Multicultural Media, Telecom and Internet Council
1250 Connecticut Ave NW, 7th FL
Washington, D.C. 20036
Phone: 202.261.6543 | MMTConline.org

MEMORANDUM

To: Multicultural Media, Telecom, and Internet Council (MMTC)

From: Thalia Etienne, Cathy Hughes Fellow

Re: The Potential Impact of The *Loper Bright* Decision on Telecommunications Policy

Date: December 13, 2024

I. Introduction

Loper Bright v. Raimondo is a pivotal Supreme Court decision that dismantled the foundational *Chevron* doctrine. This landmark case marks a shift in administrative law with the potential to upend decades of established regulatory practices.[1] *Loper Bright* has far-reaching implications for healthcare, the environment, telecommunications, and more. This memorandum discusses the history and impacts of the *Loper Bright* decision. Section II explains the history and significance of the *Chevron* decision and discusses the *Loper Bright* case and its implications on administrative law and the FCC. Section III discusses *Loper Bright*'*s* impact on certain telecommunications programs, including the Universal Service Fund (USF), Lifeline, and the Broadband Equity, Access, and Deployment Program (BEAD). Section IV discusses advocacy perspectives on *Loper-Bright*, while Section V discusses how MMTC can move forward post-*Loper Bright* and provides policy recommendations.

II. Background

A. The History of the Chevron Doctrine

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc established a 40-year deference that courts used to address ambiguous language in congressional statutes.[2] In 1970, Congress passed the Clean Air Act of 1970,

[1] *See generally Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).*

[2] *Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984).*

which entrusted power to the Environmental Protection Agency (EPA) to set national air quality standards.[3] In 1997, Congress enacted specific requirements applicable to States that did not achieve the national air quality standards established by the EPA[4] The amended Clean Air Act required these States to establish a permit program regulating "new or modified major stationary sources" of air pollution.[5] The EPA regulation allows a State to adopt a definition of the term "stationary source." [6] The Natural Resources Defense Council, Inc. challenged whether the EPA's decision to allow States to develop their definitions was based on a reasonable construction of the statutory term "stationary source." [7] The Supreme Court granted certiorari.[8]

In a 6-3 decision, the Supreme Court held that if an administrative agency issues a permissible construction of a statute on an issue about which the statute is silent or vague, the courts must respect the agency's interpretation of the statute.[9] In his majority opinion, Justice Stevens established a two-part test to determine whether a court should defer to an agency's interpretation of a statute.[10] First, if the court determines that Congress has spoken on the issue and the language in the statute is clear and unambiguous, then both the agency and the court must honor what Congress promulgated.[11] Second, if the court determines that the statute is ambiguous or silent on the issue, the agency's interpretation is valid if the interpretation is based on a permissible construction of the statute.[12] Similarly, if Congress leaves a gap in the statute, the court must defer to the agency unless the agency's interpretation is contrary to the original statute.[13] In the subsequent cases following *Chevron*, the Supreme Court narrowed the scope of the decision, stating that "only the agency interpretations reached through formal proceedings with the force of law, such as adjudications, or notice-and-comment rulemaking, qualify for Chevron deference, while those contained in opinion letters, policy statements, agency manuals, or other formats that do not carry the force of law are not warranted a *Chevron* deference".[14]

B. Chevron's Significance for FCC Administrative Rulemaking

[3] *Clean Air Act Requirements and History*, EPA (Aug. 6, 2024), https://www.epa.gov/clean-air-act-overview/clean-air-act-requirements-and-history.

[4] *Chevron*, 467 U.S. at 837, 839-40.

[5] *Id*.

[6] *Id*. at 837, 840.

[7] *Chevron*, 467 U.S. at 837, 840.

[8] *Id*.

[9] *Id.* at 837, 842-43.

[10] *Id.*

[11] *Id*.

[12] *Id.*

[13] *Id*. at 837, 843-44.

[14] *Chevron deference*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/chevron_deference (last visited Nov. 18, 2024).

