

Defining Substantial Burdens: Using RLUIPA to Regulate the Environment, Post-*Loper Bright*

*Note by Dalton Guillory **

The Supreme Court's Loper Bright v. Raimondo decision, which overruled the Chevron Doctrine, combined with the Court's commitment to upholding religious protections, paves a path for the Religious Land Use and Institutionalized Persons Act ("RLUIPA") to be utilized to fill anticipated regulatory gaps in environmental protection. The decision in Loper Bright marks a significant shift in administrative law by eliminating deference to agency interpretations of ambiguous statutory language, which is expected to increase challenges to the rule-making authority of administrative agencies and potentially lead to gaps in environmental protections. Clarification is warranted regarding the proper standard for defining a "substantial burden". under RLUIPA due to existing circuit splits. This note argues that if the Supreme Court resolves these circuit splits, it will likely adopt a broader interpretation of "substantial burden." This broader definition could enable the pursuit of environmental protection under the guise of protecting religious freedoms, thereby supplementing environmental regulations in the wake of the fall of Chevron Deference. Specifically, a proposed "relaxed behavioral standard" for RLUIPA's substantial burden provision could serve as a legal remedy for religious entities and individuals whose free exercise rights are burdened by environmental externalities.

* Staff Editor, Rutgers Journal of Law and Religion: J.D. Candidate May 2026, Rutgers Law School.

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I. INTRODUCTION

The Supreme Court’s *Loper Bright v. Raimondo* decision, overruling the *Chevron* Doctrine, paired with the Court’s commitment to upholding the First Amendment and religious protections, paves a path where the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) could be utilized to fill the regulatory gaps in environmental protection that are likely to arise. In recent terms, the Supreme Court has released decisions

upholding and expanding religious freedom protections,¹ while simultaneously releasing decisions that limit the regulatory authority of administrative agencies.² In *Groff v. DeJoy*, the Supreme Court bolstered protections for workers who were asking for religious accommodations.³ Additionally, the Supreme Court sided with a Colorado web designer who did not want to provide services to same-sex couples based on her own religious beliefs, in

¹ See Johnathon Beasley, *A Slippery Slope: What the Supreme Court's Recent Rulings Mean for Religion in the U.S.*, HARVARD DIVINITY SCH. (July 21, 2023), <https://hds.harvard.edu/news/2023/07/21/supreme-court-rulings-mean-religion-united-states> [<https://perma.cc/884Y-2XPU>] (interviewing Reverend Naomi Washington-Leapheart, a Religion and Public Life Government Fellow at Harvard Divinity School, in which she discusses recent SCOTUS decisions upholding religious protections and accommodations); William C. Duncan, *2024 in the Courts: What's on the Docket for Religious Freedom*, SUTHERLAND INSTITUTE (Jan. 4, 2024), <https://sutherlandinstitute.org/2024-in-the-courts-whats-on-the-docket-for-religious-freedom/> [<https://perma.cc/38CZ-7F2G>] (briefly discusses two 2023 decisions, then shifts to an overview of pending 2024 decisions in other courts).

² Alex Guillén & Josh Gerstein, *Supreme Court Shifts Power Over Federal Regulations From Agencies to Judges*, POLITICO (June 28, 2024, at 10:53 ET), <https://www.politico.com/news/2024/06/28/supreme-court-shifts-power-over-federal-regulations-from-agencies-to-judges-00165742> [<https://perma.cc/7U74-PLM7>] (discussing the Court's use of the Major Questions Doctrine to limit regulatory authority, as well as the Court overruling Chevron Deference).

³ The Court held in *Groff* that the standard for determining an undue hardship on an employer when implementing religious accommodations under Title VII is higher than the lower courts' previous interpretations. Specifically, prior applications of a "more than a *de minimis cost*" should be supplemented with a fact-specific inquiry that the Court believes aligns more with the actual text of Title VII. *Groff v. DeJoy*, 600 U.S. 447, 468, 472-73 (2023).

303 Creative v. Elenis.⁴ If more cases reach the Supreme Court, the Justices will likely fortify their commitment to upholding and expanding religious protections.⁵

The Supreme Court's decision in *Loper Bright Enterprises v. Raimondo* represents a significant shift in administrative law by overruling the *Chevron* Doctrine, which has long granted deference to an agency's interpretation of ambiguous statutory language.⁶ *Loper Bright* came after decisions invoking the major questions doctrine to circumvent *Chevron* deference and limit statutory interpretations by administrative agencies, like

⁴ In this case, SCOTUS held that the application of Colorado's Anti-Discrimination Act to a website designer who refuses to create wedding websites for same-sex couples based on her own religious and personal beliefs would violate the website designer's free speech rights under the First Amendment. *303 Creative LLC v. Elenis*, 600 U.S. 570, 587-89 (2023). Even though the Court grounds its arguments in this case in the Free Speech Clause of the First Amendment, the Court is essentially allowing a website designer to claim a religious exemption to Colorado's Anti-Discrimination Act. *Id.* at 623-35 (Sotomayor, Gagan, & Jackson, JJ., dissenting).

⁵ See generally *Groff*, 660 U.S. 447; see generally *303 Creative*, 600 U.S. 570; see generally *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (holding that for-profit corporations could assert claims under the Religious Freedom Restoration Act); see generally *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017) (holding that the denying a religious entity of a publicly available benefit solely on account of religious identity constitutes a violation of the Free Exercise Clause of the First Amendment); see generally *Little Sisters of the Poor Saints Peter & Paul Home v. Pa.*, 591 U.S. 657 (2020) (holding that employers with religious and conscientious objections to contraceptives should not be required to provide insurance plans to employees that cover contraceptives); see generally *Tandon v. Newsom*, 593 U.S. 61 (2021) (granting an injunction against California restrictions on religious gatherings during the COVID-19 pandemic).

⁶ *Loper Bright Enter. V. Raimondo*, 144 S. Ct. 2244, 2273 (2024); After *Chevron*: What the Supreme Court's *Loper Bright* Decision Changed, and What It Didn't, Cleary Gottlieb (July 11, 2024), <https://www.clearygottlieb.com/news-and-insights/publication-listing/after-chevron-what-the-supreme-courts-loper-bright-decision-changed-and-what-it-didnt/> [https://perma.cc/Z2EX-8NB4].

West Virginia v. EPA.⁷ These changes will likely result in increased challenges to the rule-making authority of administrative agencies, potentially leading to gaps in environmental protections.⁸

The Federal Circuit Courts of Appeals would benefit from Supreme Court clarification on the proper standard for determining a “substantial burden” under RLUIPA.⁹ This statute is often used by religious entities, such as churches, to challenge discriminatory zoning practices¹⁰ and by indigenous tribes to challenge extractive mineral and fossil fuel projects, as well as pipeline and highway construction, on sacred lands.¹¹ The varying definitions of “substantial burden” warrant

⁷ *W. Va. v. Env’t Prot. Agency*, 597 U.S. 697, 734-35 (2022) (using the Major Questions Doctrine to strike down rules proposed by the Environmental Protection Agency that would require energy shifting to meet carbon emission standards). A Louisiana District Court followed the example set by the Supreme Court in *West Virginia*, granting a preliminary and final injunction based upon the Major Questions Doctrine, specifically citing *West Virginia* for the preliminary injunction. *See La. v. U.S. Env’t Prot. Agency*, No. 2:23-CV-00692, 2024 U.S. Dist. LEXIS 12124, 80 (W.D. La. Jan. 23, 2024) (citing *W. Va.*, 596 U.S. at 722-23, 743-44).

⁸ George Gigounas, et al., *US Environmental Law Post-Chevron: Changes Ahead*, DLA PIPER (July 15, 2024), <https://www.dlapiper.com/en-us/insights/publications/2024/07/us-environmental-law-post-chevron/> [https://perma.cc/NX8N-DHBA] (discussing the effects of *Loper Bright* on environmental regulation); Rich Gold, et al., *What’s Next for the Regulatory Landscape Post-Chevron?*, HOLLAND & KNIGHT (July 2, 2024), <https://www.hklaw.com/en/insights/publications/2024/07/whats-next-for-the-regulatory-landscape-post-chevron> [https://perma.cc/XZ46-TC28] (discussing the effects of *Loper Bright* on administrative agencies more broadly).

⁹ *See Hicks v. Garner*, 69 F.3d 22, 26 n.22 (5th Cir. 1995) (discussing various courts’ attempts to define “substantial burden” shortly after Congress passed RFRA).

¹⁰ *See Midrash Sephardi, Inc.*, 366 F.3d at 1218-19; *see C.L. for Urb. Believers v. City of Chi.*, 342 F.3d 752, 755 (7th Cir. 2003).

¹¹ Overall, claims by indigenous tribes have been less successful, but part of that can be attributed to the inconsistent interpretation and application of these statutes. *See Apache Stronghold v. U.S.*, 95 F.4th 608, 614 (9th Cir. 2024); *see Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 239 F. Supp. 3d 77, 80 (D.C. Cir. 2017).

clarification by the Court to ensure consistent decisions regardless of jurisdiction and to guarantee the fair and proper enjoyment of the protections afforded by RLUIPA.¹²

This note argues that if the Supreme Court decides to resolve the current circuit splits surrounding RLUIPA, it will likely adopt a broader interpretation of “substantial burden.” The adoption of a broader interpretation could allow for the pursuit of environmental protection under the guise of protecting religious freedoms, ultimately filling the gaps in environmental regulation that will likely arise due to the fall of *Chevron* Deference.

Part II will explain how zoning authorities and administrative agencies function and how both entities are used to manage environmental quality. Part III will follow the rise and fall of *Chevron* Deference, exploring relevant case law and analyzing how *Loper Bright* will affect administrative agencies’ ability to regulate the environment. Part IV examines religious freedom protections in the United States, specifically focusing on RLUIPA and the current circuit splits regarding the interpretation of RLUIPA’s substantial burden provision, and a prediction of how the Supreme Court would likely define “substantial burden.” Finally, Part V will analyze the ability to use the circuit split resolution, proposed in the previous section, to supplement environmental protections in the wake of the Court’s *Loper Bright* decision.

II. ADMINISTRATIVE AGENCIES AND ZONING BOARDS

Although zoning authorities and administrative agencies function differently and were created to achieve

¹² See *Braxton v. U.S.*, 500 U.S. 344, 347 (1991) (“[a] principal purpose for which we use our certiorari jurisdiction...is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law”); see also *Rogers v. Grewal*, 140 S. Ct. 1865, 1875 (2020) (“[t]his case gives us an opportunity to provide lower courts with much-needed guidance, ensure adherence to our precedents, and resolve a Circuit split”).

different goals, they are both used to regulate environmental quality. While administrative agencies operate at the federal and state levels,¹³ zoning authorities are local, only regulating the county, town, or city in which they are located.¹⁴ Additionally, zoning laws are intended to prevent incompatible land uses from interfering with each other for a plethora of reasons, while administrative agencies concerned with environmental protection usually focus on minimizing adverse human health effects caused by degraded environmental conditions.¹⁵ Nevertheless, both zoning authorities and administrative agencies contribute to

¹³ See *Administrative Agency*, LAW SHELF, <https://www.lawshelf.com/shortvideoscontentview/administrative-agency> [<https://perma.cc/99ME-RE4V>] (last visited Oct. 30, 2024) (“[a]n administrative agency is an organization set up by a federal or state government....”).

¹⁴ 12 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 79C.03[1] (2024) (“[t]he police power, which derives from the power of the sovereign, authorizes a government to adopt and enforce all laws (including zoning laws) necessary to protect and further the public health, safety, morals, and general welfare”); *The Basics of Land Use and Zoning Law*, TULANE ONLINE LAW BLOG (Aug. 26, 2021), <https://online.law.tulane.edu/blog/land-use-and-zoning-law> [<https://perma.cc/K6RG-VM5A>] (“[t]he authority to create and enact [zoning laws] ...comes from the police powers left to each state, most of which delegate it to local governments.”).

¹⁵ See *supra* note 15; see *U.S. Environmental Protection Agency*, U.S. DEPT. OF THE INTERIOR, <https://www.doi.gov/recovery/about-us/primary-agencies/EPA> [<https://perma.cc/E5MD-UT74>] (“[t]he [EPA] is responsible for the protection of human health and the environment”) (last visited Nov. 2, 2024) [hereinafter US DOI, *EPA*]; *Environmental Protection Agency (EPA)*, USA GOV, [https://www.usa.gov/agencies/environmental-protection-agency#:~:text=The%20Environmental%20Protection%20Agency%20\(EPA,develops%20and%20enforces%20environmental%20regulations](https://www.usa.gov/agencies/environmental-protection-agency#:~:text=The%20Environmental%20Protection%20Agency%20(EPA,develops%20and%20enforces%20environmental%20regulations) [<https://perma.cc/P3S9-VLWQ>] (“[t]he [EPA] protects people and the environment from significant health risks....”) (last visited Nov. 3, 2024) [hereinafter USA GOV, *EPA*].

protecting the environment and are vital tools to ensure public health and environmental integrity.¹⁶

A. Zoning

Zoning laws consistently impact our day-to-day activities, but most people write them off as boring and inconsequential without considering how or why they are implemented.¹⁷ In the United States, most areas are zoned for a single use, referred to as Euclidian zoning, named after the Supreme Court case *Village of Euclid, Ohio v. Ambler Realty Co.*¹⁸ Ideally, under Euclidian zoning, zoning laws ensure that property is used efficiently and in the most beneficial ways for each community.¹⁹ The vast majority of municipalities in the United States utilize zoning laws to control which types of

¹⁶ TULANE, *supra* note 15; US DOI, *EPA*, *supra* note 16; USA GOV, *EPA*, *supra* note 16; Juliana Maantay, *Zoning, Equity, and Public Health*, 91 AM. J. PUB. HEALTH 1033, 1033 (“[z]oning...has substantial implications for equity and public health.... influencing the location of resulting environmental and health impacts”).

