NCCMP Lawyers and Administrators Meeting

Litigation Update

Featuring

The Loss of *Chevron* Deference and What it Means to Multiemployer Plans

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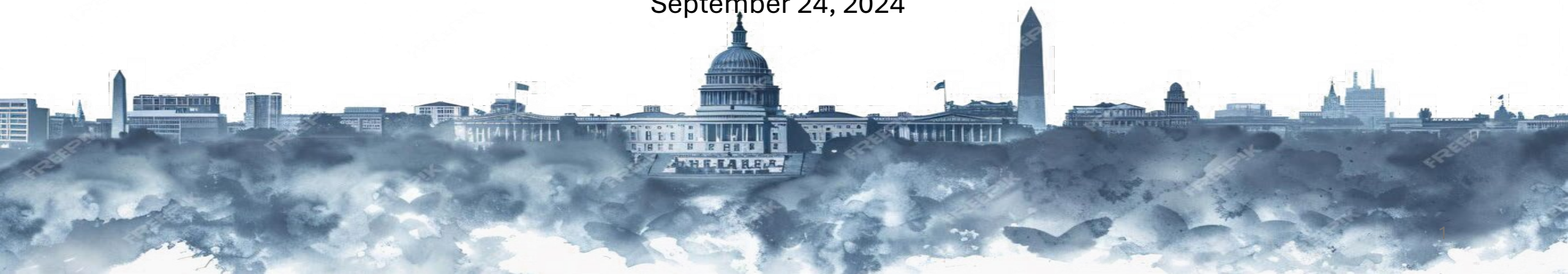
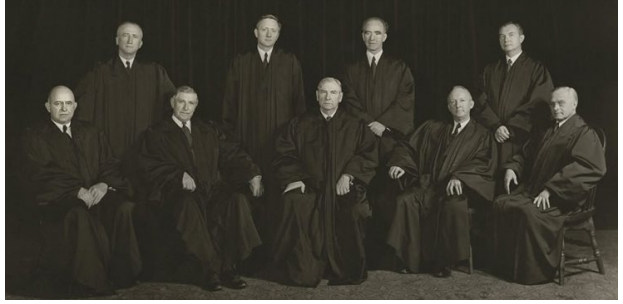
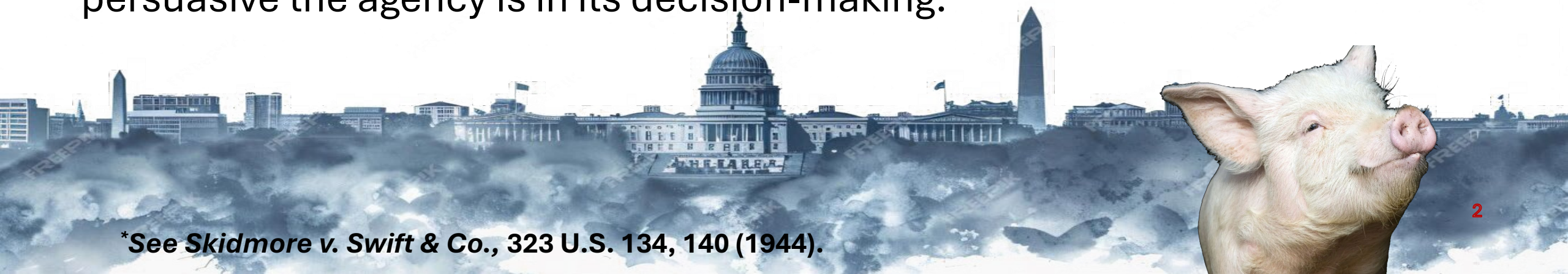


Chevron Background



- The Administrative Procedures Act (APA) was enacted in 1946, assigning to the courts the obligation and authority to resolve "all relevant questions of law" arising on review of agency actions.
- Review of regulations under the APA typically followed the standard set in *Skidmore*, that a court may be informed by the expertise and factual development by an agency in matters of policy and interpretation "depend[ing] upon the[ir] thoroughness . . . , the validity of [their] reasoning, [their] consistency with earlier and later pronouncements, and all those factors which give [them] power to persuade."*
- *Skidmore* is therefore less a standard of deference than a question of how persuasive the agency is in its decision-making.