Chevron is significant because it determines the extent of judicial deference to federal agencies' interpretations of statutes. Under the Telecommunications Act of 1996 (Telecommunications Act), the Federal Communications Commission (FCC) has the authority to serve as a watchdog in the communications marketplace and look out for the public interest.[15] As a regulatory agency, the FCC possesses specialized knowledge and expertise in the rapidly evolving telecommunications, media, and technology industry. The *Chevron* doctrine was particularly instrumental in the context of net neutrality. In 2015, the FCC established its 2015 Open Internet Order.[16] This Order reclassified broadband as a Title II telecommunications service.[17] The 2015 Order illustrates the importance of the *Chevron* doctrine in enabling the FCC to regulate broadband providers effectively.[18] Relying on *Chevron*, the FCC exercised its delegated authority to interpret ambiguous statutory terms, including revisiting the classification of broadband internet access services.[19] The FCC reasoned that broadband is primarily a transmission service, consistent with the definition of "telecommunications service" in the Communications Act of 1934 (Communications Act). [20] This reclassification allowed the FCC to establish enforceable rules preventing blocking, throttling, and paid prioritization, which are critical for preserving an open and competitive internet ecosystem.[21]

The FCC's decision in the 2015 Order highlighted its reliance on *Chevron* deference to interpret statutory ambiguity in a manner responsive to evolving technologies and market dynamics.[22] This affirmed the FCC's expertise in addressing technical complexities within its jurisdiction.[23] By grounding its actions in both Section 706 and Title II of the Communications Act, the FCC set forth a legal foundation to safeguard the "virtuous cycle" of innovation and investment driven by internet openness while maintaining a "light-touch" regulatory framework to avoid undue burdens on broadband providers.[24]

C. The Loper-Bright Decision and its Impacts

---

[15] *Net Neutrality*, FED. COMMC'NS COMM'N, https://www.fcc.gov/net-neutrality (last visited Nov. 18, 2024).

[16] *FCC Releases Open Internet Order*, FED. COMMC'NS COMM'N, https://www.fcc.gov/document/fcc-releases-open-internet-order (last visited Nov. 18, 2024).

[17] Christopher W. Savage et al., *Landmark Open Internet Order Released by FCC*, DAVIS WRIGHT TREMAINE LLP (Aug. 2015), https://www.dwt.com/blogs/media-law-monitor/2015/06/landmark-open-internet-order-released-by-fcc.

[18] Randy Sukow, *Supreme Court Overturns Chevron, Placing Doubt on Title II Order*, NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE (June 28, 2024), https://www.nrtc.coop/supreme-court-overturns-chevron-placing-doubt-on-title-ii-order/.

[19] *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24 (Feb. 26, 2015), released Mar. 12, 2015, available at https://docs.fcc.gov/public/attachments/FCC-15-24A1.pdf.

[20] *Id.* at 157.

[21] *Id.* at 7.

[22] *Id*. at 14.

[23] *Id.*

[24] *Id.* at 3.

Loper Bright v. Raimondo overruled *Chevron* and changed how courts will interpret broad statutory language.[25] Justice Roberts in his majority opinion explained that courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the Administrative Procedure Act (APA) requires.[26] Roberts states, "when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it."[27] Courts may not defer to an agency's interpretation of the law simply because a statute is ambiguous.[28] Roberts also cited the framers' intent to have the court treat statutory interpretation as the judiciary's role alone and emphasized that the *Chevron* doctrine was not what Congress intended when it created and founded these agencies.[29]

Justice Kagan, in her dissent, with whom Justice Sotomayor and Justice Jackson joined, highlighted that the Supreme Court's decision to consider itself and other federal courts as the primary experts on complex regulatory issues rather than deferring to specialized agencies could lead to inconsistent and arbitrary results.[30] The outcome of *Loper Bright* is problematic, given the courts' need for more specialized knowledge in many areas.[31]

D. Potential Impacts on the FCC

The *Loper Bright* decision could heighten judicial scrutiny and increase litigation risks for federal agencies.[32] Without *Chevron* deference, numerous cases may be brought against the FCC, with courts scrutinizing whether the agency's policies fall within its statutory authority. Justice Jackson in her dissent argued that the *Loper Bright* ruling, would authorize "a tsunami of lawsuits" with "the potential to devastate the functioning of the Federal Government."[33] Robert's majority opinion ensured that it was not reversing previously decided cases that relied on *Chevron* deference, affirming that "the holdings of those cases that specific agency actions are lawful are still subject to statutory stare decisis despite the Supreme Court's change in interpretive methodology."[34] The dissenting opinion, however, points out that the majority's ruling does not address the fact that many agency rulings and

---

[25] *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

[26] *Id.* at 2244, 2273.

[27] *Id*. at 2244, 2247.

