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Critical Legal Issues: **WORKING PAPER SERIES**

LIFE AFTER *CHEVRON v. NRDC*: OPPORTUNITIES AND CHALLENGES

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LIFE AFTER *CHEVRON v. NRDC*: OPPORTUNITIES AND CHALLENGES

INTRODUCTION

Following the U.S. Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*[1], the path forward is laden with both opportunities for regulated parties and challenges for federal administrative agencies. The ruling sets a new precedent that will undoubtedly impact the broader regulatory landscape. This WORKING PAPER examines key opportunities and challenges in a post-*Chevron* deference administrative law world.

I. THE *LOPER BRIGHT* DECISION

On June 24, 2024, the U.S. Supreme Court upended forty years of administrative law jurisprudence when it overruled *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* [2] *Chevron* required federal courts to defer to an administrative agency's interpretation of a statute whenever both the intent of Congress is ambiguous and the agency's interpretation is reasonable. In a 6-3 decision, the Court in *Loper Bright* ruled that "*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority."[3] The decision was

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[1] *Loper Bright Enterprises v. Raimondo*, 603 U.S.___, 144 S. Ct. 2244 (2024) decided together with *Relentless, Inc. v. Department of Commerce*.

[2] 467 U.S. 837 (1984).

[3] 144 S. Ct. at 2237.

predicated on the requirements of the Administrative Procedure Act ("APA")[4], which instructs "the reviewing court" to "decide all relevant questions of law" and "interpret . . . statutory provisions." The Court found that the APA "cannot be squared with" *Chevron*'s directive to accept any "permissible" construction of an ambiguous statutory provision.[5] Even when a "statute [is] ambiguous, there is a best reading all the same," and the reviewing court is required to adopt the one that, "after applying all relevant interpretive tools [of statutory construction], [it] concludes is best."[6] Thus, *Loper Bright* leaves it to the federal courts alone to determine the best reading of a statute as opposed to deferring to an agency on one of multiple permissible interpretations.[7]

Importantly, *Loper Bright* reflects the majority's concern over the expansion of the administrative state and a sensitivity to the Executive Branch's usurpation of the constitutional principle espoused in *Marbury v. Madison* that federal courts are responsible to "say what the law is."[8] *Loper Bright* is much more the majority's bid to re-establish the proper lanes of the three branches of government than it is a power grab.[9] One could also view the

[4] 5 U.S.C. § 551 et seq. (1946).

[5] 144 S. Ct. at 2263.

[6] *Id.* at 2266.

[7] Finding the best reading is sometimes not so simple a task. *See* Christoher H. Marraro and Gary C. Marfin, "*The High Court's* Benzene *Decision at 40: Will It Rise If* Chevron *Falls?,*" Washington Legal Foundation *Legal Backgrounder,* Jan. 31, 2020.

[8] 1 Cranch 137,177 (1803).

[9] Justice Kagan's dissent implies the majority's decision is a power grab for the federal courts: "Today, the Court flips the script: It is now "the courts (rather than the agency)" that

decision as a not-so-subtle message to Congress that it should strive to make its intent clear in future legislation and its delegation to agencies obvious. Challenges and opportunities attendant to *Loper Bright* can be viewed thoughtfully in this context.

II. WHAT *LOPER BRIGHT* DOES NOT CHANGE

Loper Bright has its bounds. Its reach is limited to agency interpretations of statutes. The opinion does not apply to agency decisions where the agency is not interpreting a statute but instead is promulgating a technical standard within the bounds of obvious delegated authority. The Supreme Court has long held that the resolution of issues "requiring a high level of technical expertise … is properly left to the informed discretion of responsible federal agencies."[10] This type of agency action will continue to be reviewed under the APA's arbitrary-and-capricious standard as interpreted in *Motor Vehicle Mfrs. Ass'n U.S. Inc. v. State Farm Mut. Auto. Ins.*[11] ("*Motor Vehicle Ass'n*") where the "agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational

