. Both examples were chosen because they span the years both before and after the Supreme Court stopped using *Chevron* by name in 2016.[87] Overall, these examples follow the same general patterns seen in the Bruhl study, demonstrating a shift at the EPA from relying heavily on *Chevron* to supplementing briefs with arguments for *Skidmore* deference or changing the standard of proof sections to avoid the *Chevron* two-step framework.

1. Clean Air Act § 209 California Waiver

Clean Air Act § 209[88] prohibits state and local governments from "adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines,"[89] but California can request a waiver of the § 209(a) prohibition to set state standards on new motor vehicles and engines.[90] Section 209(b), known as the "California waiver provision," provides:

> (1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that–
>
> (A) the determination of the State is arbitrary and capricious,
>
> (B) such State does not need such State standards to meet compelling and extraordinary conditions, or

85. Aaron-Andrew P. Bruhl, *Supreme Court Litigators in the Age of Textualism*, FLA. L. REV. (forthcoming 2023) (manuscript 29) (concluding that the results of the empirical study support the hypothesis of the parallelism between the Supreme Court's opinions and litigators' briefs).

86. *Id.*

87. *See* Kunhardt and O'Connell, *supra* note 3.

88. Codified at 42 U.S.C. § 7543.

89. 42 U.S.C. § 7543(a).

90. 42 U.S.C. § 7543(b).

> (C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.

As provided in the statute, to attain a § 209 waiver, California must file a waiver request, after which the EPA publishes a notice in the Federal Register for public hearing and comment.[91] After the notice and comment period expires, the EPA reviews the comments and determines whether the waiver requirements have been met.[92] The EPA grants the waiver unless the Administrator makes a finding pursuant to § 209(b)(1)(A)-(C).[93] If the EPA grants the waiver, California can then enforce its own rules, and other states can adopt California's standards under CAA § 177.[94] California has continuously applied for waivers under § 209 since 1969.[95] Until 2007, the EPA had never "outright denied" a California waiver request.[96]

In recent years, beginning in 2019 and continuing to the present, there has been ongoing litigation regarding a 2013 EPA California waiver. The briefs in this litigation exemplify how the EPA has shifted its litigation strategy to take into account the changing landscape of *Chevron* deference.

a. The 2013 Waiver

In 2013, the EPA granted a California waiver for the "Advanced Clean Cars" program (the 2013 Waiver), which contained three components: a set of criteria-pollutant emission standards, a set of "tailpipe" greenhouse-gas emission standards, and a zero-emission-vehicle mandate.[97] The final rule explained EPA's textual reasoning for granting this waiver request, stating that the EPA's "traditional approach" "was the best approach for considering a waiver," citing *Chevron* once in its statutory interpretation analysis.[98] Although the 2013 Waiver did not repeatedly cite *Chevron*, the citation in combination with EPA's explanation of Congress's intent to give EPA "broad discretion" in granting § 209(b) waivers[99] demonstrates the typical reliance on expansive deference to the agency that was commonplace in EPA actions in 2013.

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91. EPA, VEHICLE EMISSIONS CALIFORNIA WAIVERS AND AUTHORIZATIONS, https://perma.cc/D364-CEXJ.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Jeremy S. Scholtes, *When the Darkness Consumes the Light. . .*, 27 TEMP. J. SCI. TECH. & ENV'T. L. 177, 190 (2008).

97. *See* California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's Advanced Clean Car Program and a Within the Scope Confirmation for California's Zero Emission Vehicle Amendments for 2017 and Earlier Model Years, 78 Fed. Reg. 2112 (Jan. 9, 2013); Resp'ts Final Br. At 17–18, *Union of Concerned Scientists v. NHTSA* (D.C. Cir. 2020) (No. 19-01230).

98. 78 Fed. Reg. 2112 (Jan. 9, 2013), *supra* note 97, at 2126–27.

99. *Id.* at 2127.

b. Withdrawal of the 2013 Waiver

After the EPA completed its mid-term evaluation in 2018, it concluded that the 2012 emissions standards promulgated in the 2013 Waiver "were not appropriate" and drafted the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule with the National Highway Traffic Safety Administration (NHTSA) instead.[100] SAFE proposed two actions: 1) setting new federal fuel-economy and vehicle emissions standards for passenger cars and light-duty trucks and 2) new rules regarding preemption and waiver.[101] The latter was at issue in the subsequent litigation that resulted from the SAFE Vehicles Rule.[102]

In 2019, the EPA and NHTSA finalized the proposed 2013 waiver withdrawal, which covered California's greenhouse-gas standards and zero-emission-vehicle standards in the One National Program.[103] "EPA concluded that California's greenhouse-gas standards and zero-emission-vehicle mandate fail Section 209(b)(1)(B)'s requirement that California 'need such State standards to meet compelling and extraordinary conditions.'"[104] Furthermore, the EPA "also concluded that whether California 'needs' its standards to 'meet compelling and extraordinary conditions,' turns on whether there is a particularized, local nexus between (1) pollutant emissions from sources, (2) air pollution, and (3) resulting impact on health and welfare," but no such nexus exists for greenhouse gases.[105]

The case was appealed to the U.S. Court of Appeals for the D.C. Circuit regarding the EPA's waiver withdrawal in October 2019.[106] The government's brief sheds light on the EPA's reliance on *Chevron* deference during the years after the Supreme Court last granted *Chevron* deference to an agency. In the section regarding the EPA's waiver withdrawal in its final brief at the D.C. Circuit,[107] the government argued that the EPA has the authority to withdraw waivers previously granted under § 209(b) and that the EPA reasonably concluded the withdrawn portions of the 2013 Waiver were inconsistent with § 209(b)(1)(B).[108] The EPA did not reference *Chevron* deference explicitly in these sections, but it did use language akin to that used in a traditional *Chevron* analysis, referring to the EPA's interpretation of § 209 as "reasonable" and the petitioner's interpretation as "unreasonable."[109] Additionally, the EPA argued that its interpretation of the

100. Final Br. of Resp'ts at 18–19, *Union of Concerned Scientists* (No. 19-01230).
101. *Id.*
102. *See id.* at 19.
103. *See id.* at 20–22; 84 Fed. Reg. 51310, 51328 (Sept. 27, 2019).
104. Final Br. of Resp'ts at 22, *Union of Concerned Scientists* (No. 19-01230).
105. *Id.* at 23.
106. Pet. For Review (filed Jul. 13, 2020), *Union of Concerned Scientists* (No. 19-01230).
107. Respondents in this case included both EPA and NHTSA. The U.S. Department of Justice's Environmental & Natural Resources Division also joined this brief. Resp'ts Final Br. at cover page, *Union of Concerned Scientists* (No. 19-01230).
108. Final Br. of Resp'ts at 63–105, *Union of Concerned Scientists* (No. 19-01230).
109. *Id.* at 81.

text was "reasonable" because it effectuated the congressional intent of the statute, logically fit into the rest of the section's text, and was not precluded by court precedent or legislative history relating to the 1977 and 1990 amendments to Title II of the CAA.[110] This analysis incorporates many of the interpretive tools used in a traditional *Chevron* analysis but refrains from citing *Chevron* or explicitly identifying that the agency should receive deference at step two.