[28] *Id*. at 2244, 2248.

[29] *Id.*

[30] *Id.* at 2244, 2294.

[31] *Loper Bright Enterprises*, 144 S. Ct. at 2294.

[32] *See* Victoria Guida, *Supreme Court opens door to 'tsunami' of regulatory challenges*, POLITICO (July 1, 2024, 11:03 AM), https://www.politico.com/news/2024/07/01/supreme-court-regulatory-challenges-00166023.

[33] *Id.*

[34] Sean A. Stokes & Casey Lide, *The End of Chevron Deference for Agency Decisions: Potential Implications for Telecommunications Policy*, BEYOND TELECOM LAW BLOG (July 15, 2024), https://www.beyondtelecomlawblog.com/the-end-of-chevron-deference-for-agency-decisions-potential-implications-for-telecommunications-policy/#_edn11.

interpretations were never challenged, and may therefore be vulnerable to future challenges.[35] Thus, the implications of *Chevron* could allow past rulings to be revisited, potentially leading to a reevaluation of policies and regulations aimed at addressing disparities in telecommunications and internet access for marginalized communities.[36]

One notable FCC ruling likely to be affected by the *Loper Bright* decision is the 2024 Open Internet Order.[37] In his concurrence, Justice Gorsuch pointed to the FCC's alternating classification of broadband internet service under the Communications Act, as an example of policy instability resulting from deference to agency interpretations.[38] He pointed specifically to the alternation between a Title I unregulated "information service" and a Title II regulated "telecommunications service".[39] Currently, several internet service providers are challenging the Open Internet Order in the U.S. Court of Appeals for the Sixth Circuit.[40] The removal of Chevron deference, combined with Justice Gorsuch's critique, provides petitioners with additional grounds to contest the FCC's authority to classify broadband as a Title II "telecommunications service."[41] In response to *Loper Bright*, the Sixth Circuit directed parties to file supplemental briefs addressing the decision's impact on the court's evaluation of a pending motion to stay the Order.[42]

The *Loper Bright* decision forces the FCC to navigate the complexities of promulgating policies without the stability of *Chevron* deference or clear statutory guidance.[43] The FCC will now need to prove that new regulations are justified by the most accurate interpretation of the relevant statute, rather than just a "reasonable" interpretation.[44] This challenge will be particularly true for emerging FCC initiatives, such as 6G development and other broadband-related programs, which will likely depend on broad statutory interpretations to advance progressive policy objectives.[45]

---

[35] *Id*.

[36] *Supreme Court decision curbs federal regulatory power*, PBS (June 28, 2024), https://www.pbs.org/video/at-the-court-guest-1719612096/.

[37] Sean Stokes & Casey Lide, *The End of Chevron Deference for Agency Decisions: Potential Implications for Telecommunications Policy*, THE NATIONAL LAW REVIEW (July 15, 2024), https://natlawreview.com/article/end-chevron-deference-agency-decisions-potential-implications-telecommunications.

[38] *Id*.

[39] *Id*.

[40] *Id*.

[41] *Id.*

[42] *Id*.

[43] Craig A. Gilley & Laura A. Stefani, *Telecommunications Law and Policy in a Post-Chevron World*, VENABLE LLP (July 9, 2024), https://www.venable.com/insights/publications/2024/chevron-decision/telecommunications-law-and-policy-in-a-post.

[44] *Id*.

[45] *See Federal Communications Commission*, *Consolidated 6G Paper*, FCCTAC23 (2023), https://www.fcc.gov/sites/default/files/Consolidated_6G_Paper_FCCTAC23_Final_for_Web.pdf.

III. Loper Bright's Potential Other Impacts on Communications Policy

A. Threats to Existing Programs

The USF operated as a mechanism by which interstate long-distance carriers were assessed a fee to subsidize telephone service to low-income households and high-cost areas prior to the Telecommunications Act.[46] The FCC administers the USF under the authority granted by the Telecommunications Act and supports programs like E-rate, High Cost, Rural Healthcare, and Lifeline.[47] This authority, however, includes broad terms that have historically relied on *Chevron* deference for interpretation. The Lifeline program specifically helps low-income and rural communities access the internet, broadband, and all essential telecommunications services, and is authorized under Section 254 of the Telecommunications Act.[48] Many of Lifeline's specific implementations rely on the FCC's broad interpretations of statutory language, such as what qualifies as "telecommunications services" and how the USF may be applied to modern broadband services.[49] For instance, the FCC expanded Lifeline to include broadband access, interpreting "telecommunications services" to address modern connectivity needs.[50] The FCC's interpretation of the Telecommunications Act allowed the Lifeline program to support initiatives to close the digital divide. *Chevron's* absence would lead to heightened judicial scrutiny over its interpretations of statutory language related to the Lifeline and other USF programs.[51]