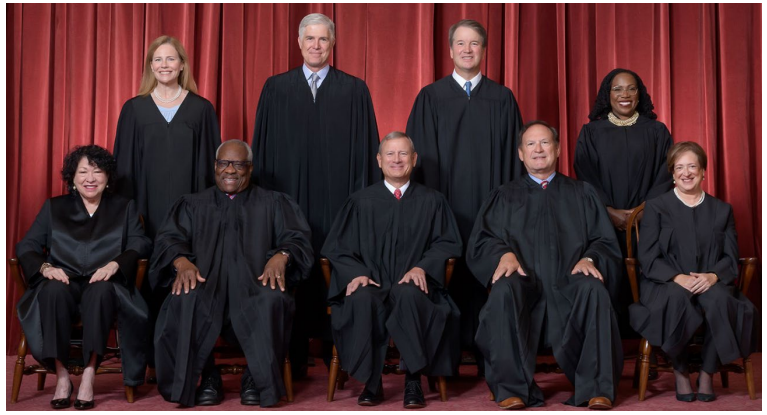
*See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Chevron

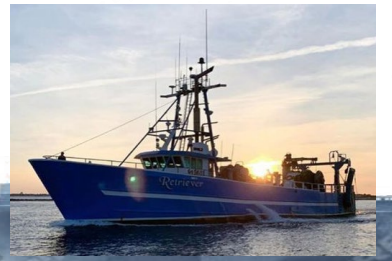
- *Chevron* required the courts to defer to an agency's interpretation of law, unless the law was unambiguous, provided the agency's interpretation was "'a permissible construction of the statute,' even if not 'the reading the court would have reached . . . .'" *
- *Chevron* delegated authority to the administrative agencies, even without a clear grant by Congress of such discretionary authority.
- Why? The EPA, under Neil Gorsuch's mother, issued regulations representing the views of the Reagan administration.

*Chevron U. S. A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

Loper Bright[*]



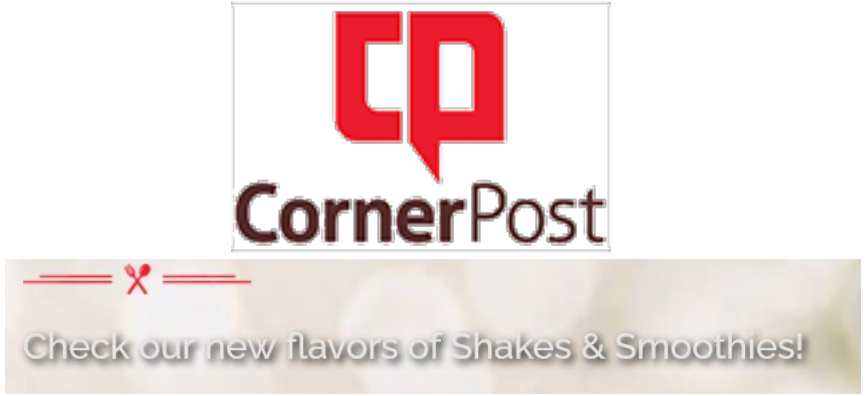
- Overruled *Chevron*.
- Absent an express delegation of authority by Congress, the courts must exercise their authority under the APA and Constitution Art. III to resolve issues of law as they arise, without deference to any agency interpretation.
- "[S]tatutes, no matter how impenetrable, do—in fact, must—have a single, best meaning. That is the whole point of having written statutes; 'every statute's meaning is fixed at the time of enactment.' So instead of declaring a particular party's reading 'permissible' in such a case, courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity."[**]
- *Skidmore* remains good law, however.



[*] ***Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024).**

[**] ***Id., quoting Wisconsin Central Ltd. v. United States*, 585 U. S. 274 , 284 (2018).**

Adding Insult to Injury



- *Corner Post*[*]
  - The APA allows any aggrieved party to challenge the legality of a regulation within 6 years following a cognizable injury to that specific party.
  - This means that no regulation is free from challenge, no matter how long ago it was adopted or many times it may have been challenged in the past, subject only to the now very loose standard of *stare decisis*.