¹⁷ See David Walters, *How Zoning Shapes Your Daily Life, Even If You Don't Know It*, UNC CHARLOTTE URBAN INSTITUTE (Mar. 30, 2016), <https://ui.charlotte.edu/story/how-zoning-shapes-your-daily-life-even-if-you-dont-know-it/> [<https://perma.cc/FJR5-B4E3>] (discussing the effects of zoning on day-to-day activities, pulling examples from multiple U.S. cities and stressing the importance of community participation in the zoning process).

¹⁸ Rachel Watsky, *The Problems with Euclidian Zoning*, BOS. U. SCH. OF L. DOME (July 19, 2018), <https://sites.bu.edu/dome/2018/07/19/the-problems-with-euclidean-zoning/> [<https://perma.cc/7TWY-QYBX>]; see generally 272 U.S. 365.

¹⁹ WATSKY, *supra* note 19.; *Zoning 101: A Primer for First-Time Developers*, TOY STORY NATION (Oct. 19, 2023), <https://toystoragenation.com/2023/10/19/zoning-101-a-primer-for-first-time-developers/> [<https://perma.cc/4QPA-8ULJ>]; see generally Amber Wheeler, *RLUIPA's Equal Terms Clause and The Circuit Split: Striking a Balance Between Economic Concerns and Protecting Religious Liberty*, 38 MISS. C.L. REV. 173, 173 (2020) (“[h]istorically, zoning originated as an attempt to create legislatively-fixed plans of a community.”).

land uses are acceptable within each “zone,” also called districts, of the city.²⁰

Zoning designations are often based on the intensity of the planned use, with standard designations for residential, commercial, industrial, or agricultural uses, with the potential for further sub-categories therein.²¹ Furthermore, in jurisdictions that allow for cumulative zoning, less intense uses can be allowed in districts that are zoned for more intense uses.²² For example, in a district zoned for multi-family homes, it would not violate the zoning laws to use the property for a single-family home.²³ The ultimate goal of zoning regulations is to protect and further the general welfare,²⁴ but pursuing that goal often requires reasonable infringement upon individual property rights.²⁵ As one may expect, there is a plethora of litigation surrounding zoning laws, which outline what rights can and cannot be infringed on by zoning authorities in the pursuit of

²⁰ TULANE, *supra* note 15; *What is Zoning?*, OUR NEIGHBORHOODS, https://www.aapineighborhoods.org/wp-content/uploads/2019/08/What-is-Zoning_Final.pdf [<https://perma.cc/FCH4-M23J>]; *An Introduction to Zoning Codes [Example]*, CAL. LAND DEVELOPMENT, <https://californialanddevelopment.com/blog-posts/an-introduction-to-zoning-codes/> [<https://perma.cc/BGU7-5RQT>] (last visited Nov. 14, 2024).

²¹ *See supra* note 21.

²² Legal Information Institute, *Zoning*, CORNELL L. SCH., <https://www.law.cornell.edu/wex/zoning> [<https://perma.cc/HW42-KQ5Z>] (last visited Nov. 14, 2024).

²³ *Id.*; CAL. LAND DEVELOPMENT, *supra* note 21.

²⁴ Note that the term “general welfare” in particular is “broad and inconclusive[.]” and can include maintaining property values of adjacent properties, lessening street congestion, protecting moral character, ensuring adequate access to public services, and enhancing or protecting the fiscal well-being of a community. This is not an exhaustive list, and zoning bodies are often granted expanded authority as society becomes more complex. POWELL, *supra* note 15 at § 79C.03[2].

²⁵ “The whole concept of zoning implies a restriction upon the owner’s right to use a specific tract for a [beneficial] use...to him but detrimental to the value of other properties in the area[.]” *Id.* at note 139 (quoting *Blades v. Raleigh*, 187 S.E.2d 35, 43 (1972)).

advancing or maintaining the general welfare of a community.²⁶ Specifically, the right to freely practice one's religion has led to the creation of statutory and zoning frameworks to ensure religious entities are not discriminated against in the zoning process.²⁷

1. Zoning For The Environment

Rooted in public health, zoning was initially adopted to advance and maintain the general welfare.²⁸ While zoning might not, on its face, seem directly tied to environmental protection, the relation becomes apparent when discussing how environmental stressors affect one's physical and mental health.²⁹

²⁶ See generally *Midrash Sephardi, Inc.*, 366 F.3d 1214 (11th Cir. 2004); see generally *Kentner v. City of Sanibel*, 750 F.3d 1274 (11th Cir. 2014); see generally *C.L. for Urb. Believers v. City of Chi.*, 342 F.3d 752, 755 (7th Cir. 2003); see generally *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

²⁷ See Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2000); see Melissa Rogers & Eric Trene, *Protecting Religious Freedom*, NATIONAL ARCHIVES (Jan. 16, 2014), <https://obamawhitehouse.archives.gov/blog/2014/01/16/protecting-religious-freedom#> [<https://perma.cc/7PGD-9FV6>]; see generally Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1993).

²⁸ Joseph Schilling, et. al., *The Public Health Roots of Zoning*, 28 AM. J. PREV. MED. 96, 98-100 (2005).

²⁹ National Academies of Sciences, Engineering, and Medicine, *The Interplay Between Environmental Exposures and Mental Health Outcomes: Proceedings of a Workshop in Brief*, WASHINGTON, DC: THE NATIONAL ACADEMIES PRESS 2 (2021), <https://doi.org/10.17226/26201> [<https://perma.cc/AU6L-UNBU>] (“[t]he concept that environmental exposures can affect mental health outcomes comes as no surprise to those who study human behavior.”); Linchuan Yang et al., *The Physical Environment and Health: Implications for the Planning and Management of Healthy Cities*, 11 FRONTIERS PUB. HEALTH 10 (2023) (“[m]any aspects of the physical environment such as air and water quality, noise pollution, exposure to hazardous substances, housing conditions, indoor environments, and access to open/green spaces and recreational areas, contribute to human health.”), <https://acrobat.adobe.com/link/review?uri=urn:aaid:scds:US:d715e0b6-5901-38eb-913c-81ffa2033c3b> [<https://perma.cc/3NZV-E424>].

Zoning directly impacts air and water pollution exposure in communities, access to green spaces, and the degradation or protection of natural resources.³⁰ Unfortunately, pollutants are not stationary once emitted into the air or water.³¹ The emissions from industrial and/or commercial uses travel based on weather and hydrological patterns.³² That means that the decisions to zone regions for polluting uses affect not only that zone but also the surrounding areas, potentially degrading the natural environment and exposing the individuals in the

³⁰ YANG, *supra* note 30; MAANTAY, *supra* note 17 ([z]oning determines where various categories of land use may go, thereby influencing the location of resulting environmental and health impacts.”). In this discussion, the term ‘natural resources’ is used in its broadest sense to include all biotics (plants, animals, fungi, microbes, fossil fuels, etc.) and abiotics (soil, minerals, air, sunlight, water, climate, etc.). *see* MOHD AKHTER ALI & M. KAMRAJU, NATURAL RESOURCES AND SOCIETY: UNDERSTANDING THE COMPLEX RELATIONSHIPS BETWEEN HUMANS AND THE ENVIRONMENT, 1-2 (Abdelazim M. Negm et. al. eds., 2023). Similarly, the term ‘green spaces’ is broadly used to include “land that is partly or completely covered with grass, trees, shrubs, or other vegetation.” Common examples are parks, community gardens, cemeteries, higher education campuses, common land, woods, nature reserves, botanical gardens, and public squares, among others. Green spaces are of special concern in urban and low-income areas. *see* SCENIC AMERICA, *The Importance of Green Spaces* (July 27, 2022), <https://www.scenic.org/2022/07/27/the-importance-of-green-spaces/> [<https://perma.cc/LB4C-38SA>]. Green spaces are comprised of various natural resources. Thus, when discussing the effects of zoning, the term ‘natural resources’ can be interchanged with ‘green spaces’ and vice versa.

³¹ Melissa Denchak, *Water Pollution: Everything You Need to Know*, NRDC (Jan. 11, 2023), <https://www.nrdc.org/stories/water-pollution-everything-you-need-know> [<https://perma.cc/V6VV-DE4Q>]; Heather Wylie, *Atmospheric Dispersion and Pollution Transport*, AIR QUALITY BLOG (June 6, 2021), <https://airquality.climate.ncsu.edu/2021/06/06/atmospheric-dispersion-and-pollution-transport/> [<https://perma.cc/D8NS-FE7J>]; *see generally* PERRY K. SAMSON, AIR POLLUTION, THE AUTOMOBILE, AND PUBLIC HEALTH 77-104 (Ann Y. Watson et. al. Eds., 1st ed. 1988) (an in-depth analysis of the movement of air pollutants released from automobile and the associated public health risks).

³² Denchak, *supra* note 31.

surrounding zones to said pollutants.³³ Additionally, “[t]raditional zoning tends to encourage large-lot sprawl that pushes development into farmlands and forests, which ends up destroying the local food supply and trees that clean our air....”³⁴

Some municipalities have adopted zoning practices to further environmental pursuits specifically,³⁵ but even if environmental protection policies are not considered in the zoning process, they are often a side effect of public health considerations.³⁶ Thus, it is important to note that in regard to the distribution of environmental burdens and the associated adverse health effects, not all communities are afforded the same protections under the

³³ Pollution exposure causes and/or worsens many health issues such as cancer and respiratory diseases. Additionally, pollution can damage the quality of the soil (affecting soil fertility, porosity, etc.), disrupt food chains, lead to biomagnification of pollutants in upper trophic levels, eliminate suitable habitat for various species, and more. See Antonia Juhasz, “We’re Dying Here” *The Fight for Life in a Louisiana Fossil Fuel Sacrifice Zone*, HUMAN RIGHTS WATCH (Jan. 25, 2024), <https://www.hrw.org/report/2024/01/25/were-dying-here/fight-life-louisiana-fossil-fuel-sacrifice-zone> [<https://perma.cc/VY4X-2JP9>]; see Martin Donohoe, *Causes and Health Consequences of Environmental Degradation and Social Justice*, 56 SOC. SCI. & MED. 573, 574-78 (2003); see THE CLIMATE REALITY PROJECT, *Sacrifice Zones 101*, <https://www.climateRealityProject.org/sacrifice-zones> [<https://perma.cc/Q959-K2QS>]; see generally RACHEL CARSON, *SILENT SPRING* (Houghton Mifflin Company Boston eds., 1st ed. 1962) (discusses the disappearance of predatory birds due to the bioaccumulation of DDT through trophic levels and is credited as one of the primary pieces of literature that started the modern environmental movement).

³⁴ Michele Lerner, *Sustainability and Zoning*, ON COMMON GROUND (Nov. 8, 2023), <https://www.nar.realtor/on-common-ground/sustainability-and-zoning> (last visited Feb. 21, 2024).

³⁵ Los Angeles, CA, and Minneapolis, MN, are implementing “green zones” or “ecodistricts.” Brandon Hanson, *Green Zones*, SUSTAINABLE DEV. CODE, <https://sustainablecitycode.org/brief/creating-green-zones/> [<https://perma.cc/6JLJ-BUC6>] (last visited Nov. 26, 2024); see generally Los Angeles, CA, Municipal Code §13.18 (A) (2016); see generally Gordon, Cano & Reich, *Establishing Green Zones in the City of Minneapolis*, Res. (2017).

³⁶ See *supra* note 36; see *supra* note 32; see *supra* note 34.

zoning codes.³⁷ Consequently, there has been a push to incorporate zoning practices that support sustainable development and environmental protection initiatives as a front-line consideration in zoning plans.³⁸ Although the implementation of environmentally conscious and sustainable zoning practices can be difficult, these initiatives have been fruitful, with success in both small and large cities.³⁹ However, there is still progress that needs to be made before there is widespread implementation of these practices.⁴⁰

III. ADMINISTRATIVE AGENCIES

From a young age, we are taught that there are three branches of government: the legislative, judicial, and executive branches. Each of which has its own

³⁷ See Patricia E. Salkin, *Environmental Justice and Land Use Planning and Zoning*, 32 REAL EST. L.J. 429, 429-31 (2003) (discussing the effects of discriminatory zoning practices on marginalized communities); see also Savannah Collins, *Houston's Lax Zoning Practices are Poisoning Its People*, VT. ENV'T L.J. (May 3, 2024), <https://vjel.vermontlaw.edu/beacon/2024/05/houstons-lax-zoning-practices-are-poisoning-its-people/> [<https://perma.cc/XD3E-A98A>].