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will wield power when Congress has left an area of interpretive discretion. A rule of judicial humility gives way to a rule of judicial hubris. In recent years, this Court has too often taken for itself decision-making authority Congress assigned to agencies." 144 S. Ct. at 2294

[10] *Kleppe v. Sierra Club*, 427 U.S. 390, 412, (1976) (upholding Department of Interior's decision not to prepare a single Environmental Impact Statement related to coal mining operations covering entire Northern Great Plains Region.); *Baltimore Gas and Ele. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 103 (1983) (Nuclear Regulatory Commission's zero release assumption for licensing of individual nuclear plants was within the discretion and technical expertise of agency.).

[11] 463 U.S. 29, 43 (1983).

connection between the facts found and the choice made."

Second, Congress's clear grants of authority to fill statutory gaps it left are unaffected by *Loper Bright*. For example, in *Young v. Community Nutrition Institute*,[12] the Court upheld the Department of Health and Human Services' decision not to promulgate food safety regulations where Congress expressly delegated that "the Secretary shall promulgate regulations limiting the quantity [of any poisonous or deleterious substance added to any food] *to such extent as he finds necessary for the protection of public health*."[13] (emphasis supplied). The Court found Congress expressly committed the decision to act or not act to the Secretary and the Secretary's decision was not arbitrary or capricious.

Third, because *Loper Bright* applies only to agency conclusions of law and not to agency factfinding, formal agency rulemaking[14] and traditional agency adjudications[15] such as those of the National Relations Labor Board are largely unaffected by *Chevron*'s demise. Under the APA, agency findings of fact in formal agency proceedings can be set aside only if they are not supported by "substantial evidence."[16]

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[12] 476 U.S. 974 (1986).

[13] 21 U.S.C. § 346.

[14] 5 U.S.C §§ 554, 556-67 (1946).

[15] 5 U.S.C §§ 554, 556-67 (1946).

[16] 5 U.S.C § 706 (1966).

Fourth, rulemaking challenges apply to "final agency action" only and therefore, *Loper Bright* rarely will be applicable to agency interpretive rules, opinion letters, agency guidance, and the like that do not constitute "final agency action."

Finally, under *Loper Bright*, agency interpretations of law may, under certain circumstances, still be considered persuasive authority by litigants and courts. In *Loper Bright*, the Court pointed to *Skidmore v. Swift & Co.*,[17] under which "'the interpretations and opinions' of the relevant agency, 'made in pursuance of official duty' and 'based upon … specialized experience,' 'constitute[d] a body of experience and informed judgment to which courts and litigations [could] properly resort for guidance,' even on legal questions."[18] In *Skidmore*, the Court provided factors to be considered in determining the weight to be afforded agency interpretations[19] and found that agency interpretations meeting those factors were to be afforded "respect." But even here, *Loper Bright* replaces this limited deferential standard with "[c]areful attention to the judgment of the Executive Branch may help inform that inquiry."[20]

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[17] 323 U.S. 134 (1944).

[18] 144 S. Ct. at 2259.

[19] The weight of such a judgement in a particular case would depend upon 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." 323 U.S. at 140.

[20] 144 S. Ct. at 2273.

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III. NEW OPPORTUNITIES FOR THE REGULATED COMMUNITY IN FUTURE LITIGATION

Loper Bright presents the regulated community with new opportunities because it levels the playing field between the agency and the challengers in litigation over agency rulemaking. Now the "best" reading and not a "permissible" reading carries the day, and the government will no longer enjoy the advantage of attempting to formulate a statutory ambiguity in its quest to gain judicial deference. This landmark precedent has already had noteworthy influence on the federal district and appellate courts in several substantive areas of law.