[*]***Corner Post, Inc. v. Federal Reserve,* 144 S. Ct. 2440, 219 L. Ed. 2d 1139 (2024).**

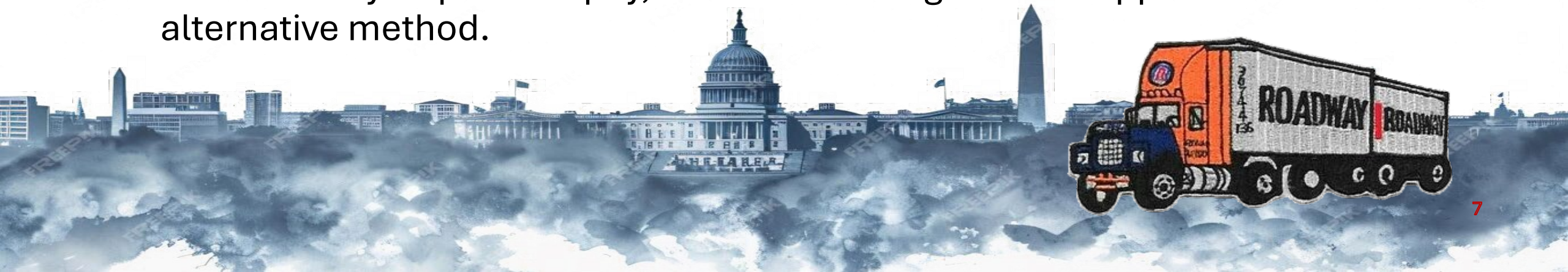
Yellow Freight

- After *Yellow Freight* closed its doors and filed Chapter 11 bankruptcy, 11 multiemployer pension plans that received or were going to receive Special Financial Assistance (SFA) filed claims totaling $6.5 billion.
- Between them, the plans received more than $40 billion in SFA from the PBGC.

YELLOW®

Yellow Freight (cont.)

- *Yellow* objected on four primary grounds:
  - The PBGC regulation phasing-in SFA assets was invalid.
  - The PBGC regulation requiring SFA-recipient plans to disregard receivables, including SFA not received by the measurement date, was invalid.
  - The plans claimed Yellow's total allocated UVBs without reflecting the 20-year cap on installments.
  - At least two of the plans calculated Yellow's withdrawal liability as if Yellow were paying 100% of the Master Freight contribution, rather than the 25% it was contractually required to pay, but had not sought PBGC approval of this alternative method.



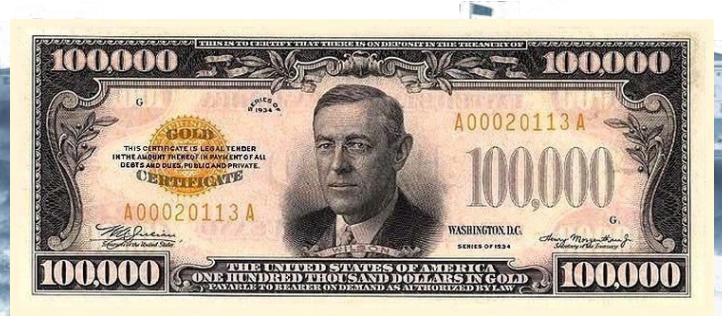
Yellow Freight (cont.)

- The bankruptcy court *mostly* ruled in favor of the plans.*
- Using the *Loper Bright* analysis (with a little *Skidmore* thrown in for good measure), the court upheld the PBGC's asset recognition regulations against both challenges, finding:
  - That the SFA enabling legislation gave PBGC explicit authority to "impose, by regulation or other guidance, reasonable conditions on an eligible multiemployer plan that receives special financial assistance relating to … withdrawal liability."
  - Additionally, the PBGC has general authority to adopt "regulations as may be necessary to carry out the purposes" of Title IV of ERISA.***

*_In re Yellow Corporation_, Case No. 23-11069-CTG (Dkt. No. 4326, Bkr. D. Del., Sept. 13, 2024)
**ERISA Section 4262(m), 29 U.S.C. § 1432(m).
***ERISA Section 4002(b)(3), 29 U.S.C. § 1302(b)(3).