³⁸ HANSON, *supra* note 36; see Toccarra Nichole Thomas, *New Initiative: Eliminating Zoning Barriers to Health Communities*, SMART GROW AM. (Feb. 3, 2025), <https://smartgrowthamerica.org/new-initiative-eliminating-zoning-barriers-to-healthy-communities/> [<https://perma.cc/LY8E-H68L>]; see generally Sung-Wook Kwon, et al., *Zoning to Enhance Local Sustainability: Why Local Governments Choose to Use Sustainability-Focused Land Use Tools*, 67 J. ENV'T PLAN. & MGMT. 788 (2024); see Jonathan Rosenbloom & Christopher Duerksen, *Saving the World Through Zoning: The Sustainable Development Code, Regeneration, and Beyond*, 5 J. COMPAR. URB. L. & POL'Y 363, 363 (2022).

³⁹ See Rosenbloom, *supra* note 39 at 363-67; see Hanson, *supra* note 36; see generally George Homsy & Mildred Warner, *Defying the Odds: Sustainability in Small and Rural Places*, ICMA (2015), https://www.nado.org/wp-content/uploads/2015/07/defying_the_odds_briefing_paper-1.pdf [<https://perma.cc/4X6V-GSCC>].

⁴⁰ See Rosenbloom, *supra* note 39 at 363-67; see Hanson, *supra* note 36; see generally HOMSY, *supra* note 40.

specific powers expressly granted to that branch by the United States Constitution.⁴¹ We then go on to understand the system of checks and balances arising from this separation of powers,⁴² but most curricula do not delve into the often controversial “fourth branch of government[,]” administrative agencies.⁴³

Administrative agencies are part of the executive branch, led by the President, to enforce the laws of the United States.⁴⁴ Administrative agencies, however, are also tasked with the quasi-legislative task of promulgating rules and the quasi-judicial job of managing disputes regarding those rules.⁴⁵ This is not to say that administrative agencies are grabbing authority on their own, nor are they assuming positions that conflict with these foundational principles that our government was founded upon. This is because, before any administrative agencies take any action, there must be some form of enabling legislation passed by Congress.⁴⁶ These quasi-

⁴¹ Kevin Johnson, *A "Hard Look" at the Executive Branch's Asylum Decisions*, 1991 UTAH L. REV. 279, 280 (1991); *see generally* U.S. CONST. art. I-III.

⁴² JOHNSON, *supra* note 42.

⁴³ *See* CORNELIUS KERWIN & SCOTT FURLONG, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 50 (4th ed. 2011).

⁴⁴ *Id.*; *see* AJ Blechner, *Administrative Law Research*, HARV. L. SCH. LIBR., <https://guides.library.harvard.edu/law/administrative> [<https://perma.cc/7WJM-YTRA>] (last updated Apr. 12, 2024).

⁴⁵ KERWIN, *supra* note 44, at 50-51; Varnika Chaturvedi & Anil Kumar Dixit, *Quasi-Judicial and Quasi-Legislative Functions of Administrative Body: An Analytical Study* 7 INT'L J.L. MGMT. & HUMAN. 108, 110-15 (2024); Lindsey Martin, *The Administrative State: Congress's Role in Perpetuating It* 41 CAMPBELL L. REV. 559, 564 (2019); Also note that the terms “rule” and “regulation” are used interchangeably. Maeve P. Carey, *The Federal Rulemaking Process: An Overview*, CONG. RSCH. SERV. at 1 (last updated Jun. 17, 2013), <https://crsreports.congress.gov/product/pdf/RL/RL32240> [<https://perma.cc/8BHC-SZVZ>].

⁴⁶ “Whatever form a new administrative agency takes, the legislature must enact a statute creating the agency... frequently referred to as an agency’s *enabling act*, is the fundamental source of an agency’s power.” WILLIAM F. FOX, JR., *Understanding Administrative Law* 3 (4th ed. 2000).

legislative and quasi-judicial functions are necessary to the function of our society because, ultimately, there are a myriad of decisions that Congress and the Judicial branch are faced with, which they are incapable of adequately resolving on their own.⁴⁷ The individuals within the administrative agencies have specific expertise, and thus are better situated to make technical decisions than the Judiciary or Legislature.⁴⁸

A. Administrative Procedure Act & Enabling Legislation

As fears surrounding the looming powers of administrative agencies grew – especially after the “New Deal” Era, where we saw an explosion in the creation of administrative agencies – President Franklin Roosevelt responded by creating the Attorney General’s Committee on Administrative Procedure. This committee issued nearly 500 pages of recommendations that formed the basis of the Administrative Procedure Act of 1946 (“APA”).⁴⁹ The APA was enacted by Congress to provide “an outline of minimum essential rights and procedures.”⁵⁰ Accordingly, all administrative agencies must abide by the provisions of the APA, basing their

⁴⁷ Administrative agencies are often better situated to tackle the complexities of scientific fields and public services than the legislative or judicial branches. See Max Johnson, *Defining Interim Storage of Nuclear Waste*, 117 NW. U.L. REV. 1177, 1193 (2023); see *Understanding Administrative Law*, PEPP. L. BLOG (Mar. 19, 2024), <https://law.pepperdine.edu/blog/posts/understanding-administrative-law.htm> [<https://perma.cc/XS6H-FXZQ>]; See generally Ric Simmons, *The Failure of the Computer Fraud and Abuse Act: Time to Take an Administrative Approach to Regulating Computer Crime*, 84 GEO. WASH. L. REV. 1703, 1714 (2016).

⁴⁸ JOHNSON, *supra* note 48; SIMMONS, *supra* note 48.

⁴⁹ Alicia R. Ashcraft & Jeffrey F. Barr, *The Importance of The Administrative Procedure Act and The Hidden Dangers of Exemption*, 29 NEV. LAW. 20, 20-21 (2021); see generally Administrative Procedure Act, 5 U.S.C. § 1001 et seq. (1946).

⁵⁰ ASHCRAFT, *supra* note 50 at 21 (quoting H.R. REP. NO. 1980 at 250 (May 3, 1946)).

operations upon the framework that includes a regulatory scheme governing agency “investigations, adjudications, rulemaking, licensing, open meeting and disclosure requirements,... [and] judicial review of administrative proceedings.”⁵¹

Administrative agencies are created through enabling acts and are charged with the responsibility of carrying out the will of Congress.⁵² For example, the Social Security Act of 1935 established the Social Security Administration, granting it various powers to oversee and operate the administration of social security benefits in the United States.⁵³ The President can also recommend the formation of agencies, but they still must be approved by Congress, as seen with the formation of the Environmental Protection Agency (“EPA”).⁵⁴ The creation of the EPA was proposed by President Richard Nixon through the Reorganization Plan No.3 of 1970 and sent to Congress on July 9, 1970.⁵⁵ After conducting committee

⁵¹ *Id.*; see also 2 GLENDA K. HARNARD ET AL., 2 Am. Jur. 2d Admin. Law § 11.

⁵² FOX, *supra* note 47; KEITH WERHAN, PRINCIPLES OF ADMINISTRATIVE LAW 10 (3d ed. 2019); MARTIN, *supra* note 46 at 563; *A guide to the Rulemaking Process*, OFF. OF THE FED. REG. 2 [hereinafter RULEMAKING PROCESS], https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf [<https://perma.cc/XNP9-FZHL>] (last visited Nov. 24, 2024).

⁵³ *Historical Background and Development of Social Security*, SOC. SEC. ADMIN. <https://www.ssa.gov/history/briefhistory3.html> [<https://perma.cc/A7TD-SBJS>] (last visited Nov. 21, 2024); see generally Social Security Act, 42 U.S.C. §§ 301-1305 (1935).

⁵⁴ Johnathan H. Adler, *The Environmental Protection Agency Turns Fifty*, 70 CASE W. RES. L. REV. 871, 871 (2020); see Edward Richards, *Establishing Agencies*, <https://biotech.law.lsu.edu/map/EstablishingAgencies.html> [<https://perma.cc/9VH2-M4M3>] (last visited Nov. 24, 2024) (“[a]gencies must be established by the legislature...”); *The Origins of EPA*, EPA, <https://www.epa.gov/history/origins-epa> [<https://perma.cc/42D3-MZJD>] (last visited Nov. 23, 2024); see generally Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (Oct. 6, 1970), *reprinted as amended in* 5 U.S.C. app. at 202–07 (2006) [hereinafter REORGANIZATION PLAN].

⁵⁵ ADLER, *supra* note 54; see generally REORGANIZATION PLAN, *supra* note 55.

hearings, the House and the Senate approved the proposal, establishing the EPA as an administrative agency.⁵⁶

A significant function of administrative agencies is rule promulgation.⁵⁷ For an agency to create and implement rules, it must first examine the authority granted by the enabling legislation, ensuring that its rules align with congressional intent.⁵⁸ When regulations are properly promulgated under the APA, they “have the force of law, binding the agency as well as other affected persons.”⁵⁹ To comply with the APA, an administrative agency must:

publish a notice of proposed rulemaking (NPRM) in the Federal Register...[then,] [a]fter giving “interested persons” an opportunity to comment on the proposed rule, and after considering the public comments, the agency may then publish the final rule, incorporating a general statement of its basis and purpose...[f]inally, the APA states that the final rule cannot become effective until at least 30 days after its publication unless (1) the rule grants or recognizes an exemption or relieves a restriction, (2) the rule is an interpretative rule or a statement of policy, or (3) the agency determines that the rule should take

⁵⁶ Adler, *supra* note 54.

⁵⁷ *Legal Research Guide: Administrative Law*, SAM HOUSTON STATE UNIVERSITY, <https://shsulibraryguides.org/c.php?g=699719&p=5035850> (adjudication)[<https://perma.cc/7V5Z-YQBQ>] (last visited Nov. 25, 2024); *see* RULEMAKING PROCESS, *supra* note 53.

⁵⁸ RULEMAKING PROCESS, *supra* note 53; *Understanding Administrative Law*, *supra* note 48.

⁵⁹ 3 JACOB A. STEIN, ET. AL., 3 ADMINISTRATIVE LAW § 13.03 (Release No. 141, 2024).

effect sooner for good cause, and publishes that determination with the rule.⁶⁰

In addition to the ability to strike down agency regulations for violations of these requirements outlined in the APA, a court could strike down regulations if they are found to be “arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law.”⁶¹

B. Interpreting Legislative Intent

As established in the previous section, administrative agencies gain their authority through enabling legislation, they must comply with the APA, and their regulations must further Congress's intent – otherwise, the courts can strike down the regulations.⁶² Statutory interpretation is an essential part of administrative law because, in most instances, administrative agencies are tasked with interpreting the congressional intent of enabling statutes to determine the bounds of their own authority.⁶³ The Supreme Court has spoken on the issue of administrative agency interpretations that are inconsistent with the power that the Court believes Congress intended to bestow through a statute, stating:

[w]e have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting

⁶⁰ CAREY, *supra* note 47, at 6.

⁶¹ *Id.*

⁶² *Id.*; see *supra* note 53; MARTIN, *supra* note 46 at 563; *Understanding Administrative Law*, *supra* note 48; STEIN, *supra* note 60; CAREY, *supra* note 47 at 6.

⁶³ See Michael J. Zydney Mannheimer, *Vagueness as Impossibility* 98 TEX. L. REV. 1049, 1092-93 (2020); see *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472-76 (2001); see also *Interpreting The Language of An Ambiguous Statute*, MEUSER, YACKLEY & ROWLAND (Feb. 19, 2015), <https://meuserlaw.com/interpreting-the-language-of-an-ambiguous-statute/> (Minn [<https://perma.cc/G389-3EC6>]).

construction of the statute. . . . The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority.⁶⁴

Interpreting the intent of Congress is generally not an issue when a statute is clear on its face, but it can be more challenging when the language of the statute is “vague” or “ambiguous.”⁶⁵ Ideally, each and every statute that Congress writes would be clear on its face. The true reason behind vague and ambiguous statutes is unclear, even to the Supreme Court.⁶⁶ In their landmark *Chevron* decision, the Court stated:

Perhaps [Congress] consciously desired the [agency] to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency.⁶⁷

⁶⁴ *Id.* (quoting *Whitman*, 531 U.S. at 472-73).

⁶⁵ See Lawrence Solum, *Legal Theory Lexicon: Vagueness and Ambiguity*, LEGAL THEORY BLOG (Mar. 15, 2020), <https://lsolum.typepad.com/legaltheory/2020/03/legal-theory-lexicon-vagueness-and-ambiguity.html> [<https://perma.cc/XHV9-KLEZ>];

⁶⁶ See John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1943-52.

⁶⁷ *Id.* at 1950 (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984)).

No matter the reason, Congress will likely continue to create vague or ambiguous statutes, and statutory interpretation will continually remain an integral part of administrative law.⁶⁸ Next, this note will dive further into Congressional intent and judicial review of administrative agency statutory interpretations through the discussion and analysis of *Chevron* Deference and the Court's *Loper Bright* decision.