However, the EPA did explicitly cite *Chevron* in its brief when countering the petitioner's additional argument that EPA unreasonably interpreted CAA § 177.[111] The EPA argued for *Chevron* deference at step two, claiming that its interpretation "that 'standards' means emission standards for criteria pollutants, not greenhouse gases . . . is reasonable" given the text and structure of § 177.[112] Further, the EPA asserted that it should receive *Chevron* deference because the interpretation was not undercut by § 209(e) and because it fulfilled the purpose of § 177.[113] The EPA's brief also outlined the *Chevron* two-step standard at the outset of the Standard of Review section.[114] Thus, although some sections of the brief omitted *Chevron*—perhaps a strategic decision to underplay the agency's use of the *Chevron* framework—other sections made clear that *Chevron* was the basis of EPA's argument for deference for the 2013 Waiver withdrawal. This oscillation between avoiding and endorsing *Chevron* in different sections of the same brief is a hallmark of *Chevron*'s transitional period, where the EPA knew that the Supreme Court was beginning to forgo *Chevron* deference.[115]

c. Ohio v. EPA and Restoration of the 2013 Waiver

Comparing the 2019 Withdrawal to recent California waiver litigation in the D.C. Circuit in 2022 illustrates the continuing shift in litigation strategy by the EPA as the Court draws further away from the era of *Chevron* deference dominance.

With the change from the Trump administration to the Biden administration, the EPA reversed its 2019 Withdrawal and restored the 2013 Waiver, deciding that the 2019 Withdrawal was "deficient in several respects," including the EPA's interpretation of § 209(b).[116] Several States challenged this decision, arguing that § 209(b)(1)—which the EPA relied on in the 2013 Waiver—is unconstitutional and that the 2013 Waiver must be set aside under the Administrative Procedure Act because it is not in accordance with the Energy Policy and Conservation Act.[117]

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110. *Id.* at 84–89.
111. *See id.* at 105–11.
112. *Id.* at 108.
113. *Id.* at 109.
114. *See id.* at 25.
115. *See* Kunhardt and O'Connell, *supra* note 3 (noting that the Court was still committed to *Chevron* deference in 2016 when it granted deference to the Patent and Trademark Office's interpretation of the Leahy-Smith America Invents Act).
116. Initial Br. of Resp'ts at 17–18, *Ohio v. EPA* (D.C. Cir., 2022) (No. 22-01081).
117. *See* corrected Proof Br. of Pet'rs at 19–20, 96, *Ohio v. EPA* (No. 22-01081).

The respondents' initial briefs addressed the States' standing arguments and constitutional claims before arguing that the 2013 Waiver reasonably interpreted the waiver requirements in § 209 (thus concluding that the 2019 Withdrawal was improper).[118] This brief was similar to some sections of the 2019 Withdrawal brief by the EPA and NHTSA in that it did not directly cite *Chevron* but instead used language and arguments commonly invoked under a traditional *Chevron* regime. Again here, the government asserted that the EPA "reasonably" interpreted § 209 based on the statutory text, congressional purpose, and historical practice of the EPA.[119]

However, there were noticeable changes in the EPA's January 2023 brief. The 2023 brief did not cite *Chevron* at all, even in the Standard of Review section.[120] Instead, the Standard of Review stated: "Where 'traditional tools of statutory interpretation' demonstrate that the agency's interpretation of the statute is 'the best one,' the court need not rely on deference to the agency . . . But agency interpretations that are 'reasonable' should also be upheld."[121] Moreover, the brief dedicated a separate section to the major questions doctrine,[122] arguing that it does not demand a stricter interpretation of § 209.[123]

These differences between the EPA's briefs (less than four years apart) reflect—and in some ways mirror—the Court's most recent attitude toward *Chevron*. Although the Court has not yet outright overruled *Chevron*, it continues to not give deference to agency action, to avoid citing *Chevron* where it can,[124] and to now use the major questions doctrine to strike down agency action. Despite some circuits remaining steadfast in their adherence to *Chevron*,[125] the Court's actions leave agencies at bay as to whether they can successfully rely on *Chevron*. Thus, the EPA—and other agencies—will likely continue to utilize the tactics in the 2023 brief in the wake of the Court's silence on *Chevron*, including minimization to the point of complete absence of any citation to *Chevron*, altering the standard of

118. *See generally* Initial Br. of Resp'ts, *Ohio v. EPA* (No. 22-01081).

119. *Id.* at 58–68.

120. *See id.* at 22.

121. *Id.* (internal citations omitted). To support their standard, the respondents cited *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 45 F.4th 306, 313 (D.C. Cir. 2022), where the Fourth Circuit determined "there is no need to decide what deference, if any, a regulation should receive where we can conclude that the agency's interpretation of the statute is the best one. Our decision to forgo engaging with questions of *Chevron*'s applicability is consistent with how courts have approached agency interpretation issues in the past." The respondents also pointed to *Washington All. Of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 50 F.4th 164, 192 (D.C. Cir. 2022), which cites *Chevron* for the proposition that "reasonable" agency interpretations should be given deference. Thus, the respondents were, in a sense, covering their bases by avoiding citing to *Chevron* directly, while citing to cases collectively arguing that *Chevron* deference may be the proper standard but that *Chevron* deference is unnecessary for the agency to win.

122. West Virginia v. EPA, 142 S. Ct. 2587, 2607–08 (2022) (announcing a formal declaration of the major questions doctrine).

123. *See* Initial Br. of Resp'ts at 77, *Ohio v. EPA* (No. 22-01081).

124. *See* Am. Hosp. Ass'n v. Becerra, 596 U.S. 724 (2022).

125. *See*, *e.g.,* Diaz-Rodriguez v. Garland, 55 F.4th 697, 728 n.30 (9th Cir. 2022).

review for statutory interpretation to avoid the *Chevron* two-step, and adding sections to address the major questions doctrine.

2. Clean Air Act § 211

An analysis of cases about § 211 of the CAA[126] over time exemplifies 1) how the courts have narrowed the scope of *Chevron* for informal agency action[127] and 2) how the government has shifted its strategy to take advantage of the Court's recent stance on *Chevron*: from arguing at the circuit court that *Chevron* deference is due despite conflicting precedent to stating in its Supreme Court brief that *Chevron* does not apply.[128]

In 2005, Congress amended § 211 of the CAA, authorizing the EPA to regulate fuel by establishing a renewable fuel program (RFP).[129] "Congress specified increasing minimum volumes of fuel to be used annually," and parties obligated by the statute including refiners, importers, and certain blenders of gasoline and diesel must show that they meet this minimum amount of fuel requirement each year.[130] In 2013, the EPA established applicable renewable fuel standards (RFS),[131] which were later upheld by the D.C. Circuit in 2014.[132]

Within § 211, Congress created a small refinery exception to lessen the RFP's impact on small refineries.[133] This applied as a blanket exception from the RFP until 2011.[134] The statute directed the EPA to "'extend the exemption under clause (i)' for at least two years if the Secretary of Energy determined RFP obligations would impose 'a disproportionate economic hardship' on a given small refinery."[135] Starting in 2011, EPA extended exemptions to some small refineries.[136] Since then, the EPA's interpretation of the text of § 211 has been the subject of frequent litigation involving *Chevron* deference.