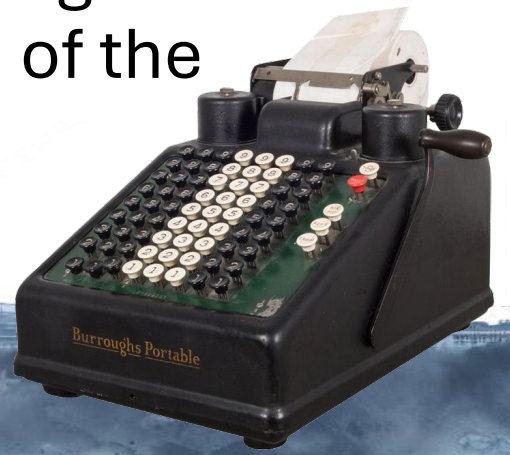
Yellow Freight (cont.)

- The court also rejected the assertion that the PBGC's asset recognition regulations were contrary to ERISA's requirement that withdrawal liability assessments be based on a plan's "assets."
  - The single use of the word "assets" from 1980 could not override the explicit statutory directive that prohibits the use of SFA proceeds for any purpose other than paying benefits and administrative expenses.
  - Furthermore, the PBGC went through an open process and reasoned analysis in its rulemaking, which was far from "arbitrary and capricious."
  - The court, however, rejected the supporting argument that analogized the PBGC's phase-in rule to the IRS' asset smoothing regulations, which, unlike the PBGC's rule, are designed to provide a more accurate and less volatile measure of asset value.



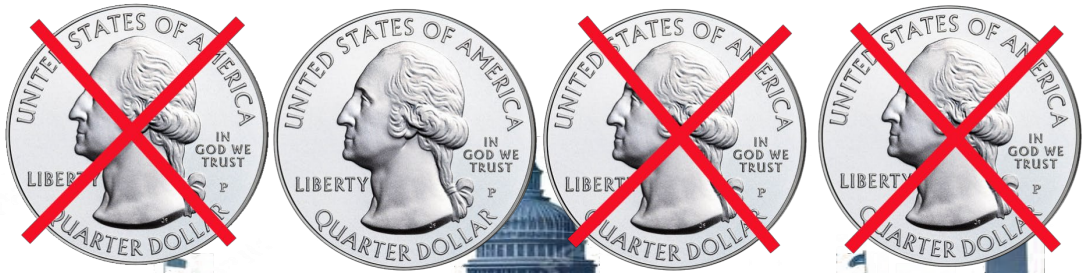
Yellow Freight (cont.)

- The court did agree with Yellow that the 20-year cap on annual installments is a substantive limitation on the amount of withdrawal liability, based on the plain language of ERISA Sections 4201(b)(1)(C) and 4219(c)(1)(A)(i) and (1)(B), and that nothing in the "default" language in Section 4219(c)(5) changes that result.
- The court rejected, however, Yellow's argument that the amount payable on a default was the present value of the outstanding payments, ruling instead that it was the undiscounted sum of the outstanding payments.



Yellow Freight (cont.)

- Finally, the court rejected Yellow's contention that the failure of the two plans to get PBGC approval to assess withdrawal liability based upon 4x Yellow's contractual contribution invalidated those assessments because Yellow had agreed to it. Consensual changes that increase withdrawal liability do not require PBGC approval.