C. Administrative Control of the Environment

Multiple federal administrative agencies are tasked with protecting and conserving the environment and natural resources in the United States, including but not limited to the Environmental Protection Agency ("EPA"), Fish and Wildlife Service of the Department of the Interior ("FWS"), Environment and Natural Resource Division of the Department of Justice ("ENRD"), United States Forest Service ("USFS"), National Oceanographic and Atmospheric Administration ("NOAA"), Natural Resource Conservation Service ("NRCS"), Council on Environmental Quality ("CEQ"), Department of Energy Environmental Management ("DEEM"), and Department of Transportation ("DOT").⁶⁹ Additionally, each state has many state administrative agencies that work in

⁶⁸ See *supra* note 64.

⁶⁹ Muse Law Library, *Environmental Law*, RICH. L. SCH., <https://law-richmond.libguides.com/c.php?g=129528&p=845971> [<https://perma.cc/L2CA-7WNZ>] (last updated Sept. 5, 2022); *Federal & State Agencies*, CENTER FOR ENVIRONMENTAL EXCELLENCE, <https://environment.transportation.org/resources/federal-state-agencies/> [<https://perma.cc/XA4B-AS8S>] (last visited Nov. 26, 2024); Paul L. Boley Library, *Environmental Law Research Guide*, LEWIS & CLARK L. SCH., <https://lawlib.lclark.edu/environmental/agencies> [<https://perma.cc/GBH3-4MVQ>] (last updated Nov. 7, 2024).

conjunction with their federal counterparts to carry out the specific agency's goals.⁷⁰

These agencies play a crucial role in protecting and conserving the environment and natural resources through various initiatives and regulatory actions.⁷¹ For instance, the Environmental Protection Agency enforces environmental laws, such as the Clean Air Act and Clean Water Act, by setting pollution standards and holding violators accountable.⁷² The Fish and Wildlife Service

⁷⁰ CENTER FOR ENVIRONMENTAL EXCELLENCE, *supra* note 70; *see Intergovernmental Relationships: How The Three Levels of Government Work Together*, NORWICH UNIVERSITY (“[t]he federal government places requests on the states and local governments, known as federal mandates, to implement its programs.”), <https://online.norwich.edu/online/about/resource-library/intergovernmental-relationships-how-three-levels-government-work-together> [<https://perma.cc/Q8PN-R63D>] (last visited Nov. 26, 2024); *see also* Michelle Sager, *The Critical Role of Federal Partnerships with State & Local Governments During COVID-19*, U.S. GOV'T ACCOUNTABILITY OFF. (Sept. 9, 2020), <https://www.gao.gov/blog/critical-role-federal-partnerships-states-local-governments-during-covid-19> [<https://perma.cc/5Q6C-2H6C>].

⁷¹ Most of their goals are accomplished through the quasi-legislative means of rule-making, setting the requirements that the regulated industries must follow. Then, the agencies can use their quasi-judicial powers and/or pursue civil or criminal actions in the Judiciary if a regulated entity violates the regulations. Although there are some differences between agencies in how each of these is completed, the differences are negligible in the context of this discussion. *See* EPA, *The Basics of the Regulatory Process*, <https://www.epa.gov/laws-regulations/basics-regulatory-process> (last updated July 31, 2024); *see* EPA, *Basic Information on Enforcement*, <https://www.epa.gov/enforcement/basic-information-enforcement> [<https://perma.cc/KMZ4-BGW6>] (last updated Feb. 26, 2025).

⁷² The EPA draws authority from, creates regulations for, and enforces various acts passed by Congress. Most notably the Clean Air Act and Clean Water Act, but also Acts controlling pesticide use, ocean dumping, environmental remediation, emergency planning, and more. *See generally* DAVID M. BEARDEN ET AL., CONG. RSCH. SERV., RL 30798, ENVIRONMENTAL LAWS: SUMMARIES OF MAJOR STATUTES ADMINISTERED BY THE ENVIRONMENTAL PROTECTION AGENCY (2023) (the table of contents can serve as a list of the statutes that the EPA administers, and further review of each section can provide additional information about each statute).

works to protect endangered species through the Endangered Species Act, implementing habitat conservation plans and restoring wildlife populations.⁷³ Similarly, the National Oceanic and Atmospheric Administration manages marine ecosystems by regulating commercial fishing practices and monitoring climate change impacts on coastal communities.⁷⁴

The United States Forest Service manages national forests and grasslands, implementing wildfire prevention

⁷³ Like the EPA, the FWS uses its authority from Congress to create and enforce rules and regulations. U.S. FISH & WILDLIFE SERV., *Laws & Regulations*, <https://www.fws.gov/laws> [<https://perma.cc/D84S-47AD>] (last visited Feb. 22, 2025). Additionally, the FWS runs programs to balance the needs of various entities with protecting endangered and vulnerable species. For example, the FWS’s Habitat Conservation Plans “create[] creative partnerships that allow public and private sectors to work with the Service to address listed and at-risk species in an ecosystem context, generate long-term commitments to conserve such species, and deliver regulatory assurances to project proponents.” Essentially, these types of programs give assurances to entities, that as long as they follow the guidelines set out in the plan, the entity will not be punished for any “incidental losses” or “unintentional take[ing]” of protected species. U.S. FISH & WILDLIFE SERV., *Habitat Conservation Plans*, <https://www.fws.gov/service/habitat-conservation-plans> [<https://perma.cc/HSA3-M2DM>] (last visited Feb. 22, 2025).

⁷⁴ “Our work is governed by more than 40 laws and policies, which are implemented by NOAA Fisheries and enforced by the NOAA Office of Law Enforcement.” NOAA FISHERIES, *Understanding Laws and NOAA Fisheries*, <https://www.fisheries.noaa.gov/insight/understanding-laws-and-noaa-fisheries> [<https://perma.cc/NLY6-TPMY>] (last visited Feb. 23, 2025). NOAA uses its administrative powers to manage marine fisheries in U.S. federal waters, prevent the “taking” of marine mammals, protect endangered species and their habitats, and foster the integration of environmental values into other federal agencies’ decision-making processes. *Id.*

strategies and sustainable logging practices.⁷⁵ The Department of Energy's regulations span from implementing energy efficiency and conservation measures to ensuring the safety of nuclear waste sites, but a large function is approving or denying permits for various actors in the energy field.⁷⁶ Meanwhile, the Department of Transportation promotes sustainable infrastructure by funding projects that reduce carbon emissions, such as expanding public transit and

⁷⁵ The Forest Service is a U.S. Department of Agriculture division with broad delegated authority from the Secretary of Agriculture. 36 CFR § 200.3 (2019). The FS has quasi-legislative and quasi-judicial functions and maintains public outreach and education programs. *See* FOREST SERVICE, *Meet the Forest Service*, <https://www.fs.usda.gov/about-agency/meet-forest-service> [<https://perma.cc/R7GS-EJNV>] (last visited Feb. 26, 2025); *see* ANNE A. RIDDLE, CONG. RSCH. SERV. R43872, NATIONAL FOREST SYSTEM MANAGEMENT: OVERVIEW AND ISSUES FOR CONGRESS [1] (2023) (information regarding the National Forest System and the role of the Forest Service); *see generally* ANNE A. RIDDLE, CONG. RSCH. SERV. R45219, FOREST SERVICE ASSISTANCE PROGRAMS (2023) (the table of contents serves as a list of programs, which each section further discusses).

⁷⁶ *See* DOE, *Laws DOE Administers*, <https://www.energy.gov/gc/laws-doe-administers> [<https://perma.cc/C84P-EC89>] (last visited Feb. 26, 2025); *see* Nick Lawton, *DOE Finalized New Rule for Federal Permitting of Transmission Lines*, EARTHJUSTICE (May 1, 2024), <https://earthjustice.org/experts/nick-lawton/doe-finalized-new-rule-for-federal-permitting-of-transmission-lines> [<https://perma.cc/P6YE-2G4A>]; *see* DOE, *Regulatory Process*, <https://www.energy.gov/eere/buildings/regulatory-processes> [<https://perma.cc/79BJ-WVMB>] (last visited Feb. 26, 2025) (discussing the regulatory process followed by the DOE).

improving fuel efficiency standards.⁷⁷ These agencies enforce regulations, fund conservation efforts, promote sustainable resource management, and more to protect our nation's access to a safe, clean environment.

IV. THE RISE AND FALL OF *CHEVRON* DEFERENCE

From 1984 until 2024, *Chevron* deference was considered to be one of the most important facets of administrative law in the United States.⁷⁸ The rise of *Chevron* can be attributed to the significant growth of the administrative state – more agencies, more regulations,

⁷⁷ “The transportation sector is the largest source of greenhouse gas (GHG) emissions in the United States, responsible for one-third of all emissions. To address the growing climate crisis and to meet the goal of net-zero GHG emissions economy-wide by 2050, the United States must decarbonize transportation by eliminating nearly all GHG emissions from the sector.” DOE ET AL., *Efficient Transportation: An Action Plan for Energy Innovation* (Dec. 2024), https://www.energy.gov/sites/default/files/2024-12/doe-eere-modal-reports_efficient-transportation-energy-emissions-action-plan.pdf [<https://perma.cc/867Z-MM9J>]; The DOT also participated in the environmental justice initiatives of the federal government, but the future of these efforts is uncertain under the Trump administration. See e.g., Exec. Order No. 14173, 90 Fed. Reg. 8633 (published Jan. 31, 2025) (order withdrawing previous executive orders to ensure broad agency consideration of environmental justice and disparate impacts in their decision making processes); see generally Procedures for Considering Environmental Impacts, 85 Fed. Reg. 74640 (proposed Nov. 23, 2020) (currently being withdrawn by Procedures for Considering Environmental Impacts, 90 Fed. Reg. 5808 (proposed Jan. 17, 2025)).

⁷⁸ “Outlined in the 1984 decision *Chevron U.S.A. v. NRDC*, the doctrine has become one of the most frequently cited in administrative law, and a change could significantly affect the ability of federal agencies to regulate business.” Thomas W. Merrill, *Professor Thomas W. Merrill on the Future of the Chevron Doctrine*, COLUM. L. SCH. (Jan. 11, 2024), <https://www.law.columbia.edu/news/archive/professor-thomas-w-merrill-future-chevron-doctrine> [<https://perma.cc/C83M-56WH>]; see generally *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

more deference to the expertise of those agencies.⁷⁹ The practice of deferring to agency expertise extends over 80 years, with the Supreme Court holding in *Skidmore v. Swift & Co.* that agency decisions “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”⁸⁰ The Supreme Court then held in 1945, “the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.”⁸¹ In 1984, the Supreme Court created the *Chevron* Doctrine – borrowing many of the sentiments shared in earlier cases about agency expertise and the reasonableness of agency interpretations.⁸² Specifically, the Court in *Chevron* stated as follows:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not

⁷⁹ “The modern administrative state, as measured by the number of agencies, their budgets and staffing, and the number of regulations they issue, has grown significantly over the last hundred years.” Susan E. Dudley, *Milestones in the Evolution of the Administrative State*, 150 DÆDALUS 33, 33-34 (2021).

⁸⁰ “The weight of such a judgment in a particular case 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 which give it power to persuade, if lacking power to control.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

⁸¹ This decision furthers *Skidmore* slightly and opens the door for *Chevron*. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

⁸² *CHEVRON*, 467 U.S. at 842-85.

directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.⁸³

It is important to mention that by the late 1990s and early 2000s, there seemed to be the start of a turn on *Chevron Deference*, with limitations starting to appear – which would pave the way for the newly coined Major Questions Doctrine and, ultimately, the Supreme Court's willingness to overrule *Chevron* deference in their *Loper Bright* decision.⁸⁴

A. The Age of Chevron Deference

During the 40 years that *Chevron* ruled the landscape of administrative law, the deference and considerable weight shown to an agency's "permissible interpretation" allowed for "expanded agency authority and limited judicial oversight over agency interpretations and regulations."⁸⁵ This allowed the regulatory state to thrive because as long as an agency could point to a "permissible construction of the statute[.]" the courts

⁸³ *Id.* at 842-43.

⁸⁴ See Daniel J. Gifford, *The Emerging Outlines of a Revised Chevron Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783, 784-85 (2007) (discussing some of the changes in the Supreme Court's approach to *Chevron*); see generally Alyssa Greenstein, *The EPA in the Age of Chevron Deference Ambiguity and Decline*, 36 GEO. ENVTL. L. REV. 269 (2024) (discussing the decline of *Chevron*'s use in the courts, and its impacts on the EPA).