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126. Codified at 42 U.S.C. § 7545.

127. *See, e.g.,* Sinclair Wyoming Ref. Co. v. EPA, 887 F.3d 986 (10th Cir. 2017) (holding that *Skidmore* deference, not *Chevron* deference, applied to the information agency action in question).

128. *See* Br. for the Federal Resp't at 46–47, HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n, 141 S. Ct. 2172 (2021); Resp'ts Br. at 34, HollyFrontier Cheyenne Ref., LLC v. EPA, 2021 WL 8269239.

129. Nat'l Petrochemical & Refiners Ass'n v. EPA, 630 F.3d 145, 147 (D.C. Cir. 2010).

130. *Id.* at 147–48.

131. Regulation of Fuels and Fuel Additives: 2013 Renewable Fuel Standards, 78 Fed. Reg. 49794 (Aug. 15. 2013).

132. Monroe Energy, LLC v. EPA, 750 F.3d 909, 916 (D.C. Cir. 2014) (holding that the EPA exercised reasonable discretion that furthered the purposes of the statute).

133. 42 U.S.C. § 7545(*o*)(1)(J), (*o*)(1)(L), (*o*)(2)(A)(i).

134. HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n, 141 S. Ct. 2172, 2176 (2021); 42 U.S.C. § 7545(*o*)(9)(A)(i).

135. *HollyFrontier*, 141 S. Ct. at 2176; 42 U.S.C. § 7545(*o*)(9)(A)(ii).

136. *See HollyFrontier*, 141 S. Ct. at 2176.

a. Hermes Consolidated, LLC v. EPA

The D.C. Circuit granted the EPA *Chevron* deference in 2015 in *Hermes Consolidated, LLC v. EPA*, when an oil refining company sought review of the EPA's denial of extension for the small refinery economic hardship exemption from the § 211 RFP.[137] The plaintiff, an oil refining company, asserted that the EPA did not permissibly interpret the term "disproportionate economic hardship" in its denial of the company's economic hardship extension pursuant to 42 U.S.C. § 7545(o)(9)(B).[138] Applying the traditional two-step *Chevron* framework, the court found that there was ambiguity at step one and that the EPA's interpretation was reasonable at step two.[139]

The EPA's brief in *Hermes* principally relied on the *Chevron* framework for deference in interpreting the statutory language when it evaluated hardship petitions for exemption.[140] The agency's *Chevron* argument was the first argument in the brief and spanned eighteen pages of the seventy-four-page brief, indicating the agency's belief in the strength and importance of the *Chevron* argument relative to its other arguments.[141] The section did not address any other form of deference (such as *Skidmore*), indicating that the EPA did not feel it was necessary to make a secondary deference argument given the perceived stability of the *Chevron* framework.[142] This marked reliance on *Chevron* is unsurprising in 2015, a time when agencies were still accustomed to receiving *Chevron* deference, especially at the circuit court level.[143]

b. Sinclair Wyoming Refining Company v. EPA

In 2017, the Tenth Circuit decided *Sinclair Wyoming Refining Company v. EPA*, which again dealt with the EPA's interpretation of the "disproportionate economic hardship" language in the small oil refinery exemption in § 211.[144] In the opinion, the court considered *Chevron* but ultimately stopped its analysis at *Chevron* step zero.[145] The court found that *Skidmore* deference was applicable per *Mead* because the EPA conducted Sinclair's hardship petitions via informal adjudication rather than formal notice-and-comment rulemaking. Furthermore, a mid-level agency official, rather than the head of the EPA, decided the petitions,

137. Hermes Consol., LLC v. EPA, 787 F.3d 568 (D.C. Cir. 2015).

138. *Id.* at 574.

139. *Id.* at 574–75. The Eighth Circuit similarly gave deference to the EPA's interpretation of "disproportionate economic hardship" in *Lion Oil Co. v. EPA*, decided shortly after *Hermes*. Lion Oil Co. v. EPA, 792 F.3d 978, 984 (8th Cir. 2015).

140. Br. for Resp't EPA at 33–51, *Hermes*, 787 F.3d 568 (No. 14-1016).

141. *Id.*

142. *Id.* (noting that the brief did subsequently argue that the denial of the extension was not arbitrary or capricious).

143. *See* Heinzerling, *supra* note 27; Barnett & Walker, *supra* note 11, at 6.

144. *See* Sinclair Wyo. Ref. Co. v. EPA, 887 F.3d. 986, 989–90.

145. *See id.* at 991–92.

so the action did not have the "force of law."[146] The court also distinguished *Hermes* (and *Lion Oil* from the Eighth Circuit), stating that neither the D.C. Circuit nor the Eighth Circuit considered whether to apply *Skidmore* and instead "assumed that *Chevron* applied."[147] Ultimately, the court decided against granting *Skidmore* deference to the EPA, holding that agency interpretations should only receive *Skidmore* deference when they have the "power to persuade" the court.[148] The EPA's interpretation failed to persuade the court because it was "contrary to the meaning and purpose of the statute."[149] The dissent did not address whether *Chevron* or *Skidmore* was the appropriate standard, instead merely stating that "[r]egardless of the standard of review applied, EPA's adoption of the Department's three-part viability test should be upheld."[150]

Like its brief in *Hermes*, the EPA's brief in *Sinclair* primarily argued that the EPA should receive *Chevron* deference and only secondarily argued for *Skidmore* deference.[151] The EPA also issued a supplemental brief outlining why *Chevron* was the appropriate standard rather than *Skidmore*, relying heavily on *Hermes* and *Lion Oil* as precedent.[152] The EPA had full faith that *Chevron* would win them the day.

Hermes (and *Lion Oil*) came well after *Mead* and *Barnhardt*, but the D.C. Circuit and Eighth Circuit followed the typical path of giving the *Chevron* doctrine wide breadth. Just two years later, the Tenth Circuit in *Sinclair* narrowed the scope of *Chevron* in the context of the § 211 small refinery exemption and applied the lower *Skidmore* standard, deviating from two circuits' precedent that was directly on point. It is important to note the years of these decisions: *Hermes* and *Lion Oil* were decided in 2015 (a year before the last time the Court granted *Chevron* deference), and *Sinclair* was decided in 2017 (a year after the Court's last grant of *Chevron* deference).[153] When there was other circuit precedent to substantiate its reliance on *Chevron*, the EPA was perhaps not yet accustomed to the trend of narrowing *Chevron*, as shown by its *Sinclair* brief.

c. HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Association

A dispute regarding the small refinery exemption reached the Supreme Court in 2021 in *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels*

146. *See id.* at 991–93 (noting that one factor in determining whether *Chevron* deference applies is whether the decision was a written formal decision by the head of the agency).

147. *Id.* at 998.

148. *Id.* at 999.

149. *Id.*

150. *Id.* at 1001 (Lucero, J., dissenting).

151. *See* Supplemental Br. on the Applicability of *Chevron* Deference from Resp'ts, Sinclair Wyo. Refin. Co. v. EPA, 887 F.3d 986 (10th Cir. 2017) (No. 16-9532).