Very recently, the Northern District of Texas issued a preliminary injunction against the Federal Trade Commission's rule to ban most non-compete agreements. In *Ryan et al. v. Chamber of Commerce et al.*,[21] the court cited *Loper Bright* in its analysis using the traditional tools of statutory construction to find that the Section 6 (g) of the Federal Trade Commission Act does not provide the Commission authority to issue substantive rules to regulate unfair methods of competition. In another very recent high visibility case, the Sixth Circuit in *In re: Safeguarding and Securing the Open Internet*[22] temporarily stayed the Federal Communication Commission's ("FCC") highly controversial "net neutrality" rule pending a decision on the

[21] Civil Action No. 3:24-CV-00986-E (N.D. Tex. July 3, 2024).

[22] No. 24-700 (6th Cir. Aug. 1, 2024).

merits. Although, the court invoked the "major questions" doctrine to find that petitioners would likely succeed on the merits, *Loper Bright* loomed large in the decision. The court did acknowledge that petitioners raised other arguments to be decided on the merits, but it pointed to the plain language of the FCC Act that "[n]owhere does Congress clearly grant the discretion to classify broadband providers as common carriers." Moreover, in his concurring opinion. Chief Judge Sutton cited to *Loper Bright* and applied the "best reading" of the statute as an "additional reason" for granting the stay.

The environmental and energy area is where *Loper Bright* may have its greatest influence because the Environmental Protection Agency ("EPA") often invokes *Chevron* deference in defending its rulemakings. For example, the Waters of the United States ("WOTUS") rule[23] has been challenged in three federal courts.[24] Each challenge was filed prior to *Loper Bright* and there have been no decisions on the merits. However, in both *West Virginia et al. v. EPA*[25] and *Texas et al. v. EPA*,[26] courts granted preliminary injunctions against enforcement of the rule in the face of EPA arguing that it should be accorded *Chevron* deference. Neither court accorded the EPA deference on its interpretation of the Clean Water Act and instead employed traditional tools of

[23] 88 Fed. Reg. 3004 (Jan. 18, 2023).

[24] See Commonwealth of Kentucky *et al. v. EPA et al.*, No. 3:23-cv-00007 (E.D. Ky.); *State of West Virginia et al. v. EPA et al.*, No. 3:23-cv-00032 (D.ND); and *Texas et al v. EPA,* No. 3:23-cv-00017 (S.D. TX.).

[25] 669 F. Supp. 3d. 781 (D. ND 2023).

[26] 662 F. Supp. 3d. 739 (S.D. TX. 2023).

statutory construction sanctioned in *Loper Bright* to find that EPA exceeded its authority by reading navigability out of the Act. Undoubtedly, *Loper Bright* will be front and center of any appeal of these cases. In another major test of the limits of agency discretion, the U.S. Supreme has granted certiorari in *Seven County Infrastructure Coalition et al. v. Eagle County Colorado et al.*,[27] a case that will examine the limits of the National Environmental Policy Act ("NEPA") to permit consideration of remote impacts including greenhouse gas emissions assessments. Interestingly, the Court has long ruled that "CEQ's interpretation of NEPA is entitled to substantial deference."[28] Considering *Loper Bright*, look for the Court to engage in a searching analysis of Congress's intent to reach a "best" reading of NEPA in terms of agencies' discretion to require consideration of so-called remote impacts.

Loper Bright has already left its mark in healthcare litigation. In *State of Tennessee et al. v. Becerra et al.*[29] the Southern District of Mississippi, applying *Loper Bright*, enjoined the Secretary of Health and Human Services from enforcing a May 2024 rule issued under the Affordable Care Act that extended anti-discrimination bar to protect gender identity. The court, after applying traditional tools of statutory interpretation, ruled "[i]nterpreting the word "sex" to include gender identity would create contradictions and

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[27] No. 23-975.

[28] *Andrus v. Sierra Club*, 442 U.S. 347,358 (1979).

[29] No. 1:24-cv-161 (S.D. Miss., July 3, 2024. The case is on appeal to the Sixth Circuit.

ambiguity within Title IX and its regulations.