B. Impact on NTIA Programs

The National Telecommunications and Information Administration (NTIA) oversees the BEAD Program, which provides $42.45 billion to expand high-speed internet access by funding planning, infrastructure deployment, and adoption programs in all 50 states, Washington D.C., Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.[52] This program funds projects that help expand high-speed internet access and use.[53] BEAD also supports infrastructure deployment, mapping, and adoption which

---

[46] *Universal Service Fund*, FED. COMMC'NS COMM'N, https://www.fcc.gov/general/universal-service-fund (last visited [insert date]).

[47] *Id.*

[48] *See Lifeline Program Worksheet*, USAC, https://www.usac.org/wp-content/uploads/lifeline/documents/forms/LI_Worksheet_UniversalForms-1.pdf.

[49] *Lifeline Support for Affordable Communications*, FED. COMMC'NS COMM'N (Oct. 29, 2024), https://www.fcc.gov/lifeline-consumers.

[50] *Id.*

[51] *See* supra note 32, *Supreme Court opens door to 'tsunami' of regulatory challenges.*

[52] *Broadband Equity, Access, and Deployment Program*, BROADBANDUSA, https://broadbandusa.ntia.doc.gov/funding-programs/broadband-equity-access-and-deployment-bead-program (last visited Nov. 3, 2024).

[53] *Id.*

includes planning and capacity-building in state offices.[54] And, it supports outreach and coordination with local communities.[55] The NTIA derives its authority over the BEAD program from the Infrastructure Investment and Jobs Act of 2021 (IIJA).[56] This federal legislation allocated an unprecedented amount of funding to the NTIA to administer broadband deployment and equity programs, including BEAD, to address digital divides across the United States.[57] Post *Loper Bright*, NTIA could face legal challenges over its interpretations of BEAD funding rules and eligibility criteria, especially if NTIA's methods are seen by a court to be beyond the explicit scope of statutory authority.

IV. Advocacy Perspectives on Loper Bright

MMTC supports equity-based rulemaking. Thus, the *Loper Bright* decision poses a major concern if dismantling *Chevron* deference hinders progressive communications policies designed to ensure equal access to technology, media, and the internet. Federal agencies, especially the FCC, must use their expertise in interpreting statutes where ambiguity exists.

Other public interest groups have expressed similar sentiments. Public Citizen voiced strong opposition to overturning *Chevron*, warning that it would make it harder for federal agencies to protect public health, safety, and the environment.[58] Prior to the ruling, Bitsy Skerry, regulatory policy associate for Public Citizen, warned that in a post-*Chevron* world, decisions made by agency experts such as scientists, engineers, and policy professionals, on how to protect the public would be subject to review by judges without subject-matter expertise and who are not accountable to the public.[59]

Devon Ombres, senior director for Courts and Legal Policy at the Center for American Progress (CAP) argued that *Loper Bright* would significantly hinder the government's ability to protect and serve the American people.[60] He stated that *Loper Bright* is part of a broader conservative effort to enable judges to impose their

---

[54] *Broadband Equity, Access, and Deployment (BEAD) Program*, INTERNET FOR ALL, https://www.internetforall.gov/program/broadband-equity-access-and-deployment-bead-program (last visited Nov. 1, 2024).

[55] *Id.*

[56] *NTIA's Role in Implementing the Broadband Provisions of the 2021 Infrastructure Investment and Jobs Act*, BROADBANDUSA, https://broadbandusa.ntia.gov/news/latest-news/ntias-role-implementing-broadband-provisions-2021-infrastructure-investment-and (last visited Nov. 1, 2024).

[57] *Id.*

[58] *Overturning Chevron Deference Would Harm the Public*, PUBLICCITIZEN (Jan. 17, 2024), https://www.citizen.org/news/overturning-chevron-deference-would-harm-the-public/.