152. *Id.* at 3, 8.

153. Heinzerling, *supra* note 27.

Association.[154] At issue in *HollyFrontier* was the EPA's interpretation of the word "extension" in § 7545(*o*)(9)(B)(i).[155] Three small refineries had received a small refinery exemption from the EPA, and when their exemptions lapsed, they petitioned the EPA for exemption again in 2017 and 2018.[156] The EPA granted the exemptions, and a group of renewable fuel producers objected, petitioning for review in the Tenth Circuit.[157] A comparison of the government's briefs at the Tenth Circuit and the Supreme Court exemplifies the agency's recognition of the decline of *Chevron* at the Supreme Court.

i. The Tenth Circuit Decision

A group of renewable fuel producers sued the EPA in the Tenth Circuit, challenging its order granting the extensions of the small refinery exemptions.[158] In its brief, the EPA first argued that the statutory language was not ambiguous and that its interpretation of "extension" fit within that language.[159] The EPA next argued that even if the language was ambiguous, its interpretation was reasonable, and thus *Chevron* deference was due at step two.[160] Secondarily, the EPA argued its interpretation was at least deserving of *Skidmore* deference.[161] In anticipation of the court's deferral to *Sinclair*, the EPA distinguished its interpretation here from its prior interpretation in *Sinclair*.[162] Despite this, the EPA seemed adamant that *Skidmore* was not the appropriate standard of deference, stating two separate times that its interpretation should be upheld "under *Skidmore* or *any level of deference*."[163]

The Tenth Circuit found that *Chevron* deference was inapplicable and instead applied *Skidmore*, relying on *Sinclair*.[164] The court found the argument that *Chevron* was the applicable standard unpersuasive because it "assumes not only that the 2014 Small Refinery Rule is up for grabs in this litigation, but also that the Rule sets forth a permissible construction of the term 'extension.' Neither assumption is accurate."[165] Ultimately, the court held that the EPA's interpretation of "extension" was not even deserving of *Skidmore* deference because "[p]aired with the rest of the amended Clean Air Act . . . common definitions of

154. HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n, 141 S. Ct. 2172 (2021).
155. *See id*. at 2176.
156. *Id*.
157. *Id*.
158. Renewable Fuels Ass'n v. EPA, 948 F.3d 1206 (10th Cir. 2020), *rev'd sub nom*. *HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172 (2021).
159. Resp't's Br. at 25–27, *Renewable Fuels*, 948 F.3d 1206 (No. 18-9533).
160. *Id*. at 34.
161. *Id*. at 34–38.
162. *Id*. at 37–38.
163. *Id*. at 38, 40 (emphasis added).
164. Renewable Fuels Ass'n v. EPA, 948 F. 3d 1206, 1244 (10th Cir. 2020), *rev'd sub nom. HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172 (2021).
165. *Id*. at 1251.

'extension' mean that a small refinery which did not seek or receive an exemption in prior years is ineligible for an extension."[166]

The structure and language of EPA's brief demonstrate that the agency still believed that *Chevron* was the appropriate standard of deference for this type of agency action. However, this brief differed from the agency's brief in *Sinclair* in that it recognized the courts' turn toward the lower *Skidmore* deference standard, and thus made a secondary argument using this standard to supplement its *Chevron* argument. Thus, as of 2020, the EPA was beginning to shift its briefing and litigation strategy, knowing that *Chevron* deference was not as reliable as it once was. Still, its strategy did not persuade the Tenth Circuit, and the case was subsequently appealed to the Supreme Court.

ii. HollyFrontier *at the Supreme Court*

The government's brief at the Supreme Court told a different story from the EPA's brief at the Tenth Circuit.[167] The government's brief did not argue that *Chevron* deference was due.[168] Instead, it stated that it "is not invoking *Chevron* in this Court" because "EPA no longer adheres to the interpretation of Section 7545(o)(9)(B)(i) that petitioners believe to be implicit in the 2014 regulation."[169] The government argued that because a traditional justification for *Chevron* deference is that "'policy choices' should be left to the Executive Branch," it does not make sense to defer to an earlier agency position when the Executive Branch has changed its position on the appropriate interpretation.[170] The Court pulled from this portion of the government's brief in the opinion, stating that because the government is not invoking *Chevron* in light of the change of administration, the Court "decline[s] to consider whether any deference might be due."[171]

This exemplifies agencies' current awareness of the Court's attitude toward *Chevron* and how the government can take advantage of the Court's distaste toward *Chevron* deference when it benefits the policy stance of the current presidential administration. The government here knew that if it did not argue for *Chevron* deference, there was little chance that the Court would consider it as the appropriate deference standard.

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Overall, this line of cases demonstrates the courts' systematic narrowing of *Chevron* deference in the context of the § 211 small refinery exemption and

166. *Id*. at 1245.

167. The EPA, Department of Justice, and Solicitor General wrote the brief for the federal respondent. Br. for the Federal Resp't, HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n, 141 S. Ct. 2172 (2021); Br. for Resp'ts, HollyFrontier Cheyenne Ref. LLC v. EPA, 2021 WL 8269329.

168. *See* Br. for the Federal Resp't, *HollyFrontier*, 141 S. Ct. 2172.

169. *Id*. at 46.

170. *Id*. at 46–47.

171. HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n, 141 S.Ct. 2172, 2180 (2021).

shows how the EPA's briefs have changed over time in response. In years past, the EPA relied on *Chevron* as nearly a surefire way to get deference—as it did in *Hermes* and *Sinclair*. When the courts narrowed *Chevron*'s scope, holding in *Sinclair* that lower *Skidmore* deference was the appropriate standard, the EPA's subsequent briefs recognized that it would likely need to argue *Skidmore* to win but still clung to *Chevron*, indicating the agency believed this was the applicable standard. When the *Chevron*-averse Supreme Court granted certiorari, the government took advantage of the Court's silence on *Chevron* when it suited its changed policy stance.

Even though it was convenient for the agency to abandon *Chevron* in *HollyFrontier* for the purposes of that case, the EPA seems to have given up on *Chevron* after *HollyFrontier* in the § 211 small refinery exemption context in the circuit courts. In *Suncor Energy, Inc. v. EPA*, the petitioner, who operated two oil refining operations, sought review of the EPA's denial of its requested extension of its small refinery exemption.[172] The Tenth Circuit, relying on *Sinclair*, found that *Skidmore* was the applicable deference standard and held that the EPA's interpretation of the term "refinery" should not receive *Skidmore* deference.[173] Notably, the EPA's brief directly recognized that "that circuit precedent dictates that *Chevron* does not apply to its adjudication of small refinery petitions" and "reserve[d] its right to later ask for review of this precedent," indicating that the agency is playing by the court's rules for now with only a glimmer of hope of *Chevron* having success in a future appeal.[174]

This transition in the § 211 small refinery exemption context as well as in the § 209 California waiver cases demonstrates the EPA's changes in its briefing strategy. The agency has increasingly recognized that in these statutory contexts, the Court's attitude toward *Chevron* is here to stay—at least for the foreseeable future. And now, the Supreme Court's stance is impacting the likelihood of *Chevron* success at the circuit courts too.