Loper Bright is also at the forefront of petitioners' challenge to the Securities and Exchange Commission's ("SEC") controversial climate disclosure rules[30] in multi-district litigation in the Eighth Circuit.[31] Although the challengers' briefs were filed prior to *Loper Bright*, the SEC's brief cites the case six times, demonstrating the overarching importance of the precedent.

Even in the criminal law context where *Chevron* deference is not a factor, *Loper Bright* has made an entrance. In *United States v. Trumbull*,[32] the Ninth Circuit upheld an increase in Trumbull's sentence because the statutory Guideline warranted a sentence increase if his offense involved a "semiautomatic firearm capable of accepting a large capacity magazine." The court found that the statutory term was ambiguous and examined the Sentencing Commission's Note 2 to the Guideline that elaborated on the meaning of the statutory term. The court deferred to the Commission's interpretation as a fair and considered judgement. In a forceful concurring opinion, Judge Bea, citing *Loper Bright,* disagreed with the majority's deference to the Commission's Note 2. Rather, he reasoned that the term was not "ambiguous" but "vague" and he applied the traditional tools of statutory construction to reach a conclusion that Trumball's sentence should be upheld

[30] The Enhancement and Standardization of Climate-Related Disclosures for Investors, Securities Act Release No. 33-11275 (Mar. 6, 2024), 89 Fed. Reg. 21,668.

[31] *State of Iowa et al. v. SEC* (No. 24-1522 and consolidated cases).

[32] No. 23-12 (9th Cir. Aug. 22, 2024).

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because he used a "semiautomatic firearm capable of accepting a large capacity magazine" in the commission of the offense.

As the above examples illustrate, *Loper Bright* undoubtably will influence future administrative litigations involving a broad array of agency rulemakings for decades to come.

IV. OPPORTUNITIES TO CHALLENGE PRE-*LOPER BRIGHT* DECISIONS

Can regulated parties lodge challenges to decided cases where the challenger lost because a court accorded the agency *Chevron* deference? Chief Justice Roberts cautioned against this. Here, the Court downplayed *Loper Bright* as only a "change in interpretive methodology," emphasizing that prior holdings that relied on *Chevron* are entitled to *stare decisis* and cautioning that "[m]ere reliance on *Chevron* cannot constitute a special justification" for "overruling such a holding."[33] Notwithstanding the Chief Justice's admonition regarding revisiting old cases, many venerable law firms are scouring old cases for their clients to determine if *Loper Bright* can resurrect old losses.

In this regard, three days after *Loper Bright*, the Court created a loophole to challenge older rules. In *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*,[34] the Court held that the APA's six-year statute of limitations begins to run when the plaintiff is injured and not when the rule is adopted.

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[33] 144 S. Ct. at 2273.

[34] 144 S. Ct. 2440 (2024).

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Corner Post may provide a convenient vehicle to challenge older agency regulations made vulnerable by *Loper Bright* even if no one bothered to challenge the regulation at the time because doing so would have been fruitless under *Chevron*. More to the point, a challenge is now likely possible even if parties did bring suit and lost when the court deferred to the agency's position. As a practical matter, a new entrant to the industry could bring suit—and obtain a decision that affords relief to the rest of the industry. One important caveat is that *Corner Post* affects only statutory schemes that apply the APA's six-year limitations period. Certain statues, such as the Clean Air Act,[35] prescribe their own limitations period for filing suit which may be significantly more truncated than that of the APA.

V. CHALLENGES FOR FEDERAL AGENCIES

Justice Gorsuch, in his *Loper Bright* concurring opinion, maintained that the decision did not usher in a new world in regulatory affairs; "all today's decision means is that, going forward, federal courts will do exactly as this Court has since 2016, exactly as it did before the mid-1980s, and exactly as it had done since the founding: resolve cases and controversies without any systemic bias in the government's favor."[36] And, yet, for regulatory agencies, if not a new world, the world in *Chevron*'s aftermath is certainly different. In this

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[35] The Clean Air Act provides that a petition for review challenging certain standards and regulation must be filed within "sixty days" the date of notice of promulgation. 42 U.S.C. § 7607 (b).