⁸⁵ Arron D. Arnson & Steve Coleman, *Feature: Focus on Employment Law: How the End of Chevron Deference Could Transform Employment Law*, 61 AZ ATTORNEY 30, 30 (2025) (quoting CHEVRON, 467 U.S. at 843-44).

would likely uphold its decisions – making achieving the agency's goals easier.⁸⁶ *Chevron* deference also acknowledged the greater role of agencies in policy implementation, as their interpretations were often shaded through the lens of the presidential administration in office.⁸⁷

The *Chevron* framework requires the Court to complete the two-step analysis to determine if (1) the statute is ambiguous and (2) if so, is the agency's interpretation is reasonable.⁸⁸ After introducing *Chevron* deference in 1984, no one expected the doctrine to become the landmark that it eventually became.⁸⁹ The Supreme Court's 1984-85 term saw nineteen cases presenting a question of deference to agency interpretations, but *Chevron* was only cited in one of the Court's decisions.⁹⁰ However, the Supreme Court then applied *Chevron* in six opinions during the 1985-86 term, two in the 1986-87 term, and five in the 1987-88 term.⁹¹ Soon the Court was adopting the *Chevron* framework in the majority of deference cases being heard.⁹²

Unfortunately, the broad application and support of *Chevron* only lasted roughly 20 years before the Supreme Court started restricting the scope and application of the doctrine.⁹³ In 2000, the Supreme Court decided against extending chevron deference to the Food & Drug Administration because of the 'importance' of the

⁸⁶ *Id.*

⁸⁷ See Shannon Roesler, *Agency Reasons at the Intersection of Expertise and Presidential Preferences*, 71 ADMIN. L. REV. 491, 493-495, 498 (2019) (discussing the political undertones of administrative actions in the modern era).

⁸⁸ GREEN, *supra* note 85 at 271 (quoting *Chevron*, 467 U.S. at 842-44).

⁸⁹ Thomas W. Merrill, *Chevron v. NRDC: A Thirtieth Anniversary Commemoration on the Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 275-76 (2014).

⁹⁰ *Id.* at 276.

⁹¹ *Id.*

⁹² "By the end of the 1980s, the percentage of deference cases in the Supreme Court adopting the *Chevron* framework had risen to around 40%; by the early 1990s it was up to around 60%." *Id.*

⁹³ See *supra* note 85 and accompanying text.

administrative decision.⁹⁴ In 2001, the Court held that *Chevron* deference only applies to agency actions that have the force of law – all other agency interpretations revert to *Skidmore* deference.⁹⁵

In the present day, it is easy to see the line between the ‘importance’ factor of *FDA v. Brown & Williams* and the 2022 *West Virginia v. EPA* decision – which formally introduced the Major Questions Doctrine.⁹⁶ Additionally, one could draw parallels between the Court’s limitation on *Chevron* Deference in *U.S. v. Mead Corp.* and the elimination of *Chevron* Deference in *Loper Bright*.⁹⁷ However, even with these limitations, agencies were still often successful in *Chevron* cases until its demise.⁹⁸

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%).’ In deference cases, agencies won nearly 25% more often when courts applied *Chevron* compared to the cases where *Chevron* was not

⁹⁴ “Insofar as the decision to regulate tobacco reflects the policy of an administration, it is a decision for which that administration, and those politically elected officials who support it, must (and will) take responsibility. And the very importance of the decision taken here, as well as its attendant publicity, means that the public is likely to be aware of it and to hold those officials politically accountable.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 190 (2000).

⁹⁵ “We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority...The Customs ruling at issue here fails to qualify, although the possibility that it deserves some deference under *Skidmore* leads us to vacate and remand.” *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

⁹⁶ *Tobacco Corp.*, 529 U.S. at 190; *West Virginia v. EPA*, 597 U.S. 697, 700 (2022).

⁹⁷ *Mead Corp.*, 533 U.S. at 226-27; *Loper Bright Enter. V. Raimondo*, 144 S. Ct. 2244, 2257-64 (2024).

⁹⁸ GREENSTEIN, *supra* note 85, at 274.

applied. Ultimately, the criticisms of and limitations put on *Chevron* at least had the Court speaking about *Chevron*—the years leading up to the Court’s *Loper Bright* decision saw a surprising silence around *Chevron*.⁹⁹

Even with these signs towards the end of *Chevron*, it still would have been a reasonable position to stand firm that the Court would never touch it due to the long line of precedent it holds.¹⁰⁰ Once the Supreme Court accepted *Loper Bright* into their docket, Kent Barnett and Christopher J. Walker urged the Court not to accept the “invitation” to overrule *Chevron* “because the pull of statutory stare decisis is too strong to overcome.”¹⁰¹ As we know, the Court did accept that invitation, overruling *Chevron* deference, creating a new age of uncertainty for the agencies, industries, legislatures, and citizens that have relied on the doctrine for decades.¹⁰²

1. *Loper Bright Enterprises v. Raimondo*

Loper Bright Enterprises v. Raimondo resulted from a National Marine Fisheries Service regulation requiring the fisheries industry to pay for an individual to be on each boat as an at-sea observer.¹⁰³ The goal of the regulation was to ensure compliance with federal laws,

⁹⁹ GREENSTEIN, *supra* note 85 at 274-75.

¹⁰⁰ Kent Barnett & Christopher J. Walker, *Chevron and Stare Decisis*, 31 GEO. MASON L. REV. 475, 476-78 (2024).

¹⁰¹ *Id.* at 476.

¹⁰² Adam Liptak, *Supreme Court Imperils an Array of Federal Rules*, N.Y. TIMES (July 1, 2024), <https://www.nytimes.com/live/2024/06/28/us/supreme-court-chevron> [<https://perma.cc/8X6N-NQYZ>] (discussing the death of *Chevron* and some of the accompanying issues that may follow); BARNETT, *supra* note 102, at 476, 479-83 (discussing the reliance of the judiciary and legislature on *Chevron*).

¹⁰³ *Loper Bright*, 603 U.S. 369, 380; *see also* SAVE THE SOUND, *Loper-Bright Enterprises, et. al. v. Raimondo*, <https://www.savethesound.org/loper-bright-enterprises-et-al-v-raimondo/> [<https://perma.cc/5768-MMAY>] (last updated Sept. 26, 2024) (offering a useful summary of the case).

but the regulated parties believed it to be an overstep of the agency's authority.¹⁰⁴

Prior to Supreme Court review of the case, the lower courts upheld the agency's interpretation and rule, relying heavily on *Chevron*.¹⁰⁵ The Supreme Court did not take the same position, instead holding in a 6-3 decision that “[b]ecause the D. C. and First Circuits relied on *Chevron* in deciding whether to uphold the Rule, their judgments are vacated, and the cases are remanded for further proceedings consistent with this opinion.”¹⁰⁶

The Court quoted *Marbury v. Madison*, stating that “[i]t is emphatically the province and duty of the judicial department to say what the law is” – believing *Chevron* deference to be taking these decisions of law away from the judiciary.¹⁰⁷ Some believe this quote from *Marbury* tends to be misinterpreted and thus miscited in briefs and judicial decisions.¹⁰⁸ For example, see the following quote from Richard J. Pierce, Jr., the Lyle T. Alverson Professor of Law at The George Washington University Law School regarding the petitioner's brief in *Loper Bright*:

¹⁰⁴ See *supra* note 105.

¹⁰⁵ *Loper Bright*, 603 U.S. at 369; see, e.g., *Relentless, Inc. v. U.S. Dep't of Commerce*, 62 F.4th 621, 624-25, 627 (1st Cir. 2023) (“The district court granted summary judgment for the government, reasoning that the rule is a permissible exercise of agency authority under the statute governing fishery stocks and conservation, that its promulgation followed proper procedures, and that it does not violate the Constitution. On appeal, plaintiffs renew their attacks. Because we agree with the district court that the rule is a permissible exercise of the agency's authority and is otherwise lawful, we affirm...The district court granted summary judgment for the Agency. The court found that the MSA is ambiguous regarding authorization for industry-paid monitors, and that under [*Chevron*] the Agency's interpretation is entitled to deference. It further found that the Rule does not violate any” other relevant federal statutes).

¹⁰⁶ *Loper Bright*, 603 U.S. 369, 413 (2024).

¹⁰⁷ *Id.* at 369 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)); Richard J. Pierce, Jr., *On Misciting Marbury*, THE REG. REV. (Jan. 29, 2024), <https://www.theregreview.org/2024/01/29/pierce-on-misciting-marbury/> [<https://perma.cc/N9QZ-XKF2>].

¹⁰⁸ PIERCE, *supra* note 109.

The petitioner's brief in *Loper Bright* is a good example of a document that challenges the *Chevron* doctrine by quoting *Marbury* out of context. The brief quotes *Marbury* and then states that a court's duty 'to say what the law is' must also 'include saying what the law is in close cases even when the authorities at issue are murky or silent.' The brief, though, does not cite any case to support that extended proposition—and for a good reason. Neither *Marbury* nor any other nineteenth century opinion supports the argument that the courts, rather than agencies, must be the primary or sole authority of what the law is in cases of statutory silence or ambiguity that involve agency rulemaking.¹⁰⁹

The Court also pointed to the Administrative Procedure Act, which shares a similar tone to *Marbury* as it requires courts to “decide *all* relevant questions of law arising on review of agency action...even those involving ambiguous laws – and set aside any such action inconsistent with the law as they interpret it”¹¹⁰ These sentiments of reclaiming judicial review and eliminating administrative overreach are felt throughout the opinion.¹¹¹

¹⁰⁹ *Id.*

¹¹⁰ *Loper Bright*, 603 U.S. at 392 (quoting 5 U.S.C. § 706).

¹¹¹ In Justice Thomas's concurrence, he specifically says, “the Framers drafted a Constitution that divides the legislative, executive, and judicial powers between three branches of Government. *Chevron* deference compromises this separation of powers in two ways. It curbs the judicial power afforded to courts, and simultaneously expands agencies' executive power beyond constitutional limits. *Id.* at 414 (Thomas, J., concurring) (citation omitted).

Chief Justice Roberts, in the majority opinion, made sure to state that “Congress in 1946 enacted the APA ‘as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices.’” *Id.* at 391 (quoting *U.S. v. Morton Salt Co.*, 338 U.S. 632, 644 (1950)).

Furthering these goals of the Supreme Court is the elimination of the Court deferring to an agency's permissible interpretation – interpretations that are often based on agency expertise.¹¹² Instead, the Court believes that every ambiguous statute has a “best reading” or interpretation and that it is the duty of the courts to decide what that reading is.¹¹³

Although part of the Court's justification for overruling *Chevron* was the protection of the separation of powers, the Court failed to acknowledge that this decision itself could lead to an imbalance.¹¹⁴ The *Loper Bright* decision threatens the regulatory authority of every

¹¹² See generally Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006) (discussing the place of expertise in the interpretation of ambiguous statutes, including the intent of the Court in *Chevron* and the potential benefits of leaving the duty of interpretation to those who would be held politically accountable).

¹¹³ *Loper Bright*, 603 U.S. at 373-74.

¹¹⁴ “I write separately to underscore a more fundamental problem: Chevron deference also violates our Constitution's separation of powers[.]” *Loper Bright*, 603 U.S. at 413 (Thomas, J., concurring).

This decision has the possibility of making judges the ‘experts’ when it comes to agency decisions due to the “independent judgment” that they must now exercise. This “independent judgment” also could take away the rightfully authorized authority of administrative agencies if a judge simply does not like the agency's actions. *Id.* at 394.

agency in the United States – whether or not we will see these threats come to life is yet to be seen.¹¹⁵

B. The Impacts of Loper Bright on Environmental Regulation

Loper Bright immediately sent shockwaves throughout the environmental community – with some predicting that this decision would lead to a complete rollback of environmental protections.¹¹⁶ Others stood strong in their belief that just because the loss of *Chevron* will likely lead to increased challenges to environmental

¹¹⁵ Marisa Katz, *The End of Chevron Deference and the Impact on Public Health*, PUB. HEALTH L. CTR. (July 22, 2024), <https://www.publichealthlawcenter.org/commentary/240722/7/22/24-end-chevron-deference-and-impact-public-health> [https://perma.cc/L2BY-BYUS]; Craig Orji & Jason Hayes, *Why all the hysteria over Supreme Court's Loper Bright Ruling?*, MACKINAC CTR. (July 19, 2024), <https://www.mackinac.org/blog/2024/why-all-the-hysteria-over-supreme-courts-loper-bright-ruling> [https://perma.cc/9HJK-5E37]; SIDLEY, *Environmental Law Implications of Loper Bright and the End of Chevron Deference* (July 2, 2024), <https://environmentalenergybrief.sidley.com/2024/07/02/environmental-law-implications-of-loper-bright-and-the-end-of-chevron-deference/> [https://perma.cc/2USQ-B8CL]; see generally Cass R. Sunstein, *The Consequences of Loper Bright* (Harvard L. Sch. Pub. L. Working Paper No. 24-29, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4881501 [https://perma.cc/FJ24-HHM8].