B. HOW RULEMAKING HAS CHANGED: THE RECENT SILENCE ON *CHEVRON*

A comparison of rules promulgated by the EPA over time indicates that the decline of *Chevron* deference by the Court has potentially affected how the agency drafts rules.[175] There is little empirical work studying the effect that *Chevron* has had on agency rule drafting because of the difficulty of confounding

172. Suncor Energy (U.S.A.), Inc. v. EPA, 50 F.4th 1339, 1343 (10th Cir. 2022).

173. *Id.* at 1355–58.

174. Final Br. for U.S. Env't Prot. Agency at 35 n.4, *Suncor Energy*, 50 F.4th 1339 (No. 19-9612).

175. Although an analysis and comparison of these rules indicates a decline in the use of *Chevron* by the EPA, this Note only suggests a pattern that exists among the rules compared between the first two years of the Obama administration and the first two years of the Biden administration, looking specifically at rules promulgated by the EPA.

factors.[176] Jonathan Choi conducted only the second empirical analysis to study the effect of *Chevron* on agency rule drafting using *Mayo Foundation v. United States*, a 2011 Supreme Court decision requiring agencies to apply the *Chevron* framework to interpretive tax regulations.[177] *Mayo Foundation* provided the unique opportunity to have a "treatment group (interpretative tax regulations) and a control group (all other regulations)."[178] Choi's study concluded that *Chevron* caused the Internal Revenue Service to write rules that are more detailed and policy-focused, shifting strongly away from statutory explanations and toward normative explanations for interpretive tax regulations compared to other regulations.[179]

Given that *Chevron* impacted agency rule drafting in some contexts, there is a strong possibility that agencies like the EPA have changed their rule drafting in reaction to the decline of *Chevron*. Recent data suggests this is true. As of August 2022, only five of the fifty-one major rules and other actions made by agencies since the start of Biden's administration—a mere 9.8%—invoked *Chevron*, and only one of those rules relies on *Chevron* in any "meaningful" way.[180] A comparison of the language in rules invoking *Chevron* promulgated during the first two years of the Obama administration with rules invoking *Chevron* from the first two years of the Biden administration shows how the EPA has altered its rule drafting to limit its reliance on *Chevron* deference, perhaps in anticipation of diminished judicial success when relying on *Chevron*.[181]

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176. Jonathan H. Choi notes that "despite the enormous volume of scholarly literature on *Chevron*, almost no empirical work has studied the effect of *Chevron* on agencies themselves. The only study so far to address this question—Christopher Walker's survey of agency rule drafters—was inconclusive." Jonathan H. Choi, *Legal Analysis, Policy Analysis, and the Price of Deference: An Empirical Study of* Mayo *and* Chevron, 38 YALE J. ON REG. 818, 821 (2021) (noting that "the rise of cost-benefit analysis . . . and the new textualism" makes it difficult to establish a control group to evaluate how *Chevron* impacted agency rule drafting).

177. *Id*. at 818, 822.

178. *Id*. at 818.

179. *Id*. at 849–51.

180. The rule that invokes *Chevron* in a "meaningful" way is a proposed rule about the "waters of the United States," and may rely on *Chevron* more than other recent rules because it is an attempt to overturn a rule promulgated during the Trump administration that did rely on *Chevron*. *See* Kunhardt and O'Connell, *supra* note 3 (noting this data was found in the Brookings Regulatory Tracker).

181. For consistency, this section compares rules promulgated during administrations of the same political party. Further, the comparison of Obama-era and Biden-era rules likely provides a more accurate depiction of how rule drafting has shifted to limit reference to *Chevron* than would a comparison to Trump-era rules given the administration's particular distaste toward expansive administration action. *See, e.g.*, Kathy Wagner Hill, *The State of the Administrative State: The Regulatory Impact of the Trump Administration*, 6 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 25, 26–27 (2019) (noting that "[t]he Trump Administration is by its own admission not just anti-regulatory, but is strongly anti-administrative state as well," which impacted the administration's administrative and judicial actions).

1. EPA Rules During the Obama Administration

During the Obama administration, the EPA relied heavily and explicitly on *Chevron* deference to justify agency action.[182] For instance, an EPA rule from June 2010 about "tailoring the applicability criteria that determine which stationary sources and modification projects become subject to permitting requirements for greenhouse gas (GHG) emissions under the Prevention of Significant Deterioration (PSD) and Title V programs of the [CAA]" cited *Chevron ninety times* in the main text of the final rule.[183] In the first paragraph of the final rule, the EPA announced that the "legal basis for this rule is our interpretation of the PSD and Title V applicability provisions under the familiar *Chevron* two-step framework for interpreting administrative statutes."[184] The EPA devoted an entire section to explaining how *Chevron* deference applies under three *Chevron* sub-doctrines (the absurd results, administration necessity, and one-step-at-a-time doctrines).[185] Moreover, the rule asserted that the EPA should receive deference at both step one and step two for its interpretation of the PSD[186] and that it should receive deference at step two for its interpretation of Title V of the CAA provision.[187] This extensive two-step analysis that incorporates several sub-doctrines is indicative of the EPA's confidence in its *Chevron* argument should the rule be challenged in the future. In addition, the EPA announced in this rule that it planned to continue to use the *Chevron* framework in a supplemental notice of proposed rulemaking in 2011, indicating that it expected to be able to rely on this framework for the foreseeable future.[188]

This rule perhaps falls on the far end of the spectrum of the use of *Chevron* in an EPA rule,[189] but it still shows the normalcy with which the EPA utilized *Chevron* when drafting and promulgating rules during the Obama administration. This pattern becomes salient when compared to EPA rules promulgated during the Biden administration.

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182. Kunhardt and O'Connell, *supra* note 3.

183. *See generally* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514 (June 3, 2010).

184. *Id.* at 31516; *see also* Kunhardt and O'Connell, *supra* note 3.

185. *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31513, 31541–49.

186. *Id.* at 31517.

187. *Id.*

188. *Id.* at 31516.

189. *See* Mandatory Reporting of Greenhouse Gases from Magnesium Production, Underground Coal Mines, Industrial Wastewater Treatment, and Industrial Waste Landfills, 75 Fed. Reg. 39735, 39752 (July 12, 2010) (exemplifying an instance where the EPA relied less heavily on *Chevron*—only citing it once—but still applied the traditional framework and analysis to explain why the EPA's interpretation is "entirely reasonable" given the language and congressional intent of the statute).

2. EPA Rules During the Biden Administration

Of the five rules promulgated during the Biden administration that reference *Chevron*, the EPA promulgated two of them.[190] The way the EPA used *Chevron* in these rules in comparison to the Obama-era rules demonstrates how the EPA started to change its rule drafting in accordance with the shifting attitude toward *Chevron*.

