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Sixth Circuit, applying *Loper Bright,* rejects FCC's net neutrality regulations

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The Sixth Circuit has set aside the Federal Communications Commission's 2024 order reimposing net neutrality regulations on broadband internet service providers. Applying *Loper Bright,* the court concluded that the FCC's interpretation of the Communications Act was incorrect. The decision provides a valuable window into the new, post-*Loper Bright* landscape for challenges to agency action.

Background

The Sixth Circuit's decision follows multiple reversals by the FCC under successive administrations regarding the classification of broadband internet service providers under the Communications Act, as amended by the Telecommunications Act. If they provide a "telecommunications service," they may be subject to more extensive common-carrier regulations. But if they provide only an "information service," they may not.

Prior to 2015, the FCC concluded that providing access to the internet was an information service, not a telecommunications service.[1] In 2015, during the Obama Administration, the FCC reversed course and issued an order determining that broadband providers provided telecommunications services, and therefore were subject to new net neutrality restrictions.[2] Applying *Chevron*, the D.C. Circuit upheld the FCC's interpretation of the statute as reasonable.[3] Three years later, during the Trump Administration, the FCC reversed course, and issued an order defining broadband as an information service. The D.C. Circuit again upheld this order under *Chevron*, explaining that this (completely opposite) interpretation was also a reasonable reading of the statute.[4] The FCC reversed itself once more during the Biden Administration, issuing a 2024 order that again classified broadband providers as offering telecommunications services (and thus subjected them to net neutrality restrictions).

This most recent FCC order was challenged by various broadband provider associations in multiple circuits nationwide. The Judicial Panel on Multidistrict Litigation selected the Sixth Circuit to hear the petitions on a consolidated basis, and the Sixth Circuit subsequently denied the FCC's motion to transfer the petitions to the D.C. Circuit.[5]

Summary of decision

The Sixth Circuit's unanimous decision, authored by Judge Griffin, granted the petitions and set aside the FCC's 2024 order, holding that broadband providers offer an information service, not a telecommunications service, under the Telecommunications Act.

The new, post-*Chevron* legal landscape took center stage. While challenges to the FCC's prior orders received *Chevron* deference, following the Supreme Court's decision in *Loper Bright*, the Sixth Circuit could no longer defer to any reasonable interpretation of an ambiguous statute. Instead, the court concluded that *Loper Bright* required an independent judicial determination of the *best* reading of the statute.[6]

Before turning to the statutory text, the court considered whether it was bound by Supreme Court precedent, namely *National Cable & Telecommunications Association v. Brand X Internet Services* (*Brand X*), 545 U.S. 967 (2005). In *Brand*

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X, the Supreme Court applied *Chevron* and upheld a 2002 FCC determination that cable companies providing cable modem services provided information services.[7] Per the Sixth Circuit, *Brand X* did not dictate the panel's decision. To reach this determination, the panel applied the Supreme Court's instructions in *Loper Bright*, which explained that while *Chevron* was overruled, the holdings of prior cases that applied *Chevron* and upheld "specific agency actions" remain good law.[8] The Sixth Circuit panel focused on the "specific agency action" language – because the 2024 FCC order was distinct from the FCC's 2002 ruling, the panel concluded *Brand X* was not entitled to stare decisis.[9]

The court then turned to determining the best meaning of the statute. Of primary importance was the statutory language, as informed by contemporaneous dictionary definitions.[10] Also relevant to the analysis was the statutory structure[11] and the historical context, namely the FCC's long-standing position prior to 2015.[12]

Takeaways

The Sixth Circuit's decision provides a valuable window into the post-*Loper Bright* landscape for challenges to agency action:

1. **There is only one "best meaning" of a statute:** The *Loper Bright* Court viewed statutes as having a "single, best meaning"[13] that is "fixed at the time of enactment."[14] *Loper Bright* made clear that while courts must be the ultimate deciders of the best meaning of the statute, they could, consistent with *Skidmore*, "seek aid" from agency interpretations;[15] these interpretations would be "especially informative 'to the extent [they] rest[] on factual premises within [the agency's] expertise.'"[16] *Loper Bright* thus left some play in the joints for a court friendly to an agency's interpretation to lean into this reading.[17]

   While acknowledging the subject matter was "complicated and dynamic," the court gave effectively no consideration to the agency's 2024 interpretation.[18] In fact, the court gave more credence to the agency's prior interpretation than the interpretation under review in fulfilling *Loper Bright's* mandate to find the best reading of statutory language that had been held to be ambiguous.

   The opinion shows how courts reading *Loper Bright* for all its worth may approach similar issues: taking a fresh look at the statute and considering the statutory text, context, and history, in order to find its "single, best meaning."

2. **Agency flip-flopping curtailed:** The *Chevron* regime tolerated agency flip-flopping from one administration to the next, such as the FCC's successive reversals regarding the classification of broadband providers. The *Loper Bright* Court took aim at this consequence of the *Chevron* regime,[19] and Justice Gorsuch's concurrence highlighted net neutrality as a specific example.[20] The age of *Loper Bright* heralds an end to this flip-flopping, limiting the ability for agencies to shift their statutory interpretations from administration to administration and creating greater certainty and stability in the law.
3. **Cert-worthy circuit splits may grow:** As the circuits must make independent determinations about statutory interpretation under *Loper Bright*, irreconcilable circuit splits seem more likely to arise in cases, requiring Supreme Court resolution.
4. **The death of *Chevron* as a check on the major questions doctrine:** Following *Loper Bright*, some commentators noted that this regime may decrease the need to apply the major questions doctrine.[21] Here, we see an example of this dynamic: given the court's holding regarding the meaning of the statute, it declined to – and did not have to – reach the issue of whether the major questions doctrine precluded the FCC's order.[22]

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[1] *In re MCP No. 185*, No. 24-3449, 2025 WL 16388, slip op. at 6 (6th Cir. Jan. 2, 2025).

[2] *Id.* at 6-7.

[3] *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

[4] *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).

[5] *In re MCP No. 185*, slip op. at 8.

[6] *Id.* at 10.

[7] *Id.* at 6.

[8] *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024) (overruling *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

[9] *In re MCP No. 185*, slip op. at 10-11.

[10] *Id.* at 9, 11-13.

[11] *Id.* at 13-14.

[12] *Id.* at 14-17.

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[13] *Loper Bright*, 603 U.S. at 400.

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

[15] *Id.* at 402 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

[16] *Id.* (quoting *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 98, n. 8 (1983)).

[17] *Id.* at 476 (Kagan, J., dissenting).

[18] *In re MCP No. 185*, slip op. at 20.

[19] *Loper Bright*, 603 U.S. at 410-11.

[20] *Id.* at 438 (Gorsuch, J., concurring).

[21] Richard J. Pierce, Jr., *Two Neglected Effects of* Loper Bright, The Regulatory Review, Jul. 1, 2024, https://www.theregreview.org/2024/07/01/pierce-two-neglected-effects-of-loper-bright/.

[22] *In re MCP No. 185*, slip op. at 20.

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