¹¹⁶ ORJI, *supra* note 117. Environmental advocacy organizations like the Sierra Club have criticized the *Loper Bright* decision, stating that the Supreme Court is “gutting federal environmental protections,” which “could send a ‘convulsive shock’ to decades of federal environmental...regulations.”

regulations, it does not immediately mean that these challenges will be successful.¹¹⁷

One area of concern is how the new “best interpretation” of an ambiguous statute requirement will impact environmental justice regulations that draw their authority from the National Environmental Policy Act (“NEPA”).¹¹⁸ NEPA provides a framework that requires all branches of government to properly consider potential environmental concerns before taking any action that “significantly affects the environment.”¹¹⁹ The exact environmental concerns to be considered are ambiguous in the statute, so under guidance from the Biden

¹¹⁷ The Mackinac Center believes that although the *Loper Bright* decision was a shock, “[t]he decision to overrule *Chevron* deference will not shrink federal or state bureaucracies, and it probably won’t do much to rein in the regulatory apparatus.” *Id.* Jack M. Beerman, Professor of Law at Boston University School of Law, stated that “*Chevron* was an important doctrine in administrative law, and it may have seemed like a good idea when it was decided. But over the years it proved to be at best a distraction from the regulatory issues at stake, and at worst a fundamental mistake.” *Chevron Deference Is Dead, Long Live Deference*, 2023-2024 CATO SUP. CT. REV. 31, 31 (2024). See generally Bracewell Env’t L. Monitor, *The Future is Loper Bright* (Aug. 21, 2024), <https://www.bracewell.com/resources/the-future-is-loper-bright/> [<https://perma.cc/M9L7-GVVT>] (providing a discuss focused on potential benefits for the regulatory landscape, primarily from the point of view of regulated entities – while also acknowledging the likely increase in litigation).

¹¹⁸ *How Loper Bright Weakens NEPA Enviro Justice Strategy*, LAW360 (Aug. 1, 2024), <https://www.law360.com/articles/1862553/how-loper-bright-weakens-nepa-enviro-justice-strategy> [<https://perma.cc/Z7UP-ZBBE>] [hereinafter *Enviro Justice Strategy*].

¹¹⁹ *Summary of the National Environmental Policy Act*, EPA, <https://www.epa.gov/laws-regulations/summary-national-environmental-policy-act> [<https://perma.cc/Z5JV-JH52>] (last updated July 31, 2024); see generally National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332.

administration, NEPA has been interpreted to include environmental justice considerations.¹²⁰

Under a *Chevron* analysis, an interpretation of NEPA that authorizes environmental justice considerations would likely be upheld,¹²¹ but the *Loper Bright* decision tees up arguments that this interpretation is not “the best’ interpretation of NEPA” – especially as the broad framework provided by NEPA does “not bear any clear connection” to these considerations.¹²²

Further, some worry that without *Chevron* deference, the fossil fuels industries will be motivated to “launch more lawsuits aimed at weakening or reversing climate regulations.”¹²³ If these challenges are brought in conservative courts, judges could use the absence of *Chevron* to limit the EPA’s ability to act “swiftly and decisively” regarding climate change and environmental

¹²⁰ *Loper Bright*, 603 U.S. at 373-74; LAW360, *supra* note 120. “The NEPA rulemaking is part of a broad regulatory reform directed by President Joe Biden in Executive Order 13990, issued Jan. 20, 2021.” *Id.* at n.1. “Environmental justice” is a movement aimed at ensuring “that everyone – regardless of race, color, national origin, or income – has the right to the same environmental protections and benefits, as well as meaningful involvement in the policies that shape their communities.” This equal enjoyment of the environment principle also includes considerations of equal environmental burdens regardless of race, color, national origin, or income. Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NRDC (Aug. 14, 2025), <https://www.nrdc.org/stories/environmental-justice-movement> [<https://perma.cc/VK6C-LCZB>].

¹²¹ Under *Chevron*, the agency would only need to establish that the language of NEPA is ambiguous and that their interpretation is reasonable. *See supra* Section III.A.

¹²² LAW360, *supra* note 120. Even though there may not be clear connections between the broad language of NEPA and consideration of environmental justice issues, that could be by design. Congress is not comprised of environmental experts, and their intention may have been to allow the administrative agencies to use their expertise to determine what specific environmental issues should be considered. *See supra* Section II.B.ii.

¹²³ Alec Goldstein, *Loper Bright Decision as a Potential Threat to Climate Change*, FORDHAM ENV’T L. REV. (Nov. 19, 2024), <https://fordhamlawelr.org/?p=1771> [<https://perma.cc/T5P9-E8RP>].

issues.¹²⁴ Even if the courts do not overwhelmingly decide in favor of these challenges, increased litigation will slow down and potentially derail the already lengthy administrative process.¹²⁵

Permitting decisions under the Clean Water Act and emissions standards under the Clean Air Act often turn on ambiguous statutory terms like “navigable waters” or “appropriate and necessary” levels of control.¹²⁶ These provisions have traditionally been interpreted through the lens of agency expertise, particularly as new technologies and scientific evidence evolve.¹²⁷

¹²⁴ *Id.*; Sam Sakar, senior vice president at Earthjustice, stated that recent rulings from the Supreme Court, like the *Loper Bright* decision, are “‘especially valuable for conservative judges who are inclined towards striking down [environmental] regulations[.]’” Maxine Joselow, *How Conservative Judges Secured a ‘Chain Saw’ to Derail Environmental Rules*, WASH. POST (July 1, 2024), <https://www.washingtonpost.com/climate-environment/2024/07/01/supreme-court-climate-environmental-policy/> [<https://perma.cc/SX45-94QW>]. Now that Trump is in office again, he can appoint even more conservative judges willing to use the *Loper Bright* decision in conjunction with other new canons like the Major Questions Doctrine to strike down the regulatory authority of environmental agencies. GOLDSTEIN, *supra* note 125.

¹²⁵ JOSELOW, *supra* note 125; Alicia Marrero-Riera, *Potential Impacts of the Supreme Court’s Loper Bright Enterprises v. Raimondo Decision*, BECKER & POLIAKOFF (July 10, 2024), <https://beckerlawyers.com/becker-spotlight-potential-impacts-of-the-supreme-courts-loper-bright-enterprises-v-raimondo-decision/> [<https://perma.cc/8G9S-EERG>].

¹²⁶ Shai Stern & Itay Biton, *The Regulatory Triad: Reimagining Environmental Law in the Post-Chevron Era*, 36 VILL. ENV’T L.J. 3, 18, 32-33 (2025); *see generally*, Nicholas S. Bryner & Victor Byers Flatt, *The Importance of Looking Under the ‘Administrative Hood’: A Case Study of the National Waters Protection Rule*, LSU LAW DIGITAL COMMONS (2022) (discussing how the field of environmental law is already inundated with legal challenges based upon administrative law); *see generally*, The Clean Air Act in a Nutshell: How It Works, EPA (Mar. 22, 2013), https://www.epa.gov/sites/default/files/2015-05/documents/caa_nutshell.pdf [<https://perma.cc/6BBV-XL98>] (overview of many of the terms in the clean air act); *see generally*, 40 C.F.R. 120 (2023) (revision of the term “navigable waters”).

¹²⁷ STERN, *supra* note 128 at 23-24; *see supra* note 114 and accompanying text.

Finally, the elimination of Chevron deference intensifies an already volatile regulatory landscape.¹²⁸ Environmental policy frequently shifts between administrations, often with dramatic changes in enforcement priorities and rulemaking.¹²⁹ Previously, Chevron offered a measure of predictability by allowing agencies some flexibility in adapting statutory interpretation to new executive agendas.¹³⁰ Without that deference, each change in policy must now survive heightened judicial scrutiny, which may discourage agencies from acting boldly or revisiting prior deregulatory decisions – further slowing progress on urgent environmental challenges.¹³¹

Overall, if the likely flurry of challenges to environmental regulations are successful, they will alter the authority and ability of administrative agencies to carry out their missions to ensure that everyone has access to a clean environment.¹³² Judges will be the final word, calling the shots that Congress intended experts employed by the administrative agencies to make.¹³³ The decisions of these judges have the potential to create unprotected gaps in environmental regulation, putting individuals across the country at risk of increased negative environmental externalities.

V. RELIGIOUS FREEDOM IN THE UNITED STATES

The principle of religious liberty is one of the core tenets of the American identity.¹³⁴ We are taught in grade

¹²⁸ BRYNER, *supra* note 128; *see supra* note 116 and accompanying text.

¹²⁹ STERN, *supra* note 128 at 25.

¹³⁰ *Id.* at 23-30.

¹³¹ *Id.* at 26-33.

¹³² *See supra* note 126 and accompanying text.

¹³³ *Id.*; *see supra* note 124 and accompanying text.

¹³⁴ David Hudson, *Religious Liberty in The United States: An Inalienable Right*, FOUND. FOR INDIVIDUAL RTS. AND EXPRESSION (Aug. 25, 2023), <https://www.thefire.org/news/religious-liberty-united-states-inalienable-right> [<https://perma.cc/H5LF-NJ4E>].

school that the first settlers of the thirteen colonies left England to escape religious persecution,¹³⁵ and the First Amendment of our Constitution includes two clauses enshrining the right to religious freedoms – the Establishment Clause and the Free Exercise Clause.¹³⁶ These Clauses are supplemented by federal statutes like the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) and the Religious Freedom Restoration Act (“RFRA”).¹³⁷

A. THE FIRST AMENDMENT

The First Amendment contains the Establishment Clause and the Free Exercise Clause.¹³⁸ The Establishment Clause limits the federal government so that it cannot “promote and inculcate a common set of beliefs through mandate, like Great Britain did with the Church of England.”¹³⁹ The courts were then tasked with determining what government actions violate the

¹³⁵ See generally Tim Bailey, *Colonial America: Pilgrims, the Mayflower Compact, and Thanksgiving*, THE GILDER LEHMAN INST. OF AM. HIST. (2018), https://www.gilderlehrman.org/sites/default/files/Unit1_Complete_ColAm_0.pdf [<https://perma.cc/DUR2-QRCA>].

¹³⁶ HUDSON, *supra* note 136. The Establishment Clause: Congress shall make no law respecting an establishment of religion.” U.S. CONST. amend. I. The Free Exercise Clause: “or prohibiting the free exercise thereof[.]” *Id.*

¹³⁷ HUDSON, *supra* note 136.

¹³⁸ HUDSON, *supra* note 136; U.S. CONST. amend. I.

¹³⁹ Falco Anthony Muscante II, “*Play in the Joints*” Among the Religion Clauses: Rebuilding the Strong Joints the Framers Formed, 22 AVE MARIA L. REV. 27, 29-30 (2024) (providing a discussion on the evolution of the Establishment Clause from its founding to present day).

Establishment Clause and which do not.¹⁴⁰ Throughout the years, the Supreme Court attempted to establish tests and bright-line definitions to assist in these determinations.¹⁴¹

One such test arose when the Court decided *Lemon v. Kurtzman* in 1971, establishing a three-factor balancing test.¹⁴² The *Lemon* test provides that an action by the government does not violate the Establishment Clause if: “(1) the primary purpose is secular, (2) it neither promotes nor inhibits religion, and (3) there is no excessive entanglement between church and state.”¹⁴³ The *Lemon* test remained good law for fifty years until the Court overruled it in its *Kennedy v. Bremerton School District* decision – now requiring courts to interpret the Establishment Clause by ‘reference to historical practices and understanding.’”¹⁴⁴

The Free Exercise Clause can be generally understood to further the Establishment Clause by ensuring the “freedom for Americans to believe what they want...[and] the freedom to act on that belief.”¹⁴⁵ As expansive as this freedom is, it has some limitations, as

¹⁴⁰ “As the final arbiter of the law, the Court is charged with ensuring the American people the promise of equal justice under law and, thereby, also functions as guardian and interpreter of the Constitution.” Charles Evans Hughes, Chief Justice, Cornerstone Address (Oct. 13, 1932) (specifically speaking about the role of the Supreme Court in constitutional interpretation, but as SCOTUS is the “final arbiter,” issues must first travel through the lower-level courts – giving each court a similar responsibility), [https://www.supremecourt.gov/about/constitutional.aspx#:~:text=As%20the%20final%20arbiter%20of,Justice%20Charles%20Evans%20Hughes%20observed \[https://perma.cc/J7E2-RHDM\]](https://www.supremecourt.gov/about/constitutional.aspx#:~:text=As%20the%20final%20arbiter%20of,Justice%20Charles%20Evans%20Hughes%20observed%20[https://perma.cc/J7E2-RHDM]).

¹⁴¹ MUSCANTE, *supra* note 141 at 30; *See generally* Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2000); Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1993).

¹⁴² *Id.* at 31; HUDSON, *supra* note 136; 403 U.S. 602, 612-13 (1971).

¹⁴³ MUSCANTE, *supra* note 141, at 31; HUDSON, *supra* note 136; 403 U.S. at 612-13.

¹⁴⁴ HUDSON, *supra* note 136; MUSCANTE, *supra* note 141, at 31; 597 U.S. 507, 534-36 (2022).

¹⁴⁵ MUSCANTE, *supra* note 141, at 31-32.

illustrated by the Supreme Court's decisions over time.¹⁴⁶
As illustrated by the following:

In the early 1960s, the Supreme Court ruled that the government could not infringe upon a person's free-exercise rights unless the government's action could survive 'strict scrutiny' – that is, a showing that the regulation burdening this freedom was advancing a compelling government interest in the least restrictive way possible. In the 1963 decision *Sherbert v. Verner*, the Court ruled that the state of South Carolina violated the free-exercise rights of Seventh Day Adventist Adele Sherbert by denying her unemployment compensation when she was terminated for refusing to work on Saturday, her Sabbath day. But the Court changed course abruptly in *Employment Division v. Smith* (1990), a case also involving unemployment compensation benefits and religious faith. Alfred Smith and Galen Black, members of the Native American Church, were fired after they ingested peyote, a hallucinogenic drug, for religious reasons.... In his majority opinion, Justice Antonin Scalia ruled that the government does not violate the Free Exercise Clause when it acts pursuant to a neutral and generally applicable law that does not target religion but merely has an incidental effect on it. 'We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate,' Justice Scalia wrote[.]¹⁴⁷

¹⁴⁶ HUDSON, *supra* note 136; *Sherbert v. Verner*, 374 U.S. 398 (1963); *Emp. Div. v. Smith*, 494 U.S. 872 (1990).

