Supreme Court 2024 term reveals unanticipated insights on agency deference and litigation strategy for businesses

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The latest Supreme Court Term felt a bit breathless. The merits docket was packed with culture-war issues including minors' access to gender-affirming care, age-verification requirements for pornographic websites, parent[illegible] to LGBTQ+ themed books, and a state's ability [illegible] Parenthood from Medicaid. The Justices also grappled with over 100 emergency applications — many of them implicating fundamental questions like birthright citizenship, Presidential impoundment of appropriated funds, and the President's ability to fire members of independent agencies at will.

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The 2024 Term also held major developments for businesses. The Justices issued decisions on key questions in labor and employment, civil procedure, and aiding-and-abetting liability. But some of the most anticipated rulings on the Court's business docket did not materialize, and many of the Term's consequential holdings for businesses came from unexpected quarters.

Several of the most closely watched cases impacting businesses resolved anticlimactically. The Court dismissed as improvidently granted a major class action case, *Laboratory Corporation of America Holdings v. Davis*, challenging the legitimacy of classes that include uninjured members. Another case, *Nuclear Regulatory Commission v. Texas*, resolved on [illegible] rule that, absent clear authority from Congress, agencies lack power to make decisions affecting "major questions" of extraordinary economic and political significance.

Perhaps the most eagerly awaited business case was *FCC v. Consumer Research*, in which the Justices were asked to revive the nondelegation doctrine. The nondelegation doctrine seeks to ensure that Congress doesn't bestow its Article I legislative power on another branch or entity. Several Justices have expressed a desire to reinvigorate the doctrine, which would provide a fulsome tool for challenging unfavorable agency action.

When the Justices agreed to review the 5th U.S. Circuit Court of Appeals' decision in this case, which held that the Universal Service Fund (a congressionally created fund that imposes fees on telecom companies to subsidize services in underserved areas) runs afoul of the nondelegation doctrine, it seemed like the dormant doctrine was poised for resurgence. Instead, an ideologically scrambled majority found no nondelegation problem at all. That doesn't mean that parties can't continue to raise nondelegation arguments, but it's unclear what it will take for the Supreme Court to bless them.

While the Term may not have produced the decisions that we expected, it did bring some unanticipated developments for businesses.

One of the biggest surprises came from the emergency docket, where the conservative Justices concluded in *Trump v. Wilcox* that President Trump was likely to prevail in a challenge to his removal of officers from the National Labor Relations Board (NLRB) and the Merit Systems Protection Board (MSPB). In doing so, the majority cast doubt on *Humphrey's Executor*, a 90-year-old precedent recognizing that Congress can restrict

the President's ability to remove members of multi-member, expert agencies, if the agencies don't exercise executive authority.

Although the Court has curtailed *Humphrey's Executor* in recent years, it is highly unusual to overturn or narrow precedent via the emergency docket, which operates on an expedited timeline and without the benefit of full briefing or oral argument. And although the Court's order was not a decision on the merits, its statement that "the Government is likely to show that both the NLRB and MSPB exercise considerable executive power" could enhance the President's control over independent agencies and may enable new administrations to more quickly change agencies' priorities and policies upon taking office.

The Court's penchant for incrementalism is a good reminder that there is some flexibility and room for strategic argument in any given case, depending on where a client's interests lie.

Another surprise was the Justices' approach to agency deference in the wake of last Term's *Loper Bright* decision. *Loper Bright* directs courts to apply traditional tools of statutory interpretation to determine the best reading of a statute, rather than deferring to an agency's reasonable interpretation of an ambiguous statute that it administers.

Just one year later, few would have expected to see multiple decisions celebrating agency expertise. In *Food and Drug Administration (FDA) v. Wages & White Lion Investments*, a unanimous Court upheld the FDA's denials of applications to sell flavored e-cigarette products. Reversing the 5th Circuit's holding that those denials were arbitrary and capricious, the decision stressed the "narrow" scope of arbitrary-and-capricious review of an agency's clearly delegated authority: Courts "must exercise appropriate deference to agency decisionmaking" without "substitut[ing] their own judgment for that of the agency."

The decision also gave agencies leeway to change their position, as long as they "provide a reasoned explanation for the change, display awareness that they are changing position, and consider serious reliance interests." These statements, which apply to arbitrary-and-capricious challenges more broadly, bolster some of the guardrails that Loper Bright suggested. When it comes to day-to-day factual determinations that an agency is tasked with handling, agencies get to do their jobs and courts shouldn't micromanage them.