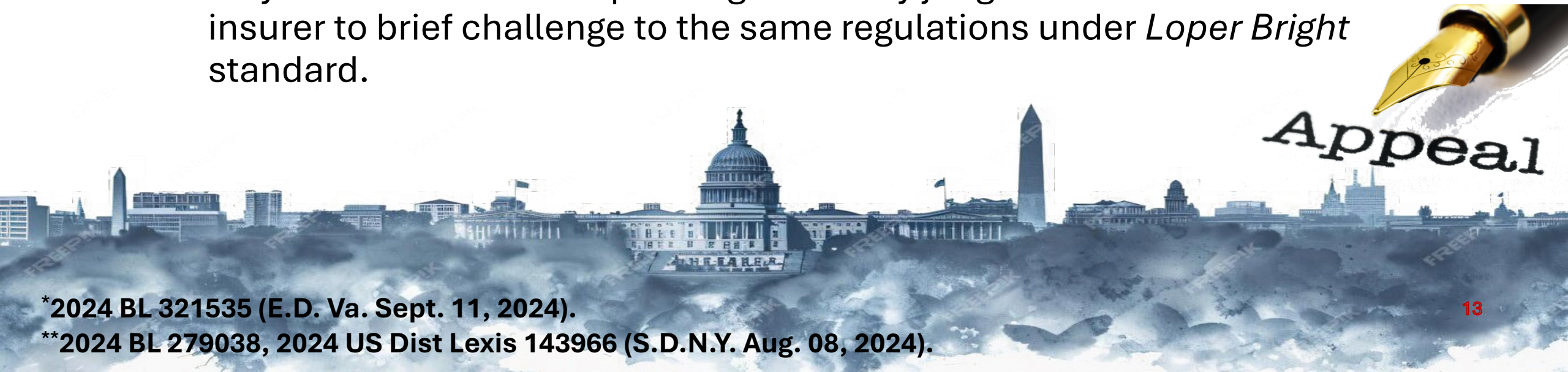
Other Regulations at Risk

- Mental Health Parity.
- Investment considerations/shareholder activism regulations.
  - *Utah v. Su,*[*] — District court decision upholding "tiebreaker" rule using *Chevron* deference reversed and remanded for further proceedings.
- Affordable Care Act.
  - Section 1557 Discrimination.
  - Grandfathered plan status.
  - Preventive care mandates.

[*] 109 F. 4th 313 (5th Cir. 2024).

Other Regulations at Risk (cont.)

- Claims and Appeals Regulations
  - *Cogdell v. Reliance Standard Life Insurance*[*] — Court rejected LTD insurer's challenge to DOL's 45-day deadline for responding to an appeal, based upon Congress' broad grant of authority to DOL under ERISA.
  - *Rappaport v. Guardian Life Insurance Company of America*[**] — Court stayed consideration of pending summary judgment motions to allow LTD insurer to brief challenge to the same regulations under *Loper Bright* standard.



[*]2024 BL 321535 (E.D. Va. Sept. 11, 2024).
[**]2024 BL 279038, 2024 US Dist Lexis 143966 (S.D.N.Y. Aug. 08, 2024).

How Should Congress Respond?

- Be more explicit in granting regulatory authority to the administering agency.
  - But what about "unlawful delegation":

    "Chevron deference compromises [the] separation of powers in two ways. It curbs the judicial power afforded to courts, and ***simultaneously expands agencies' executive power beyond constitutional limits.***"*
- Be more explicit in the details of the statute.

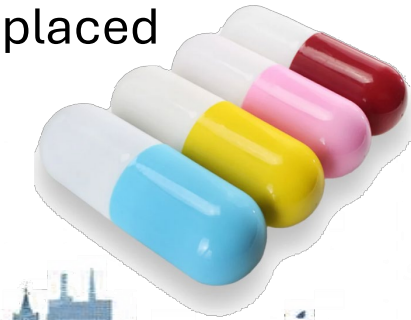
***Chevron*, 144 S.Ct. at 2274 (Thomas, J, concurring, emphasis added).**

How Will the Agencies Respond?

- Beef up factual development, textual analysis, and/or legislative history in the rulemaking process (*e.g.*, incessantly tie the regulation back to the statute).
- Be more cautious in rulemaking absent explicit statutory authority.
- Not bother with the traditional rulemaking process where the statutory authority is questionable, since the courts won't honor it anyway.
- Stick with more sub-regulatory guidance without any outside input or oversight.
- More interpretation through enforcement (*e.g.*, threats and intimidation).

Preemption

- *Pharmacy Care Management Association v. Mulready**
  - Oklahoma enacted legislation to regulate prescription benefit managers (PBMs) by, among other things:
    - Prohibiting any use of incentives to use one pharmacy over another (including for mail order).
    - Imposing accessibility standards on prescription networks.
    - Requiring prescription networks to include any provider willing to accept the terms.
    - Prohibiting expulsion of pharmacies based upon a pharmacist having been placed on probationary status with the state.
  - PCMA sued to prevent the law's enforcement.



*78 F.4th 1183 (10th Cir. 2023)

PCMA v. Mulready (cont.)

- The district court* concluded that the law was not preempted by ERISA because it was not targeted at plans *and* it only affected costs, which was permitted under *Rutledge*.**
- The Court of Appeals reversed, finding that the law did affect the core administration of plans, notwithstanding the fact that it was targeted at PBMs.
- Oklahoma's *cert.* petition is currently pending at the Supreme Court, and is scheduled for conference on September 30, 2024.

*598 F. Supp. 3d 1200 (W.D. OK 2022).
***Rutledge v. PCMA*, 592 U.S. 80 (2020).

Questions?