¹⁴⁷ HUDSON, *supra* note 136.

Since these decisions, the Supreme Court has clarified that the government must still satisfy a ‘strict scrutiny’ level of review to result in a finding that the regulation does not violate the free exercise clause – even with the “neutral” and “generally applicable” language used in *Smith*.¹⁴⁸ Additionally, the Court has consistently acknowledged that “belief and action cannot be neatly confined in logic-tight compartments” – reinforcing the need for expansive protections for religious exercise.¹⁴⁹

B. RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

The Religious Land Use and Institutionalized Persons Act was enacted after the Supreme Court held that the Religious Freedom Restoration Act unconstitutionally attempted to alter the jurisprudence of the Free Exercise Clause.¹⁵⁰ Congress set forth that the purpose of the RFRA was to “restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*,...and to guarantee its application in all cases where free exercise of religion is substantially burdened....”¹⁵¹ Congress represented that this purpose simply enforced the Free Exercise Clause, but the Supreme Court disagreed.¹⁵² With the Court holding that

¹⁴⁸ *Id.*

¹⁴⁹ MUSCANTE, *supra* note 141 at 32; *Id.* at n.26 (providing further language from various Justices in different opinions, discussing the same idea).

¹⁵⁰ Andrew Denning, *RLUIPA: Calming the Interpretive Seas*, 62 U. LOUISVILLE L. REV. 227, 230 (2023); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (SCOTUS decision invalidating the RFRA); *See generally* Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2000); Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1993).

¹⁵¹ DENNING, *supra* note 152 at 230 (quoting 42 U.S.C. § 2000bb; *Sherbert v. Vener*, 347 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)) (emphasis omitted).

¹⁵² DENNING, *supra* note 152 at 231.

“[l]egislation which alters the Free Exercise Clause’s meaning cannot be said to be enforcing the Clause.”¹⁵³ Notably, the Supreme Court had already declined to apply the compelling interest test that the RFRA attempted to codify in its *Employment Div. v. Smith* decision.¹⁵⁴

After the Supreme Court struck down the RFRA, Congress passed the RLUIPA, aimed at furthering the goals of the RFRA without triggering the same constitutional concerns.¹⁵⁵ One way Congress achieved this goal was by narrowing the statute’s scope from “all federal, state, and local governmental actions” to “discrimination against land use as free exercise and discrimination against the free exercise of institutionalized persons.”¹⁵⁶ Additionally, Congress omitted the portion of the RFRA tying the statute to the Free Exercise Clause of the First Amendment.¹⁵⁷ Further, two sponsors of the bill stated that the term “substantial burden” as used in this Act is not intended to be given any broader interpretation than the Supreme Court’s articulation of the concept of substantial burden or religious exercise.”¹⁵⁸

This separation from the Supreme Court’s “valid and neutral law general applicability standard used in First Amendment free exercise cases” – paired with the inclusion of the substantial burden test – has caused division between the circuit courts when determining what actually constitutes a substantial burden.¹⁵⁹

¹⁵³ *Id.* (quoting *City of Boerne*, 521 U.S. at 519).

¹⁵⁴ *Id.*; 494 U.S. 872, 879 (1990); 42 U.S.C. § 2000bb.

¹⁵⁵ DENNING, *supra* note 152 at 231-32.

¹⁵⁶ *Id.* at 231; 42 U.S.C. § 2000cc; 42 U.S.C. § 2000bb.

¹⁵⁷ DENNING, *supra* note 152 at 231-32, n.43.

¹⁵⁸ *Id.* at 232; 146 CONG. REC. S7774-01, 7776 (2000).

¹⁵⁹ The primary tension lies in Congress’s intent to expand protections for religious exercise and the present state of the substantial factor test. DENNING, *supra* note 152, at 232.

C. DEFINING A SUBSTANTIAL BURDEN

The lack of clarity regarding the definition of a substantial burden on religious exercise has led the Circuit Courts of Appeals to adopt different articulations of RLUIPA's substantial burden provision, with some opting to use a factor-based test rather than adopting a specific standard or definition.¹⁶⁰ These different standards – or lack of a standard – have caused the circuits' decisions to vary wildly, with a plaintiff's likelihood of success relying heavily on which circuit their case arises in.¹⁶¹

The Seventh Circuit was the first circuit court to define its standard to determine a substantial burden on religious exercise under RLUIPA in relation to land use,

¹⁶⁰ As Mr. Denning articulates, “the jurisprudential inclinations of these courts [can be] categorized as follows: the Seventh and Fourth Circuits, Eleventh and Eighth Circuits, Fifth and Third Circuits, Ninth Circuit, and courts that only use factors as opposed to a working definition.” Those that choose not to define substantial burden are the First, Second, and Sixth Circuits. *Id.* at 233, 236-37.

¹⁶¹ *Id.* at 233-37. It is not a new occurrence that a plaintiff's likelihood of success depends on the interpretation of the circuit in which they bring their suit. Variations in a circuit's jurisprudential doctrines and political biases impact cases daily, causing plaintiffs to be unsuccessful in one circuit when they likely would have succeeded in another circuit or with another judge. See Alice Clapman, *Judge Shopping, Explained*, BRENNAN CTR. FOR JUST. (Feb. 27, 2025), <https://www.brennancenter.org/our-work/research-reports/judge-shopping-explained> [<https://perma.cc/WA25-UJDD>] (discussing how interested parties can forum shop to increase their likelihood of a favorable outcome based on the political whims of the jurisdiction); See generally Jacob Cogdill, *The Law of Vibes: Much Ado About Preliminary Injunctions*, 101 WASH. U. L. REV. 1345 (2024) (discussing the variations in application of preliminary injunctions amongst circuit courts); see generally Deborah Beim & Kelly Rader, *Evolution of Conflict in the Federal Circuit Courts*, https://law.yale.edu/sites/default/files/documents/pdf/Intellectual_Life/EvolutionofConflict.pdf [<https://perma.cc/86JV-8EWU>] (posted Mar. 20, 2015) (discussing how common circuit splits are, the life cycles of these splits, and the political factors involved).

which the Fourth Circuit would later align with.¹⁶² These two circuits follow the holding of *Civil Liberties for Urban Believers* decided in the Seventh Circuit, which reads as follows:

We therefore hold that, in the context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise--including the use of real property for the purpose thereof within the regulated jurisdiction generally--effectively impracticable.¹⁶³

This standard places the highest burden on plaintiffs of all circuits, and has been criticized for functionally requiring “an effective bar on free exercise rather than a substantial burden on religious exercise.”¹⁶⁴

The Eleventh Circuit rejected the Seventh Circuit's standard, instead opting for a definition of substantial burden that is less rigorous for religious organizations to meet, which the Eighth Circuit seems to have adopted at least in part.¹⁶⁵ The Eleventh Circuit believes that “a ‘substantial burden’ is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly...[A] substantial burden can result from pressure that tends to force adherents to forego religious precepts.”¹⁶⁶ The Eleventh Circuit then

¹⁶² DENNING, *supra* note 152 at 233-34; C.L. for Urb. Believers v. Cty. of Chi., 342 F.3d 752, 760 (7th Cir. 2003); Bethel World Outreach Ministries v. Montgomery Cty. Council, 706 F.3d 548, 556 (4th Cir. 2013).

¹⁶³ *Urb. Believers*, 342 F.3d at 760.

¹⁶⁴ DENNING, *supra* note 152, at 233.

¹⁶⁵ *Id.* at 234-35.

¹⁶⁶ *Id.* at 234 (quoting *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004)).

further clarified the standard in their 2020 *Thai Meditation Association of Alabama, Inc. v. City of Mobile, Alabama* decision, where the court explained that “it isn’t necessary for a plaintiff to prove...that the government required her to completely surrender her religious beliefs; modified behavior, if the result of government coercion or pressure, can be enough.”¹⁶⁷

Although the Eighth Circuit did not directly adopt the standard of the Eleventh Circuit and has no official controlling opinion governing substantial burdens under RLUIPA, its decisions seem to follow the sentiment of the Eleventh Circuit.¹⁶⁸ For example, the District of Minnesota held that “a government regulation substantially burdens an exercise of religion when the regulation’s effects go beyond being an inconvenience to a religious institution, and instead put substantial pressure on the institution to change that exercise.”¹⁶⁹ The standards of the Eighth and Eleventh Circuits represent the most expansive protections out of the U.S. Circuit Courts, departing from the rigorous standard of the Seventh and Fourth Circuits.¹⁷⁰

The Fifth Circuit’s standard, in which the Third Circuit aligns, states that “a governmental regulation imposes a substantial burden when it ‘influences the adherent to act in a way that violates his religious beliefs, or...forces the adherent to choose between...enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs.’”¹⁷¹ Additionally, the Fifth Circuit went as far as to describe what is not a

¹⁶⁷ 980 F.3d 821, 831 (11th Cir. 2020). Specifically, the Eleventh Circuit wanted to clarify that “[t]he ‘completely prevents’ and ‘force...to forego’ passages [of *Midrash*] simply describe conduct that would suffice...to demonstrate a substantial burden” DENNING, *supra* note 152 at 235 (quoting *Id.*).

¹⁶⁸ DENNING, *supra* note 152, at 235.

¹⁶⁹ *First Lutheran Church v. City of St. Paul*, 326 F. Supp. 3d 745, 761 (D. Minn. 2018).

¹⁷⁰ DENNING, *supra* note 152, at 235.

¹⁷¹ *Id.* at 235-36 (quoting *Adkins v. Kaspar*, 393 F.3d 559, 567 (5th Cir. 2004)).

substantial burden on religious exercise, holding that a governmental action is not a substantial burden if it only prevents an individual from “enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed.”¹⁷²

The Third Circuit, following closely with the Fifth Circuit’s acknowledgment of the need to balance Congress’s intent “to create a broad definition of substantial burden” with the need to ensure private religious land users are not privileged over non-religious land users, held that:

[f]or the purposes of RLUIPA, a substantial burden exists where: 1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other[s]...versus abandoning one of the precepts of his religion in order to receive a benefit; OR 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs.¹⁷³

This is one of “the most encompassing definition[s] of RLUIPA’s substantial burden provision[.]”¹⁷⁴

The Ninth Circuit defined its standard in *San Jose Christian College v. City of Morgan Hill*, where the court held, “for a land use regulation to impose a substantial burden, it must be oppressive to a significantly great extent. That is, a substantial burden on religious exercise must impose a significantly great restriction or onus upon such exercise.”¹⁷⁵ This standard departs from

¹⁷² *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004).

¹⁷³ *Washington v. Klem*, 497 F.3d 272, 280 (3rd Cir. 2007); DENNING, *supra* note 152, at 235-36.

¹⁷⁴ DENNING, *supra* note 152, at 236.

¹⁷⁵ *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004).

each of the previous standards discussed, adding another layer of confusion to the overall jurisprudence of RLUIPA's substantial burden provision.¹⁷⁶

The First and Second Circuits have not adopted bright-line rules and instead have opted to analyze these questions under vague factor tests.¹⁷⁷ The First Circuit stated in its *Roman Catholic Bishop v. City of Springfield* decision that “[w]e do identify some factors that courts have considered relevant when determining whether a particular land use restriction imposes a substantial burden on a particular religious organization, but we do not suggest that this is an exhaustive list.”¹⁷⁸ The First Circuit then goes on to list the various factors it could consider, which include:

whether the regulation at issue appears to target a religion, religious practice, or members of a religious organization because of hostility to that religion itself...whether local regulators have subjected the religious organization to a process that may appear neutral on its face but in practice is designed to reach a predetermined outcome contrary to the group's requests...and whether the land use restriction was ‘imposed on the religious institution arbitrarily, capriciously, or unlawfully.’¹⁷⁹

Although the court states that this is not an exhaustive list, “[t]aken together, these factors reveal that the substantial burden analysis often ‘backstops the explicit prohibition of religious discrimination in’ RLUIPA’s subsection (b) much in

¹⁷⁶ DENNING, *supra* note 152, at 236.

¹⁷⁷ *Id.* at 236-37.

¹⁷⁸ *Roman Catholic Bishop v. City of Springfield*, 724 F.3d 78, 96 (1st Cir. 2013).