In *Seven County Infrastructure Coalition v. Eagle County*, the Justices gave another boost to agency expertise. This case tested the scope of environmental impact studies that federal agencies must conduct under the National Environmental Policy Act (NEPA).

Conservation groups and a Colorado county challenged the Surface Transportation Board's approval of a Utah rail project intended to haul crude oil. They argued that the board violated NEPA by failing to analyze the full impact of the project, including its potential downstream effects on greenhouse gas emissions and air pollution.

In greenlighting the project, the Justices instructed courts to give "substantial deference" to an agency's determination as to what should be included in environmental impact statements prepared pursuant to NEPA. Dispelling any tension with *Loper Bright*, the Court explained that "when an agency exercises discretion granted by a statute" — as NEPA does — courts don't "micromanage" agencies and instead look at whether the agency action "was reasonable and reasonably explained."

NEPA's goal is "to inform agency decisionmaking, not to paralyze it," and in determining whether a project should go forward, "an agency is not constrained [by NEPA] from deciding that other values outweigh the environmental costs."

Seven County may become a roadmap for construing other instances where Congress has granted an agency discretion. The decision confirms that agencies still get deference in certain contexts, including factual determinations that are within the agency's technical expertise and authorized by statute.

In contrast to the agency victories in *Wages & White Lion* and *Seven County*, however, the Justices dealt a major blow to deference in *McLaughlin Chiropractic Associates v. McKesson Corporation*. In a 6-3 decision, the conservative majority put an end to courts' practice of accepting the FCC's interpretations of the Telephone Consumer Protection Act (TCPA) in enforcement proceedings.

Some courts had read the Hobbs Act, which gives federal appellate courts "exclusive jurisdiction … to determine the validity of all [FCC] final orders" in *pre-enforcement* proceedings to mean that district courts were bound by the FCC's interpretation in later *enforcement* actions. But the Supreme Court disagreed, holding that district courts must independently determine a law's meaning by applying ordinary principles of statutory interpretation. *McLaughlin* opens the door to more challenges of FCC orders, including orders that have long been considered final.

It's hardly surprising that the same Court that overruled *Chevron* would also end Hobbs Act deference. But the juxtaposition of *Seven County* and *Wages & White Lion* — reaffirming agency deference in some contexts — and *McLaughlin* paints a broader picture of two important characteristics of the Court's jurisprudence: incrementalism and the double-edged sword.

Especially when it comes to business cases, the Supreme Court seldom does anything out of the blue; the Justices prefer to move incrementally. We saw this with *Chevron*: The Supreme Court hadn't even cited *Chevron* since 2016, and lower courts and the government had already started to adapt to that reality. *Loper Bright* formally recognized it. But even *Loper Bright* built in some guardrails to preserve deference in certain contexts — and we're seeing those solidify in *Wages & White Lion* and *Seven County*.

McLaughlin shows a similar incrementalism: The Court grappled with the same question in *PDR Network v. Carlton & Harris Chiropractic* (2019), but at the time, appeared to be one vote shy of ending Hobbs Act deference and ultimately decided the case on other grounds. A decision ending Hobbs Act deference that would have seemed somewhat radical in 2019 feels like a smaller step in the wake of *Loper Bright*.

The Court's penchant for incrementalism is a good reminder that there is some flexibility and room for strategic argument in any given case, depending on where a client's interests lie. As this Term's decisions demonstrate, cabining agency discretion is a double-edged sword. To be sure, limits on agency power open the door for businesses to challenge unfavorable regulations. But deference (or lack thereof) can cut both ways. In *Seven County*, deferring to the agency means that more projects will be approved. But deference had the opposite effect in *Wages & White Lion*.

More broadly, restricting agency power comes with the risk of empowering attacks on rules that businesses find helpful and predictable. *McLaughlin* opens the door for entities to challenge unfavorable FCC orders, even longstanding ones. But the defendant in that case, McKesson Corporation, was advocating *for* deference to the FCC. And the end to deference risks undermining stability and predictability — especially in the context of the TCPA, where the FCC's agility has been helpful to keep pace with technological advances.

All of this, combined with the erosion of *Humphrey's Executor*, makes it more critical than ever for businesses to vigilantly monitor changing agency policies and regulations — and think strategically about changes they may want to challenge.

The writers are regular, joint contributing columnists on the U.S. Supreme Court for Reuters Legal News and Westlaw Today.

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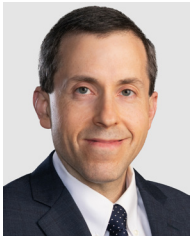

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