[36] 144 S. Ct. at 2293.

section we look at two fundamental differences: 1) vagueness, which had been a source of empowerment under *Chevron*, no longer confers automatic deference and (2) increased uncertainty brought about by the combination of *Loper Bright* and *Corner Store*. Underlying both, as we show below, is litigation risk to the agency: the lack of deference inevitably increases the risk of loss while agencies may now encounter more litigation than they have in the past. One envisions agency general counsel offices throughout the government preparing memos on whether their prior interpretations now are subject to challenge. There are, however, factors that mitigate this worst-of-both-worlds—increased probability of loss while encountering more opportunity to lose—scenario for the agency.

A. The Demise of Vagueness

Having enjoyed empowerment under *Chevron*, how might agencies respond to *Loper Bright's* framework? Most obviously, it would seem that agencies will strive to show that their regulatory actions are, indeed, contemplated by the statute, even if not explicitly expressed therein. After all, overturning *Chevron* did not suddenly create a statutory world devoid of gaps. At minimum, when a proposed rule, or existing one is challenged, agencies will obviously want to claim that 1) fulfilling statutory objectives requires the answer to specific question(s) addressed in a rulemaking, and 2) the answer draws upon agency technical expertise and its experience from implementing the statute, or those like it over time.

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Agency expertise is the new source of influence after *Chevron*, although concern has been expressed about the possibility that courts will ignore it. Justice Kagan, in her dissent in *Loper Bright*, contends that "In one fell swoop, the majority gave itself exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law."[37] The phrase "expertise-driven" suggests that courts will pretend to possess more, or as much expertise as a regulatory agency and that courts will endeavor to replace the agencies' expert judgment with their own. That may be a possibility, but how likely is its realization?

In the aftermath of *Chevron*, regulatory agencies would appear to have a real incentive to demonstrate that expertise is very much involved in rulemaking. Regulatory agencies can be expected to realize that expertise is now a new source of empowerment. Unfortunately, that prospect may not be greeted with great enthusiasm; agencies may well contend that expertise is what they have shown all along under *Chevron*. That is almost certainly correct for many cases. Yet, the reviewing landscape has changed.

Consider again Justice Kagan's dissent. She lists five questions that are, in her view, typical of the questions raised under *Chevron*. Each is highly technical. Each is intended to emphasize that courts lack the expertise required to determine what Congress may have intended. Yet, providing answers to

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[37] 144 S. Ct. at 2295.

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questions very much like the ones she has posed are precisely what an agency's assessment is likely to receive from a reviewing court—if not automatic deference, at least significant weight in reaching a decision. To prevail against challenges to rulemakings, agencies will strive to convince courts that a decision against the agency is a decision against its expertise. In terms of demonstrating its expertise, the Court in *Skidmore* provided advice that *Loper Bright* endorsed: the weight accorded to an agency judgment "will [depend] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors that give it power to persuade, if lacking power to control."

B. Agency Interpretations as Policy Implementation

In the wake of *Loper Bright*, should agencies frame their rulemakings more in terms of policy implementation than statutory interpretation? Professor Lisa Schultz Bressman, in her thoughtful article, "Lower Courts After *Loper Bright*,"[38] argues in the affirmative. She notes that over the last forty years, courts have been more likely to accept the parties' characterization of the dispute as one of agency "interpretive authority rather than implementation authority." As evidence, she found that over that same period, lower courts cited *Chevron* more than twice as often (18,500 times) as *Motor Vehicle Ass'n* (9,000 times) even though they both address agency rulemaking

[38] 31 GEORGE MASON L. REV. 499 (2024).