¹⁷⁹ *Id.* at 96-97.

the same way as ‘the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination.’¹⁸⁰

In a similar fashion, the Second Circuit has held that, “[t]wo...factors...must be considered in reaching such a burden determination: (1) whether there are quick, reliable, and financially feasible alternatives [the organization] may utilize to meet its religious needs absent its obtaining the construction permit; and (2) whether the denial was conditional.”¹⁸¹

To round out the standards, or lack thereof, there is the Sixth Circuit, which asks an unclear question rather than adopting an official standard.¹⁸² The Sixth Circuit asks: “[D]oes the government action place substantial pressure on a religious institution to violate its religious belief or effectively bar a religious institution from using its property in the exercise of religion?”¹⁸³ As I criticize these courts for their lack of a more bright-line standard, it is important to acknowledge that the First, Second, and Sixth Circuits echo the inclinations of the other circuits discussed in this section – whether their analysis is looking for a government action that effectively bars free exercise, or creates a choice between religious exercise and a generally available benefit, all of these Circuits are attempting to make sense of RLUIPA’s substantial burden provision.

D. The Supreme Court’s Resolution of the Circuit Splits

The Circuit splits regarding the definition of a substantial burden under RLUIPA tee up an opportunity for the Supreme Court to clarify the extent to which

¹⁸⁰ *Id.* at 97.

¹⁸¹ DENNING, *supra* note 152, at 237 (quoting *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 352 (2d Cir. 2007)).

¹⁸² DENNING, *supra* note 152, at 237.

¹⁸³ *Id.* (quoting *Living Water Church of God v. Charter Twp. Meridian*, 258 F. Appx. 729, 737 (6th Cir. 2007)).

courts should weigh Congress's intent when they originally enacted the RFRA, and the Supreme Court's previous rulings in cases like *Smith*, when applying the substantial burden provision of RLUIPA.¹⁸⁴ Given the court's current composition and recent Supreme Court decisions regarding religious freedoms, the Court may be tempted to define substantial burden in a manner that more closely aligns with Congress's original intent.¹⁸⁵ This leaves two questions: (1) What standard should the Court implement when determining a substantial burden under RLUIPA, and (2) What standard would the current Supreme Court adopt?

Andrew Denning proposed that the model standard should read: "A substantial burden exists where the government puts pressure on an adherent to modify his behavior in a way that would render free exercise, under the meaning of RLUIPA, sufficiently more difficult or impossible."¹⁸⁶ As Denning explains, this standard seems

¹⁸⁴ See *supra* note 145 and accompanying text. Congress enacted the RFRA to bring the *Sherbert* and *Yoder* decisions back into the courts when analyzing cases where government action may be discriminatory to religious entities or individuals. DENNING, *supra* note 152 at 230. The Supreme Court, in its *Smith* decision, had already "shifted the Court's free exercise jurisprudence away from the compelling interest test of *Sherbert* and *Yoder*." *Id.* at 231.

¹⁸⁵ DENNING, *supra* note 152 at 230-231; see *supra* notes 2, 145 and accompanying text. It should be noted that the Supreme Court has recently released decisions that are not aligned with the presumed conservative position regarding some government actions. For further discussion see e.g., Ruth Marcus, *The Supreme Court Finally Takes on Trump*, THE NEW YORKER (Apr. 21, 2025), <https://www.newyorker.com/news/the-lede/the-supreme-court-finally-takes-on-trump> [<https://perma.cc/X4P5-P829>]. (Although many thought the conservative majority of the Court would mean that the justices would align with conservative views, the Court released an unsigned order just before 1:00 a.m. on Saturday, April 19 directing the government to not "remove any member of the putative class of detainees from the [U.S.] until further notice[.]" in response to the Trump administration's recent deportations.).

¹⁸⁶ DENNING, *supra* note 152, at 248.

to compromise between “an incidental effects standard and an impracticability standard.”¹⁸⁷

This standard, where a substantial burden arises when the government pressures an adherent to modify their behavior in a way that renders religious exercise sufficiently more difficult or impossible, offers a middle ground that both respects religious liberty and maintains judicial manageability.¹⁸⁸ As he notes, this approach rejects the extremes of the current circuit interpretations: it avoids the impracticability standard favored by some Circuits, which arguably renders RLUIPA protections too narrow, while also steering clear of the overly permissive incidental effects approach employed by other Circuits.¹⁸⁹

In grounding this standard, Denning emphasizes that courts should focus less on quantifying hardship and more on whether the government’s action materially alters the religious actor’s behavior, thereby frustrating the ‘free’ nature of religious exercise guaranteed by RLUIPA.¹⁹⁰ This standard would enable courts to more faithfully interpret Congress’s intent, which was to protect religious exercise from substantial interference, not merely extreme or total prohibitions.¹⁹¹ Further, this “relaxed behavioral standard” could survive review of its constitutional concerns. RLUIPA as a whole has not suffered the same fate as the RFRA, and this standard is unlikely to open the door to the same criticism regarding altering the substance of the Free Exercise Clause that the RFRA received.¹⁹²

¹⁸⁷ *Id.* Those standards are the two that we see the Circuit Courts grappling with as they attempt to build their substantial burden jurisprudence, attempting to balance the protections for religious liberty that Congress intended, without creating a standard that would allow for every government action to be considered a substantial burden on religious exercise. *See supra* Section IV.C.

¹⁸⁸ DENNING, *supra* note 152, at 248-49.

¹⁸⁹ *Id.*; *see supra* Section IV.C.

¹⁹⁰ DENNING, *supra* note 152, at 248-49.

¹⁹¹ *See supra* note 178 and accompanying text.

¹⁹² *See supra* Section IV.B.; DENNING, *supra* note 155, at 250-52.

If the current Justices address this issue, Denning's formulation seems to be well-positioned to appeal to the conservative majority. The Court's recent decisions reflect an increasing willingness to expand religious liberty and reinterpret long-standing precedent in favor of broader protections.¹⁹³ These rulings suggest the Court may be open to adopting a more deferential approach to religious claimants under RLUIPA, particularly one that explicitly incorporates congressional intent and emphasizes free exercise rather than mere feasibility.¹⁹⁴

Thus, if the Supreme Court accepts the invitation to speak on this matter, it will likely adopt a standard similar to Denning's 'relaxed behavioral standard,' allowing for expanded protection of religious exercise, affirming RLUIPA's intent while removing the confusion amongst the Circuit Courts in applying RLUIPA's substantial burden provision.

1. Filling the Gaps in Environmental Regulation through the Protections of RLUIPA's Substantial Burden Provision

As legal challenges erode the regulatory authority of administrative agencies to protect the environment effectively, the 'relaxed behavioral standard' for RLUIPA's substantial burden provision provides a potential legal remedy for religious entities and individuals whose free exercise rights are being burdened by environmental externalities due to governmental actions.¹⁹⁵ The standard's focus on government actions for determining if a facially neutral government action or law is burdensome, rather than on the conduct of the religious entity, could allow courts to find that these adverse

¹⁹³ See *supra* note 2 and accompanying text.

¹⁹⁴ See *supra* note 2 and accompanying text; In the Court's *Loper Bright* decision, the Court expressed a desire to ensure that the government's actions as a whole are aligned with the intent of Congress and that the courts are the branch of government to interpret the law. See *supra* Section III.B.

¹⁹⁵ See *supra* note 188 and accompanying text for the proposed substantial burden standard (relaxed behavioral standard).

environmental externalities ‘render free exercise sufficiently more difficult or impossible.’¹⁹⁶

While the vast majority of these claims will not be able to affect the federal body of environmental regulations, they may be able to protect communities at the local level.¹⁹⁷ Obviously, the boundaries of what types of environmental externalities and which religious practices courts will believe fit within this standard are debatable. Still, this section will discuss some of the potential claims that a claimant could bring, along with the possible reactions of the courts.

Indigenous tribes could invoke RLUIPA to challenge land-use decisions that threaten sacred sites, such as pipeline or highway construction projects.¹⁹⁸ Under the relaxed behavioral standard, tribes might argue that environmental degradation from government-approved projects, such as water pollution from pipeline leaks or air pollution from industrial activities near sacred lands, substantially burdens their religious exercise.¹⁹⁹ For example, a tribe could claim that pollution from a fossil fuel project approved by a zoning board or federal agency compromises the spiritual purity required for traditional ceremonies, forcing them to modify their practices in violation of their beliefs.²⁰⁰ Such a claim would assert that the government’s action makes religious

¹⁹⁶ See *supra* note 188 and accompanying text for the proposed substantial burden standard (relaxed behavioral standard).

¹⁹⁷ RLUIPA protects religious entities from substantial burdens regarding governmental land use actions. See *supra* Section IV.B. So, while these claims likely can’t bring back a regulation struck down for not being the best interpretation of an enabling statute, they may be able to prevent zoning changes that would bring more pollution into a community.

¹⁹⁸ See Bernard Bell, *Land, “Sacred Spaces,” and Free Exercise of Religion: Musings About Apache Stronghold v. United States*, YALE J. ON REGUL. (July 6, 2022), <https://www.yalejreg.com/nc/land-sacred-spaces-and-free-exercise-of-religion-musings-about-apache-stronghold-v-united-states/> [<https://perma.cc/D7WX-B2WM>].

¹⁹⁹ See *supra* Section IV.D.

²⁰⁰ See BELL, *supra* note 200.

exercise sufficiently more difficult by altering the conditions necessary for sacred rituals.

Religious institutions, such as churches or mosques, could use RLUIPA to challenge zoning decisions that expose their properties to environmental stressors, such as air or noise pollution from nearby industrial zones.²⁰¹ For instance, a church might argue that a zoning board's approval of a factory adjacent to its property creates noise pollution that disrupts worship services, pressuring the congregation to alter its religious practices. Under the relaxed behavioral standard, this could constitute a substantial burden if the government's action forces the institution to modify its behavior to make religious exercise more difficult, such as limiting the ability to conduct traditional outdoor worship.²⁰²

Communities with religious practices tied to environmental stewardship, such as those rooted in ecological spirituality, could leverage RLUIPA to challenge zoning or permitting decisions that exacerbate environmental injustice.²⁰³ For example, a religious group that views access to clean air and water as integral to its spiritual mission might argue that a government's decision to zone an area for industrial use near their community burdens their religious exercise by exposing them to pollutants. This could be framed as a substantial burden if the pollution forces the group to forgo outdoor rituals or relocate their practices, thus modifying their behavior to render religious exercise sufficiently more difficult.²⁰⁴ Such claims would emphasize the

²⁰¹ See generally Andrew M. Englander, *God and Land in the Garden State: The Impact of the Religious Land Use and Institutionalized Persons Act in New Jersey*, 61 RUTGERS L. REV. 753 (2011) (providing examples on common religious organizations to bring RLUIPA claims, specifically in New Jersey, and the substance of those claims).

²⁰² See *supra* Section IV.D.

²⁰³ See *supra* text accompanying note 188 (RLUIPA is specifically situated to challenge zoning laws and decisions by local governments).

²⁰⁴ See *supra* Section IV.D.

government's role in creating environmental conditions that hinder spiritual practices.²⁰⁵

When applying the relaxed behavioral standard, courts would likely focus on whether the government's action, such as a zoning decision or agency permitting, materially alters the religious adherent's behavior, thereby frustrating the free exercise guaranteed by RLUIPA.²⁰⁶ This approach would prioritize the impact of environmental externalities on religious practices, allowing courts to find a substantial burden when government actions make religious exercise more difficult or impossible, even if they do not completely prohibit it. For instance, courts might recognize that pollution from a government-approved project near a sacred site pressures a tribe to modify its ceremonies, meeting the threshold for a substantial burden.²⁰⁷ Similarly, noise or air pollution disrupting a church's worship could be a substantial burden if it forces the congregation to change its practices.²⁰⁸

Courts would likely evaluate claims by examining the nexus between the environmental harm and the religious practice affected. Claimants would need to demonstrate that the government's action pressures them to modify their behavior in a way that violates their beliefs or makes religious exercise significantly more challenging.²⁰⁹ For example, a religious community arguing that industrial zoning burdens its outdoor rituals would need to show how pollution alters its practices, such as by preventing gatherings in a spiritually significant space.²¹⁰ Courts applying the relaxed behavioral standard would be less concerned with quantifying the severity of the burden and more focused

²⁰⁵ See *supra* text accompanying note 197-98.

²⁰⁶ See *supra* text accompanying note 192-94.

²⁰⁷ See *supra* Section IV.D.

²⁰⁸ See *supra* Section IV.D.

²⁰⁹ See *supra* Section IV.D.

²¹⁰ See *supra* Section IV.D.

on whether the government's action creates a material interference with religious exercise.²¹¹

VI. CONCLUSION

The relaxed behavioral standard for RLUIPA's substantial burden provision offers a promising avenue for religious entities to address environmental externalities caused by government actions, particularly in the wake of *Loper Bright*. By focusing on whether government actions pressure adherents to modify their religious behavior, and not specifically the modified behavior, this standard enables indigenous tribes, religious institutions, and environmentally focused communities to challenge zoning and permitting decisions that harm the environment. RLUIPA can serve as a critical tool to fill regulatory gaps at the local level, aligning religious freedom with environmental justice goals. However, claimants must navigate legal and practical challenges, including proving a direct link between environmental harm and religious exercise and ensuring their claims are framed within RLUIPA's religious framework.

²¹¹ See *supra* Section IV.D.