[59] *Id.*

[60] Sam Hananel, *CAP Report, Fact Sheets Show Harms of Supreme Court Overturning Chevron Doctrine*, CAP 20 (Jan. 10, 2024), https://www.americanprogress.org/press/release-cap-report-fact-sheets-show-harms-of-supreme-court-overturning-chevron-doctrine/.

political views over the elected branches, which could ultimately undermine effective governance in the United States.[61]

Information Technology and Innovation Foundation Director of Broadband and Spectrum Policy Joe Kane stated "The Supreme Court's decision in *Loper Bright v. Raimondo* makes it even less likely that the FCC's recent regulatory overreaches on Digital Discrimination and Title II for the Internet will survive judicial review." [62]

V. Policy Recommendations

A. Congress Should Codify Chevron

Congress should codify *Chevron*, or a version of the doctrine, to protect agency authority. Potential legislation would require courts to defer to reasonable agency interpretations of ambiguous statutes, provided the interpretation aligns with the statute's intent. The legislation would also provide clear guidelines for determining when agency deference applies, such as specifying technical or complex subject areas where agencies possess expertise.[63] Moreover, such legislation would reinforce agencies' authority to interpret ambiguous statutory provisions where Congress has not provided explicit guidance. Overall, codifying *Chevron* would provide stability and clarity for courts, agencies, and regulated entities. This would also ensure that agencies like the FCC can continue addressing technical and complex issues without undue judicial interference.[64] On July 23, 2024, U.S. Senators Cory Booker (D-NJ), Elizabeth Warren (D-MA), Richard Blumenthal (D-CT), Mazie Hirono (D-HI), Ben Ray Luján (D-NM), Edward J. Markey (D-MA), Jeff Merkley (D-OR), Bernie Sanders (I-VT), Chris Van Hollen (D-MD), Peter Welch (D-VT), and Ron Wyden (D-OR) introduced the Stop Corporate Capture Act (SCCA).[65] SCCA would codify the *Chevron* doctrine and modernize and strengthen the regulatory process under the APA, empower and expand public participation in the regulatory process, increase transparency and protect independent expertise in the regulatory process.[66] MMTC should support legislation like the SCCA to codify *Chevron* and support the regulatory process.

B. MMTC Should Strengthen Coalitions with other Advocacy Groups and Explore Public-Private Partnerships

---

[61] *Id.*

[62] Austin Slater, *'Loper Bright' Decision Reins In Regulatory Overreach by FCC, Says ITIF*, INFO. TECH. & INNOVATION FOUND. (June 28, 2024), https://itif.org/publications/2024/06/28/FCC-digital-rules-could-reverse-after-loper-bright-decision/.

[63] *See* Kent Barnett, *Codifying Chevmore*, 90 N.Y.U. L. REV. 1 (2015), available at https://nyulawreview.org/issues/volume-90-number-1/codifying-chevmore/.

[64] *Id*.

[65] *Booker Joins Senate Response to End of Chevron Doctrine*, CORY BOOKER (July 24, 2024), https://www.booker.senate.gov/news/press/booker-joins-senate-response-to-end-of-chevron-doctrine.

[66] *Id*.

MMTC should continue to strengthen coalitions with other civil rights, communications, and public interest organizations to present a unified stance on the need for agency discretion in equitable policymaking. This in turn would elevate the need to address the implications of *Loper Bright* and push for effective policy making and change. MMTC along with other advocacy groups could band together with other technology and telecommunications companies and nonprofits to address inequities in telecommunications access and other essential services to marginalized communities. Specifically, MMTC and other groups can work with tech companies to develop digital literacy programs and diversity initiatives within the media and telecommunications industries. This could attempt to close the digital gap to address delays in ensuring digital equity post *Loper Bright*.

VI. Conclusion

In conclusion, the Supreme Court's decision in *Loper Bright v. Raimondo* could be detrimental to FCC rulemaking and has the potential to negatively impact marginalized communities. Programs such as Lifeline and BEAD, critical to addressing disparities in telecommunications access, now face heightened legal vulnerabilities due to ambiguous statutory language that no longer benefits from *Chevron's* deference.

MMTC, alongside other advocacy groups, should work towards codifying a version of *Chevron* into law, ensuring that agencies retain the authority to enforce equitable policies. Strengthening coalitions, fostering public-private partnerships, and advocating for legislation like the SCCA will be essential to navigating the post-*Loper Bright* era. Through advocacy, MMTC can help safeguard policies that promote equitable access in the communications landscape, even amid heightened judicial scrutiny.