In a rule from October 2021 about the "phasedown of hydrofluorocarbons" under the American Innovation and Manufacturing Act, the EPA only mentioned *Chevron* in a brief response to a comment about the definition of the term "consumption" in the statute.[191] The final rule did not reference *Chevron* anywhere else,[192] nor was it cited at all in the proposed rule, showing that the EPA did not draft the rule with the intention of relying primarily on *Chevron* deference.[193]

This leads to the question: what did the EPA do instead of relying on *Chevron*? The final rule did not cite other deference regimes, like *Skidmore*.[194] It also did not dedicate a section to laying out its legal rationale the way the June 2010 Obama-era rule did.[195] Instead, the EPA referenced its own past statutory interpretation as precedent,[196] made arguments using judicial precedent,[197] and referenced the purpose of the statute.[198] In other recent rules, the EPA used similar

190. One of the remaining three rules from the Biden administration also came from the EPA, but that proposed rule referred to *Chevron* more explicitly and was an outlier in comparison to the other four rules that referenced *Chevron* less explicitly. *See* Kunhardt and O'Connell, *supra* note 3.

191. Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program Under the American Innovation and Manufacturing Act, 86 Fed. Reg. 55116, 55131 (Oct. 5, 2021).

192. *See generally id.*

193. *See generally* Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program Under the American Innovation and Manufacturing Act, 86 Fed. Reg. 27150 (May 19, 2021).

194. Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program Under the American Innovation and Manufacturing Act, 86 Fed. Reg. 55116 (Oct. 5, 2021) [hereinafter Phasedown of Hydrofluorocarbons Oct. 2021].

195. *Compare id.*, *with* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514, 31515 (June 3, 2010) (incorporating a distinct section for legal justification titled "What is the legal and policy rationale for the final actions?").

196. *See, e.g.*, Phasedown of Hydrofluorocarbons Oct. 2021 at 55135 ("This exclusion was not found in § 82.3 but matches EPA's long-held interpretation in CAA title VI programs that reclamation does not constitute production and that reclaimed material is inherently reused/recycled.").

197. *See, e.g.*, *id.* at 55193 ("Therefore, EPA's decision to clearly assert in this rule that EPA intends to release the designated information aligns with the Supreme Court's decision and the subsequent guidance that the government's assurances that a submission will be treated as *not* confidential should dictate the expectations of submitters. Moreover, this interpretation and approach are consistent with other applicable case law.").

198. *See, e.g.*, *id.* at 55162 ("EPA is finalizing its proposed interpretation that subsections (j)(2)(A) and (j)(2)(B) be read together to mean that Congress intended for the international transfer provisions only to apply to countries that have revised their production limits to establish a phasedown schedule at least as stringent as the AIM Act's. All commenters on this topic agreed that in order to meet the

strategies, remaining silent on *Chevron*. In an April 2021 rule updating the 2008 ozone National Ambient Air Quality Standards (NAAQS), the EPA justified its action in response to a comment by citing judicial precedent where circuit courts and the Supreme Court have affirmed the EPA's interpretive approach.[199]

These rules use techniques commonly used at step two to show its interpretations are reasonable without reference to the traditional *Chevron* framework. In this way, the EPA rules mirror the Supreme Court's silence on *Chevron* while still attempting to justify the agency's actions through precedential and purpose-based rationales.

III. HOW THE EPA SHOULD DRAFT RULES GOING FORWARD

These examples show how the EPA has perhaps already begun to alter its briefs and rules in response to the decline of *Chevron*, at least in some contexts. However, the EPA must do more *if* the agency wants to continue to promulgate regulations and subsequently increase its likelihood of success in the courts going forward. Although the EPA's recent rules seem to rely less on *Chevron*,[200] if the EPA wants its actions to pass judicial scrutiny in the future, the agency should continue to make both substantive and procedural changes at the rule drafting phase—rather than relying on its briefs once litigation has been initiated—in anticipation of the continuously changing state of administrative deference doctrine.[201]

A study by Christopher Walker provides important background about the familiarity of agency regulators with deference regimes that informs the subsequent recommendations in this Part. Walker's 2015 study empirically evaluates the extent to which agency regulators use judicial deference doctrines during rule

environmental goals of the AIM Act, transfers must only be with countries that have phasedown schedules that are the same or more stringent than in the AIM Act.").

199. *See, e.g.*, Revised Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 85 Fed. Reg. 23054, 23071–72 (Apr. 30, 2021) ("These comments do not inform how EPA should define significant contribution nor do they recognize that EPA has discretion to define significant contribution. The D.C. Circuit first upheld the validity of using cost as part of the method for determining "significance" in *Michigan* v. *EPA,* 213 F.3d 663, 675-79 (D.C. Cir. 2000). The Supreme Court upheld that same approach in *EPA* v. *EME Homer City Generation, L.P.,* 572 U.S. 489, 512–20 (2014).").

200. *See supra* Part II.B.

201. The Supreme Court granted certiorari on May 1, 2023 in *Loper Bright Enterprises v. Raimondo*, a case that asks the Court to either overrule or clarify the *Chevron* doctrine, demonstrating the need for agencies like the EPA to anticipate changes to the agency deference regime ex ante at the rule drafting phase. Greg Stohr, *Supreme Court to Mull Voiding* Chevron *Ruling on Agency Power*, BLOOMBERG LAW (May 1, 2023), https://perma.cc/UZ5R-MWHA. The Court subsequently granted certiorari in *Relentless Inc. v. Dep't of Commerce* as a companion case to *Loper Bright*. *Relentless, Inc. v. Dep't of Com.*, No. 22-1219 (2023) (Supreme Court argued Jan. 17, 2024).

drafting.[202] Walker's study, a 195-question survey, which had 128 responses from seven executive departments and independent agencies,[203] showed that *Chevron* deference was "the tool cited most frequently as known and used in drafting."[204] "94% of the rule drafters knew *Chevron* deference by name, followed by 81% for *Skidmore*, 61% for *Mead*, and 53% for *Seminole Rock/Auer*," which are the other available deference regimes.[205] Importantly, 85% of rule drafters said they "strongly agreed" or "agreed" with the "bedrock *Chevron* principle that federal agencies, not courts, are the primary interpreters of statutes Congress has charged them to administer," [206] and 90% of rule drafters reported using *Chevron* in their rule drafting—more than any other interpretive tool in the survey.[207] Furthermore, two in five rule drafters "agreed" or "strongly agreed" that the agency "is more aggressive in its interpretive efforts if it is confident that *Chevron* deference (as opposed to *Skidmore* deference or de novo review) applies."[208] The respondents reported that the principles most affecting whether *Chevron* deference applies come from *Mead*: 1) "whether Congress authorized the agency to engage in rulemaking and/or formal adjudication under the statute (84%)," and 2) "whether the agency promulgated the interpretation via rulemaking and/or formal adjudication (80%), followed closely by whether the agency has expertise relevant to interpreting the statutory provisions at issue (79%)."[209]

These results indicate that agency rule drafters are well aware of *Chevron* deference and invoke it far more often than other deference regimes when drafting rules,[210] which is not a promising result given the current state of *Chevron*. Additionally, agencies are more confident when using *Chevron*, so when *Chevron* applies, their actions are more aggressive.[211] These conclusions are indicative of several substantive changes that federal agencies, including

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202. *See* Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999 (2015).

203. The EPA did not participate in this survey because it did not want to "burden its entire rule-drafting staff with the survey." *Id.* at 1000, 1014–15 n.61. However, there are no factors indicating that the survey's findings would be substantially different for EPA rule drafters.

204. *Id.* at 1007.