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and were decided about a year apart. Because *Motor Vehicle Ass'n* focuses more on the "quality of the rulemaking process as opposed to the substance of the agency's [statutory] interpretation," agencies might prevail more often under this precedent if they framed the rulemakings and arguments in policy implementation terms as opposed to interpretation of statutes. As further evidence for this position, Professor Bressman notes that agency decisions involve components of both policy implementation and interpretation, and "can be characterized as either or for purposes of judicial review."

Now that *Loper Bright* has taken deference off the table, agencies might do better if they can frame the issue as one of implementing policy subject to a *Motor Vehicle Ass'n* legal analysis rather than one of statutory interpretation subject to *Loper Bright*. This is exactly one tact the SEC is taking in *Iowa et. al. v. SEC et al.*, the pending challenge to its climate disclosure rules. There, the SEC's brief argues, "Petitioners' disagreement with these conclusions amounts to an APA argument about whether the Commission "has engaged in reasoned decision making" within "the boundaries of [its] delegated authority." It is not an argument that the Commission lacks statutory authority to promulgate the Rules (citations omitted)."[39] We think that agencies are likely to follow a similar approach as they try to grapple with *Loper Bright*.

[39] *Iowa v. SEC.* Consolidated Brief for Respondent U.S. Security and Exchange Commission at 47 (Aug. 5, 2024).

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Also, agencies could attempt more often to set policy by informal means such as interpretive rules, frequently asked questions, or guidance that do not likely come within the ambit of *Loper Bright* because these informal means are not likely "final agency action."

C. Uncertainty and Inconsistency

Under *Chevron* when an agency's rule was accorded deference, that was, almost always, the end of the matter. Now, as courts provide their own interpretation of statutes, there is a risk of variation across judicial districts. This eventuality will be viewed by regulatory agencies and certain segments of industry as one of increasing uncertainty which both the agencies and regulated parties abhor.

To be sure, *Loper Bright* should mitigate uncertainty brought about by policy differences between administrations. Here, agencies can take solace because it is less likely that stakeholders would in the future lobby agency decisionmakers to flip-flop on a rule when administrations more welcoming to the stakeholder's view of that issue comes into office.

However as to uncertainty, is an incremental decrease in uncertainty resulting from a change in policy between administrations too high a price for *Loper Bright*? The answer is not obvious. More stability might result if the loss of deference inhibits agencies from altering rules every time a new administration assumes the helm. We are now in a world where the smart money is not automatically placed on the agency under assumption that it will

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be accorded deference. But the counterweight to this point is the yet unknown effects of *Corner Post*, which could result in increasing uncertainty for agencies and stakeholders because older rules, even those that have been upheld, could still fall.

Regulatory uncertainty, however, need not be the long-term steady state for agencies or regulated entities. We think that an equilibrium state will again develop once the agencies and the regulated parties have had experience dealing in a post-*Loper Bright* world.

CONCLUSION

Loper Bright, as we have endeavored to show above, leaves unanswered a host of questions that only the passage of time can answer. This much, however, is certain: *Loper Bright* is a watershed decision in administrative law. Few aspects of our system of government are as important as the separation of powers. At its most fundamental level, *Loper Bright*, as the Court's opinion emphasized, is an attempt to restore the separation of powers to the framework that was envisioned by the Framers. After *Loper Bright*, courts will again "exercise their independent judgment in deciding whether an agency has acted within its statutory authority as the APA requires."[40] Stated simply, *Chevron*'s long reign has ended. Across a range of industry sectors, we may see regulated entities challenge existing regulations. We may also see

[40] 144 S. Ct. at 2273.

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regulated entities that have incurred compliance related operating and capital expenditures defend agency efforts and oppose any attempt to unwind them. We may see agencies attempt to rely more on guidance documents, opinion letters or other means that avoid the appearance of final agency action. Finally, after witnessing decades of extraordinary growth in the number of regulations issued, we may now have an opportunity to see a decline in that growth. The administrative state is not on the verge of implosion, but the issuance of regulations may be less frenetic and, with any luck, more manageable over the coming years.

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