205. *Id.* at 1062–63 (noting that far fewer respondents were aware of *Mead* by name and far fewer used it in drafting when compared to *Chevron*, but the answers indicate that the respondents understood the substance of *Mead* in practice).

206. *Id.* at 1051.

207. *Id.* at 1062 (62% of rule drafters used *Skidmore*, 49% used *Mead*, and 39% used *Seminole Rock/Auer*, but 11% "indicated that none of these deference doctrines played a role in their drafting decisions.").

208. *Id.* at 1063.

209. *Id.* at 1063–64 (noting that "[n]o other factor received an affirmative response from more than half of the rule drafters surveyed").

210. *Id.* at 1062.

211. *Id.* at 1063.

the EPA, should weigh at the rule drafting stage if they want to issue regulations that will be upheld in court.[212]

First, when drafting, the EPA should focus on other deference regimes—like *Skidmore*—that courts might look upon more favorably. Given that agency rule drafters were less aware of the names of other judicial deference doctrines and used them less frequently than *Chevron*,[213] the EPA could implement training about other deference doctrines and encourage increased use of them. Some scholars argue that even if *Chevron* is dead, doctrines like *Skidmore* may survive.[214] If *Skidmore* does live on, the more that EPA regulators utilize the *Skidmore* standard to justify their action, the more cases challenging these rules will reach the courts.[215] If favorable case law using *Skidmore* grows and the EPA wants to promulgate aggressive agency action in the future, the agency will likely feel more confident relying on *Skidmore* when taking more aggressive, far-reaching action.[216]

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212. Walker published his survey results in 2015, so it is possible that the results would differ now, but it is unlikely that they would shift dramatically.

213. Walker, *supra* note 202, at 1062.

214. *See, e.g.*, Jack M. Beerman, *The Anti-Innovation Supreme Court: Major Questions, Delegation,* Chevron *and More*, 65 WM. & MARY L. REV. (forthcoming 2023-24) (finding that the likely doctrinal result of overruling *Chevron* would be to reinstall *Skidmore* given how Justice Gorsuch "endorsed *Skidmore* as more 'faithfully' following the APA's judicial review provisions than Chevron") (citing *Buffington v. McDonough*, 143 S. Ct. 14, 17 (2022) (Gorsuch, J. dissenting from the denial of certiorari)); Choi, *supra* note 176, at 822 (noting that Justice Breyer and Judge Posner "have argued that *Chevron* deference is similar to *Skidmore* deference"); Aaron Saiger, *Derailing the Deference Lockstep*, 102 B.U. L. REV. 1879, 1927 (2022) (maintaining that agencies should be given "*Skidmore* weight," meaning "a respect for agencies' exercises of judgment in light of both their interpretive validity and agencies' institutional role"); *see also* Carly L. Hviding, *What Deference Does It Make? Reviewing Agency Statutory Interpretation in Maryland*, 81 MD. L. REV. ONLINE 12, 13 (2021) (concluding that "[w]hen Maryland courts give weight to an agency interpretation of the law, it almost always resembles federal *Skidmore* deference"); Paul R. Gugliuzza, *Patent Law's Deference Paradox*, 106 MINN. L. REV. 1397, 1443–45 (2022) (suggesting that *Skidmore* is the appropriate deference regime when the Federal Circuit directly reviews the Patent Office); Richard W. Murphy, *Abandon* Chevron *and Modernize Stare Decisis for the Administrative State*, 69 ALA. L. REV. 1, 5-6, 8 (2017) (noting that evidence that the "choice between *Chevron* and *Skidmore* deference should be outcome determinative" is "equivocal at best," and "the choice between *Chevron* and *Skidmore* standards of review has little demonstrable effect on the level of scrutiny that courts apply to agency statutory constructions"). *But see, e.g.*, Nathan D. Richardson, *Deference Is Dead (Long Live* Chevron*)*, 73 RUTGERS U. L. REV. 441, 448, 516 (2021) (noting that a looser *Skidmore* standard might be too difficult to implement in practice and arguing that *Chevron* is not likely to be completely overruled in the near future).

215. Jonathan H. Choi conducted an empirical study that found that "increased judicial deference could encourage an agency to spend greater effort to justify its rulemaking" and that "under a weaker deference regime, agencies may not find it worthwhile to exert much effort obeying rulemaking procedures-procedural compliance might become irrelevant if the regulation is rejected on statutory interpretation grounds." Choi, *supra* note 176, at 830. The suggestion in this Note that the EPA focus on *Skidmore* deference at the drafting stage proposes that the agency should continue to spend time and effort at the drafting stage to justify its rulemaking, even when relying on a "less deferential regime, like *Skidmore*." *Id.*

216. *See* Walker, *supra* note 202, at 1063 (explaining that rule drafters felt more confident using *Chevron* and thus acted more aggressively when that doctrine was applicable).

To receive *Skidmore* deference, an agency must satisfy the court of its "power to persuade," which depends on the "thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." [217] Given the growing textualist bent of the current Court, the EPA should focus on augmenting its textual arguments when rule drafting and responding to public comments.[218] This will set up the agency to make more robust textual arguments in subsequent litigation, perhaps resulting in a better chance of success in attaining *Skidmore* deference.[219]

The feedback loop that is established when an agency relies on a doctrine in drafting its regulations, the courts find favorably for the agency using that doctrine, and the agency cites judicial precedent in subsequent rules was successful for a long period of time for *Chevron*, and now similar success could play out for *Skidmore* deference. However, given what has happened to *Chevron* and the current attitude of the Court toward the power of the administrative state,[220] this strategy could potentially experience a similar rise and fall as *Chevron* if hostility toward agency deference and the growth of the administrative state continues to increase among the Supreme Court and federal judiciary at large.[221] It is yet to be seen, though, how far agencies can push other deference doctrines, so this is a plausible strategy at the current moment.

Furthermore, the EPA could also emphasize within the agency the importance of surviving judicial review in comparison to other factors that are considerd during the drafting phase. In the years after the *Chevron* decision (when courts were

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217. Skidmore v. Swift, 323 U.S. 134, 140 (1944); United States v. Mead Corp., 533 U.S. 218, 234 (2001) (noting that some deference to agency interpretations is justified "given the 'specialized experience and broader investigations and information' available to the agency" and the importance of uniformity in a regulation's meaning and application) (quoting *Skidmore*, 323 U.S. at 139).

218. *See* Bruhl, *supra* note 85 (noting that the Supreme Court has moved in a "textualist direction" for statutory interpretation); Kristin E. Hickman, *The Roberts Court's Structural Incrementalism*, 126 HARV. L. REV. 75, 77 (2022) (noting that the Roberts Court is "inclined toward originalist and textualist methods of interpretation"); *see also* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1288–89 (2007) (emphasizing the importance that agency expertise has played in a "sizable number of the . . . *Skidmore* applications" and noting that the agency should make clear how it applied agency expertise with the facts at hand to make a statutory interpretation).

219. *See* Bruhl, *supra* note 85 (concluding, based on an empirical analysis, that Supreme Court litigators' briefs have reflected the Supreme Court's shift toward textualism); *see, e.g.*, Becerra v. Empire Health Found., for Valley Hosp. Med. Ctr., 597 U.S. 424, 445 (2022) (relying on "text" and "structure" of the text to support deference to the agency's action); Am. Hosp. Ass'n v. Becerra, 596 U.S. 724, 737 (2022) (noting that the "text and structure of the statute" make this case "straightforward").

220. *See, e.g.*, Choi, *supra* note 176, at 820–21 (noting that the appointments of Justices Gorsuch and Kavanaugh have "inspired fresh arguments about judicial deference" and the administrative state); Richardson, *supra* note 214, at 516–19 (finding that Justices Thomas, Gorsuch, Alito, and Kavanaugh have indicated their distaste for *Chevron* and predicting that the Court will continue to narrow *Chevron* in the future); Stohr, *supra* note 201 (indicating the strong possibility that the Supreme Court will overrule or at the least narrow *Chevron* doctrine in the next Term).

221. *See* Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 2–3 (explaining the Roberts Court's growing skepticism toward the administrative state).

increasingly relying on the two-step framework), EPA attorneys would "stress the flexibility that the agency has under its statutes and urge the agency to probe the limits of its authority."[222] Given that *Chevron* is currently still (technically) good law but the Supreme Court has not favorably cited it in years, the EPA should shift its approach away from pushing the *Chevron* deference envelope and instead look for ways to anticipate the judiciary's future attempts to shrink the administrative state.[223]

During rule drafting, the EPA has to weigh different goals that impact the way the rule is drafted, including timeliness, administrative efficiency, scientific and technical credibility, fairness, political review, and surviving judicial review, among other considerations.[224] Different offices within the EPA involved in the drafting of any given rule have differing fidelity to each of these goals.[225] Because administrative deference is a quickly changing landscape today, the EPA could benefit from developing a metric to weigh fidelity to the statute and surviving judicial review more than other factors, especially for rules determined to be highly susceptible to litigation.[226] This could most simply involve an increase in the weight given to the advice of officials within the EPA, like the members of the Office of the General Counsel, that specialize in the potential for a rule to survive judicial review.[227]

Other solutions would require more involved restructuring of the working group but also potentially present additional benefits. For example, an "outside advisor model" for rule drafting enlists outside experts to help during rule drafting.[228] The EPA could bring in more outside experts who specialize in the area of judicial review in administrative law cases. This would increase the resources required to draft the rule in the short term but ultimately save the EPA money later on by avoiding extensive litigation. Moreover, this is a flexible strategy, allowing the EPA to internally determine whether a rule is particularly susceptible to judicial review and whether outside experts might be helpful.

Additionally, the "adversarial model" for rule drafting could be utilized more extensively.[229] The adversarial model "forces staffers with different perspectives to confront one another in an adversarial setting" where "[d]isagreements over facts, assumptions, inferences, or policies are aired in an adversarial fashion, either in memoranda or in oral presentations, before the ultimate agency

222. Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 LAW & CONTEMP. PROBS. 57, 64 (1991).

223. *Id.* at 108 ("[O]ver the course of day-to-day decisionmaking, the structure of the decisionmaking process may be the most important determinant.").

224. *Id.* at 77.

225. *Id.* at 77–78.

226. *See id.* at 80–83.

227. *Id.* (finding the Office of the General Council places more weight on surviving judicial review than other EPA offices).

228. *Id.* at 97–99.

229. *Id.* at 99–102.

decisionmaker."[230] This method has the effect of "inhibit[ing] the natural tendency of bureaucrats to ignore or belittle information that undercuts their position" and confronting vital issues at the early stages of drafting.[231] The EPA could allocate more time to adversarial discussion, emphasizing scrutiny toward the offices advocating for the legal rationale supporting the rule to identify as many problems as possible with surviving judicial review early on in the drafting process.

Lastly, it is worth noting a strategy that the EPA should not count on anymore: relying heavily on its own past interpretations for their precedential value in its rules and adjudications. In the past, the EPA workgroup that drafted rules would be influenced by and "likely adhere to precedent" from within the agency.[232] Agency members who could recount "a prior occasion in which the agency resolved an issue in a particular way" significantly influenced the working group's output.[233] For example, the EPA wrote in its brief in *Sinclair* that "[i]n considering whether *Chevron* deference applies to an interpretation issued in an adjudication, this Court 'must consider whether the decision constitutes binding precedent within the agency.'"[234] The EPA further explained that "the agency applied the same interpretation to Sinclair's petitions that it had applied to all small refinery petitions since 2011," and that the EPA "considers its decisions to be precedential, [so] the agency relies on past rulings to guide future ones."[235] On review, the court determined that this was insufficient to justify *Chevron* deference, applying *Skidmore* instead.[236]

Although this example is from an EPA brief, the same warning holds in the context of EPA rules. *Sinclair* demonstrates that the EPA should not rely on the EPA's own interpretations to justify receiving *Chevron* deference, especially because of the probability that prior precedential standards are significantly altered—if not overruled—by the time of judicial review.[237] However, as long as *Skidmore* is alive, the EPA might successfully receive a lower form of deference to prior agency interpretations.

These proposals are not extensive recommendations, and it is likely that the EPA is already employing some (and likely many) of these strategies. However, the EPA should continue to evaluate the combination of the strategies it uses and adapt based on which ones are most effective, time-saving, and cost-efficient in anticipation of the continuously evolving state of administrative deference doctrine.

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230. *Id.* at 99.
231. *Id.* at 100.
232. *Id.* at 87.
233. *Id.*
234. *See* Supplemental Br. on the Applicability of *Chevron* Deference from Resp'ts at 7, Sinclair Wyo. Refin. Co. v. EPA, 887 F.3d 986 (10th Cir. 2017) (No. 16-9532).
235. *Id.* at 8.
236. *See* Sinclair Wyo. Ref. Co. v. EPA, 887 F.3d 986, 991–92 (2017).
237. This is especially true given the rate at which administrative law doctrine has been altered in recent Court Terms. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587 (2022).

CONCLUSION

In June 2024, after substantive work on this Note was complete, the Supreme Court overruled *Chevron* in *Loper-Bright Enterprises v. Raimondo*.[238] In the years leading up to the overruling of *Chevron*, the EPA has shifted its argumentation strategies in its appellate briefs in at least some contexts over time, perhaps to account for doctrinal shift regarding *Chevron*. The rate at which the EPA cites *Chevron* in rules has also decreased, as demonstrated by a comparison of Obama-era and Biden-era EPA rules.[239] However, if the EPA wants its actions to survive judicial review, it must now continue to make both substantive and procedural changes in the drafting phase in anticipation of future litigation. The suggestions in this Note are not all-inclusive, especially given the ever-changing landscape of administrative law and the uncertainties of the administrative state in a post-*Chevron* world. But as with the EPA, other agencies must also change their rule-drafting processes to account for the overruling of *Chevron*. Given that the administrative state as we knew it for four decades is no more, and it is yet to be seen if and how agencies will successfully obtain deference in a post-*Chevron* world, the suggestions in this Note are particularly relevant and ripe for consideration at this moment in time.

238. Loper Bright Enterprises v. Raimondo, No. 22-1219, 2024 WL 3208360, at *22 (U.S. June 28, 2024).

239. *See* Kunhardt and O'Connell, *supra* note 3.